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EVALUATING SHARE SWAPS IN INDIA UNDER FEMA, NDI RULES, AND THE OI FRAMEWORK

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Abstract

Share swaps are increasingly important instruments for cross-border acquisitions, group reorganisations, corporate migrations, and reverse-flipping transactions involving Indian companies. Their apparent simplicity, exchanging one set of equity instruments for another rather than paying cash, masks a layered regulatory problem. A single transaction can simultaneously involve the issue or transfer of Indian equity instruments to a non-resident and the acquisition of foreign equity capital by an Indian resident. The former engages India's inbound foreign-investment framework, while the latter engages the overseas-investment regime. This paper evaluates that interaction under the Foreign Exchange Management Act, 1999 (FEMA), the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (NDI Rules), the Foreign Exchange Management (Overseas Investment) Rules, 2022 (OI Rules), the corresponding RBI regulations and directions, and adjacent company, securities, competition and tax law. It argues that the 2024 insertion of Rule 9A into the NDI Rules materially improves the legal architecture by expressly recognising swaps involving Indian equity instruments and foreign equity capital, but does not create a single integrated regulatory pathway. The principal difficulty therefore lies less in the abstract legality of a swap than in the cumulative application of pricing, valuation, sectoral, approval, reporting, control and financial-commitment requirements to each leg. The paper develops a transaction-by-transaction compliance model and proposes a more integrated framework for valuation, approvals and reporting, while preserving safeguards against regulatory arbitrage.

I. INTRODUCTION

Cross-border corporate restructuring increasingly requires transactions that do not depend upon contemporaneous cash consideration. Share swaps are particularly useful because equity in one enterprise can be deployed as consideration for equity in another, permitting acquisitions, reorganisations and changes in corporate domicile without the immediate funding burden of a

cash purchase. For Indian businesses, however, the absence of a cash remittance does not remove exchange-control consequences. FEMA regulates capital-account transactions involving residents and non-residents, and the statutory framework operates through delegated rules and regulations administered principally by the Central Government and the Reserve Bank of India (RBI).¹

The legal significance of a share swap depends on what is exchanged, who exchanges it, and what the exchange accomplishes. A purely domestic swap ordinarily raises questions under company and securities law rather than exchange control. A cross-border swap is different. If a non-resident acquires shares of an Indian company, the transaction engages the inbound foreign-investment regime. If an Indian resident acquires equity capital in a foreign entity, the outbound leg engages the OI framework. The same economic bargain may therefore have two legally distinct components. The 2024 insertion of Rule 9A into the NDI Rules is important precisely because it recognises both swap of Indian equity instruments and swap of foreign equity capital, while expressly cross-referencing the OI Rules for the latter.²

This distinction matters in contemporary corporate structures. “Flipping” may involve an Indian operating company becoming a subsidiary of a foreign holding company, while “reverse flipping” may involve the migration of the parent structure back to India. In either direction, the transaction may use shares rather than cash to realign ownership. Yet the exchange-control analysis cannot be reduced to the commercial equality of the swap ratio. Each legally relevant transfer must satisfy the conditions of the framework governing it.

The central argument of this paper is therefore that Indian law presently adopts a model of **conditional permissibility rather than transactional neutrality**. Share swaps are not prohibited merely because they are swaps. But neither does the absence of cash mean that regulatory requirements disappear. The NDI Rules, OI Rules, RBI regulations and directions, and, where applicable, company, securities, competition and tax laws operate cumulatively. The 2024 reform closes an important textual gap, but it does not eliminate the structural problem of dual compliance.

The paper proceeds in six stages. First, it explains the mechanics and principal classifications of share swaps. Second, it maps the FEMA architecture. Third, it analyses inbound transactions under the NDI Rules. Fourth, it examines outbound transactions under the OI framework. Fifth, it analyses hybrid swaps involving parent or holding companies and identifies the

¹ Foreign Exchange Management Act, No. 42 of 1999, §§ 6, 46-47 (India).

² Foreign Exchange Management (Non-Debt Instruments) (Fourth Amendment) Rules, 2024, Gazette of India, S.O. 3492(E), r. 4 (Aug. 16, 2024).

consequences of applying both regimes to the same commercial arrangement. Sixth, it evaluates adjacent legal regimes and proposes reforms aimed at reducing uncertainty without weakening regulatory safeguards.

