

FEMA ke FUNDAE

Overseas Investment Part – I (Introduction and Definitions)

#FamiliarwithFEMA

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Introduction

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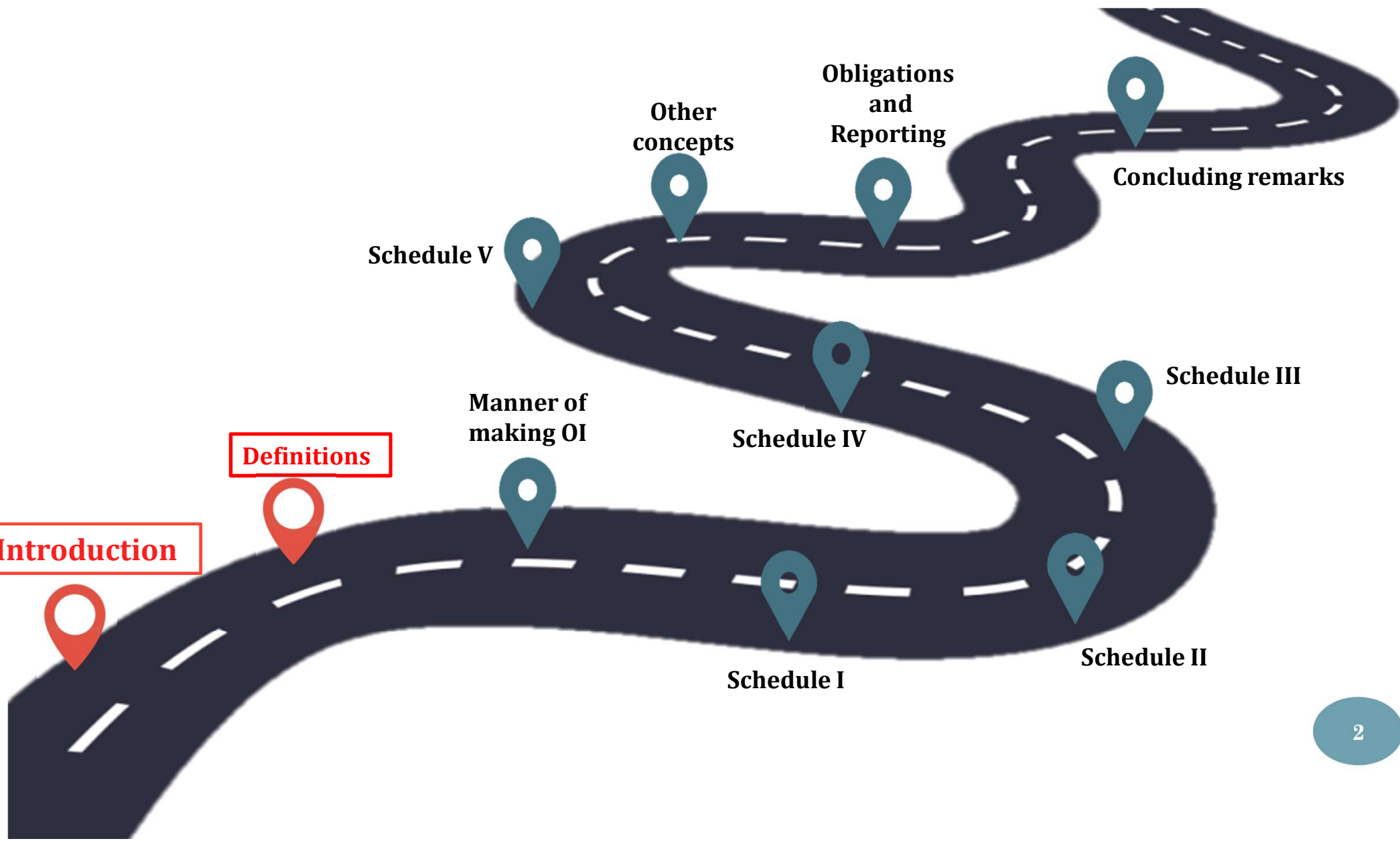
Concluding remarks

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ABBREVIATIONS

Abbreviations	Key word
ODI	Overseas Direct Investment
OPI	Overseas Portfolio Investment
OI	Overseas Investment
AIF	Alternate Investment Fund
VCF	Venture Capital Fund
IFSC	International Financial Service Centre
SDS	Step-Down Subsidiary
SPV	Special-purpose Vehicle
FC	Financial Commitment
AD bank	Authorise Dealer Bank

