

Overseas Direct Investment

*By Indian Parties and Resident
Individuals through JV and WOS*

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Introduction

1. Overseas investments (or financial commitment) in :

- Joint Venture (JV) &
- Wholly Owned Subsidiaries (WOS)

have been recognized as important avenues for promoting global business by Indian entrepreneurs.

2. Joint ventures are perceived as a medium of:

- economic &
- business co-operation between India and other countries.

3. Transfer of :

- Technology & skill
- Sharing of results of R&D
- Access to wider global market
- Promotion of brand image
- Generation of employment &
- Utilization of raw materials

available in India & in the host country are other significant benefits arising out of such overseas investments (or financial commitment).

4. They are also important drivers of foreign trade through increased exports of plant & machinery and goods & services from India and also a source of foreign exchange earnings by way of:

- Dividend earnings, royalty, technical know-how fee and other entitlements on such investments (or financial commitment).



Important Definitions

Direct Investments Outside India

- Investment by way of contribution to the capital of a foreign entity ; 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, but
- Does not include portfolio investment

Joint Venture (JV)

Means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party(IP) makes a direct investment

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.

Indian Party

- Indian Company
- Registered Partnership Firm
- Registered LLP

Provided that : Where more than one such entities make an investment in foreign entity, all such companies or bodies or entities shall together constitute the “Indian Party”.

Net Worth

- For calculation of Net worth (Paid-up capital plus free reserves) of the Indian party, following to be considered:
 - Net worth of the Indian Investing company (say A Ltd).
 - Net worth of the Indian Holding company of A Ltd (which holds at least 51% stake of A Ltd.).
 - Net worth of the Indian Subsidiary Company of A Ltd (in which A Ltd holds at least 51%).
- The above facility is not available to partnership firms. Also partnership firms net worth cannot be taken into account by an incorporated entity.
- The holding or subsidiary company furnishes letter of disclaimer in favour of the Indian Party.

Restrictions

1. Investment cannot be in a foreign entity engaged in real estate business# or banking business, without prior approval of RBI
2. An overseas entity, having direct or indirect equity participation by an Indian Party
 - Shall not offer financial products linked to Indian Rupee without specific approval of the Reserve Bank
3. The Indian Party should not be:
 - Under investigation by any investigation / enforcement agency or regulatory body*
 - On Reserve Banks's Exporter's caution list; or
 - On list of defaulters to the banking system circulated by the Reserve Bank, Credit Information Bureau (India) Ltd. (CIBIL) or any other credit information company; or
4. Investments not permitted in countries identified by Financial Action Task Force (FATF) as non-cooperative countries as "call for action" and territories or countries notified by RBI {inserted vide A.P. (DIR Series) Circular No. 28 dated January 25th, 2017}
 - Iran and North Korea (Call for Action)
5. Investments in :
 - Pakistan only through approval route
 - Nepal only in Indian Rupees
 - Bhutan in Indian Rupees and freely convertible currencies

#Real Estate meaning buying & selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential / commercial premises, roads or bridges.

*UIN not issued unless investigation is completed .



General Permission

- Persons(Individual) residents in India shall purchase / acquire securities
 - Out of funds held in RFC Account
 - As bonus shares on existing holding of foreign currency shares
 - Out of their foreign currency resources outside India when not permanently resident in India.

(As per FAQ No. 3 as on 18th June,2018)
- General permission has also been granted to persons residents in India to sell the securities purchased by way of above modes.
- A person resident in India being a company incorporated in India or a partnership firm registered under Indian Partnership Act , 1932 , may undertake agricultural operations including purchase of land incidental to such activity either directly or through their overseas offices (within overall limits of Regulation 6)
- Not permanently resident means a resident person employed in India for a specific duration(irrespective of length) or specified job the overall duration of which does not exceed 3 years.