II. SHARE SWAPS: CONCEPT, STRUCTURE AND CLASSIFICATION

A share swap may be understood as an acquisition or transfer in which shares or other equity instruments are used as consideration for acquiring equity instruments of another entity. The essential economic feature is that the consideration is securities rather than cash. In an Indian cross-border setting, the legally important question is not simply whether consideration is non-cash, but whether the securities being issued or transferred constitute an equity instrument covered by the applicable FEMA framework.

Three classifications are particularly useful.

First, inbound and outbound swaps. An inbound swap occurs where a non-resident acquires Indian equity instruments, whether by subscription or transfer, in circumstances covered by the NDI Rules. An outbound swap occurs where a person resident in India acquires foreign equity capital in a manner governed by the OI Rules. The 2024 amendment makes this distinction less artificial by expressly recognising a swap of Indian equity instruments and a swap of foreign equity capital within Rule 9A.³

Second, primary and secondary swaps. In a primary swap, an Indian company issues fresh equity instruments to the counterparty. This changes the issuer's capital structure and therefore invokes the company-law rules governing further issue of securities. Section 62 of the Companies Act, 2013 regulates further issue of share capital, including issues for consideration other than cash in specified circumstances.⁴ A secondary swap, by contrast, transfers already-issued securities between shareholders. It does not increase the issuer's capital but may trigger transfer, pricing and reporting requirements under FEMA and, for listed companies, securities-law requirements.

Third, single-leg and hybrid swaps. A single-leg swap may be analysed primarily under one regime. A hybrid swap has reciprocal effects: for example, an Indian company may issue its shares to a foreign parent in exchange for shares of a foreign subsidiary. The Indian company has issued Indian equity instruments to a non-resident, while also acquiring foreign equity capital. The two consequences are legally distinct even though commercially they form one

³ Id. r. 4 (inserting r. 9A into the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019).

⁴ Companies Act, No. 18 of 2013, § 62(1)(c) (India).

bargain. RBI's overseas-investment directions expressly provide that, in a swap of securities, both legs must comply with FEMA as applicable.⁵

This last category is the most significant for regulatory analysis. It demonstrates why the phrase "share swap" should not be treated as a self-contained legal category. It is a transaction technique whose legal consequences depend on the residence of the parties, the location and nature of the securities, the status of the investee entity, the degree of control acquired, the sector involved, and whether the securities are listed or unlisted.

III. THE FEMA ARCHITECTURE

FEMA distinguishes between current-account and capital-account transactions and authorises the Central Government and RBI to frame the rules and regulations through which capital-account transactions are controlled. Section 6 is the principal statutory gateway for capital-account transactions, while sections 46 and 47 provide rule-making and regulation-making powers respectively.⁶ This delegated structure explains why the operational answer to a share-swap question is rarely found in FEMA alone.

For inbound investment, the principal instrument is the NDI Rules, 2019. RBI's Master Direction on Foreign Investment explains that foreign investment is regulated under FEMA read with the NDI Rules and that RBI administers the framework through directions issued to authorised persons.⁷ The Mode of Payment and Reporting of Non-Debt Instruments Regulations, 2019 supplement the substantive rules by prescribing payment and reporting requirements, including FC-GPR and FC-TRS filings.⁸

For outbound investment, the OI Rules, OI Regulations and OI Directions constitute a coordinated regime. The 2022 framework replaced the earlier overseas-direct-investment architecture and sought to simplify the rules, clarify definitions and reduce approval burdens.⁹

The OI regime is deliberately layered: the Central Government makes rules; RBI makes regulations; and RBI issues directions to authorised dealers for operational implementation. The current Master Direction on Overseas Investment confirms that the OI Rules, OI

⁵ Foreign Exchange Management (Overseas Investment) Directions, 2022, para. 3 (Aug. 22, 2022).

⁶ Foreign Exchange Management Act, No. 42 of 1999, §§ 6, 46-47 (India).

⁷ Reserve Bank of India, Master Direction, Foreign Investment in India, RBI/FED/2017-18/60, FED Master Direction No. 11/2017-18 (updated Jan. 20, 2025).

