

# ICAI – Workshop on FEMA

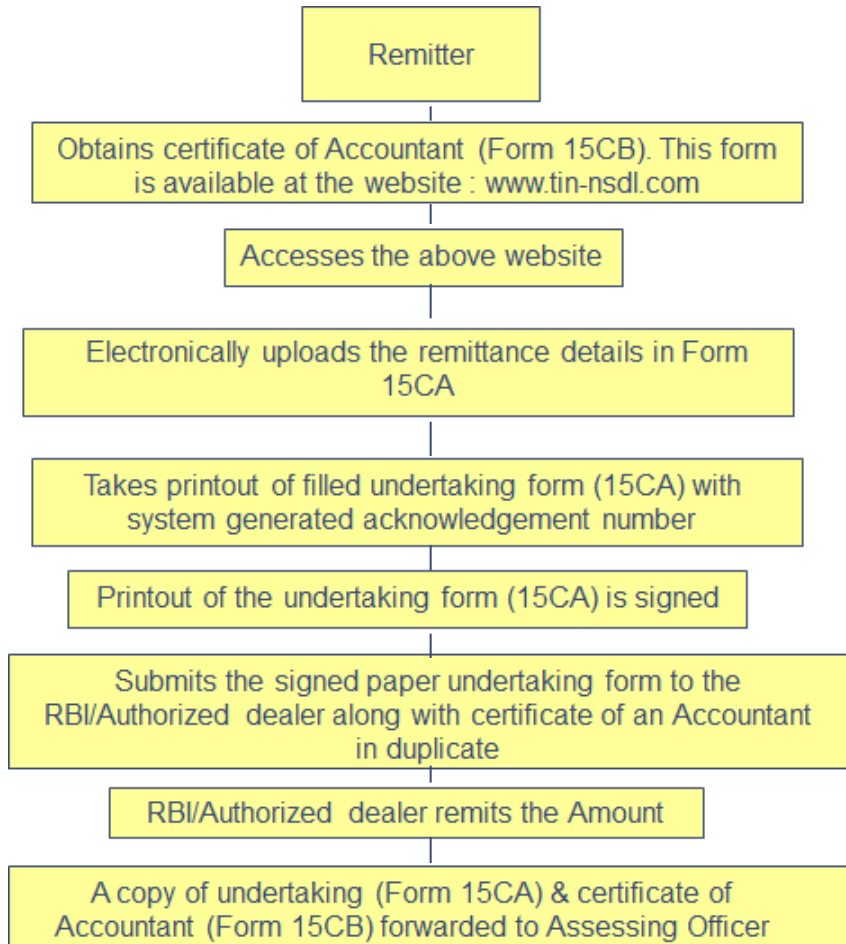
## Certifications and Recent Updates



# Certifications/Representation Services

## Multiple Regulations

- CA Certificate in Form 15CB – Rule 37BB w.e.f October 1,2013



- No PE Declaration
- TRC Available?
- PAN of recipient + Tax Rates
- Form A1 v/s Form A2
- Tax Department queries on NIL Withholding
- Documentation & Evidences
- Force of Attraction Rule
- Branch of Foreign Company
- Branch overseas of Indian Company
- Overseas Entity Structure

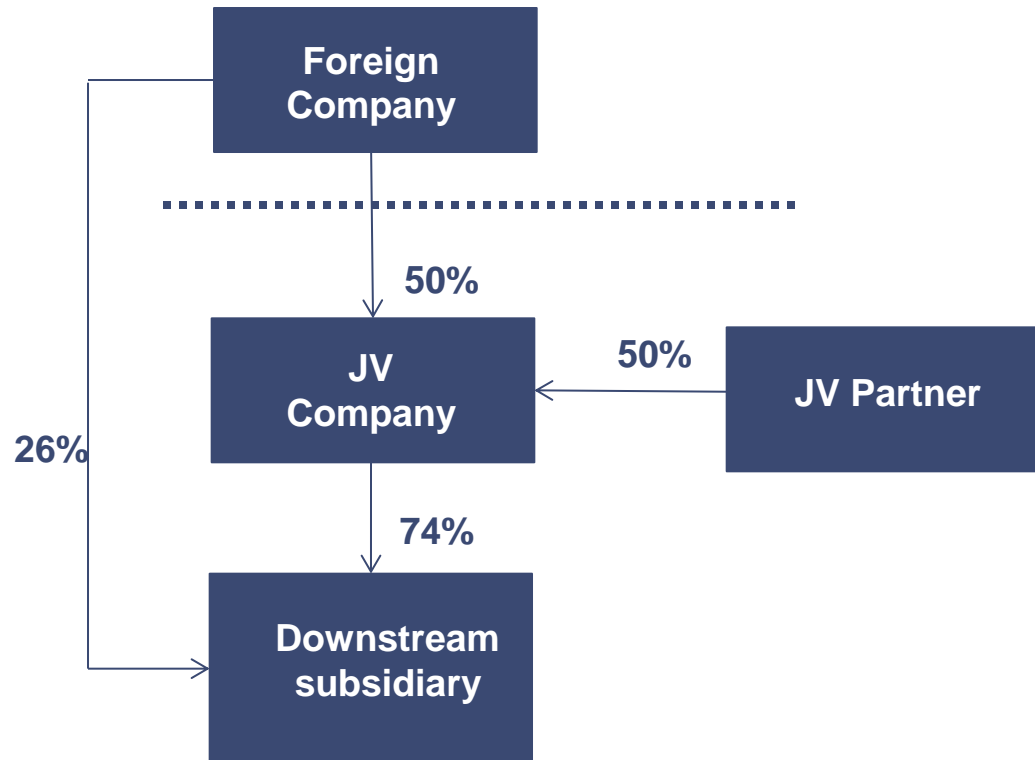
# Certifications/Representation Services