Section 6(4) of FEMA – Resident may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if acquired when he was NR or inherited from a NR



Valuation of Shares

- Requirement of valuation of shares:
 - Valuation required for investment in existing company outside India
 - No valuation required for newly set-up company outside India
 - Valuation not required for issue of right shares
- Remittance for outbound investments can be of an amount which is at or lower than the value of investment
 - Essentially foreign exchange utilized cannot be more than value per share
- No valuation methodology prescribed under FEMA – Internationally accepted method can be used

Valuation Certificate to be obtained from :

In case of investment by way of partial or full acquisition of an existing company

- If Investment is more than USD 5mn.
 - by a category I Merchant Banker registered with SEBI or a registered Investment Banker/ Merchant banker in host country
- In all other cases by a CA or CPA

In case of investment is by way of swap of shares – irrespective of amount

- By registered Category I Merchant Banker or Registered Merchant Banker in the host country



How to make investment?

1. Indian Party to approach AD Bank with FORM ODI. All transactions relating to a JV / WOS should be routed through one branch of an AD (Authorised Dealer) Bank
2. To check if all prior FEMA compliance for Indian Party should have been completed (filing of APR forms for other JV/WOS required too).
3. AD may ask for details of investment abroad such as :
 - ***If not through Special Purpose Vehicle (SPV)***
Project Report / Feasibility Study
 - ***If through SPV***
Project Report / Feasibility Study
Details of Underlying investment
4. Investments through SPV shall allowed under Automatic Route :
 - All conditions applicable for direct investment apply also to investments through SPV
 - Underlying investments through SPV to be reported to RBI through AD Bank



Routes for ODI by Indian Parties

Automatic Route	Approval Route
An Indian party does not require any prior consent from RBI	An Indian party is required to take prior approval of the Reserve Bank for which a specific application in FORM ODI with prescribed documents.
An Indian party is required to approach the AD category – 1 bank	ODI not meeting conditions prescribed for automatic route
ODI investment within limit of 400% of Indian Party's Net Worth	Overseas investments by : <ul style="list-style-type: none"> • proprietorship concerns • unregistered partnership firms • Registered Trusts/ Societies satisfying certain eligibility criteria
ODI by Indian Party engaged in financial services sector (subject to prescribed conditions)	Indian party undertaking financial commitment without equity contribution in JV/WOS
ODI in oil sector (subject to prescribed conditions)	



Financial Commitment- Meaning

Financial Commitment is the amount of direct investment by way of sum total of the following:

- 100% of the amount of equity shares and/or Compulsorily Convertible Preference Shares (CCPS)
- 100% of the amount of other preference shares (considered as loans);
- 100% of the amount of Loan;
- 100% of the amount of guarantee including corporate and personal (but other than performance guarantee) issued by the Indian Party;
- 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian party and the bank guarantee is backed by a counter guarantee/collateral by the Indian party;
- 50% of the amount of performance guarantee.

*Ceiling not applicable for investments out of EEFC A/c or funds raised through ADRs / GDRs.

Maximum limit would be:



Loan and Guarantee

With equity participation :

- Indian Party/ entity can extend loan / guarantee only to JV/WOS in which it has equity participation

Without equity participation :

- With prior approval, Indian Party can extend loan / guarantee without equity participation provided:
 - It as per business requirement of Indian Party ; and
 - As per legal requirement of host country

Loan

Indian entity can extend loan only to JV/WOS in which it has equity participation.

Guarantee

- I. Indian Party can issue Guarantee (corporate or personal) (Primary or collateral):
 - Personal guarantee by the indirect resident individual promoters of the Indian Party
 - Guarantee by the promoter company, group company, sister concern or associate company in India

- Provided that :
 - All the financial commitments, including all forms of guarantees and creation of charge are within the overall ceiling prescribed for the Indian Party
 - No Guarantee should be open-ended. The amount and period of guarantee should be specified upfront.
- To its step-down first generation operating subsidiary – JV / WOS may be SPV or Operating company under automatic route within the prevailing limit.
- To its step-down second generation or subsequent level operating subsidiaries – Under the prior RBI approval route provided the Indian Party holds directly / indirectly 51% stake in the overseas subsidiary for which such guarantee is intended to be issued.

