

FEMA - Overview



2018 MHA Legal

Historical Perspective

FERA

FERA 1947

- Introduction of Exchange Control in India

FERA 1973

- New Act focused on corporate sector and restricted foreign investment -
- Introduced concept of FERA companies (40% foreign ownership)
- Violation - a CRIMINAL OFFENCE

FERA Amendment Act 1993

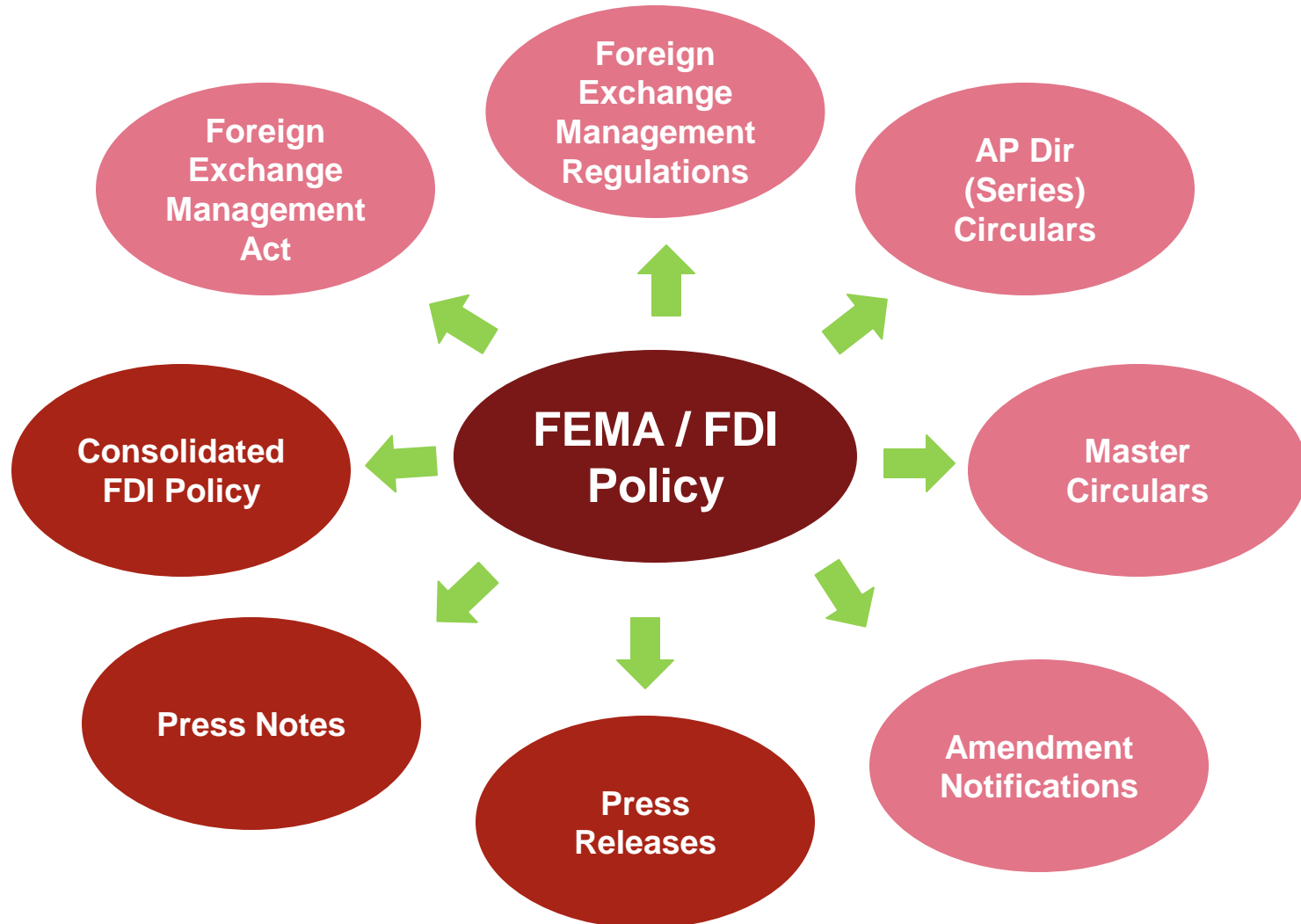
- Liberalisation to facilitate cross border transactions – Government Control continues
- Restriction on employment of foreign nationals removed
- FERA Companies Concept Deleted

