

## Regulatory Alert

August 24, 2022



# New regime on Overseas Investments

In keeping with the spirit of liberalisation and to promote ease of doing business, the Central Government and the Reserve Bank of India ('RBI') have been progressively simplifying the procedures and rationalising the rules and regulations under the Foreign Exchange Management Act, 1999. The Government/RBI duly acknowledges the importance and significance of overseas investments by persons resident in India being important drivers of foreign trade, technology transfer etc. This in turn could potentially boost domestic employment, growth, competitiveness of Indian entities in a significant manner. In this direction, significant steps have been taken with operationalisation of a new Overseas Investment regime. In this regard, on 9 August 2021, the RBI had issued draft rules/regulations regarding Overseas Direct Investment ('ODI')/ Overseas Portfolio Investment ('OPI') and had sought feedback on the same ('Draft ODI Rules'). Pursuant to the Draft ODI Rules and the feedback received, the Central Government and the RBI on 22 August 2022, released the new rules/ regulations/ direction on ODI<sup>1</sup> ('New ODI Regime').

The New ODI Regime, which is effective immediately, aims to simplify the existing framework for overseas investment by persons resident in India to cover wider economic activity and significantly reduce the need for seeking approvals. Corresponding changes in light of the amendments *vide* New ODI Regime have also been made on 23 August 2022 in the Master Directions to Liberalised Remittance Scheme ('LRS Directions').

---

<sup>1</sup> Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022, Foreign Exchange Management (Overseas Investment) Directions, 2022



**Following is a summary of the key changes introduced in the New ODI Regime vis-à-vis the Erstwhile ODI Regime:**

Particulars	Erstwhile ODI Regime	New ODI Regime
<b>Continuity of overseas investments</b>	<ul style="list-style-type: none"> <li>Existing ODI made in accordance with the Erstwhile ODI Regime<sup>2</sup> shall be deemed to have been made under the New ODI Regime.</li> </ul>	
<b>Outbound Investment – ODI v. OPI</b>	<ul style="list-style-type: none"> <li>ODI was defined to <i>inter-alia</i> include investment by way of contribution to the capital or subscription to the Memorandum of Association of foreign entity or by way of purchase of existing shares of a foreign entity but did not include portfolio investments</li> <li>The term portfolio investments was not specifically defined</li> </ul>	<ul style="list-style-type: none"> <li>ODI is defined as               <ul style="list-style-type: none"> <li>Investment in unlisted equity capital of a foreign entity, or</li> <li>Subscription to Memorandum of Association of foreign entity; or</li> <li>Investment in 10% or more of the paid-up equity capital of a listed foreign entity or</li> <li>investment with control<sup>3</sup> where investment is less than 10% of the paid-up equity capital of a listed foreign entity</li> </ul> </li> <li>OPI is defined as investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in IFSC;               <ul style="list-style-type: none"> <li>redeemable/ optionally convertible instruments are considered as debt;</li> <li>Investment in units of investment fund overseas (regulated) to be considered as OPI</li> </ul> </li> </ul>
<b>Overseas Investment by resident individual</b>	<ul style="list-style-type: none"> <li>Portfolio investments were governed by LRS Directions</li> <li>ODI prohibited in foreign entity which is engaged in real estate or banking business or in financial services activity;</li> <li>No step-down subsidiary was allowed to be acquired or set up by the foreign entity</li> </ul>	<ul style="list-style-type: none"> <li>Portfolio investments (now regarded as OPI) are governed by New ODI Regime (within LRS limit of USD 250,000); LRS Directions not applicable</li> <li>ODI permitted in operating foreign entity not engaged in financial services activity; general restriction on a person resident in India from making ODI in entity engaged in real estate activity, gambling or dealing in financial products linked to INR</li> <li>Operating foreign entity should not have subsidiary or step-down subsidiary where the resident individual has control in the operating foreign entity</li> </ul>

<sup>2</sup> Foreign Exchange Management (Transfer Or Issue Of Any Foreign Security) Regulations, 2004, Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad

<sup>3</sup> "control" means the right to appoint majority of the directors or to control management or policy decisions 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 per cent. or more of voting rights or in any other manner in the entity;