II. AD in India may also give a Bank guarantee / issue SBLC.

Method of Funding



Capitalisation of exports and other dues

1. Indian Party is permitted to capitalise the payments due from the foreign entity
 - towards exports, fees, royalties or any other dues
 - for supply of technical know-how, consultancy, managerial and other services within the ceilings applicable
2. Capitalisation of export proceeds remaining unrealised beyond the prescribed period of realization will require prior approval of the Reserve Bank.
3. Indian software exporters are permitted to receive 25% of the value of their exports
 - to an overseas software start-up company in the form of shares
 - without entering into Joint Venture Agreements , with prior approval of the Reserve Bank

Investment by Mutual Funds

Indian Mutual Funds registered with SEBI are permitted to invest within an overall cap of USD 7 billion in :

- i. ADRs / GDRs of Indian and foreign companies
- ii. Equity of overseas listed companies
- iii. Initial & follow on public offerings
- iv. Foreign debt securities in the countries with fully convertible currencies
- v. Money market instruments
- vi. Repos in form of investment (should not involve any borrowing of funds by mutual funds)
- vii. Government securities
- viii. Derivatives
- ix. Short term deposits with banks overseas
- x. Units / securities issued by overseas Mutual Funds or Unit Trusts registered with overseas regulators and investing in :
 - Aforesaid securities
 - Real Estate Investment Trusts (REITs) listed on recognized stock exchanges overseas
 - Unlisted overseas securities (not exceeding 10% of their net assets)

ODI- Approval Route

- Cases which are not covered under Automatic Route.
- Specific application to RBI with necessary documents in Form ODI through the designated AD – Bank.
- RBI would inter alia consider the following factors:
 - Prima facie viability of JV/WOS outside India;
 - Contribution to external trade and other benefits which will accrue to India through such investment;
 - Financial position and business track record of the Indian party and foreign entity;
 - Expertise and experience of the Indian party in the same or related line of activity of the JV / WOS outside India.



Details & Documents

- Applicant to approach designated AD with the proposal along with supporting documents.
- A letter from the designated AD of the IP in a sealed cover mentioning the following details :
 - Transaction number generated by the OID application
 - Brief details of the Indian entity
 - Brief details of the overseas entity
 - Background of the proposal, if any
 - Brief details of the transaction
 - Reason/s for seeking approval mentioning the extant FEMA provisions.
 - Observations / Recommendations of the designated AD Bank
- A letter from the IP addressed to the designated AD Bank
- Board Resolution for the proposed transaction
- Diagrammatic representation of the organizational structure with all subsidiaries of IP horizontally and vertically with their stake (direct & indirect) & status (whether Op Co. or SPV)
- Incorporation certificate and valuation certificate for the overseas entity (if applicable)
- Other relevant documents properly numbered, indexed and flagged
- Allotment of UIN does not constitute approval

Compliances & Obligations of Indian Party and Resident Individual

■ On Investment / Financial Commitment file :

1. Form ODI along with :
 - Certified copy of Board Resolution for investment
 - Statutory Auditor's Certificate
 - Valuation report for the value of shares
2. Obtain UIN – required for all investments
3. Post investment ensure receipt of share certificates or any other document as evidence and submit within six months to AD from the date of remittance or date when it became due

■ During Investment :

1. On Changes in investment report to RBI through AD bank within 30 days of approval by competent authority of JV/WOS
2. Repatriate to India all dues viz. dividends, royalty, technical fees, etc. within 60 days of falling due.