FEMA

FEMA 1999

- Regulation vs Management
- Partial Capital Account Convertibility
- Strict KYC and AML guidelines
- Violation - CIVIL OFFENCE

Broad Framework



Current and Capital Account Transactions

Current Account

freely permitted

Negative list principle

- Prohibited list
- Requiring Govt approval
- Requiring RBI approval

Capital Account

strictly regulated

- Investments
- Loans
- Setting up Offices in India
- Immovable Property

Important Definitions

Person resident in India means-

- a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-
 - A. a person who has gone out of India or who stays outside India, in either case-
 - for or on taking up employment outside India, or
 - for carrying on outside India a business or vocation outside India, or
 - for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
 - B. a person who has come to or stays in India, in either case, otherwise than-
 - for or on taking up employment in India, or
 - for carrying on in India a business or vocation in India,
 - for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Important Definitions

Person resident in India means-

- any person or body corporate registered or incorporated in India.
- an office, branch or agency in India owned or controlled by a person resident outside India.
- an office, branch or agency outside India owned or controlled by a person resident in India.

Important Definitions

Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes following transactions specified in Section 6(3) of FEMA:

- transfer or issue of any foreign security by a person resident in India;
- transfer or issue of any security by a person resident outside India;
- transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
- any borrowing or lending in rupees in whatever form or by whatever name called;
- any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;
- deposits between persons resident in India and persons resident outside India;
- export, import or holding of currency or currency notes;
- transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
- acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
- giving of a guarantee or surety in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India; or by a person resident outside India

Important Definitions

Current account transaction means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,-

- payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,
- payments due as interest on loans and as net income from investments,
- remittances for living expenses of parents, spouse and children residing abroad, and
- expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Important Definitions

Foreign currency means any currency other than Indian currency.

Foreign exchange means foreign currency and includes,-

- deposits, credits and balances payable in any foreign currency;
- drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;
- drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.

Export, with its grammatical variations and cognate expressions, means-

- the taking out of India to a place outside India any goods,
- provision of services from India to any person outside India;

Import, with its grammatical variations and cognate expressions, means bringing into India any goods or services;

Section 3 - restrictions

Without the general or special permission of the Reserve Bank, non person can

- deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
- make any payment to or for the credit of any person resident outside India in any manner;
- receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.
- enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Section 7

Every exporter of goods needs to:

- furnish to the RBI or to any other authority a declaration in as may be specified, containing true and correct material particulars, including the amount representing the
- full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India
- furnish to the Reserve Bank such other information as may be required by the RBI for the purpose of ensuring the realization of the export proceeds by such exporter.

The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

Section 8

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued

to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the RBI.