Particulars	Erstwhile ODI Regime	New ODI Regime
	<ul style="list-style-type: none"> <li>Investment in securities of overseas unlisted investment fund were permissible as portfolio investment</li> <li>An individual resident in India can receive foreign security by way of a gift from a non-resident</li> <li>A person resident in India may acquire foreign security issued by a company under ESOP</li> </ul>	<ul style="list-style-type: none"> <li>Investment in only units of overseas unlisted investment fund shall be considered as OPI; permitted to make investment as such</li> <li>A resident individual may acquire foreign securities by way of gift from:               <ul style="list-style-type: none"> <li>a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010</li> <li>a resident individual who is a relative</li> </ul> </li> <li>Expressly clarified that resident individuals are not permitted to transfer any overseas investment by way of gift to a person resident outside India</li> <li>Remittance towards ESOP/ sweat equity shares will be within overall LRS limit; acquisition of less than 10% of paid-up capital to be treated as OPI</li> </ul>
<b>Investment by Indian entity in overseas entity engaged in financial services activity</b>	<ul style="list-style-type: none"> <li>Indian entity not engaged in financial service activity in India prohibited from making investment, directly or indirectly, in a foreign entity engaged in financial service sector outside India</li> <li>Investment in overseas financial services entity by an Indian entity engaged in financial services activity was permitted subject to <i>inter-alia</i> approval from the concerned regulatory authorities in India and abroad</li> <li>The term 'financial services activity' was not defined</li> </ul>	<ul style="list-style-type: none"> <li>Indian entity not engaged in financial services activity in India may make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity (except banking or insurance) provided the Indian entity has posted net profits during the preceding three financial years<sup>4</sup></li> <li>Indian entity engaged in financial services activity allowed to invest in overseas financial services entity if <i>inter-alia</i> it has obtained approval as may be required from the regulators of such financial services activity, both in India and the host country/ jurisdiction, as the case may be               <ul style="list-style-type: none"> <li>Overseas Investment by banks and non-banking financial institutions regulated by the RBI shall be subject to the conditions laid down by the RBI</li> </ul> </li> <li>Foreign entity shall be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India</li> </ul>

<sup>4</sup> If an Indian entity does not meet the net profits due to the impact of Covid-19 during the period from 2020-2021 to 2021-2022, then the financial results of such period may be excluded for considering the profitability period of three years



Particulars	Erstwhile ODI Regime	New ODI Regime
<b>OPI by Alternative Investment Funds ('AIF')</b>	<ul style="list-style-type: none"> <li>AIF was permitted to invest in equity and equity linked instruments of off-shore Venture Capital Undertakings</li> </ul>	<ul style="list-style-type: none"> <li>Any investments by AIFs shall be treated as OPI</li> </ul>
<b>OPI by an Indian entity</b>	<ul style="list-style-type: none"> <li>Listed Indian entity may invest in shares of an overseas listed company provided <i>inter-alia</i> that the investment does not exceed 50% of its net worth as on the last audited balance sheet date</li> <li>Unlisted Indian entity not permitted</li> </ul>	<ul style="list-style-type: none"> <li>Indian entity (listed/ unlisted) may make OPI which shall not exceed 50% of its net worth<sup>5</sup></li> <li>An unlisted Indian entity may make OPI only by way of subscribing to rights issue/ bonus issue or capitalization or swap of securities or merger, demerger, amalgamation or any scheme of arrangement</li> </ul>
<b>Investment in IFSC</b>	<ul style="list-style-type: none"> <li>Investment in IFSC was subject to the general conditions applicable to Indian party making ODI</li> </ul>	<ul style="list-style-type: none"> <li>Specific schedule with respect to investment by person resident in India in IFSC introduced; key aspects:               <ul style="list-style-type: none"> <li>ODI in IFSC - Requisite approval by the financial services regulator concerned shall be decided within 45 days of application</li> <li>Indian entity, not engaged in financial services, may make ODI in IFSC without meeting the net profit condition</li> <li>Resident person allowed to invest in the units of investment fund or vehicle setup in an IFSC as OPI</li> <li>Resident individual allowed to make ODI in foreign entity engaged in financial service sector (except banking / insurance) in IFSC if such entity does not have subsidiary or step down subsidiary outside IFSC where the resident individual has control in the foreign entity</li> </ul> </li> </ul>
<b>Other key aspects</b>		
<b>Bona fide business activity</b>	<ul style="list-style-type: none"> <li>Investments by Indian parties in foreign entity engaged in <i>bona fide</i> business activity abroad may be made through the medium of a Special Purpose Vehicle; the phrase '<i>bona fide</i> business activity' has not been defined</li> </ul>	<ul style="list-style-type: none"> <li>Investment by a person resident in India shall be made in a foreign entity engaged in a <i>bona fide</i> business activity, directly or through step down subsidiary or the special-purpose vehicle; the phrase '<i>bona fide</i> business activity' is defined to mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be</li> </ul>