⁸ Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, No. FEMA 395/2019-RB (Oct. 17, 2019), regs. 3-4.

⁹ Foreign Exchange Management (Overseas Investment) Rules, 2022, G.S.R. 646(E) (Aug. 22, 2022); Foreign Exchange Management (Overseas Investment) Regulations, 2022, No. FEMA 400/2022-RB (Aug. 22, 2022).

Regulations and RBI directions are to be read together.¹⁰

The resulting architecture can be represented as follows.¹¹

1. **FEMA** supplies the statutory authority and basic capital-account framework.
2. **NDI Rules and FEMA 395 regulations** govern foreign investment into India, including issue/transfer, pricing, payment and reporting.
3. **OI Rules, OI Regulations and OI Directions** govern investment by Indian residents outside India, including ODI, OPI, financial commitment, valuation and reporting.
4. **Company and securities law** governs the corporate act of issuing or transferring shares.
5. **Competition and tax law** may apply independently when statutory thresholds or taxable transfers are implicated.

The practical implication is that compliance must be sequenced rather than assumed. A transaction may be commercially agreed first and legally analysed afterwards, but the transaction documents should not be drafted on the assumption that one approval or filing cures the other leg.

IV. INBOUND SHARE SWAPS UNDER THE NDI FRAMEWORK

A. The 2024 Rule 9A reform

The most important recent development is Rule 9A of the NDI Rules, inserted by the Fourth Amendment Rules, 2024. It provides that transfer of Indian equity instruments between a resident and non-resident may be by way of (i) swap of equity instruments, or (ii) swap of equity capital of a foreign company in compliance with the OI Rules and applicable RBI regulations. It also preserves the requirement of prior Government approval wherever Government approval is applicable.¹²

The significance of Rule 9A should not be overstated. It does not create a blanket exemption from the NDI Rules. Instead, it supplies express legal recognition to a transaction technique that previously required closer textual analysis. A swap must still comply with the other conditions governing the underlying foreign investment: entry route, sectoral restrictions, pricing, valuation, reporting and any applicable approval.

¹⁰ Reserve Bank of India, Master Direction, Overseas Investment, RBI/FED/2024-25/121, FED Master Direction No. 15/2024-25 (July 24, 2024; updated Apr. 1, 2026).

¹¹ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, r. 2A (India); Reserve Bank of India, Master Direction, Foreign Investment in India, supra note 7.

¹² Foreign Exchange Management (Non-Debt Instruments) (Fourth Amendment) Rules, 2024, S.O. 3492(E), r. 4 (Aug. 16, 2024).

B. Sectoral restrictions and entry route

Foreign investment is not regulated solely by the form of consideration. The NDI framework operates through sectoral conditions and entry routes.¹³ Where foreign investment in the relevant sector is permitted under the automatic route, the transaction may proceed without prior Government approval if the other conditions are satisfied. Where the sector or transaction is subject to an approval requirement, the fact that consideration is paid through a share swap does not remove that requirement.¹⁴

Rule 9 of the NDI Rules also makes clear that transfer of equity instruments involving residents and non-residents remains subject to applicable pricing guidelines and Government approval where required. The 2024 amendment modified the approval proviso while inserting Rule 9A, reinforcing the proposition that swap recognition is conditional rather than absolute.¹⁵

C. Pricing and valuation

Valuation is central because a swap can obscure the economic price of the acquisition if attention is paid only to the negotiated exchange ratio. FEMA's pricing architecture requires the issue or transfer of Indian equity instruments to comply with prescribed pricing standards. RBI's foreign-investment directions distinguish between listed and unlisted companies and prescribe different pricing methodologies and valuation requirements.¹⁶

For unlisted Indian companies, the fair value of equity instruments must be determined¹⁷ in accordance with internationally accepted pricing methodology on an arm's-length basis and certified by an appropriately qualified professional as prescribed by the framework. For listed companies, market-based pricing rules and SEBI regulations may additionally apply. The correct analytical approach is therefore to value the Indian security independently and then test whether the resulting transaction satisfies the FEMA pricing floor or ceiling applicable to the particular direction of transfer.¹⁸

This has an important consequence for swap negotiations. A contractual exchange ratio is not itself a regulatory valuation. If an Indian company issues ₹100 of equity in exchange for foreign securities valued at ₹80, the parties cannot necessarily cure the difference by describing the arrangement as a "strategic premium." The relevant FEMA and company-law requirements

¹³ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, sch. I (India).