■ Annually File :

1. Annual Performance Report (APR) in Part II of Form ODI by 31st December every year
2. Annual Return on Foreign Assets & Liabilities (FLA) by 15th July every year

*Revised Instructions for APR filing has been issued vide [A.P. \(DIR Series\) Circular No.61 dated April 13, 2016](#).

**Where law of host country does not require auditing of books of accounts of JV / WOS, the APR can be submitted based on un-audited annual accounts provided:

- Statutory Auditors of Indian Party certify that the un-audited annual accounts of the JV / WOS reflect true and fair picture.
- The un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian Party.
- The above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country/jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country/jurisdiction as prescribed by Reserve Bank of India.

Pledge of shares of JV/WOS/SDS (Step Down Subsidiary)

Indian Party may create charge, by way of pledge on the shares of JV/WOS/SDS (irrespective of level):

- As a security in favour of AD, Indian public financial institution or overseas lender
- For availing of fund based or non-fund based facility
- For itself, its group companies, sister concerns or associate concerns
- For any of its JV/WOS/SDS of Indian Party subject to terms & condition as specified below:
- Value of facility will be part of Financial Commitment of Indian Party and should be within limit of 400% of net worth
- The overseas lender should be regulated and supervised as a bank, as per the law of the host country.
- Indian Party must be in compliance with ODI Regulations.
- The period of charge, if not specified upfront, may be co-terminus with the period of end use
- The loan/ facility shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever
- Statutory Auditors certificate to the effect that the loan/ facility has not been utilized for direct or indirect investments in India is to be obtained and kept by the designated AD

Charge on domestic and foreign assets

Indian Party may create charge, by way of mortgage / pledge / hypothecation etc.

- On its assets or on the assets of its group company, sister concern or associate company in India, promoter and / or director
- In favour of an overseas lender
- As security for availing fund and / or non fund based facility for its JV / WOS / SDS (irrespective of the level) outside India.

subject to terms & condition as specified below:

- Indian party may create charge (mortgage / pledge / hypothecation or otherwise) on the assets of its overseas JV / WOS / SDS in favour of AD – Bank in India as security for availing of fund based and / or non fund based facility for itself or its JV / WOS / SDS outside India.
- A “No Objection” is obtained from the domestic lender
- The domestic assets, on which charge is being created, are not securitized.
- Other conditions as mentioned previously.

Overseas Direct Investments by Resident Individuals

- Two Routes for Outbound Investments by Resident Individuals – LRS (Liberalised Remittance Scheme) and ODI
- ODI Route introduced by FEMA 263 dt. 5.8.2013 vide Circular No. 24 dt. 14.8.2013
 - Investment in overseas JV / WOS only by way of equity / compulsorily convertible preference shares
 - JV / WOS to be engaged in bonafide business activities except real estate / banking / financial services
 - ODI in “non-co-operative countries and territories” as per FATF not permitted
 - Resident individual not to be on RBI caution / defaulters list
 - Limit of investment in JV / WOS as per LRS limit (currently USD 250,000 per annum)
 - Investment made from EEFC / RFC account also included in prescribed LRS limit
 - JV / WOS to be operating entity only - No step down subsidiary to be acquired or set up by JV / WOS
 - Valuation / Reporting and Post investment obligations same as applicable to ODI by Indian Companies
 - Write off not permitted in cases of disinvestments

Opening of Foreign Currency Account abroad

Eligible Indian Party may open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments subject to the following terms and conditions as stipulated under A.P. (DIR Series) Circular No. 101 dated April 02, 2012:

- The host country regulations stipulate that the investments into the country are required to be routed through a designated account.
- FCA shall be opened, held and maintained as per the regulation of the host country.
- The remittances sent to the FCA by the Indian party should be utilized only for making overseas direct investment into the JV / WOS abroad.
- Any amount received in the account by way of dividend and / or other entitlements from the subsidiary shall be repatriated to India within 30 days from the date of credit.
- The Indian Party should submit the details of debits and credits in the FCA on yearly basis to the designated AD bank with a certificate from the Statutory Auditors of the Indian party certifying that the FCA was maintained as per the host country laws and the extant FEMA regulations / provisions as applicable.