<sup>5</sup> As on the last audited balance sheet date; 'Last audited balance sheet' means audited balance sheet as on date not exceeding eighteen months preceding the date of the transaction



Particulars	Erstwhile ODI Regime	New ODI Regime
<b>Financial commitment/ Guarantee</b>	<ul style="list-style-type: none"> <li>For computing the eligible overseas investment limit, an Indian party can utilize the net-worth of its Indian subsidiary/ holding company to the extent not availed of by the subsidiary/ holding company independently subject to certain conditions</li> <li>No restriction on further financial commitment</li> <li>Issuance of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries will be considered under the approval route</li> </ul>	<ul style="list-style-type: none"> <li>No enabling provision to allow Indian Party to utilize the net-worth of its Indian subsidiary/ holding company</li> <li>With respect to further financial commitment - AD bank shall not facilitate any outward remittance/further financial commitment by a person resident in India towards a foreign entity until any delay in reporting is regularised by paying applicable late submission fees</li> <li>Dispensed with the requirement of approval for issuance of corporate guarantees to or on behalf of second or subsequent level step down subsidiary; holding/ subsidiary Company can provide guarantee – to be utilized against own limit of the holding/ subsidiary company</li> </ul>
<b>Pledge</b>	<ul style="list-style-type: none"> <li>Indian Party may pledge shares of foreign entity for availing of fund based or non-fund based facility for itself or foreign entity; value of the fund based or non-fund based facility is reckoned as financial commitment for the Indian party</li> </ul>	<ul style="list-style-type: none"> <li>Indian party may pledge equity capital of the foreign entity outside India or charge on Indian entity assets or charge on assets of foreign entity outside India for fund/ non-fund based facility for:               <ul style="list-style-type: none"> <li>any foreign entity outside India – value of pledge/ amount of facility, whichever is less shall be reckoned as financial commitment</li> <li>Indian entity itself – no amount shall reckon as financial commitment</li> </ul> </li> <li>ECB utilized for ODI to be reckoned for financial commitment entirely or in excess of amount of pledge/charge, as the case may be</li> </ul>
<b>ODI-FDI structure</b>	<ul style="list-style-type: none"> <li>Under approval route</li> </ul>	<ul style="list-style-type: none"> <li>Draft ODI Rules allowed ODI-FDI structure subject to such structure not being designed for the purpose of tax evasion/ avoidance</li> <li>Under New ODI Regime:               <ul style="list-style-type: none"> <li>No person resident in India shall make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries<sup>6</sup></li> </ul> </li> </ul>

<sup>6</sup> Subsidiary or step-down subsidiary of a foreign entity means an entity in which the foreign entity has control



Particulars	Erstwhile ODI Regime	New ODI Regime
		<ul style="list-style-type: none"> <li>- Layering restriction not applicable to Indian entities being a banking company, systematically important non-banking financial company, insurance company, Government company</li> </ul>
<b>OI by Indian entity by way of debt instrument</b>	<ul style="list-style-type: none"> <li>• Indian entity may extend loan only to an foreign entity in which it has equity participation</li> </ul>	<ul style="list-style-type: none"> <li>• OI in debt instrument<sup>7</sup> allowed only after Indian entity has made ODI and has control in the foreign entity; shall be backed by loan agreement where transaction is between related parties at arms' length</li> </ul>
<b>Pricing</b>	<ul style="list-style-type: none"> <li>• In case of ODI, valuation of shares of foreign entity shall be made by merchant banker or investment banker where investment is more than USD 5mn; in all other cases valuation shall be made by a CA/ CPA</li> <li>• In case of transfer under private arrangement, share price is not less than the value certified by a CA/CPA as the fair value of the shares based on the latest audited financial statements</li> </ul>	<ul style="list-style-type: none"> <li>• Issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India or from a person resident in India to a person resident outside India shall be subject to a price arrived on an arm's length basis as per any internationally accepted pricing methodology</li> </ul>
<b>Restructuring of balance sheet of foreign entity</b>	<ul style="list-style-type: none"> <li>• Restructuring of the balance sheet of the Indian party involving write-off of capital and receivables was permitted subject to following:               <ul style="list-style-type: none"> <li>- listed Indian Party, holding at least 51% in foreign entity, may write off capital (equity/preference shares) and other receivables in respect of the foreign entity up to 25% of the equity investment in the foreign entity subject to certain conditions</li> <li>- unlisted Indian Party, holding at least 51% in foreign entity, is permitted to write off capital and other receivables up to 25% of the equity investment in the foreign entity under the approval route</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Restructuring of balance sheet of foreign entity (having ODI) is permitted provided:               <ul style="list-style-type: none"> <li>- Overseas entity has made losses for previous 2 years as substantiated by its last audited balance sheet</li> <li>- Such restructuring should not tantamount to diminution of total outstanding dues towards person resident in India exceeding the proportionate accumulated losses</li> </ul> </li> <li>• Further, where the original investment made in overseas entity was more than USD 10mn or the amount of diminution exceeds 20% of total outstanding dues towards Indian entity, diminution would need to be duly certified on arm's length basis by a valuer (certificate to be dated not more than 6 months prior to the date of transaction)</li> <li>• Provision not applicable on simple revaluation not involving restructuring</li> </ul>