¹⁴ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, sch. I (India).

¹⁵ Id. r. 9(1) (as amended Aug. 16, 2024).

¹⁶ Reserve Bank of India, Master Direction, Foreign Investment in India, *supra* note 7, paras. 2.3-2.5.

¹⁷ Reserve Bank of India, Master Direction, Foreign Investment in India, *supra* note 7, para. 2.3.

¹⁸ Reserve Bank of India, Master Direction, Foreign Investment in India, *supra* note 7, paras. 2.3-2.5.

must still be satisfied. Conversely, a transaction may be commercially equal in value but require separate valuation certificates because each jurisdiction uses different valuation conventions.

D. Reporting and mode of payment

A swap does not necessarily eliminate reporting merely because there is no cash remittance. The FEMA 395 Regulations prescribe reporting requirements for investment into India, including FC-GPR for issue of equity instruments to non-residents and FC-TRS for specified transfers.¹⁹ RBI's reporting architecture therefore treats regulatory information as distinct from monetary movement. That distinction is important in share swaps: the absence of a bank transfer cannot be equated with the absence of a reportable foreign-investment event.

V. OUTBOUND SHARE SWAPS UNDER THE OI FRAMEWORK

A. ODI, OPI and the control question

The OI framework replaced the older JV/WOS terminology²⁰ with a broader framework built around ODI and OPI. ODI includes acquisition of unlisted equity capital, investment in 10% or more of the paid-up equity capital of a listed foreign entity, and investment with control where the holding is below 10%. Once an investment is classified as ODI, it retains that character notwithstanding later changes in percentage or control.²¹

This is important for share swaps because the proposition that “non-controlling equals OPI” is too simplistic. A listed foreign investment below 10% may still be ODI if control is acquired. Conversely, a holding that is not ODI may fall within OPI subject to the specific OI rules. The analysis therefore requires the transaction documents, voting rights, governance arrangements and the status of the foreign entity to be examined together.

The OI framework defines control functionally²², including rights to appoint a majority of directors or to control management or policy decisions directly or indirectly. The definition recognises shareholder, management and voting agreements as potential sources of control.²³ Consequently, a transaction structured below a numerical threshold may still be ODI if the governance package confers control.

¹⁹ Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, No. FEMA 395/2019-RB, reg. 4 (Oct. 17, 2019).

²⁰ Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 2(1) (India); Reserve Bank of India, Master Direction, Overseas Investment, *supra* note 10, pt. I.

²¹ Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 2(1)(e)-(f) (India); Reserve Bank of India, Master Direction, Overseas Investment, *supra* note 10, pt. I.

²² Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 2(1)(d) (India).

²³ Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 2(1)(d) (India); Reserve Bank of India, Master Direction, Overseas Investment, *supra* note 10, pt. I.

B. Swap as a permitted mode of overseas investment

The OI Regulations expressly recognise swap of securities as a mode of payment for overseas investment.²⁴ The OI Rules also recognise swap of securities among the permitted modes through which overseas investment may be made. The legal effect is significant: the absence of an outward cash remittance does not prevent the transaction from being an overseas investment, but the swap itself is a recognised route through which the investment may be implemented.

The OI Directions add an important operational rule: in a swap of securities, both legs must comply with FEMA as applicable. Where a swap results in an acquisition that does not conform to the OI framework, for example, because of restrictions applicable to the foreign entity or the relevant financial-services activity, the directions contemplate corrective consequences, including disinvestment within the prescribed period in specified cases.²⁵

C. Financial commitment and valuation

The OI regime also regulates financial commitment²⁶ by an Indian entity. Financial commitment aggregates ODI, specified debt and non-fund-based facilities, subject to the framework's limits and conditions.²⁷ For a pure equity swap, the principal analytical question is whether the foreign equity acquired constitutes ODI and what value must be attributed to that investment for purposes of the applicable financial-commitment architecture.

Valuation is therefore not merely an accounting exercise. It affects the regulatory character and capacity of the Indian investor. The OI Regulations also require evidence of investment and provide for designated authorised-dealer-bank routing and reporting. An Indian company cannot assume that because it has "paid" with shares, there is no financial-commitment or reporting event.

D. Restricted activities and financial services

The OI Rules contain restrictions concerning the activities and structures in which overseas investment may be made. Financial-services activities receive particular treatment, reflecting

²⁴ Foreign Exchange Management (Overseas Investment) Regulations, 2022, No. FEMA 400/2022-RB, reg. 8(3) (Aug. 22, 2022).

²⁵ Reserve Bank of India, Foreign Exchange Management (Overseas Investment) Directions, 2022, para. 3, Annex I (Aug. 22, 2022).

²⁶ Foreign Exchange Management (Overseas Investment) Regulations, 2022, No. FEMA 400/2022-RB, regs. 3-6 (Aug. 22, 2022).

²⁷ Foreign Exchange Management (Overseas Investment) Regulations, 2022, No. FEMA 400/2022-RB, reg. 3 (Aug. 22, 2022); Foreign Exchange Management (Overseas Investment) Rules, 2022, sch. I (India).

prudential concerns and the possibility that an Indian company could use an offshore structure to assume regulated financial exposure indirectly.²⁸ Accordingly, a swap involving a foreign holding company, investment vehicle or financial-services entity requires a substantive examination of the foreign entity's business, not merely its corporate label.

VI. HYBRID SWAPS: WHEN INBOUND AND OUTBOUND REGIMES COLLIDE

The most difficult transaction is one in which the Indian entity issues its own shares to a foreign parent in exchange for shares of a foreign subsidiary. Economically, the Indian company has acquired a foreign asset without cash. Legally, however, two events have occurred: Indian equity has moved to a non-resident, and foreign equity has moved to an Indian resident.

Rule 9A is significant because it expressly contemplates this architecture. But the rule should be read as a coordination provision rather than a netting rule. The NDI side must satisfy inbound investment requirements, while the foreign acquisition must satisfy the OI framework. The legal systems do not generally permit the parties to say that the value of the foreign shares "pays for" the Indian shares and therefore only one regulatory leg exists.²⁹

This produces four recurring friction points.

A. Two valuations

The Indian shares must satisfy the applicable inbound pricing rules. The foreign shares must be valued in accordance with the OI framework and applicable RBI directions. A single commercial valuation report may be useful, but it cannot be assumed to satisfy every legally prescribed certification requirement. Where the two valuations diverge, the parties may have to adjust the exchange ratio, introduce a balancing mechanism, or restructure the transaction.

B. Two approval analyses

The inbound leg may be automatic while the outbound leg requires approval, or vice versa. Sectoral restrictions, Government approval requirements and the status of the foreign entity

²⁸ Foreign Exchange Management (Overseas Investment) Rules, 2022, sch. I, para. 2 (India); Reserve Bank of India, Master Direction, Overseas Investment, *supra* note 10, para. 20(7).

²⁹ Foreign Exchange Management (Non-Debt Instruments) (Fourth Amendment) Rules, 2024, S.O. 3492(E), r. 4; Reserve Bank of India, Foreign Exchange Management (Overseas Investment) Directions, 2022, para. 3.

must therefore be tested independently. Rule 9A's cross-reference to the OI Rules reinforces this conclusion.³⁰

C. Two reporting chains

An Indian share issuance to a non-resident can require FC-GPR reporting, while acquisition of foreign equity may require Form FC and other OI reporting through the designated AD bank. The reporting systems are not interchangeable.³¹ Transaction documents should therefore contain a detailed closing checklist identifying responsibility for each filing, evidence of valuation and any conditions precedent.

D. Control and indirect structures

The most difficult classification issues arise where the Indian company acquires an interest in a foreign holding company that itself owns subsidiaries. The OI analysis must ask whether the Indian investor acquires ODI, OPI, or an investment that triggers further consequences because of control. The existence of shareholder agreements, veto rights or board appointment rights may be as important as the percentage of shares acquired.³²

VII. INTERACTION WITH COMPANY, SECURITIES, COMPETITION AND TAX LAW

FEMA compliance does not replace corporate-law compliance. Where an Indian company issues new shares as consideration, section 62 of the Companies Act becomes relevant. Private placement and preferential issue requirements may also apply depending on the structure. For listed companies, SEBI's ICDR Regulations regulate preferential issues, including valuation where securities are issued for consideration other than cash.³³

A listed-company swap can also implicate takeover regulation.³⁴ Regulation 3 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 generally requires an open offer when an acquirer crosses the prescribed 25% voting-right threshold, subject to the

³⁰ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, r. 9A (India); Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 9 (India).

³¹ Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, reg. 4; Foreign Exchange Management (Overseas Investment) Regulations, 2022, reg. 10.

³² Foreign Exchange Management (Overseas Investment) Rules, 2022, r. 2(1)(d), (e) (India).

³³ Companies Act, No. 18 of 2013, §§ 42, 62 (India); Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, regs. 160-164 (as amended).

³⁴ Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 3(1)-(2) (as amended).

regulation's exceptions and conditions.³⁵ A swap is therefore not a method for bypassing takeover law merely because consideration is in securities rather than cash.

Competition law is similarly transaction-neutral. Section 5 of the Competition Act, 2002 defines combinations to include acquisitions of shares, voting rights, assets or control above prescribed thresholds, while section 6 regulates combinations that cause or are likely to cause an appreciable adverse effect on competition.³⁶ The CCI's framework also contains exemptions for specified acquisitions, including certain intra-group transactions and acquisitions that do not amount to a change of control. The relevant question is consequently whether the share swap constitutes an acquisition or change in control falling within the statutory regime, not whether it is labelled a reorganisation.³⁷

Tax law adds a separate layer.³⁸ A share swap can constitute a transfer of a capital asset and can therefore raise capital-gains questions unless a specific exemption applies. Section 47 of the Income-tax Act, 1961 excludes specified transfers from the operation of section 45, including particular amalgamation and demerger transactions, but it does not create a general exemption for every share-for-share exchange.³⁹

Cross-border restructurings also require attention to section 9 of the Income-tax Act, including the statutory rules concerning indirect transfers where shares of a foreign company derive substantial value from Indian assets. The tax analysis is conceptually separate from FEMA: a transaction may be permissible under exchange-control law but still create a tax liability.⁴⁰

VIII. REVERSE FLIPPING AND CORPORATE MOBILITY

Share swaps have acquired particular importance in "reverse flipping," where a company that had earlier established an offshore parent structure seeks to return its principal holding structure to India. The commercial motivation may include access to Indian capital markets, investor familiarity, reduced structural complexity and alignment between the place of operations and the place of incorporation. The transaction may involve exchanging shares in an offshore parent for shares in an Indian company, sometimes alongside a merger or scheme of arrangement.

The Companies Act provides a statutory route for cross-border mergers.⁴¹ Section 234 permits

³⁵ Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 3 (as amended).

³⁶ Competition Act, No. 12 of 2002, §§ 5-6 (India).

³⁷ Competition Commission of India, Regulation of Combination, Competition Act, 2002, §§ 5-6, <https://www.cci.gov.in/regulation-of-combination> (last visited Oct. 7, 2026).

³⁸ Income-tax Act, No. 43 of 1961, §§ 2(47), 45, 47 (India).

³⁹ Income-tax Act, No. 43 of 1961, §§ 45, 47 (India).

⁴⁰ Id. § 9(1)(i), Explanation 5.

⁴¹ Companies Act, No. 18 of 2013, § 234(1)-(2) (India).

mergers or amalgamations between Indian companies and companies incorporated in notified foreign jurisdictions, subject to the statutory framework and RBI approval requirements prescribed under the law.⁴² This is distinct from a bilateral share swap, but the two techniques can produce similar economic outcomes. The choice between them should therefore be made after comparing corporate-law requirements, FEMA consequences, tax treatment and shareholder effects rather than on the basis of transaction speed alone.

The regulatory treatment of reverse flipping illustrates a broader principle: corporate mobility is possible, but it is not legally neutral. A change in the location of the parent company can alter foreign-investment status, ownership percentages, tax exposure and reporting obligations. The most efficient structure is consequently not necessarily the structure involving the fewest cash transfers; it is the structure that produces the most predictable compliance profile.

IX. CRITICAL EVALUATION OF THE PRESENT FRAMEWORK

The 2024 Rule 9A reform should be regarded as a meaningful liberalisation, but not as the completion of the legal architecture. Four gaps remain.

First, there is no single integrated compliance pathway for hybrid swaps. The transaction may be commercially indivisible but legally divided between inbound and outbound regimes. The resulting duplication is manageable for large transactions but disproportionately burdens smaller restructurings, particularly where the transaction is economically straightforward but documentation-heavy.

Second, valuation remains fragmented. The inbound and outbound regimes each contain valuation requirements, while listed securities may additionally be subject to SEBI pricing rules. This can generate multiple professional certificates for a single exchange. A coordinated recognition mechanism, without relaxing substantive valuation standards, would reduce friction.

Third, control-based classification can create uncertainty. The OI framework's functional approach to control is commercially sensible because formal shareholding percentages do not always capture governance power. But the absence of a bright-line safe harbour for ordinary minority protections can make transaction design conservative. The answer should not be to abandon the control test; rather, RBI could provide more examples distinguishing ordinary investor-protection rights from rights that amount to control.

⁴² Companies Act, No. 18 of 2013, § 234 (India); Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 25A (India).

Fourth, reporting remains fragmented. FC-GPR/FC-TRS reporting and OI reporting serve different regulatory purposes, but a hybrid swap should ideally be capable of being reported through a coordinated digital workflow that identifies both legs and prevents inconsistent information. The present system places significant responsibility on the authorised dealer and transaction advisers to reconcile the two regimes.

The anti-round-tripping concern should also be treated carefully. The current framework contains structural restrictions and approval mechanisms, and RBI directions require both legs of a swap to comply with FEMA. But “round tripping” should not be described as an independent statutory offence or prohibition without identifying the specific provision engaged. The better analytical formulation is that certain structures may attract heightened scrutiny because they can implicate prohibited structures, sectoral restrictions, indirect ownership concerns or regulatory-arbitrage risks.⁴³

X. A PROPOSED COMPLIANCE MODEL FOR SHARE SWAPS

A more predictable framework can be developed without legislative overhaul. Parties should adopt a five-stage analysis.

Stage 1: Map residence and securities. Identify every transferor, transferee, issuer and ultimate beneficial owner, and specify whether each security is Indian equity, foreign equity, listed, unlisted, primary or secondary.

Stage 2: Split the transaction into legal legs. Do not begin with the commercial label “share swap.” Identify each issue and transfer and assign it to the NDI or OI framework as applicable.

Stage 3: Test substantive permissibility. For the inbound leg, examine sectoral cap, entry route, pricing and approval. For the outbound leg, examine ODI/OPI classification, control, eligible foreign activity, financial-services restrictions, financial commitment and approval requirements.⁴⁴

Stage 4: Run parallel valuation and reporting checks. Obtain the valuation required under each regime and identify every filing, including FC-GPR/FC-TRS and OI reporting. The closing conditions should expressly allocate responsibility for each filing.⁴⁵

Stage 5: Conduct non-FEMA review. Test Companies Act requirements, SEBI regulations

⁴³ Foreign Exchange Management (Overseas Investment) Rules, 2022, rr. 8-9, 19 (India); Reserve Bank of India, Foreign Exchange Management (Overseas Investment) Directions, 2022, paras. 3, 20.

⁴⁴ Foreign Exchange Management (Overseas Investment) Rules, 2022, rr. 9, 19 & sch. I, para. 3; Reserve Bank of India, Master Direction, Overseas Investment, *supra* note 10.

⁴⁵ Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, reg. 4; Foreign Exchange Management (Overseas Investment) Regulations, 2022, regs. 9-10.

for listed entities, takeover consequences, competition-law thresholds, tax consequences and any sector-specific approvals. A transaction should be considered “FEMA-cleared” only after this broader interaction has been mapped.

This model has a further advantage: it makes legal advice auditable. Rather than a single conclusion that “the swap is permissible,” counsel can provide a leg-by-leg matrix identifying the rule, compliance requirement, responsible party, evidence and closing consequence.

XI. RECOMMENDATIONS

Three reforms would materially improve certainty.

First, RBI should publish a dedicated consolidated guidance note for hybrid swaps under Rule 9A, containing worked examples of common parent-subsidiary structures. The existing framework already contains the substantive authority; what is missing is a single interpretive map.

Second, the regulators should develop coordinated valuation guidance. Where the same two securities are exchanged, a valuation report satisfying specified professional and methodological criteria could be recognised for both FEMA legs, subject to regulator-specific adjustments where necessary.

Third, reporting should be integrated. A single transaction identifier could link the inbound and outbound filings, allowing the AD bank and regulators to see that the two reports concern the same swap. This would reduce duplicate documentation and make discrepancies easier to identify before closing.

These reforms would not require a shift toward unrestricted capital mobility. On the contrary, they would make the existing policy more effective by distinguishing genuine regulatory risks from procedural duplication.

XII. CONCLUSION

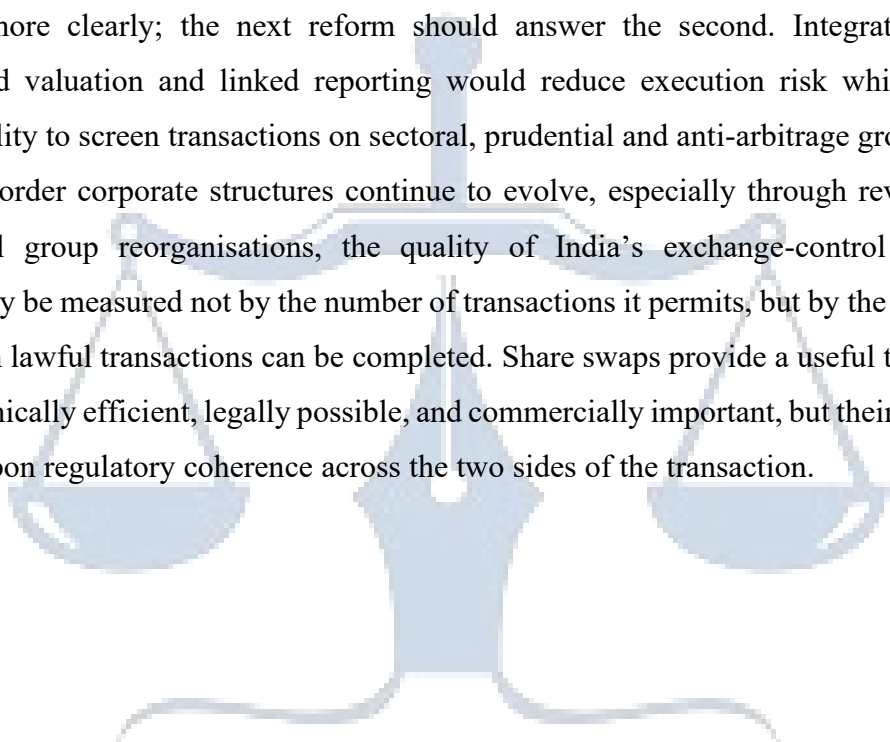
Indian law has moved from relative textual uncertainty toward express recognition of share swaps. Rule 9A is the clearest evidence of that shift. Yet the legal position remains one of conditional permissibility. A share swap involving an Indian company and a non-resident is not regulated by one rule simply because the consideration is securities. The transaction must be decomposed into its legal effects and tested under the applicable inbound and outbound regimes.

The NDI framework governs the Indian leg where foreign investment is received or Indian

equity instruments are transferred to a non-resident; the OI framework governs the foreign-investment leg undertaken by an Indian resident. RBI's directions expressly require both legs of a securities swap to comply with FEMA. Company law, SEBI law, competition law and tax law may then add independent requirements. The resulting framework is therefore best understood as a **cumulative compliance architecture**.

The central regulatory challenge is not whether India permits share swaps. It does. The challenge is whether the law provides a sufficiently predictable route for transactions that produce simultaneous inbound and outbound consequences. Rule 9A has answered the first question more clearly; the next reform should answer the second. Integrated guidance, coordinated valuation and linked reporting would reduce execution risk while preserving India's ability to screen transactions on sectoral, prudential and anti-arbitrage grounds.

As cross-border corporate structures continue to evolve, especially through reverse flipping and global group reorganisations, the quality of India's exchange-control regime will increasingly be measured not by the number of transactions it permits, but by the predictability with which lawful transactions can be completed. Share swaps provide a useful test case: they are economically efficient, legally possible, and commercially important, but their full potential depends upon regulatory coherence across the two sides of the transaction.



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