



GBCA Crossborder Insights

Tax & Regulatory Edge



TABLE OF CONTENTS

- 
1. Annual Performance Report (APR) for ODI in Foreign Entity 3
 2. Gift of Foreign Securities to Resident Individual in India 5
 3. Pre-Packaged Insolvency Resolution Process 6

ANNUAL PERFORMANCE REPORT (APR) FOR ODI IN FOREIGN ENTITY

As India is continuously reviving its measures to encourage and attract more and more FDI, the measures to promote Indians to do business outside India by way of Overseas Direct Investments are also parallelly evolving. Any Indian individual or entity undertaking Overseas Direct Investment is obliged to file an Annual Performance Report (APR) with respect to its foreign entity based on its accounting year completed in the host country by 31st of December every year.

Annual Performance Report (APR) is a mandatory annual compliance specified under FEMA Act, 1999. Non-filing/delay in filing of the APR on or before the due date will be treated as a violation of FEMA and late submission fees (LSF) as per Regulation 11 of Overseas Investment Regulations shall apply. Further filing of APR regularly is an important compliance during the subsistence of the foreign entity as well as for the exit from the foreign entity.

The Central Government has notified the Foreign Exchange Management (Overseas Investment) Rules and Regulations, 2022 (OI Regulations) on 22.08.2022 in supersession of FEMA Notification No. 120 i.e. Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004. Some significant changes and relaxations have been brought in for investment by Indian entities and individuals in foreign securities. ([Refer our Article on Overseas Investments under FEMA – Comparative Analysis](#)).

Under the revised Rules & Regulations, all reporting with respect to overseas investment by a person resident in India shall be made in accordance with Regulation 10 of OI Regulations through the designated AD bank as per the revised reporting forms and instructions.

These Regulations state various provisions pertaining to filing of APR such as who is obliged to file APR, in case of more than one Indian investors who would take the responsibility to file APR, circumstances under which audited financials of the foreign entity are needed, what are the events other than ODI which need to be reported in the APR etc. It is important to know some of the changes introduced under these regulations as due date for filing APRs is 31st December 2022 to avoid any last minute surprises.

CHECKLIST FOR APR

AUDITED FINANCIAL STATEMENT OF FOREIGN ENTITY:

The APR shall be based on Audited Financial Statement of Foreign Entity. Relaxation is provided from audited financial statement if Indian person does not have control & local laws of foreign entity do not require mandatory audit. Thus it is important to note that audit shall be required where Indian resident has control even if host country does not mandate it.

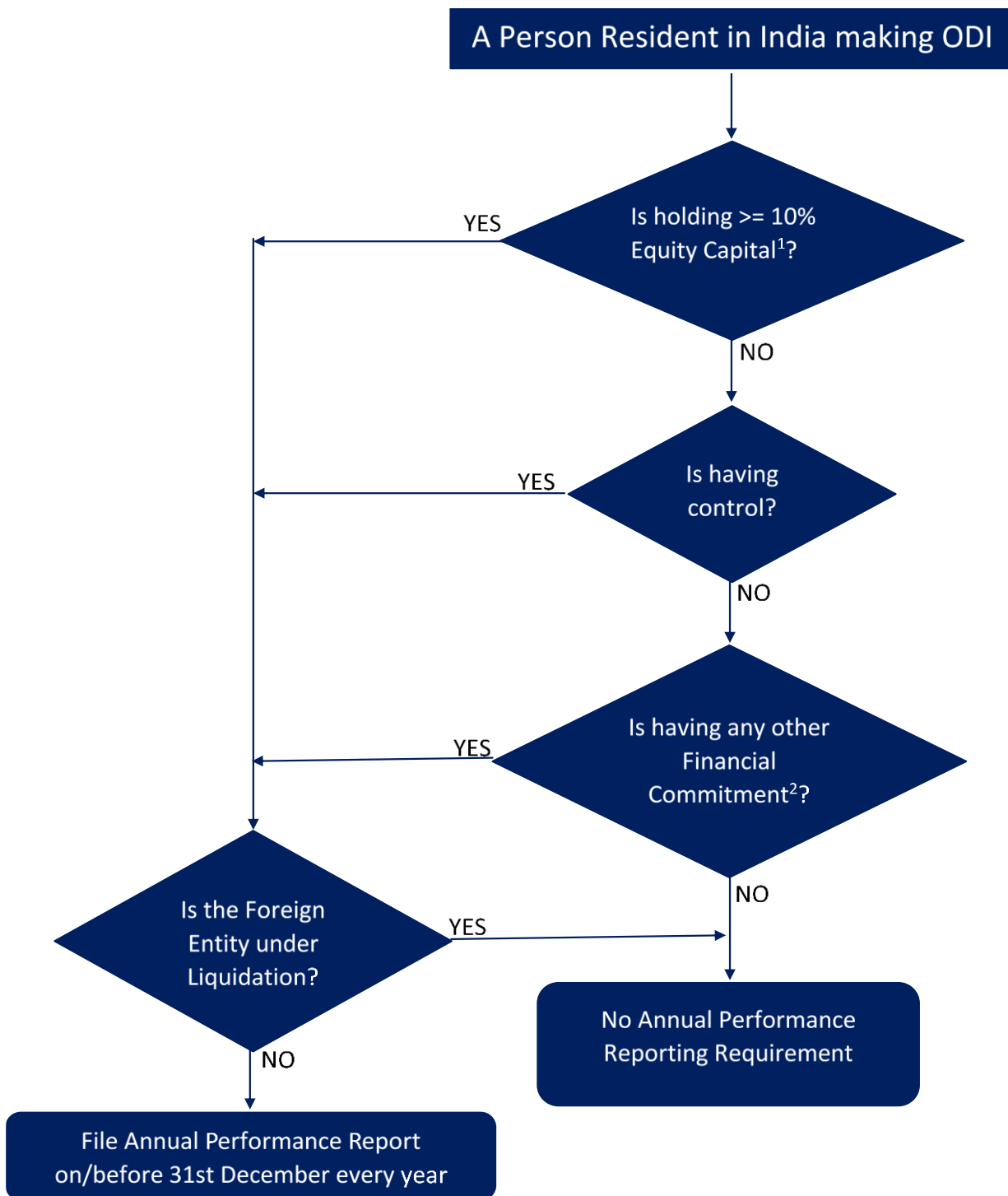
PERSON RESPONSIBLE TO FILE APR IN CASE OF MORE THAN ONE PERSON MAKING AN ODI:

In case more than one Indian resident have made ODI, person holding higher stake in foreign entity has to submit APR. APR may be filed jointly by such persons, in case where the holding are equal.

DETAILS OF INVESTMENT & ALTERATION:

Details regarding acquisition or setting up or winding up or transfer of a step down subsidiary or alteration in the shareholding pattern in the foreign entity during the year has to be reported in the APR.

Below flow chart would provide a ready guidance for applicability of APR compliance due in December 2022.



[Back to Table of Contents](#)

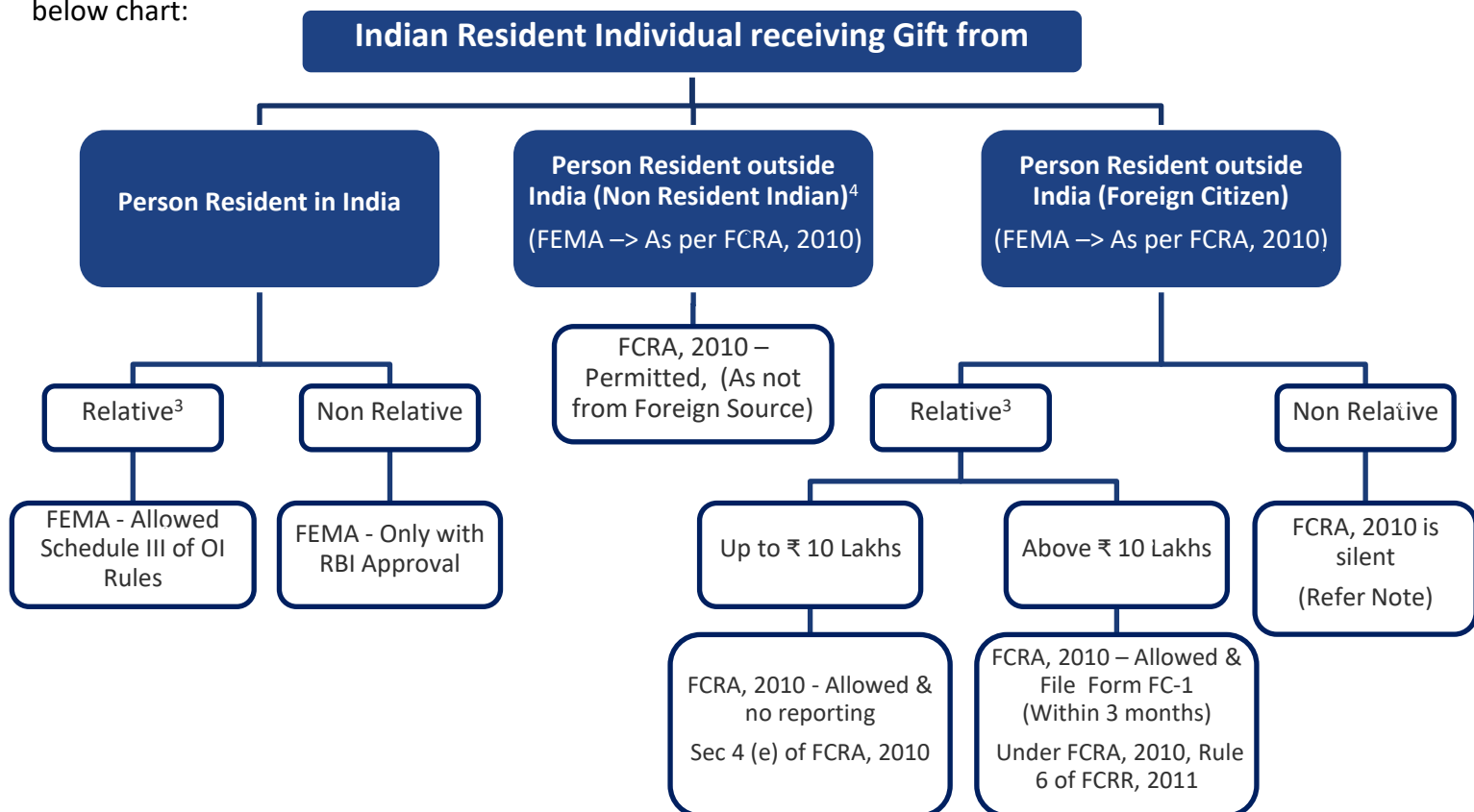
¹ Equity Capital is defined as per Rule 2(e) of FEM (Overseas Investment) Rules, 2022 as equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments;

² Financial Commitment is defined as per Rule 2(f) of FEM (Overseas Investment) Rules, 2022 as the aggregate amount of investment made by a person resident in India by way of Overseas Direct Investment, debt (other than Overseas Portfolio Investment) in a foreign entity or entities in which the Overseas Direct Investment is made and shall include the non-fund-based facilities extended by such person to or on behalf of such foreign entity or entities

GIFT OF FOREIGN SECURITIES TO RESIDENT INDIVIDUAL IN INDIA

For ease of doing business overseas, Government of India in consultation with Reserve Bank of India (RBI) recently revamped the existing framework for overseas direct investment marked by new set of rules, regulations, and directions. While a plethora of changes have been unfurled in relation to overseas investment ([Refer our Article on Overseas Investments under FEMA – Comparative Analysis](#)), one such change is pertaining to gifting of foreign securities by non-residents to an Indian resident individual.

Schedule III of **Foreign Exchange Management (Overseas Investment) Rules, 2022, (OI Rules)** lays down modes of permissible acquisition of Foreign Securities by way of gift to a resident individual which are summarized in below chart:



RESIDENT INDIVIDUALS ARE NOT PERMITTED TO TRANSFER ANY OVERSEAS INVESTMENT BY WAY OF GIFT TO A PERSON RESIDENT OUTSIDE INDIA

Note: In case foreign securities are received as gift from a foreign citizen who is not a relative, Foreign Exchange Management (Overseas Investment) Rules, 2022, (OI Rules) directs a resident individual to acquire gift in accordance with the provisions of FCRA, 2010 and related Rules & Regulation. However, FCRA, 2010 is silent on such transaction. It also does not explicitly prohibit such transaction. Therefore, lack of any express language under the law may lead to diverse interpretations. [Back to Table of Content](#)

³ Relative – is defined as per sec 2(77) of Companies Act 2013 read with rule 4 of Companies Rules, 2014. It includes members of HUF, husband or wife, Father (Step-Father), Mother (Step-Mother), Son (Step- Son), Son’s Wife, Daughter, Daughter’s Husband, Brother (Step-Brother), Sister (Step-Sister).

⁴ NRI does not satisfy the definition of “foreign source” as per sec 2 (j) of Foreign Contribution (Regulation) Act, 2010 (FCRA, 2010). NRI is a person who is a Citizen of India & is a Non Resident.

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PPIRP)

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (“IBC”) provides for a mechanism for reorganization and insolvency resolution of persons such as Companies, Limited Liability Partnerships, Partnership Firms, Proprietorship firms, and Individuals in financial distress. The objective of the IBC is to provide time-bound resolution of insolvency, maximization of the value of assets for persons, to promote entrepreneurship, to enhance the availability of credit, and balance the interests of all stakeholders.

The recent COVID-19 pandemic largely affected Micro, Small, and Medium Enterprises (“MSMEs”)⁵ resulting in financial stress. Due to the unique nature of MSMEs’ businesses and simpler corporate structure, the resolution of their stress requires different treatment. Hence, the PPIRP was introduced⁶ in the IBC to provide an efficient alternative insolvency resolution process for MSMEs.

PPIRP ensures quicker, cost-effective, and value-maximizing outcomes for all the stakeholders MSME, in a manner that is least disruptive to the continuity of the businesses.

ELIGIBILITY

- An application for initiating PPIRP may be made in respect of a Corporate Debtor (“CD”) classified as an MSME⁷.
- Amount of default committed by CD should be at least **INR 10 Lakhs**⁸.
- CD has not gone through Corporate Insolvency Resolution Process (“CIRP⁹”) / PPIRP during the 3 years preceding the initiation date.
- It is not undergoing CIRP.
- No order requiring CD to be liquidated is passed u/s 33 of the IBC.
- It is eligible to submit a resolution plan u/s 29A of the IBC¹⁰.
- Unrelated financial creditors representing at least 66% in value of the total financial debt of the CD should approve the name of the insolvency professional to be appointed as the Resolution Professional (“RP”) for conducting the PPIRP. The said name needs to be proposed by the specified number of financial creditors. If there are no financial creditors or if all the financial creditors are related, the proposal and approval under this clause shall be provided by specified unrelated operational creditors.



⁵ Refer Note 1 at the end

⁶ By way of insertion of Section 54A in the IBC with effect from 4th April, 2021

⁷ Refer Note 1 at the end

⁸ As per Notification No. S.O. 1543(E) dated 9-4-2021

⁹ CIRP is normal insolvency process for corporates under IBC.

¹⁰ Persons not eligible under s. 29A are undischarged insolvent, Wilful defaulter, and entities prohibited by SEBI etc.

PPIRP PROCESS

- After meeting the eligibility criteria and taking requisite approval from unrelated financial creditors and shareholders, the CD can file an application with the National Company Law Tribunal (“NCLT” or “Adjudicating authority”) for initiation of PPIRP.
- Among other things, the application shall be accompanied by:
 - Special resolution of Shareholders approving the application &
 - The Base Resolution Plan¹¹.
- On review of an application, NCLT may admit or reject the application.
- On admission of such an application, NCLT will declare a moratorium, publish a public notice of such PPIRP and appoint RP.
- RP within 7 days of the PPIRP shall constitute a Committee of Creditors (“CoC”).
- The CoC shall include all the unrelated financial creditors. In case of no financial creditors or all related financial creditors, CoC shall consist of the specified unrelated operational creditors.
- Unlike Corporate Insolvency Resolution Process (“CIRP”), the Board of Directors or partners continue to manage the affairs of the CD.¹²

- CD within the specified time shall submit the resolution plan to RP which he shall submit to the CoC.
- The CoC may approve the plan and such approval shall require voting by CoC members holding at least 66% of the voting share. CoC may also reject or provide an opportunity to revise such a plan.
- Wherein the CoC does not approve the Base Resolution Plan or the plan impairs any claims owed by the CD to the operational creditors, the RP shall invite other bidders (called as prospective resolution applicant (“RA”) to submit a resolution plan/s, to compete with the base resolution plan submitted by CD.
- Upon approval of such resolution plan by the CoC, the RP shall submit the plan for approval to the NCLT.
- The NCLT shall approve the plan after due evaluation.
- After the above approval, the moratorium order passed by the NCLT shall cease to have effect; and the RP shall forward all records relating to the conduct of the PPIRP and the resolution plan to the IBC Board.
- If CoC or NCLT rejects the plan, then PPIRP stands terminated.



¹¹The resolution plan among other things provides the mode and manner of resolving the insolvency and payments proposed to the creditors of the Company in satisfaction of their claims.

COMPARISON BETWEEN CIRP AND PPIRP

PARAMETER	CIRP	PPIRP
Applicability	Any Corporate Debtor	Only to Corporate Debtor which is MSME
People who can initiate the process	<ul style="list-style-type: none"> a. A financial Creditor b. An Operational Creditor c. The CD itself or its promoters 	Only the CD or its promoters/directors
Constitution of Committee of Creditors	Within 30 days	Within 7 Days
Preliminary work before applying to NCLT	CD has to only pass a special resolution (not applicable if the financial/operational creditor initiates the insolvency on application.)	The following actions need to be taken by CD <ul style="list-style-type: none"> a. Special Resolution of shareholders b. Approval of at least 66% of Financial Creditors c. Prepare Base Resolution Plan d. Compile Other prescribed information etc.
Minimum Default Amount (in INR)	1 Crore	10 Lakhs
Role of Insolvency Professional ("IP")	IP is appointed by the applicant and then RP by the CoC	RP is to be appointed with the consent of a majority of unrelated Financial Creditors.
	Managing affairs of the CD and conducting the process	Conducting the process of PPIRP
Management of CD	Vests with RP	Vests with Board or partners ¹²
Cost Effectiveness	Less	More
Time Effectiveness	Less	More
Time limit for Completion	180 Days (max. 330 days)	120 Days
Cooling Off Period	12 months between two CIRPs	3 years between two Pre-packs

¹² The power may vest with the RP on application made by CoC to NCLT on the grounds of fraud/mismanagement.

CONCLUSION

- MSMEs are greatly contributing to the growth of India and helping to generate employment.
- PPIRP is providing such MSMEs with speedy and efficient processes for reorganization and resolution.
- This model helps to protect the CD against business disruption and loss of goodwill.
- Though it is a management-friendly model, CoC has the authority to get into the process if there is any suspected misconduct of power by such management.

Note 1: Definition of Micro Small Medium Enterprise: An enterprise is classified as a Micro, Small, or Medium Enterprise on the bases of the following criteria, namely –

- a micro enterprise, where the investment in plant & machinery does not exceed INR 1 Crore and turnover does not exceed INR 5 Crore;
- a small enterprise, where the investment in plant & machinery does not exceed INR 10 Crore and turnover does not exceed INR 50 Crore; and
- a medium enterprise, where the investment in plant & machinery does not exceed INR 50 Crore and turnover does not exceed INR 150 Crore.

[Back to Table of Contents](#)

Disclaimer:

The information contained in this write up is to provide a general guidance to the intended user. The information is based on our interpretation of various prevailing laws, rules, regulations, pronouncements as on date mentioned below. The information should not be used as a substitute for specific consultations. The information has been provided in simplified manner for general reference of the public which can lead to interpretation not intended under law. Hence, we recommend that professional advice is sought before taking any action on specific issues before entering into any investment or financial obligation based on this Content.

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GBCA & Associates LLP, Chartered Accountants,

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Website: <https://gbcaindia.com/>

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GBCA & Associates LLP, Chartered Accountants,
Benefice Business House, 3rd Level, 126,
Mathuradas Mill Compound, N.M.Joshi Marg, Lower Parel (West),
Mumbai – 400013,
India.