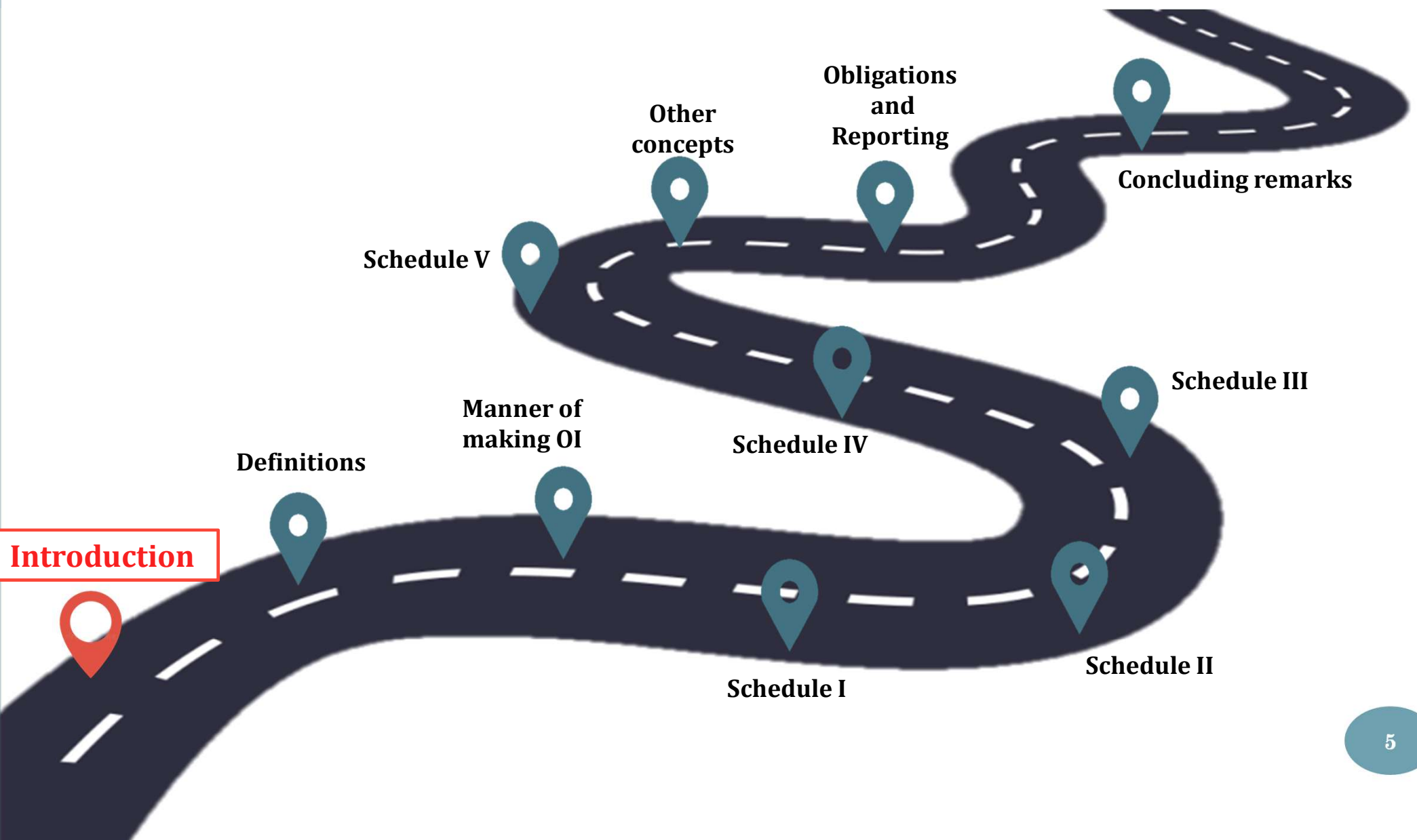
Abbreviations	Key word
RBI	Reserve Bank of India
NOC	No Objection Certificate
NPA	Non-performing Asset
JV	Joint Venture
WOS	Wholly Owned Subsidiary
IP	Indian Party
CA	Chartered Accountant
PROI	Person resident outside India
PRIN	Person resident in India
FCRA	Foreign Contribution (Regulation) Act, 2010