Rationalised and Revised Form ODI (Annex I)

(updated vide [RBI Circular no. 62 dt. Apr 13, 2016](#))

Form ODI is divided into three parts :

Part I- Application for allotment of Unique Identification Number (UIN) & reporting of Remittances / Transactions

- Section A – Details of Indian Party (IP)/ Resident Individual (RI)
- Section B – Capital Structure & other details of JV/WOS/SDS
- Section C - Details of Transaction / Remittance / Financial Commitment of Indian Party (IP)/ Resident Individual (RI)
- Section D - Declaration by Indian Party (IP) / Resident Individual (RI)
- Section E- Certificate by the Statutory Auditors of the Indian Party / self-certification by Resident Individual

Part II- Annual Performance Report

- Based on unaudited annual accounts of preceding year
- Where law of host country does not require auditing, APR can be submitted based on unaudited annual accounts of the JV/WOS provided :
 - Statutory Auditors of the Indian Party certify that “the unaudited annual accounts of the JV/WOS reflect the true & fair picture of the affairs of the JV/WOS”; and
 - The unaudited annual accounts of the JV/WOS are adopted and ratified by the Board of the Indian Party

Part III - Report on Disinvestment

- by way of
 - Closure / Merger / Voluntary Liquidation / Winding up / Amalgamation of overseas JV / WOS;
 - Sale/ Transfer of the shares of the overseas JV/WOS to another eligible resident or non-resident;
 - Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of IP
 - Buyback of shares by the overseas JV/WOS of the IP/ RI.

New Reporting Format

(updated vide RBI [Circular no. 62](#) dt. Apr 13, 2016)

- A new reporting format has also been introduced for Venture Capital Fund (VCF) / Alternate Investment Fund (AIF), Portfolio Investment and overseas investment by Mutual Funds as per the format in [Annex II](#) and [Annex III](#). In case of reporting purchase and repurchase of ESOPs, the AD banks may continue to report the same in the existing format ([Annex IV](#)).
- It is further advised that any post investment changes subsequent to the allotment of the UIN are required to be reported as indicated in the operational instructions on submission of Form ODI Part I (Annex I).
- AD banks before executing any ODI transaction must obtain the Form ODI Part I from the applicant in terms of Regulation 6 (2) (vi) of the Notification, *ibid*. Further, the AD bank should report the relevant Form ODI in the online OID application and obtain UIN while executing the remittance.
- In case of RI undertaking ODI, certification of Form ODI Part I by statutory auditor or chartered accountant need not be insisted upon. Self-certification by the RI concerned may be accepted.

Online Reporting of Form ODI

(updated vide RBI [Circular no. 62](#) dt. Apr 13, 2016)

- Online OID application has been revamped to further reduce the traditional paper based filing system, to provide the AD banks fast and easy accessibility to data for reference purpose, to improve the coverage and ensure proper monitoring of the flows in a dynamic environment. Accordingly, modules in online OID application have been added, wherein all the ODI forms as mentioned in this circular may be reported.
- A concept of AD Maker, AD Checker and AD Authorizer has now been introduced in the online application process. The AD Maker shall initiate the transaction and submit to the AD Checker for verification of the transaction before submission to Reserve Bank. The AD Authorizer shall have the authority to ratify these ODI transaction which are pending due to various reasons, such as, delay arising on account of seeking further clarification from the IP / RI, technical difficulty in reporting the transaction in the online OID application and on account of delay in completing the due diligence process.

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We are prominent Chartered Accountants in India. We offer services of accounts outsourcing, auditing, company formation in India, Business taxation, corporate compliance, starting business in India, registration of foreign companies, transfer pricing, tax due diligence, taxation of expatriates etc.

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