- **ECB Regulations**
  - **Form 83 – ECB Guideline competence**
  - **Form ECB – 2 (Monthly Returns)**
- **FDI Regulations**
  - **Form FC-TRS Related (Pricing of shares)**
  - **Form FC-GPR Related (Pricing of shares)**
- **Branch / LO in India**
  - **Annual activity certificate**
  - **Remittable surplus**
  - **Liability including Gratuity and other employee benefit have been met/provided for**
  - **No income accrues from o/s India and remains un repatriated (including export proceeds) [closure]**
  - **Profit does not include revaluation of assets (profit repatriation)**
  - **Entire profit is through permitted activities**

# Certifications/Representation Services

- **ODI Regulations**
  - **Form ODI Part I**
  - **Form APR- Annual report**
  - **APR- where overseas JV/WCS is not required to be audited. Statutory auditor report certifying True and Fair view**
- **Import of Goods and Services – Master Circular**
  - **Non physical imports – Software**
  - **CA Certificate that “the software data, drawing, design has been received by the exporter”**

# FDI Regulations - Updates



TOTAL FDI = ??

# FDI Regulations - Updates

## Circular No 1 – dated July 4, 2013

- Guidelines for calculating total FDI in Indian Companies / for transfer of ownership and control of Indian Companies – in sectors with caps
- Definition of Company “ owned by Indian Citizens ” – 50% of capital is beneficially held by Indian citizens/ Indian Companies
- “Controlled” by resident individuals if Indian citizens/ Indian Companies have the power to appoint majority of directors of the company concerned
- Total foreign Investment = Direct + Indirect Investment
- Indirect investment in any downstream company would depend on its immediate Parent’s ownership and Control
- If the immediate Parent is not owned & controlled by resident – Entire indirect investment would be considered as FDI

# FDI Regulations - Updates

## Circular No 1 – dated July 4, 2013 ....

- Defense Sector / I&B Sector – FDI limits of 49% - Illustrated
- Equity held by the largest Indian shareholder would have to be at least 51% of the total equity
- “Largest Indian shareholder”, is a combination of :
  - The individual shareholder + Relative (U/s 6 Of Companies Act)
  - A company/ group of companies in which the individual / his HUF has management and control
  - The Indian company OR A group of Indian companies under the same management and ownership control.
- One resident Indian or relative/s or HUF, either singly or in combination holding at least 51% of the shares.
- Each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company
- Declaration as per section 187C shall be counted as foreign investment.

# FDI Regulations - Updates

- Circular No 44, dated September 13, 2013
- Circular No 68, dated November 1, 2013

## November 2013

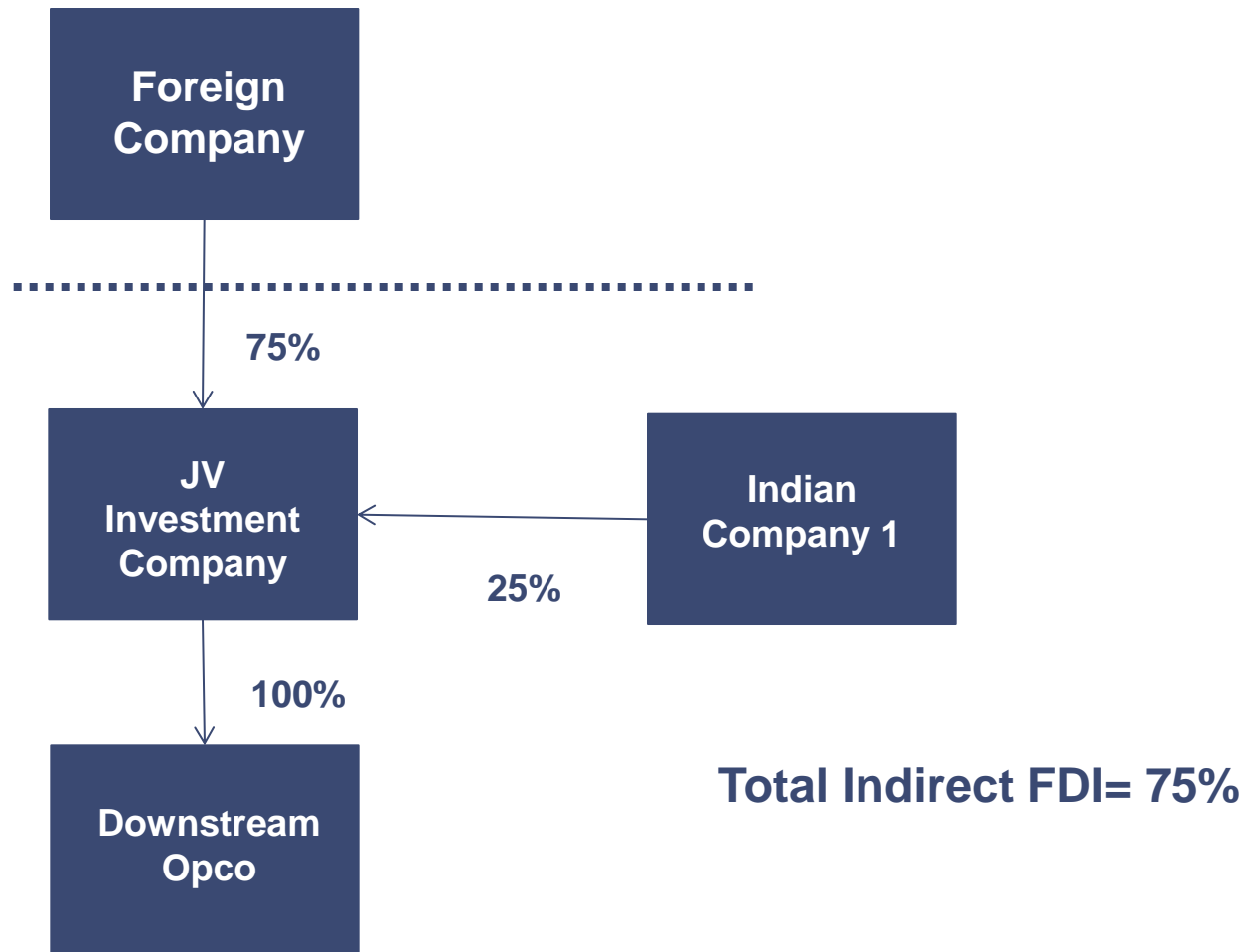
- Group companies means 2 or more enterprises which directly or indirectly are in a position to
  - Exercise 26% or more of the voting rights in the other enterprise
  - Appoint 75% of the members of the Board in the other enterprise

## September 2013

- 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements

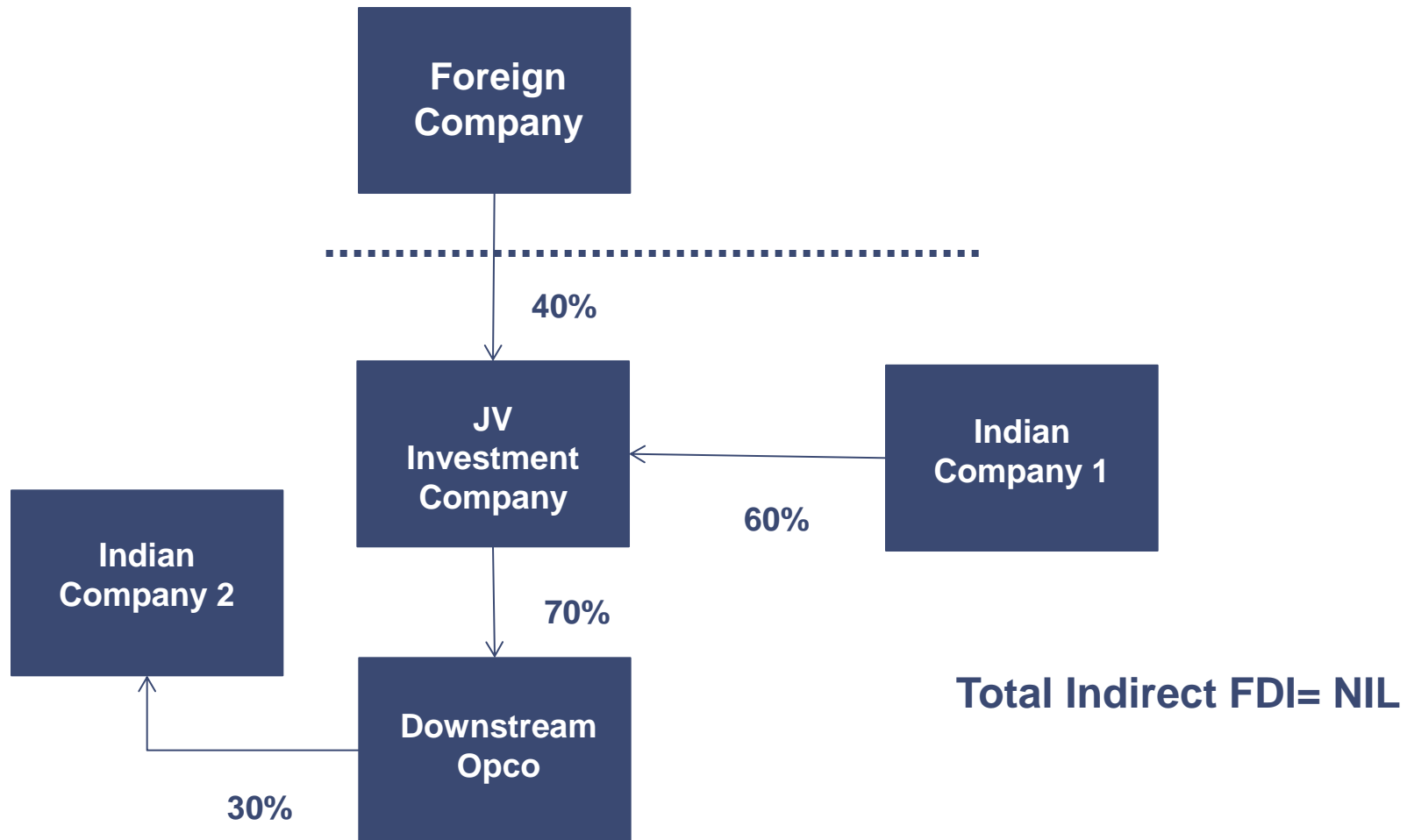
# FDI Regulations - Updates

## Ownership and Control



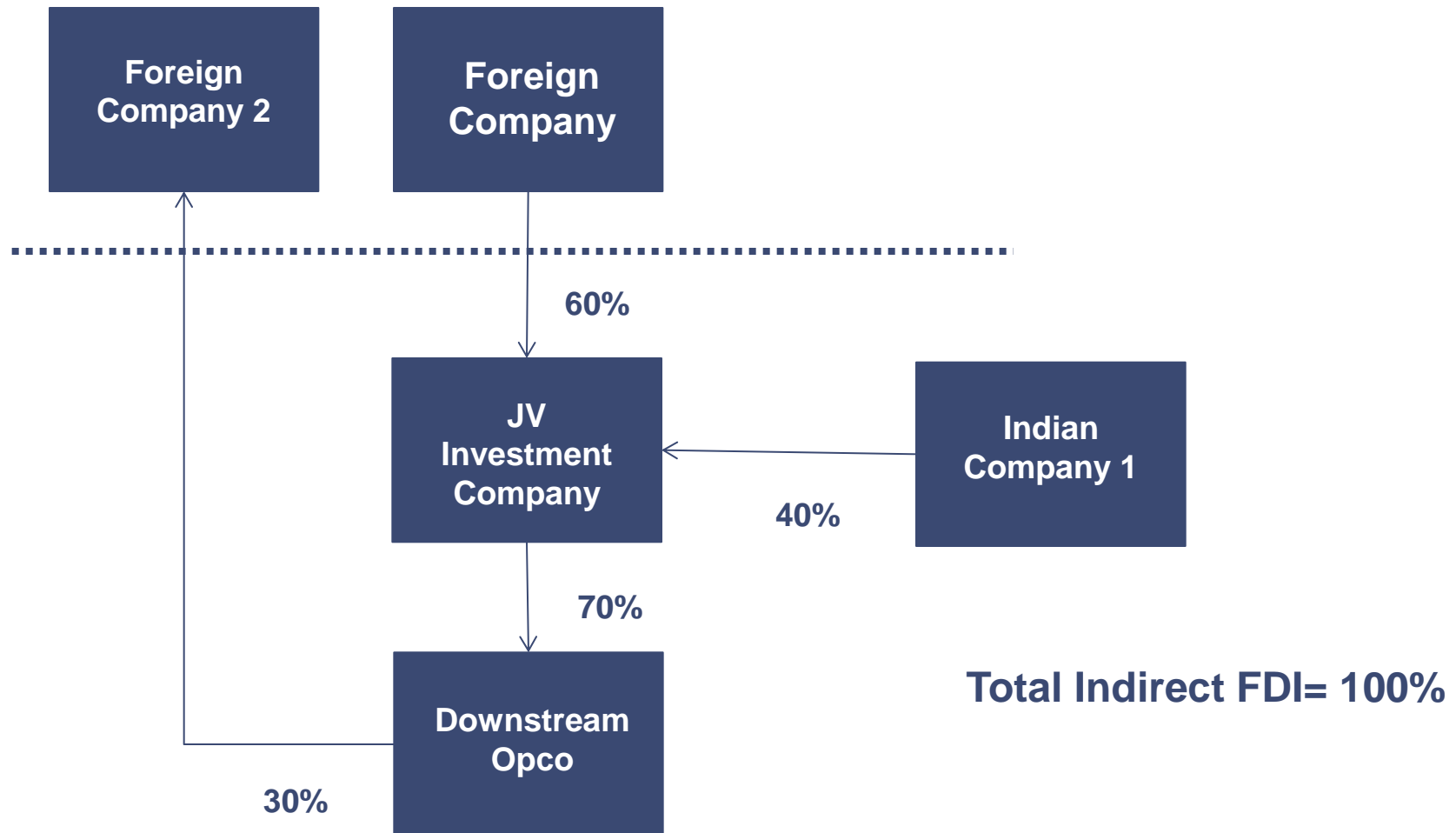
# FDI Regulations - Updates

## Ownership and Control



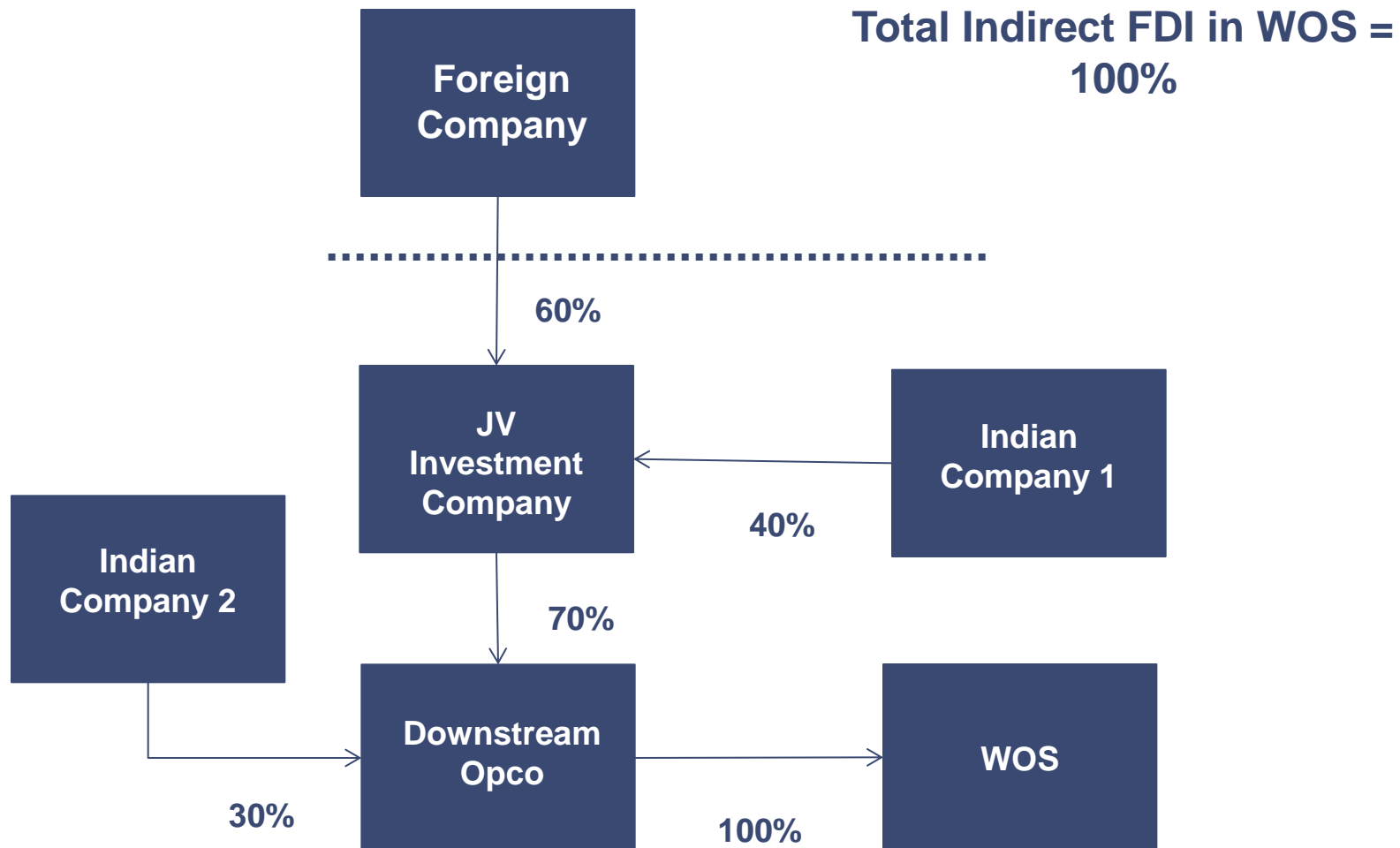
# FDI Regulations - Updates

## Ownership and Control



# FDI Regulations - Updates

## Ownership and Control



# FDI Regulations - Updates

## Real Estate

- FDI not allowed, apart from construction of townships, housing, built up infrastructure
- Minimum development
  - Having plots serviced – land area of 10 hectares (~ 25 acres)
  - Constructions development projects minimum built up area of 50,000 sq mts
- Minimum capital - USD 10 million (WOS) and USD 5 million (JV Mode)
- Funds to be bought into India, within 6 months
- 3 year lock-in of Minimum Capital (Prior FIPB approval possible)
- 50 % development within 5 years of statutory clearances
- Sale of undeveloped plots not permitted

# FDI Regulations - Updates

## Firm / Proprietorships

- NRI/ PIO – permitted – non repatriable
- Investment can be through inward remittances / NRE / NRO
- No engagement in any agricultural/ plantations or real estate business or print media

## LLP

- Permitted through Government route in sectors where 100% FDI is allowed ( No FDI linked performance conditions)
- No engagement in any agricultural/ plantations or real estate business or print media
- No downstream investment & No ECB
- Only inward remittance/ NRE/ FCNR permitted
- Resident designated partner

# FDI – SEBI ( SAST) Regulations

Circular No 38 dated September 6,2013

- Acquisition of listed shares by NR/NRI on RS Exchange permitted (auto route)
- Registered Broker
- Acquirer should be an existing shareholder as per SAST Regulations (control)
- Consideration
  - Inward Remittance (Block Deal)
  - CA Certificate/ Accounts/ MAT challenges/ Sec 10(38)
  - Rate of Income-tax 10/20/30/MAT?
  - ECNR/ NRE can be used / Escrow (non-interest bearing)
  - Pricing guidelines
  - AD banks can issue BG (no RBI prior permission) on behalf of NR for open offers / delisting /exit offers
  - SEBI(SAST) compliance
  - Counter guarantee from bank of international Reputation

# ODI Regulations - Updates

## Circular No 23, dated August 14, 2013

- August 14, 2013 – Cut off date
- 400% Limits (Net worth Criterion) reduced to 100% of NW Limit
- No winding down of earlier investments – Circular No 30 dated September 4, 2013
- EEFC/ADR/GDR exclusion
- If ECB is raised – 400% of NW Criterion remains
- Limits subsume – Equity, Loan, Corporate Guarantee or BG ( backed by collaborated guarantee by the Indian Party), Performance Guarantee (50%), creation of any charge over movable and immovable assets, pledge of shares, etc

# ODI Regulations - Updates

## Notification No FEMA 263/RD-2013 dated March 5, 2013

- Individuals ( Singly or with another resident individual or Indian Parties) can now make ODI in JV/WOS
- No real estate/ BOFS (Bonafide business activity)
- FATF-Non-cooperative nations, not permitted?
- LRS limits (also for EEFC/RFC)
- No Step down subsidiaries
- 1 year lock-in period

# Export of goods and software

## Circular 14, July 22, 2013

- Period of realization – 9 months (Bills post April 2013)
- SEZ - 12 months
- Warehouse outside India – 15 months

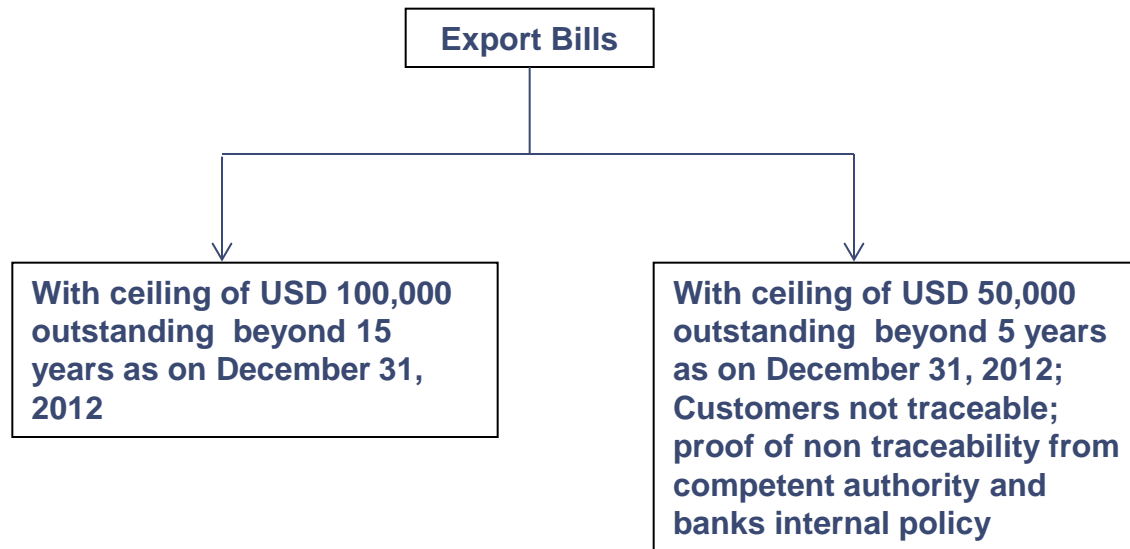
## Circular No 43 - dated, September 13,2013

- EDF Replaces GR/PP – (New Forms)
- SDF for exports through EDI ports remaining
- SOFTEX New Forms (single & bulk export)
- Export of goods & software less than USD 25000/- also covered
- Online generation of SOFTEX No's
- Effective from October 1,2013

# Export of goods

## Circular No 62 dated October 14, 2013

- One time measure to closing of old export bills outstanding in XOS before December 31, 2013
- Preconditions being:
  - No civil / criminal suit pending
  - No adverse notice from ED / CBI / DRI / law enforcement agency
  - Has no externalization problems with export recipient countries



# Trade with Iran

- **Settlement through UCO Bank**
  - **Nodal Bank for trade with Iran – approved by GOI**
  - **Per Master Circular on Export of Goods and Services - special arrangement between GOI and Foreign Government**
- **Permitted Currency**
  - **Export / import settlement both under convertible foreign exchange**
  - **Special situation – settlement in Indian Rupees**
  - **Iran Trade – receipt of Rupees – whether Regulations are fulfilled?**

# Liberalised Remittance Scheme

Circular No 24, dated August 14, 2013

- Applies only to resident individuals
- Overall limit reduced to USD 75,000 from USD 200,000
- Ceiling of USD 75,000 can be exceeded for:
  - Towards medical treatment outside India
  - For maintenance of a patient outside India ( cap of USD 25,000)
  - Education outside India – higher of estimate or USD 100,000
  - Permitted Current Account Transaction

# EEFC Accounts

## Circular No 12 dated July 31, 2012

- **Retention of Foreign Exchange Earnings restored to 100%**
- **Monthly accruals to be converted into Rupees on or before the last day of the succeeding calendar month**
- **Adjustments permitted for approved purpose or forward commitments**
- **Applicable to RFC (Domestic) and Diamond Dollar Accounts**

# ECB Regulations

## Circular No 31 dated September 4, 2013 – Working Capital Finance

- ECB now permitted for general corporate purpose – working capital
- ECB can be availed under Approval Route
- ECB can be raised only from their foreign equity holder (min 25% stake)
- Average maturity period for repayment – can be 7 years
- No prepayment allowed before maturity
- Other restrictions under original ECB guidelines apply

# ECB Regulations

## Circular No 12 dated July 15, 2013 – ODI / Financing

- Applicable to Indian companies in manufacturing, infrastructure and hotel sector, with ODI
- End use can be towards repayment of term loans of > 5 Years maturity
- Domestic Rupee Loan repayment raised for ODI
- Capital Expenditure of ODI Companies
- Limits – Higher of :
  - 75% of average forex earnings of Indian Party realized during past 3 years; and/or
  - 75% of potential foreign exchange earning from ODI in the next 3 years (Stat Auditor / CA Certified)

*Past income from overseas entity will be considered for the purpose of this scheme*
- Repayment only out of forex earnings / assets of the overseas entity

# Compounding of Contraventions

- Category of contraventions – technical / material / sensitive
- All the above contraventions can be compounded
- Application can be suo moto or referred by the RBI / FIPB
- Order of compounding authority after hearing at Bangalore / Mumbai (depending on quantifiable contravention)
- Penal Settlement – No reference again for 3 Years
- No possibility of Appeals – can reject Compounding Order
- Long-drawn appellate proceedings
- CA – Representation Services Possible ?

# Appellate Proceedings



# Import of Goods and Services

- Current Account transaction
- References to R&D Cess; IT Act; Import Licenses
- Form A1 remittances - > USD 5,000
- Evidence of import
- Time Limit for settlement of Import Payments
  - Normal imports – Within 6 months from the date of shipment
  - Deferred payment arrangements – Exceeding 6 months but less than 3 years – treated as trade credits
  - Payments outstanding beyond three years treated as ECB

# Import of Goods and Services

- Interest on import bills – trade credit
- Advance Remittances
- ECB regulations Vs. Master Circular on Import of Goods and Services
- Import Bills remaining unpaid for extended periods of time
- Alternative Evidence

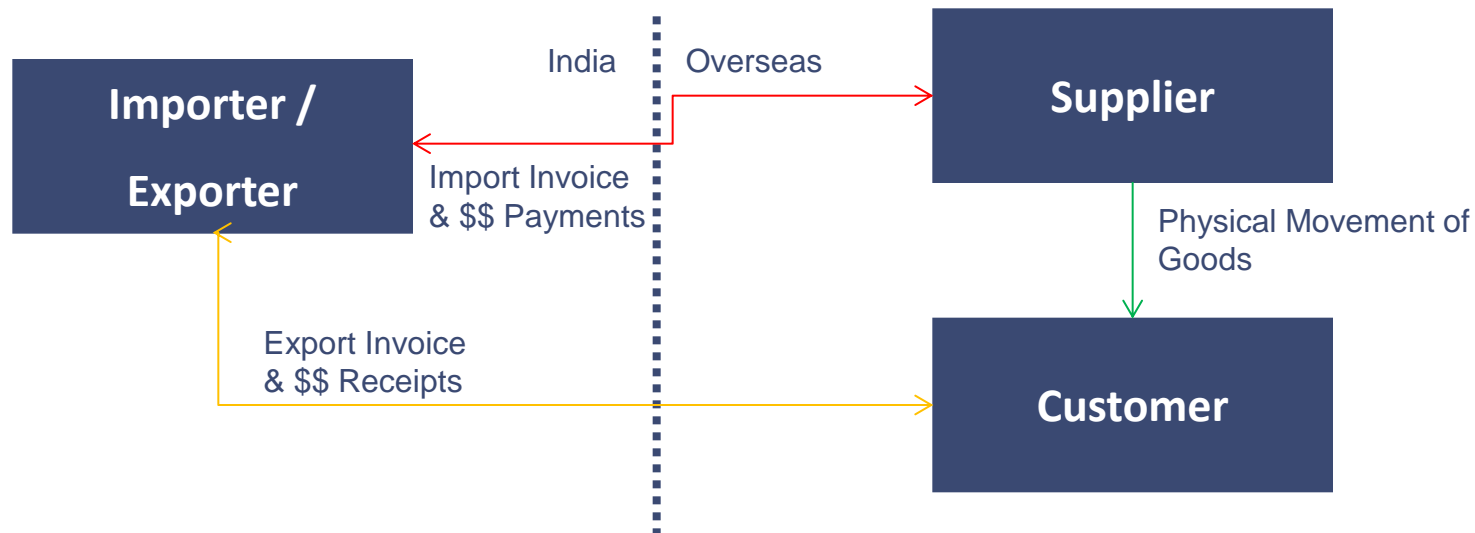


# Export of Goods and Services

- **GR Waiver: AD Category – I banks may consider requests for grant of GR waiver in certain cases**
  - **Extension of time and write off by Authorized Dealers**
  - **Reconciliation of advance for exports vis a vis actual invoicing**
  - **Endorsement of FIRC's**
  - **Onsite and offsite contracts – Audited Yearly statements to be submitted to ADs**
  - **Software Contracts:**
    - **Monthly invoice or Milestones**
    - **15 days post transmission / completion**
    - **SOFTEX filings**
- **Merchanting Trade**
  - **Facilities towards Imports / Exports – Letter of Credit, Usance, Guarantees**

# Trade – Challenges...

- In case of breach in time limits for import/export payments, would the condonation of delay application to Authorized Dealer ('AD') suffice?
- Import payments beyond a period of 3 years – In case of a deemed ECB, what is the procedure to be followed? Is a LRN required?
- Netting off of Import payables against Export receivables – Permitted?
- How are merchanting trade transactions viewed?



# External Commercial Borrowings

1. Automatic and Approval routes
2. Conditions – lender, borrower, amounts, interest, compliance
3. Maturity - 3 to 5 Years (USD 20 Million criterion – Average Maturity)  
Cal/Put Option for <USD 20 Mil OK – with 3 Year Average Maturity criterion met
4. All in Cost Ceilings – 6M LIBOR + 350 to 500 bps of respective currency
5. End-use
6. Debt Equity Ratio – 4:1
7. Conversion into equity

# External Commercial Borrowings

## Eligible Borrowers

- Corporations – including hospitals and software sectors
  - Non-Banking Finance Companies (NBFCs), exclusively involved in financing infrastructure sector
  - Individuals, Trusts, Non-profit organizations (other than MF) - Not eligible
  - Units in SEZ (only for own requirement)
  - SEZ developers for providing infrastructure facilities (under approval route)
- 

## Eligible Lenders

- International banks
- International capital markets
- Multilateral financial institutions (IFC, ADB, etc.)
- Export credit agencies
- Suppliers of equipment
- Foreign collaborators
- Foreign equity holders\* (<USD 5 Mil – 25% direct; >USD 5 Mil = 25% direct + D/E of 4:1)

# External Commercial Borrowings

## Permissible End Use

- Investment in import of capital goods
  - New and expansion projects
  - Overseas direct investment in Joint Ventures
  - Payment for spectrum Allocation
  - Sector-wise end use prescribed / restricted
- 

## Impermissible End Use

- On-lending or investment in capital markets
- Acquiring a company in India by a corporation
- Real Estate (except in integrated township)
- Working capital or general corporate purposes
- Repayment of a rupee loan
- General Corporate Purpose (Conditions)

# External Commercial Borrowings...In Summary

1. Reporting requirements
2. Loan agreement in compliance with ECB guidelines
3. Form 83 in duplicate to be submitted to AD
4. One copy to be sent to RBI by AD
5. LRN to be allotted by RBI
6. Draw down only after obtaining LRN
7. ECB-2 return to be submitted to RBI through AD on monthly basis Maturity - 3 to 5 Years

- In case of a Deemed ECB - Effective date for a Foreign Equity Holder to be a Eligible Lender as per ECB guidelines is:
  - Date of import? OR
  - Date of expiry of the time limit for import payments (i.e. 6 months)? OR
  - Date it becomes a deemed ECB?
- Extension of time for repayment of ECB – Favorably considered by RBI?

# **Establishment of Place of Business in India**

- 1. Foreign entities can set up a Branch Office (BO) or a Liaison Office (LO) or a Project Office (PO) in India**
- 2. Body Corporate incorporated outside India intending to set up a BO or a LO in India to obtain permission from the Reserve Bank**
- 3. Applications in Form FNC is considered by the Reserve Bank under two routes:**
  - Reserve Bank Route**
  - Government Route**
- 4. Application in Form FNC to be forwarded by the foreign entity through AD Category – I bank to the RBI**

# LO / Branch

## Branch

- Export/import of goods - Procurement of goods for export and sale of goods after import are allowed only on wholesale basis
  - Rendering professional or consultancy services; Carrying out research work, in which the parent company is engaged
  - Promoting technical or financial collaborations between Indian companies and parent or overseas group company
  - Representing the parent company in India and acting as buying/ selling agent in India
  - Rendering services in Information Technology and development of software in India
  - Rendering technical support to the products supplied by parent/group companies
  - Foreign airline/shipping company
- 

## Liaison Office

- Representing Parent Company
- Promotion of Import / Export
- Promotion of Technical/Financial Collaborations
- Communication channel between parent and Indian Companies

# Establishment of Place of Business in India

- **Branch – Eligibility**
  - A profit making track record during the preceding 5 financial years
  - Net Worth > USD 100,000
- **Liaison Office**
  - A profit making track record during preceding 3 financial years in the home country.
  - Net Worth > USD 50,000
  - If eligibility criteria is not met then the parent company of applicant may issue a Letter of Comfort , subject to the condition that the parent company satisfies the eligibility criteria - last 3 years Audited Financials to be submitted
  - A citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China cannot establish LO/BO/PO without prior RBI permission. Partnership / Proprietary are not allowed to establish LO/ BO/PO