<sup>7</sup> Such as Government bonds, corporate bonds, borrowings by firms through loans, depository receipts whose underlying securities are debt securities, any instrument which is redeemable or non-convertible or optionally convertible



Particulars	Erstwhile ODI Regime	New ODI Regime
<b>Disinvestment</b>	<ul style="list-style-type: none"> <li>Indian party can transfer stake in foreign entity only if the foreign entity has been in operation for at least one full year</li> <li>Indian Party may disinvest, without prior approval of the RBI, where the amount repatriated after disinvestment is less than the original amount invested subject to certain conditions; where the conditions are not met, any disinvestment resulting in write-off of investment will require prior RBI approval</li> </ul>	<ul style="list-style-type: none"> <li>Transferor to stay invested for at least 1 year from the date of making ODI before making any transfer / liquidation in the overseas entity; full disinvestment (other than liquidation) is permitted only when there are no equity/debt outstanding dues</li> <li>No requirement of RBI approval for any write-offs on disinvestments</li> </ul>
<b>Requirement of No Objection Certificate ('NoC')</b>	<ul style="list-style-type: none"> <li>No such requirement</li> </ul>	<ul style="list-style-type: none"> <li>Where a person resident in India desirous of investing or disinvesting such investment has an account appearing as non-performing asset or wilful defaulter or is under investigation, an NoC from the lender bank or regulatory body or investigative agency would be necessary before investing or disinvesting</li> <li>Deemed NoC, in case no certificate issued by concerned authority within 60 days from the date of application</li> </ul>
<b>Deferred payment</b>	<ul style="list-style-type: none"> <li>Not permitted</li> </ul>	<ul style="list-style-type: none"> <li>Consideration for equity capital acquired may be deferred for definite period as provided in the agreement provided:               <ul style="list-style-type: none"> <li>Foreign securities shall be issued/ transferred upfront</li> </ul> </li> <li>Valuation basis pricing guidelines to be done upfront</li> <li>Deferred purchase consideration treated as part of non-fund based commitment</li> <li>Buyer may be indemnified by the seller up to such amount and subject to such conditions as agreed in the agreement</li> </ul>
<b>Other restrictions and prohibitions</b>	<ul style="list-style-type: none"> <li>ODI not permitted in foreign entity <i>inter-alia</i> engaged in real estate activity; view that leasing was treated as real estate activity</li> </ul>	<ul style="list-style-type: none"> <li>ODI not permitted in foreign entity <i>inter-alia</i> engaged in real estate activity; Now clarified that leasing shall not be treated as real estate activity</li> </ul>
<b>ODI in start-ups</b>	<ul style="list-style-type: none"> <li>Investment in start-up was subject to the general conditions applicable to Indian party making ODI</li> </ul>	<ul style="list-style-type: none"> <li>Any ODI in startups recognised under the laws of the host country/ jurisdiction, shall be made by an Indian entity only from the internal accruals</li> </ul>