Section 13 - Penalty

If any person contravenes

any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the RBI,

he shall, upon adjudication,

be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable,

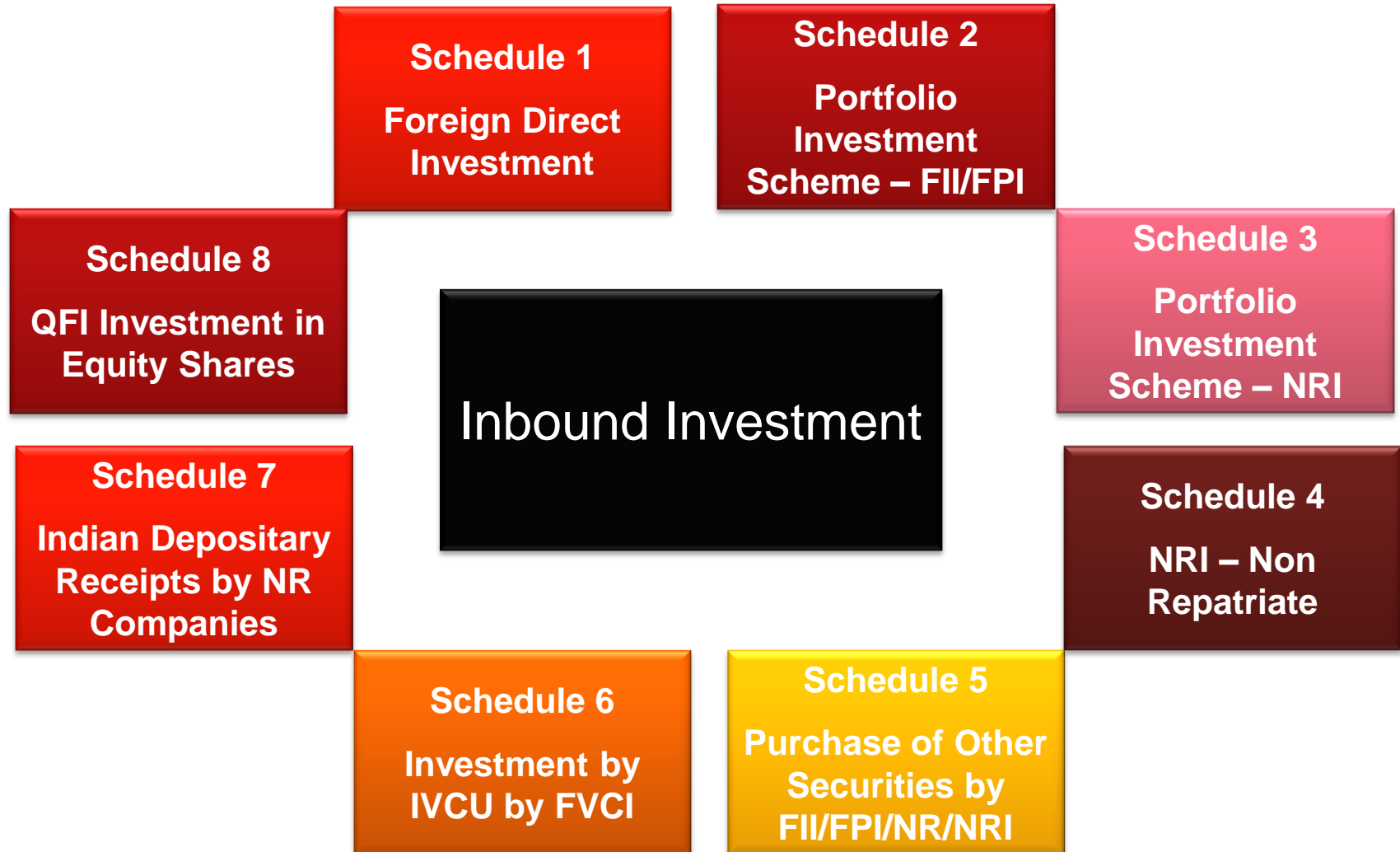
or up to two lakh rupees where the amount is not quantifiable,

and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues. .

Adjudicating Authority

- Cell for Effective implementation of FEMA (CEFA), Reserve Bank of India and the Directorate of Enforcement (DoE)
- Reserve Bank has been empowered to compound the contraventions of all the Sections of FEMA, 1999, except clause (a) of Section 3 of the Act, *ibid*.
- Directorate of Enforcement would exercise powers of compounding under clause (a) of Section 3 of FEMA, 1999 (dealing essentially with Hawala transactions).
- For effective implementation of compounding process under FEMA, 1999, the Government of India has framed the procedure for compounding of contraventions. Once a contravention has been compounded by the Compounding Authority, no proceeding or further proceeding will be initiated or continued against the contravener.

Inbound Investment Schemes



Inbound Investment Schemes

Automatic Route

- Permitted for most sectors
- No prior approval required only post-facto filing
- Remittance through normal banking channels
- Subject to compliance with the pricing guidelines
- E.g. IT/ITes, Service sector, Infrastructure, Manufacturing

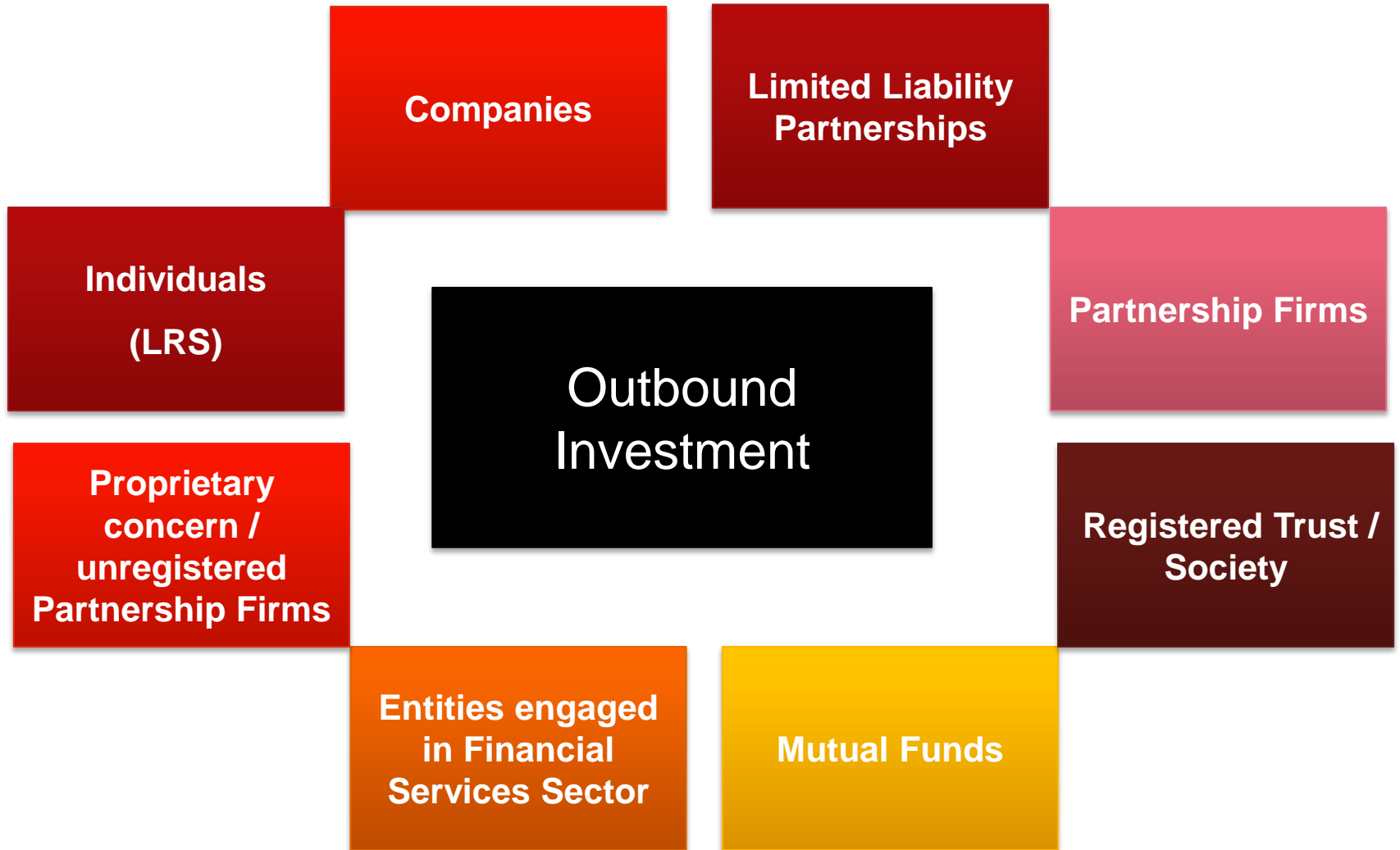
Approval Route

- Sectors not falling under automatic route.
- Investment only post obtaining approval from FIPB
- E.g. Defence, broadcasting, single and multi-brand retail etc.

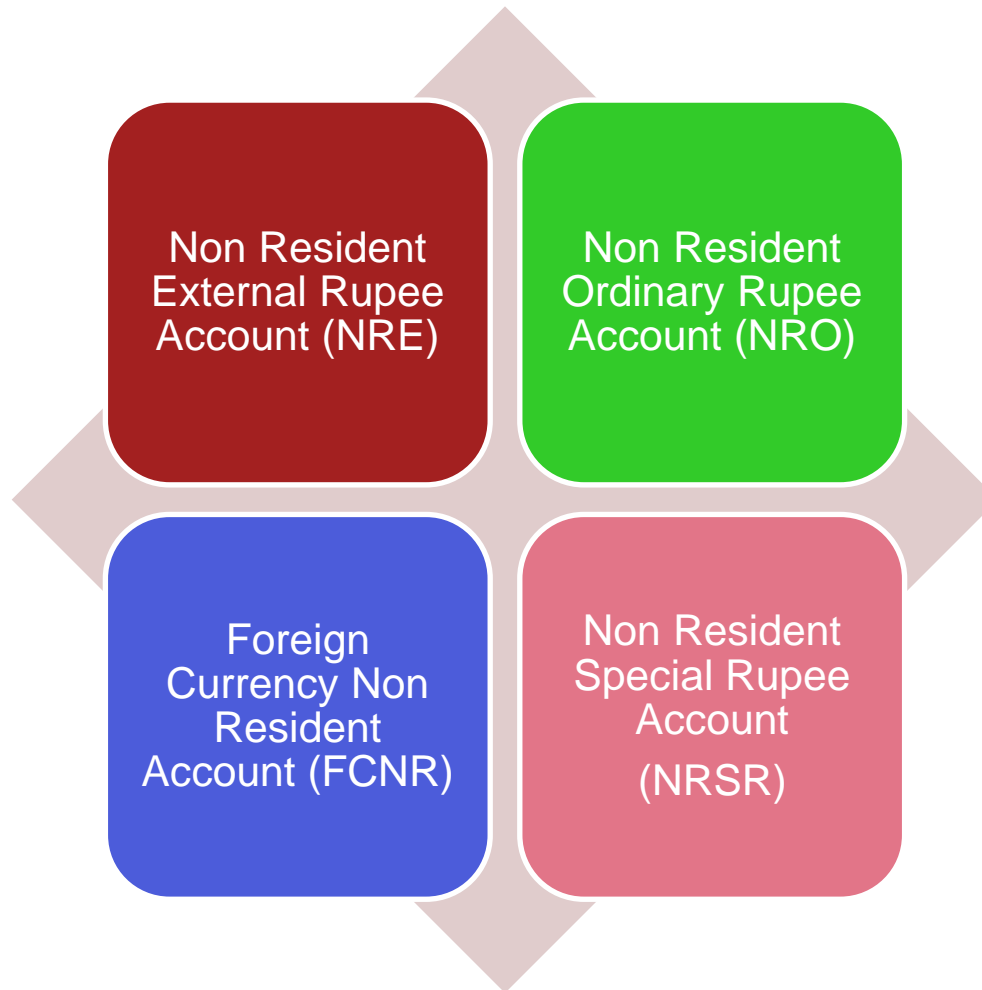
Restricted List

- Agriculture
- Atomic energy
- Lottery business
- Gambling and betting
- Trading in Transferable Development Rights
- Real Estate business
- Manufacturing of Tobacco/Tobacco substitutes

Outbound Investment – Eligible Entities



Foreign Currency Account by NR's



Foreign Currency Account by NR's - Comparison

Particulars	FCNR account	NRE account	NRO account
Eligible holder	NRIs	NRIs	NRs / NRIs
Joint account (NRI + R)	Possible	Possible	With Residents
Type of accounts	Term Deposits only	Current, Savings, Recurring, Fixed Deposits	Current Savings Recurring Fixed Deposits
Currency	Pound Sterling, US Dollar, Japanese Yen, Euro, Australian Dollar and Canadian Dollar	Indian Rupees	Indian Rupees
Repatriability: Principal	Freely repatriable	Freely repatriable	Limit of USD 1 million every year
Tax treatment	Taxable	Tax free	Taxable

Foreign Currency Account by NR's - Comparison

Particulars	FCNR account	NRE account	NRO account
Type of accounts	Term Deposits only	Current, Savings, Recurring, Fixed Deposits	Current Savings Recurring Fixed Deposits
Period for Fixed Deposits	For terms not less than 1 year and not exceeding 5 years	For the periods as announced by the deposit taking bank.	For the periods as announced by the deposit taking bank.
Nomination facility	Available	Available	Available
Rupee loans in India against the security of the funds held in the account	Permissible	Permissible.	Permissible

Investment in immovable property by NR/NRIs

- Non Residents are prohibited to acquire property in India.
- Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong not permitted to acquire property in India other than lease for a term exceeding 5 years.
- Foreign owned Indian company, Branch office, Liaison office and Project office can acquire property in India for its bonafide use.
- Foreign Embassy / Diplomats / Consulate Generals can purchase / sell immovable property in India other than agricultural, plantation and farm house post obtaining clearance from Ministry of External Affairs.
- NRIs are permitted to acquire property in India other than agricultural, plantation and farm house.
- Immovable property can be acquired through inheritance by NRs/ NRI
- Sale of agricultural, plantation and farm house permitted only to India citizens.
- NRI to NRI, R to NRI, NR to NRI gift of property (except agricultural, plantation and farm house) permitted.

Insurance from foreign insurer

General and Life Insurance Policy

- Fresh insurance policy by a person resident in India from a foreign insurer require specific approval from IRDA.
- Any policy acquired when the insured person was a person resident outside India can be continued.

In the event premium is paid by making remittance from India, the policy holder is required to repatriate to India the maturity proceeds or amounts of any claim within seven days from the date of its receipt.

Guarantee to Non Residents

Guarantees by persons other than an authorized dealer to the non-residents is prohibited unless general or specific approval of RBI is obtained.

General permission has been given RBI in the following instances:

- A resident exporting company is permitted to give a guarantee for performance of an approved project outside India, or for availing of fund based or non-fund based credit facilities, from a bank or a financial institution outside India in connection with the execution of such approved project.
- A person resident in India being an exporter company may give guarantee in lieu of Bid Bond Guarantee, for bidding for a contract outside India without the approval of the Approving Authority provided that the amount of such guarantee shall not exceed 5% of the contract value.
- An agent in India of a shipping or airline company incorporated outside India may give a guarantee on behalf of such company in connection with its obligation or liability owed to any statutory or Government authority in India.

Guarantee to Non Residents

- A company in India promoting or setting up outside India, a joint venture company or a wholly-owned subsidiary, may give a guarantee to or on behalf of the JV / WOS in connection with its business.
- A person resident in India with the prior permission of a bank (acting under the directions issued by the RBI to the authorised dealer) can issue guarantee in favour of an overseas lender or security trustee to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000.

Export of Goods, software and services

- Permitted under automatic route. Full realization of export proceed needs to be done with in 9 months from the date of issue of invoice.
- Exporters needs to file Export Declaration Form (EDF) SOFTEX forms with the RBI with prescribed documents.
- Any exemption from filing of form EDF require specific approval of RBI through AD bank.
- All export contracts and invoices shall be denominated either in freely convertible currency or in Indian Rupees.
- Third party payments permitted subject to compliance with conditions prescribed and satisfaction of AD bank.
- Exporters permitted to open and maintain EEFC Account with the AD Bank to keep export proceeds. Opening of account with the foreign bank require specific approval from RBI

Import of Goods, software and services

- Permitted under automatic route except the goods require compulsory licensing from Director general of Foreign Trade.
- Payment towards imports of goods and services need to be made within a period of 6 months. The period can be extended for a period up to 3 years by the AD bank due to financial difficulty etc. Any extension beyond 3 years requires specific approval from RBI.
- Foreign exchange for remitting the import consideration can be drawn from the AD bank by filing form A-1 (more than USD 500) and form A2 (less than USD 5000).
- AD bank verifies the custom documentation, exchange control copy of bill of entry for goods and copy of invoice / agreement for services / software before permitting the payments.
- Deferred payment arrangements, including suppliers and buyers credit, providing for payments beyond a period of six months from date of shipment up to a period of less than three years, are treated as trade credits for which the procedural guidelines laid down in the External Commercial Borrowings and Trade Credits guidelines need to be followed.
- Third party payments for import payables is possible subject to obtaining prior approval of AD bank / RBI and compliance with conditions prescribed.

External Commercial Borrowings

- ECBs refer to overseas commercial loans in the form of bank loans, buyers' credit, suppliers' credit, securitized instruments (e.g. floating rate notes and fixed rate bonds)] availed from non-resident lenders with minimum average maturity of 3 years.
- Can be availed Automatic and approval route.
- ECB can be availed from the recognized lenders only. Recognized lenders include certain international financial institutions, suppliers of equipment, foreign collaborators or foreign equity holders.
- Foreign equity holder needs to hold at least 25% of the total paid up equity capital of the company.
- In case of ECB exceeding USD 5 million from the foreign equity shareholders the proposed ECB should not exceed four times the direct foreign equity holding.
- ECB from indirect equity holders is permitted provided the indirect equity holding in the Indian company by the lender is at least 51 per cent.

External Commercial Borrowings

- ECB from a group company is permitted provided both the borrower and the foreign lender are subsidiaries of the same parent.
- Minimum maturity period –5 years.
- End used only for the capital expenditure. Can be used for working capital compliance with other conditions
- ECBs are not permitted to be used for the following purposes:
 - On-lending, investment in capital market or for acquiring a company in India;
 - Real estate sector;
 - Repayment of existing Rupee loan

Investment in JV / WOS abroad

- 400% of the Net worth as per latest audited balance sheet permitted under automatic route. Net worth means paid up capital + free reserve
- Any financial commitment exceeding USD 1 billion in a financial year require prior approval of RBI even when the total financial commitment is within 400%.
- 400% financial commitment condition not applicable to investments made out of EEFC account or proceeds of ADR/GDR.
- Total financial commitment to include:
 - Remittance of foreign exchange including investment in shares/ loan
 - Capitalization of the export proceeds
 - 100% of the guarantees / bank guarantees issued in favor of or on behalf of JV /WOS
 - 50% of the performance guarantee.
 - Share Swap
- Investment (or financial commitment) in a foreign entity engaged in real estate meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) is prohibited.

A photograph of a desk setup. On the left, a small green plant in a glass jar sits on a dark surface. A white lamp with a conical shade is lit, casting a warm glow. In the background, a laptop is open, and a pen lies on the desk. The overall scene is a professional workspace.

Thank you

In the event you need any further information or clarification. Please feel free to contact:

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About MHA Legal

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Clients benefit from the expertise and experience of the team members holding experience of the large consultancy firm while enjoying the privilege of personal attention and responsiveness of a small firm.

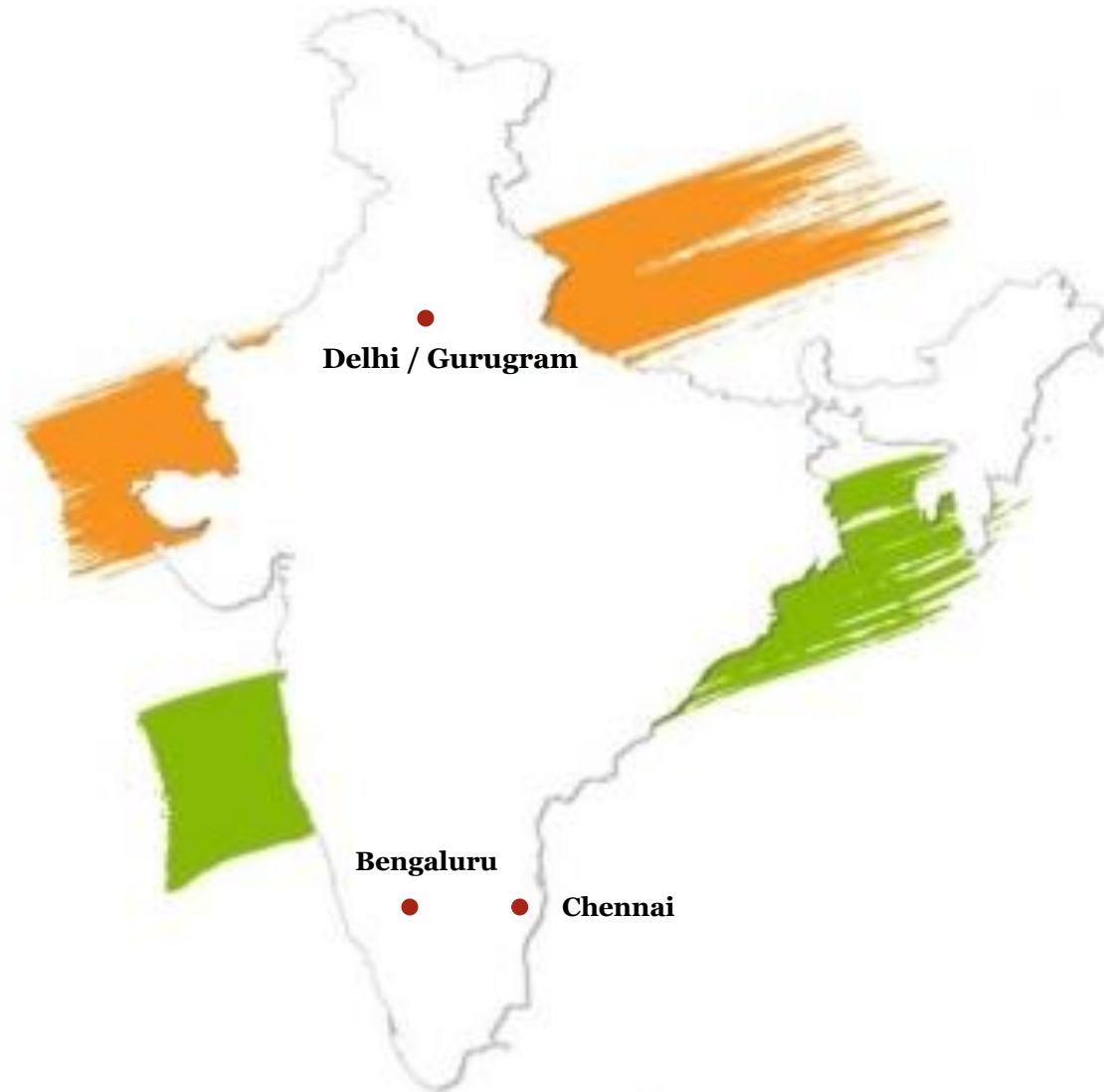
Team members hold specializing in the areas of corporate and commercial laws, Foreign Direct Investment Policy of Government of India, Foreign Exchange Regulations, mergers and acquisitions, Taxation, real estate projects, foreign trade, international transactions, trademarks and patents, and environmental law.

MHA Legal has its offices in New Delhi, Gurugram, Bengaluru, Chennai and a network of correspondents covering all Indian States.

How We Can help you

- Providing assistance in structuring of overseas investment to achieve business objective in compliance with tax and regulatory requirements.
- Drafting / Vetting Joint Venture Agreement, if required.
- Preparation and filing of documents with the AD bank / RBI for obtaining UIN for Overseas Investment
- Preparation and filing of APR.

Office Locations



Thank you



**Mind, Heart, Aspiration =
Passion, Integrity, Excellence**

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