ABBREVIATIONS

Abbreviations	Key word
ESOP	Employee Stock Ownership Plan
FEMA, 1999	Foreign Exchange Management Act, 1999
LRS	Liberalised Remittance Scheme
SEBI	Securities and Exchange Board of India
BDRs	Bullion Depository Receipts
MF	Mutual Fund
ECB	External Commercial Borrowings
ADR	American Depository Receipt
GDR	Global Depository Receipt
UIN	Unique Identification Number
APR	Annual Performance Report

Abbreviations	Key word
FLA	Foreign Liabilities and Assets
IE	Indian Entity
FE	Foreign Entity
LSF	Late Submission Fee
FS	Financial Statements
SWIFT	Society for Worldwide Interbank Financial Telecommunication

Introduction



MAJOR CONCERNS IN EARLIER REGULATIONS



1 No clarity on ODI and OPI

2 Approvals required for many overseas investment transactions such as non-financial services entity investing in foreign entity engaged in financial services, investments in IFSC, transfer/disinvestment, restructuring of ODI

3 Stringent provisions relating to ODI-FDI structures

4 Ambiguity regarding various definitions

5 No concept of strategic sector and Late submission fees

FRAMEWORK

Foreign Exchange Management
(Transfer or Issue of any Foreign
Security) (Amendment)
Regulations, 2004



[Foreign Exchange Management
(Acquisition and Transfer of
Immovable Property Outside
India) Regulations, 2015



सरकार
Government Of India



Foreign
Exchange
Management
(Overseas
Investment)
Rules, 2022



Foreign
Exchange
Management
(Overseas
Investment)
Regulations,
2022



Foreign
Exchange
Management
(Overseas
Investment)
Directions,
2022



Master
Direction
on
Reporting
(updated as
on 22nd
August
2022)



Master
Direction
on LRS
(updated
as on 24th
August
2022)



Master
Direction
on
Immovable
Property
(updated
as on 1st
September
2022)

FOREIGN EXCHANGE MANAGEMENT (OVERSEAS INVESTMENT) RULES, 2022

SCHEDULES



Schedule	Content in the Schedule
Schedule I	ODI by Indian Entity
Schedule II	OPI by Indian Entity
Schedule III	OI by Resident Individuals
Schedule IV	OI by Others (AIF, Mutual Funds, VCF, Trusts and Societies)
Schedule V	OI in IFSC

PERMISSION FOR MAKING OVERSEAS INVESTMENT

Automatic Route:

- Overseas investment may be **made in a foreign entity engaged in a bona fide business activity**, directly or through SDS/special-purpose vehicle (SPV).
- The person is required to fill **Form FC** supported by the requisite documents.



Approval Route:

- The applicant shall approach their designated **AD bank** who shall forward the proposal to the **Reserve Bank**.
- Application may be submitted to the Reserve Bank in physical/electronic form through email as hitherto, in addition to the online reporting.



RBI – Financial commitment by Indian entity, exceeding USD 1 billion (or its equivalent) in a F.Y. shall require prior approval of the RBI.

Central Government – The application for Overseas Investment in Pakistan or in strategic sector/ specific geographies shall be forwarded by AD bank to RBI for onward submission to CG.



Government Of India

NON-APPLICABILITY OF OVERSEAS DIRECT INVESTMENT NORMS TO SPECIFIED INVESTMENTS/TRANSFERS

The Foreign Exchange Management (Overseas Investment) Regulations, 2022 shall **not apply to**:

1

any investment made outside India by a financial institution in an IFSC;

2

acquisition or transfer of any investment outside India made

2.a

out of Resident Foreign Currency Account

2.b

out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years;

2.c

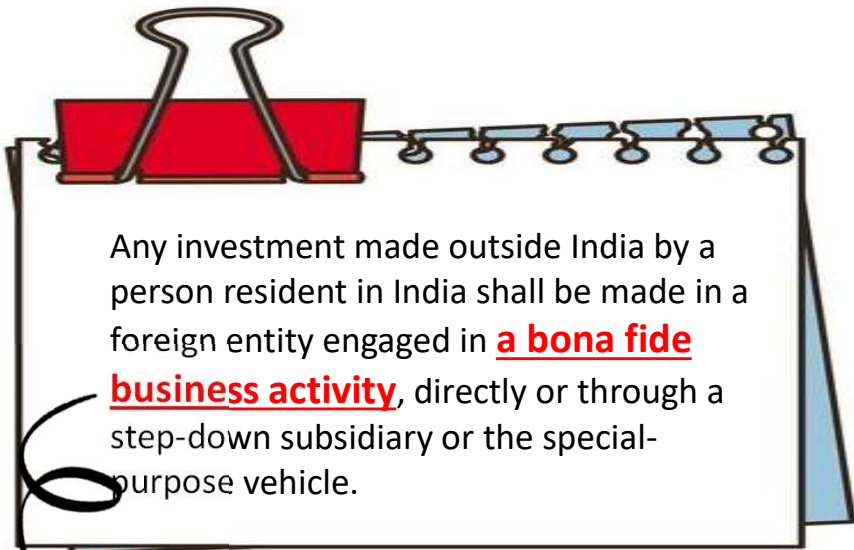
by a person when he was resident outside India or inherited from a person resident outside India

OR

OR

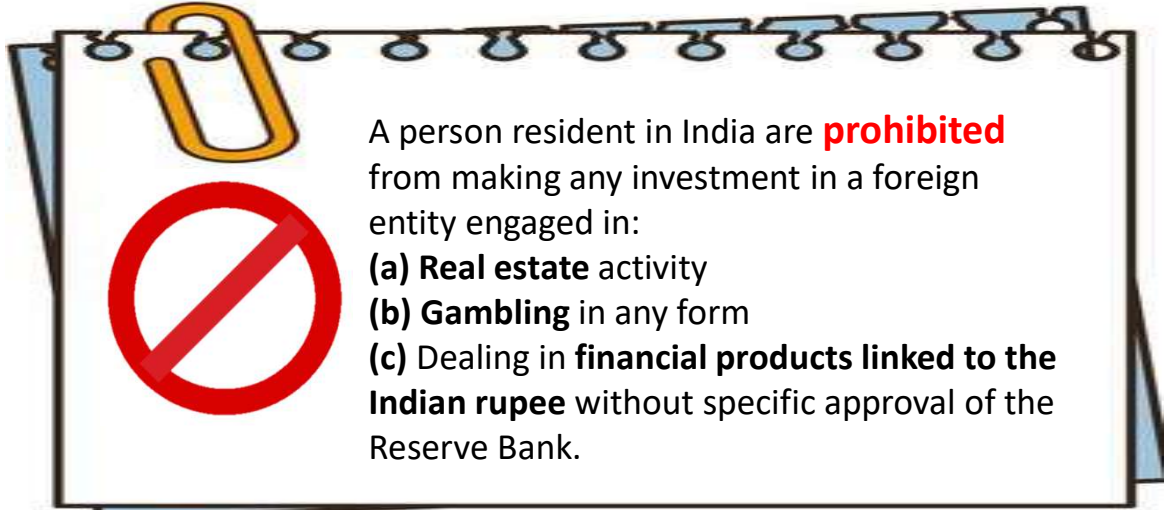


RESTRICTIONS AND PROHIBITIONS ON ACTIVITIES UNDER 'OVERSEAS INVESTMENT NORMS'



Any investment made outside India by a person resident in India shall be made in a foreign entity engaged in **a bona fide business activity**, directly or through a step-down subsidiary or the special-purpose vehicle.

“Bonafide business activity” shall mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be:



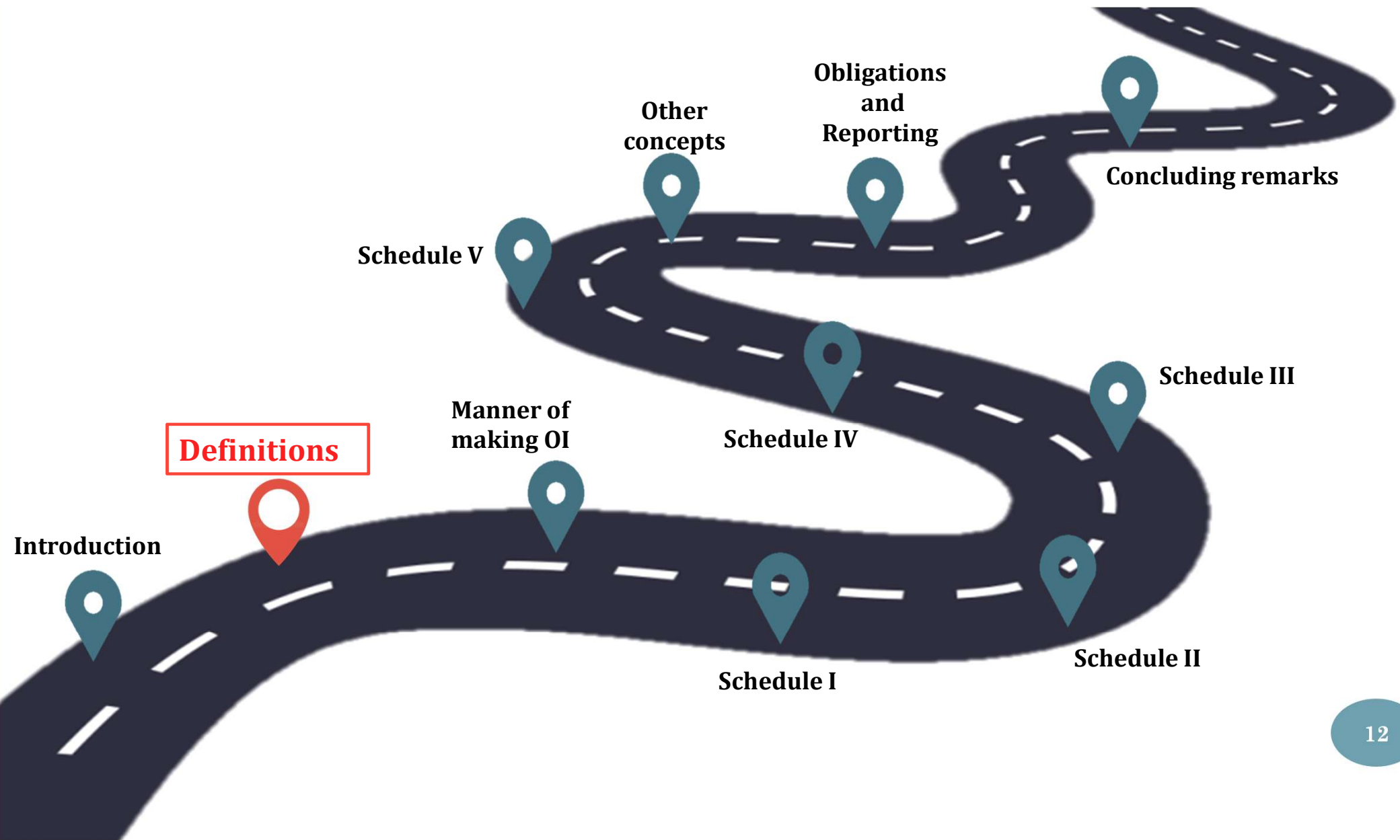
A person resident in India are **prohibited** from making any investment in a foreign entity engaged in:

- (a) **Real estate activity**
- (b) **Gambling** in any form
- (c) Dealing in **financial products linked to the Indian rupee** without specific approval of the Reserve Bank.

Restriction on further financial commitment or transfer

A **person resident in India** who has made financial commitment shall not make any further financial commitment , directly or indirectly, towards such foreign entity or transfer such investment **till any delay in reporting is regularised**

RESTRICTED



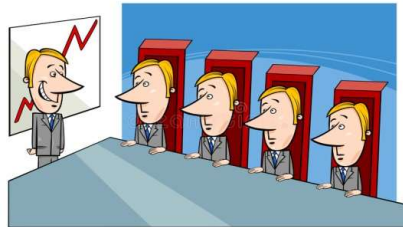
CONTROL

The right to



Control Uday Control

Right to appoint majority of directors



OR

To control the management or policy decisions



10%

The right is exercisable by:

a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to **ten percent or more of voting rights** or in any other manner in the entity.



As per the old regulations, this limit was **twenty percent or more** of voting rights

DEBT INSTRUMENTS

Any instrument which is redeemable or non-convertible or optionally convertible shall be treated as **DEBT** for the purpose of OI Rules/Regulations/Directions. Debt instruments include the following:

Depository receipts
whose underlying
securities are debt
securities

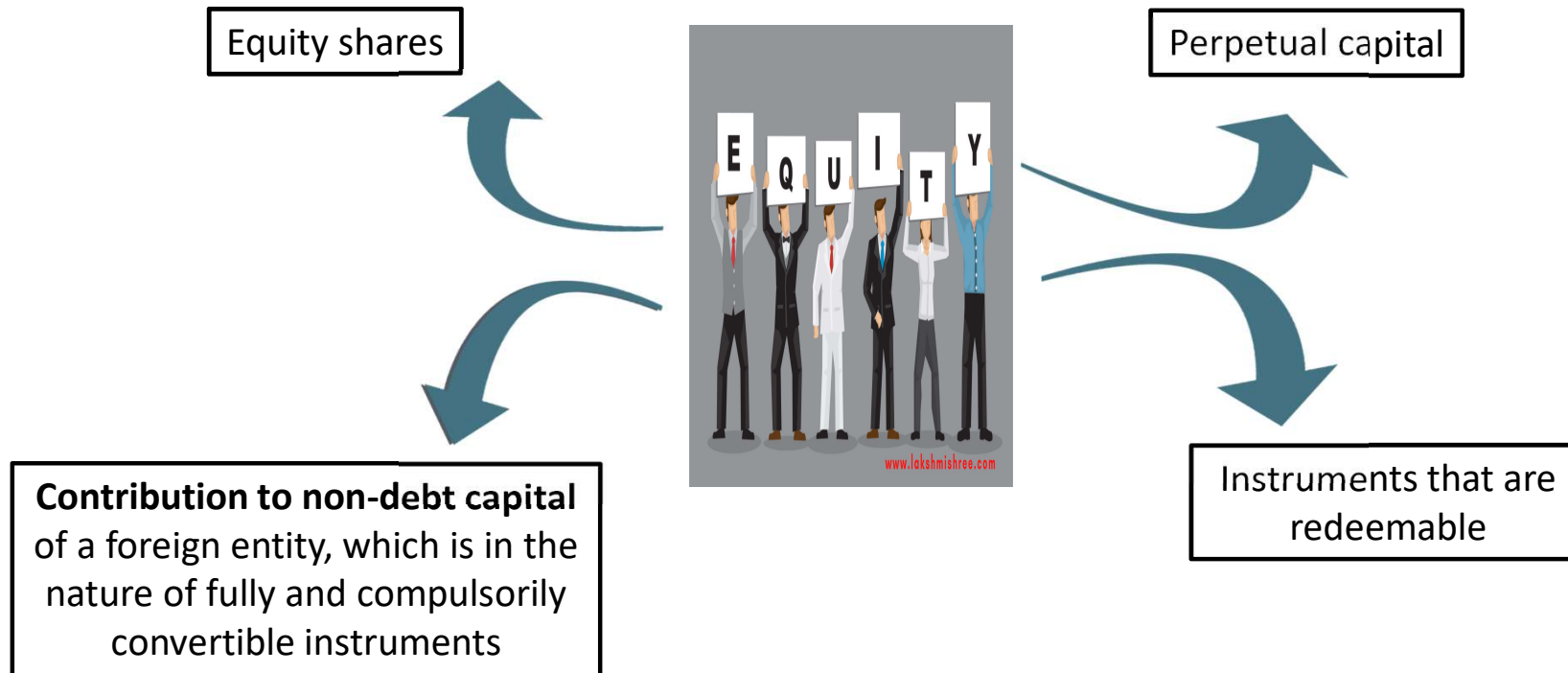
All tranches of
securitisation
structure
which are not
equity tranche

Borrowings by
firms through
loans

Corporate
Bonds/Government
Bonds



EQUITY CAPITAL



FINANCIAL COMMITMENT

“financial commitment” by a person resident in India means the **aggregate amount** of investment by way of ODI, debt other than Overseas Portfolio Investment (OPI) and non-fund-based facility or facilities extended by it to all foreign entities.

An Indian entity may lend or invest in any debt instruments issued by a foreign entity or extend non-fund based commitment to or on behalf of a foreign entity, including overseas SDSs of such Indian entity, subject to the following conditions:



1

the Indian entity is eligible to make ODI;

2

the Indian entity has made ODI in the foreign entity

3

the Indian entity has acquired control in the foreign entity on or before the date of making such financial commitment.

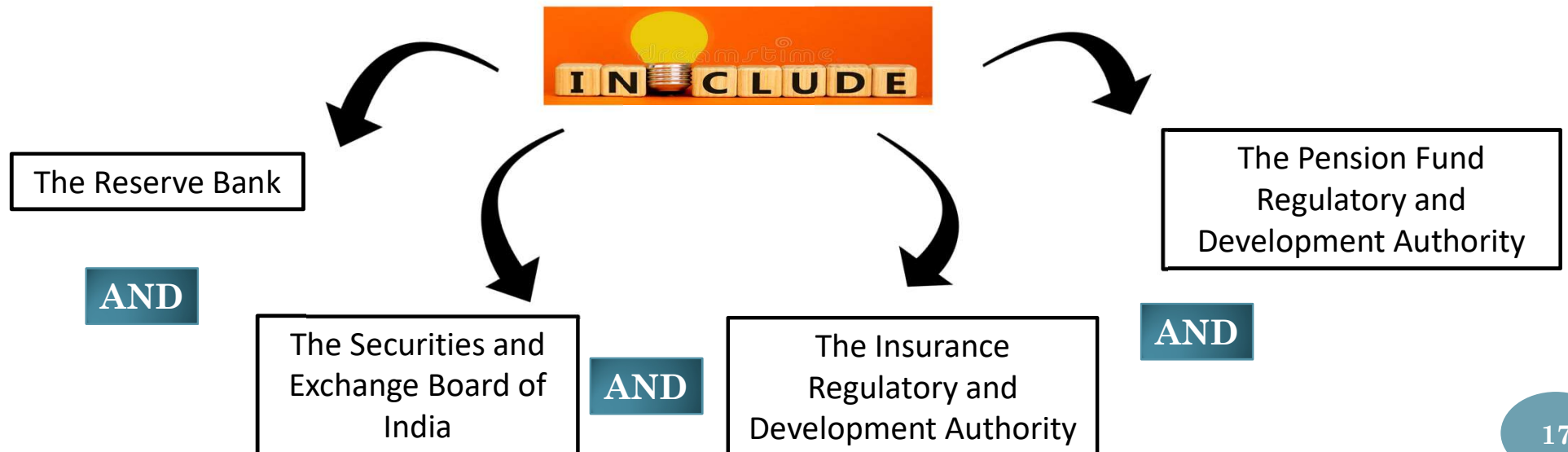
Limit for Financial Commitment

The total FC made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment shall not exceed **400 per cent** of its net worth as on the date of the last audited balance sheet.

FINANCIAL SERVICE REGULATOR

MEANS

financial service regulator established under any law in force in India



FOREIGN ENTITY

OLD

As per earlier regulations, Foreign entity was described with the concept of Joint Venture (JV) and Wholly Owned Subsidiary (WOS).

NEW

Foreign Entity means an entity formed or registered or incorporated outside India having **limited liability** that, **including:**

LIMITED

International Financial Service Centre (IFSC) in India, that has **limited liability**.

AND

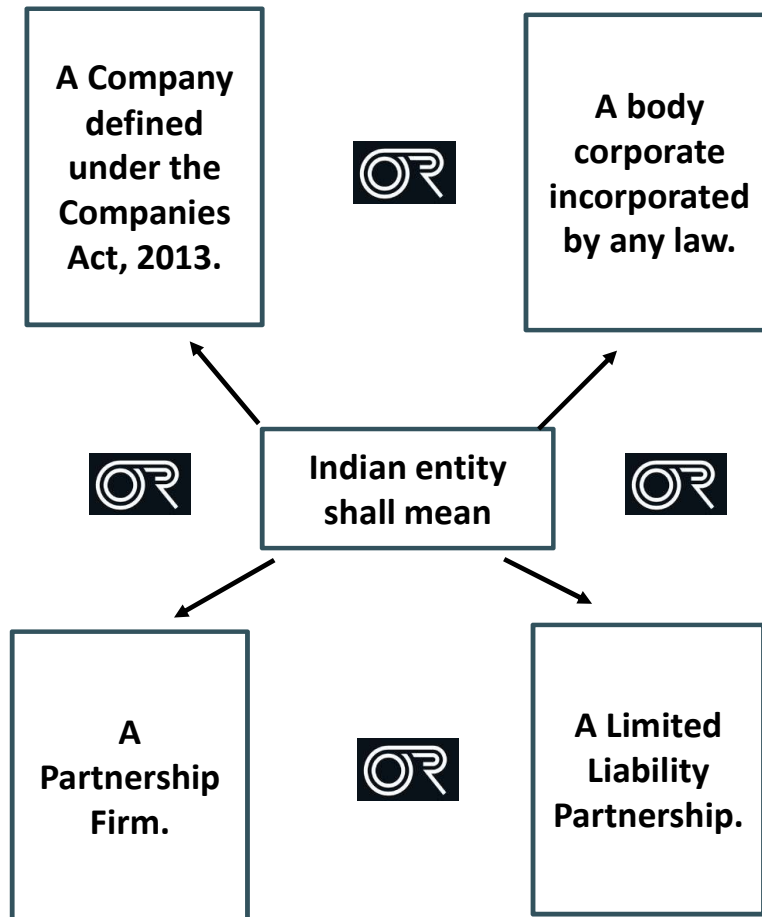
Investment Fund or Vehicle

“Listed Foreign Entity” means a foreign entity whose equity shares or any other fully and compulsorily convertible instrument is listed on a recognized stock exchange outside India.

NOTE

‘**Limited liability**’ would mean a structure such as a limited liability company, limited liability partnership, etc. where the liability of the person resident in India is clear and limited.

INDIAN ENTITY



OLD

Under the old regulations, all the investors from India in a foreign entity were together considered as Indian Party (IP).

NEW

Under the new regulations, each investor entity shall be separately considered as an Indian entity.

“Listed Indian Company” means an Indian company that has equity shares or any of its fully and compulsorily convertible instruments listed on a recognized stock exchange in **India**.

NON-DEBT INSTRUMENTS

all investments in equity in incorporated entities (public, private, listed and unlisted);

capital participation in Limited Liability Partnerships;

all instruments of investment as recognised in the Foreign Direct Investment policy from time to time;

investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts;

ODI can also be done in Non-Debt instruments, that include:

investment in units of mutual funds and Exchange-Traded Fund which invest more than fifty per cent in equity;

the junior-most layer (i.e. equity tranche) of securitisation structure;

acquisition, sale or dealing directly in immovable property;

depository receipts issued against equity instruments

contribution to trusts

OVERSEAS INVESTMENT

Overseas Investment means **any investment made outside India by a person resident in India.**

The investment shall be made in a foreign entity engaged in a **bona fide business activity**

directly or through **step down subsidiary** or the **special-purpose vehicle**

subject to the limits and the conditions laid down in these rules and the said regulations

PLEASE NOTE

Overseas investment or transfer of such investment including **swap of securities** in a foreign entity formed, **registered or incorporated in Pakistan** or any other jurisdiction **as may be advised by the Central Government** from time to time shall **require prior approval of the Central Government.**

PLEASE NOTE

the structure of such subsidiary or step down subsidiary of the foreign entity shall **comply with the structural requirements** of a foreign entity

OVERSEAS DIRECT INVESTMENT (ODI)

Old

'Direct investment outside India' means:

investment by way of contribution to the capital

OR

subscription to the Memorandum of Association of a foreign entity

OR

by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange

NOTE: This investments does not include portfolio investment.

New

Overseas Direct investment means:

Acquisition of any unlisted equity capital or subscription as a part of the Memorandum of Association of a foreign entity

OR

investment in 10% or more of the paid-up equity capital of a listed foreign entity

OR

investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity

NOTE: Once an investment in a foreign entity is classified as ODI, the investment shall continue to be treated as ODI even if such investment falls below 10% of the paid-up equity capital or the investor loses control in the foreign entity.

OVERSEAS PORTFOLIO INVESTMENT (OPI)

MEANS

investment, other than ODI, in foreign securities.

does not include

any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC



NOTE

OPI by a person resident in India in the **equity capital of a listed entity**, even **after its delisting** shall continue to be treated as OPI until any further investment is made in the entity.



STRATEGIC SECTOR

Strategic Sector **includes:**



AND



Start-ups

AND

OTHERS

Any other sector or sub-sector as deemed fit by the Central Government.

Energy and natural resources sectors such as Oil, Gas, Coal, Mineral Ores, Submarine cable system

SUBSIDIARY/STEP DOWN SUBSIDIARY



Wholly Owned Subsidiary (WOS)' means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian party;

The concept of wholly owned subsidiary is **now replaced** with subsidiary or step down subsidiary. It means:



An entity

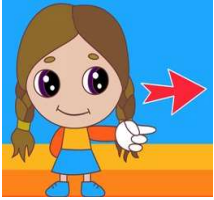
in which the foreign entity has control (10% or more)

the structure of such subsidiary/SDS shall comply with the structural requirements of a foreign entity,



Where such foreign entity does not have control (10% or more), will that be considered as subsidiary/step down subsidiary?

The investee entities of the foreign entity where such foreign entity does not have control (**10% or more**), shall not be treated as subsidiary/step down subsidiary and therefore need not be reported henceforth.



In the next part, we will cover the **Manner of making OI and Schedule I – ODI by Indian Entity.**

**To be continued next
WEDNESDAY...**





We are open to your Queries/Suggestions/Feedbacks



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