Particulars	Erstwhile ODI Regime	New ODI Regime
		whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual; ODI from borrowed funds not permitted
<b>ODI in strategic sector</b>	<ul style="list-style-type: none"> <li>No specific guidance</li> </ul>	<ul style="list-style-type: none"> <li>ODI in limited liability/ unincorporated entity permitted for energy and natural resource sectors (oil, gas, coal, start-ups etc.)</li> </ul>
<b>Compliance/ Reporting</b>	<ul style="list-style-type: none"> <li>ODI to be reported in Form ODI</li> <li>APR to be filed every year by 31 December in respect of each JV or WOS outside India; no exemption from filing of APR</li> </ul>	<ul style="list-style-type: none"> <li>ODI to be reported in Form FC; Form OPI notified for reporting OPI by person resident in India other than individuals</li> <li>Going forward Form APR will have to be filed every year by 31 December; where foreign entity accounting year ends on December 31, APR to be filed by 31 December of next year</li> <li>Filing of Form APR is not required where (i) where there is only one Indian resident investor in a foreign entity and (ii) such resident investor neither has control nor holds more than 10% equity shares</li> <li>In case more than one Indian resident has invested in the same foreign entity the Form APR has to be filed by a person resident in India having the highest stake in the foreign entity</li> </ul>

### Dhruva Comments

The New ODI Regime has provided clarity on ODI and OPI. Also, various overseas investment related transactions that were earlier under approval route are now under automatic route (such as non-financial services entity investing in foreign entity engaged in financial services, investments in IFSC, transfer/ disinvestment, restructuring of ODI) thereby significantly enhancing "Ease of Doing Business". The New ODI Regime has also eased provisions relating to ODI-FDI structures.

From an overall perspective, New ODI Regime has sought to ease the erstwhile ODI regime. However, one will have to see the application of the New ODI Regime on actual transactions and where required, the RBI may seek to further liberalise the provisions to overcome the challenges being faced.





## ADDRESSES

### Mumbai

1101, One World Center, 11th floor,  
Tower 2B, 841 Senapati Bapat Marg,  
Elphinstone Road (West),  
Mumbai 400 013  
Tel: +91 22 6108 1000 / 1900

### Ahmedabad

B3, 3rd Floor, Safal Profitaire,  
Near Auda Garden,  
Prahlanagar, Corporate Road,  
Ahmedabad 380015  
Tel: +91-79-6134 3434

### Bengaluru

Prestige Terraces, 2nd Floor  
Union Street, Infantry Road,  
Bengaluru 560001  
Tel: +91-80-4660 2500

### Delhi / NCR

101 & 102, 1st Floor, Tower 4B  
DLF Corporate Park  
M G Road, Gurgaon  
Haryana 122002  
Tel: +91-124-668 7000

### Pune

305, Pride Gateway, Near D-Mart, Baner,  
Pune 411 045  
Tel: +91-20-6730 1000

### Kolkata

4th Floor, Unit No 403, Camac Square,  
24 Camac Street, Kolkata  
West Bengal 700016  
Tel: +91-33-66371000

### Singapore

Dhruva Advisors (Singapore) Pte. Ltd.  
20 Collyer Quay, #11-05  
Singapore 049319  
Tel: +65 9105 3645

### Dubai

WTS Dhruva Consultants  
Emaar Square Building 4, 2nd Floor,  
Office 207, Downtown,  
P.O. Box 127165  
Dubai, UAE  
Tel: +971 4 240 8477

## KEY CONTACTS

### Dinesh Kanabar

Chief Executive Officer  
dinesh.kanabar@dhruvaadvisors.com

### Punit Shah (Mumbai)

punit.shah@dhruvaadvisors.com

### Mehul Bheda (Ahmedabad)

mehul.bheda@dhruvaadvisors.com

### Ajay Rotti (Bengaluru)

ajay.rotti@dhruvaadvisors.com

### Vaibhav Gupta (Delhi/NCR)

vaibhav.gupta@dhruvaadvisors.com

### K. Venkatachalam (Pune)

k.venkatachalam@dhruvaadvisors.com

### Aditya Hans (Kolkata)

aditya.hans@dhruvaadvisors.com

### Mahip Gupta (Singapore)

mahip.gupta@dhruvaadvisors.com

### Nimish Goel (Dubai)

nimish.goel@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the **“India Tax Firm of the Year”** at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the **“India Disputes and Litigation Firm of the Year”** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a Tier 1 firm in **India’s ‘General Corporate Tax’** and **‘Indirect Tax’** ranking tables as a part of ITR’s World Tax guide. The firm is also listed as a **Tier 1 firm** for India’s **‘Transfer Pricing’** ranking table in ITR’s World Transfer Pricing guide.

## Disclaimer:

This information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and opinion. Before acting on any matters contained herein, reference should be made to subject matter experts and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication