

ISSUE, TRANSFER AND REPORTING OF EQUITY INSTRUMENTS and Overview of FDI & ESTABLISHMENT OF LO/BO/PO UNDER FDI

By:- CS DEVENDER SUHAG

Rules/Regulations under FEMA

ISSUE OF SECURITIES

Power with Central Government to frame Rules [Section 46]

FEM (Non – Debt Instruments) Rules, 2019 notified on October 17,2019.

supersedes FEM (Transfer of Issue of security by a person resident outside India) Regulations, 2017

➤ supersedes FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

Power with RBI to frame Regulations [Section 47]

FEM (Debt Instruments) Regulations, 2019.

FEM (Mode of payment and reporting of Non Debt Instruments) Regulations, 2019

- Sectors specified v/s Sectors not specified
- Automatic v/s approval route
- Foreign Direct Investment v/s Foreign Portfolio Investment
- Direct Investment v/s Indirect Foreign Investment
- Repatriable v/s Non-repatriable

Foreign Investment:-

- means any investment in capital instruments of an Indian company or to the capital of an LLP
- made by a PROI
- on a repatriable basis
- PROI may hold foreign investment either as FDI or FPI

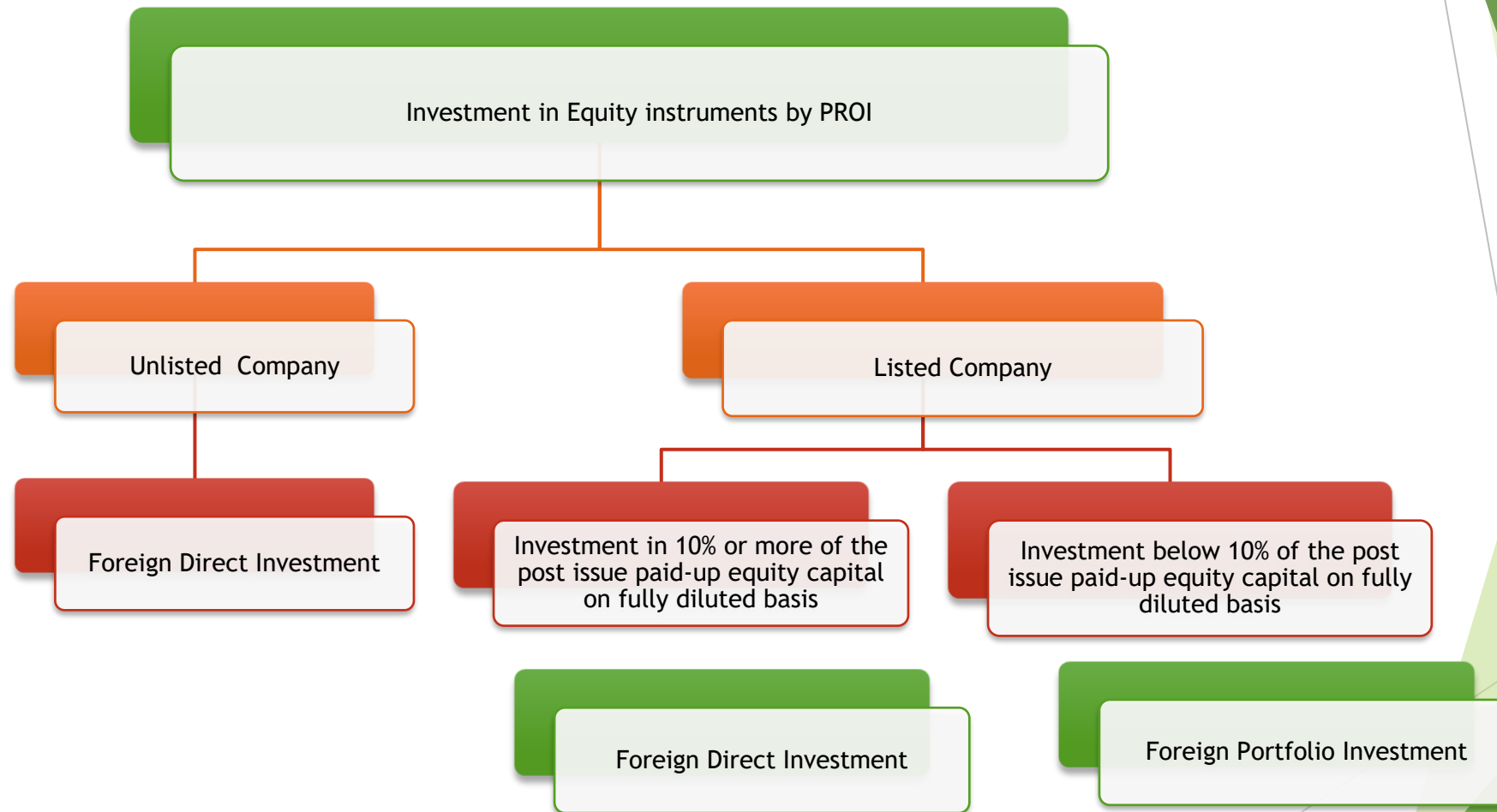
Foreign Direct Investment (FDI):-

- Investment by PROI through capital instruments
- in unlisted Indian company
- in listed Indian company
- in 10% or more of the post issue paid-up equity capital on a fully diluted basis (if all possible sources of conversion are exercised).
- existing investment below 10% shall continue to be treated as FDI

Foreign Portfolio Investment (FPI):-

Investment by PROI through capital instruments:-

- in listed Indian company
- in less than 10% of the post issue paid-up equity capital on a fully diluted basis
- The 10 percent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group as referred in Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014
- in less than 10 % of the paid up value of each series of capital instruments



NON DEBT INSTRUMENTS

1. Capital participation in LLP.
2. Units of AIFs, REITs and InVITs.
3. Units of Mutual Funds and Exchange-Traded Fund (ETFs) which invest more than 50% in equity.
4. The junior-most layer (i.e. equity tranche) of securitisation structure;
5. Contribution to Trusts.
6. Convertible Notes by Start Ups.
7. All instruments of investment recognised in the FDI policy notified from time to time.
8. Depository receipts issued against equity instruments.
9. acquisition, sale or dealing directly in immovable property;

DEBT

All Instruments other than Equity Instruments

HYBRID SECURITIES

hybrid instruments such as optionally or partially convertible preference shares or debentures and other such instruments as specified by the Central Government from time to time, which can be issued by an Indian company or trust to a person resident outside India

EQUITY INSTRUMENTS UNDER FDI

Equity shares

- issued as per Companies Act, 2013
- includes partly paid up shares
- 25% payment upfront, full payment in 12 months

Preference shares

- fully, compulsorily and mandatorily convertible into equity

Share warrants

- issued as per SEBI Regulations
- 25% payment upfront, full payment within 18 months

Debentures

- fully, compulsorily and mandatorily convertible into equity

INDIRECT FOREIGN INVESTMENT

Investment in the equity instruments of another Indian company

by an Indian entity or which has received foreign investment; **and**

is not owned and not controlled by resident Indian citizens; or
is owned or controlled by persons resident outside India.

by an Investment Vehicle whose sponsor or manager or investment manager

is not owned and not controlled by resident Indian citizens; or
is owned or controlled by persons resident outside India.

AUTOMATIC ROUTE

Permitted for most sectors

- 1 No prior approval required only post investment filing.
 - 2 Remittance through normal banking channels
 - 3 Subject to applicable laws or regulations, security and other conditionalities
- E.g. IT/ITes, Service sector, Infrastructure, Manufacturing

APPROVAL ROUTE

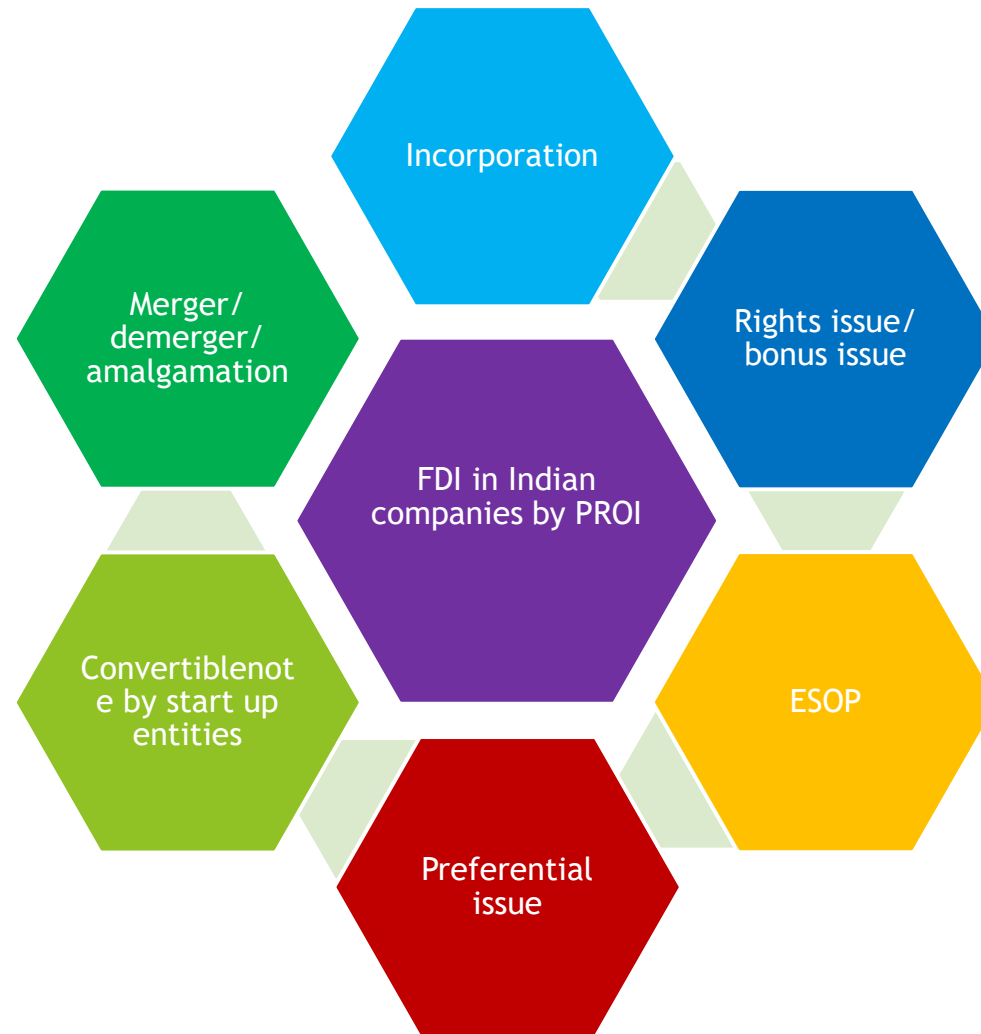
Sectors not falling under automatic route.

- 1 Investment only post obtaining approval from concerned ministries alongwith Department of Industrial Policy and Promotion ('DPIIT').
- E.g. Defence, Small Arms, Broadcasting, Print Media, Civil Aviation, Satellites, Telecom, Private Security Agencies, MBRT, unregulated financial services, Banking, Pharmaceuticals etc

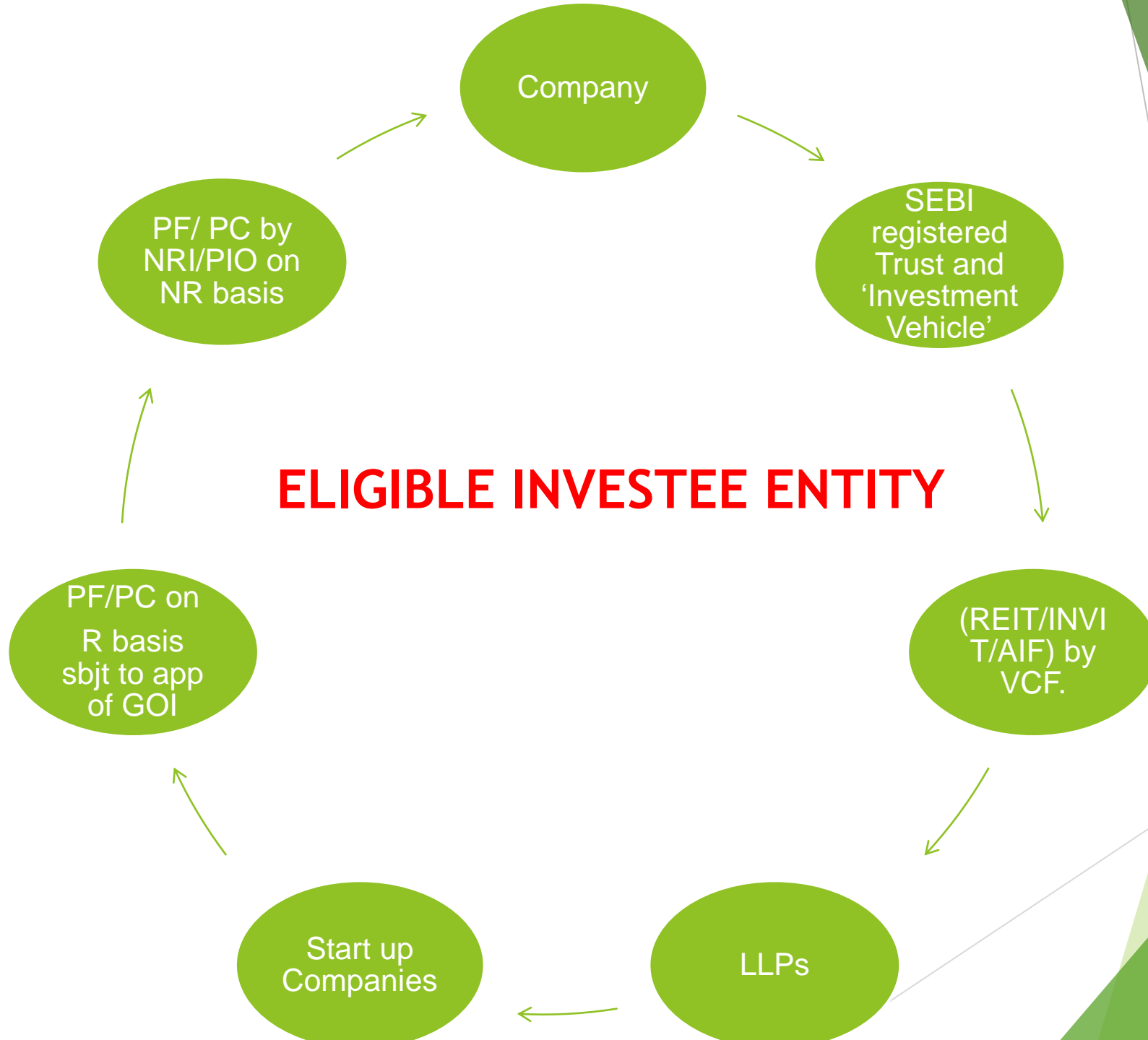
RESTRICTED LIST

1. Betting, Gambling & Lottery
- 2 Chit funds & Nidhi company
3. Real estate (except construction development and REITs)
4. Tobacco products
5. Trading in Transferable Development Rights
6. Activities/sectors not open to private sector investment e.g. Atomic Energy and Railway operations Atomic Energy and Railway Operations (other than permitted activities)

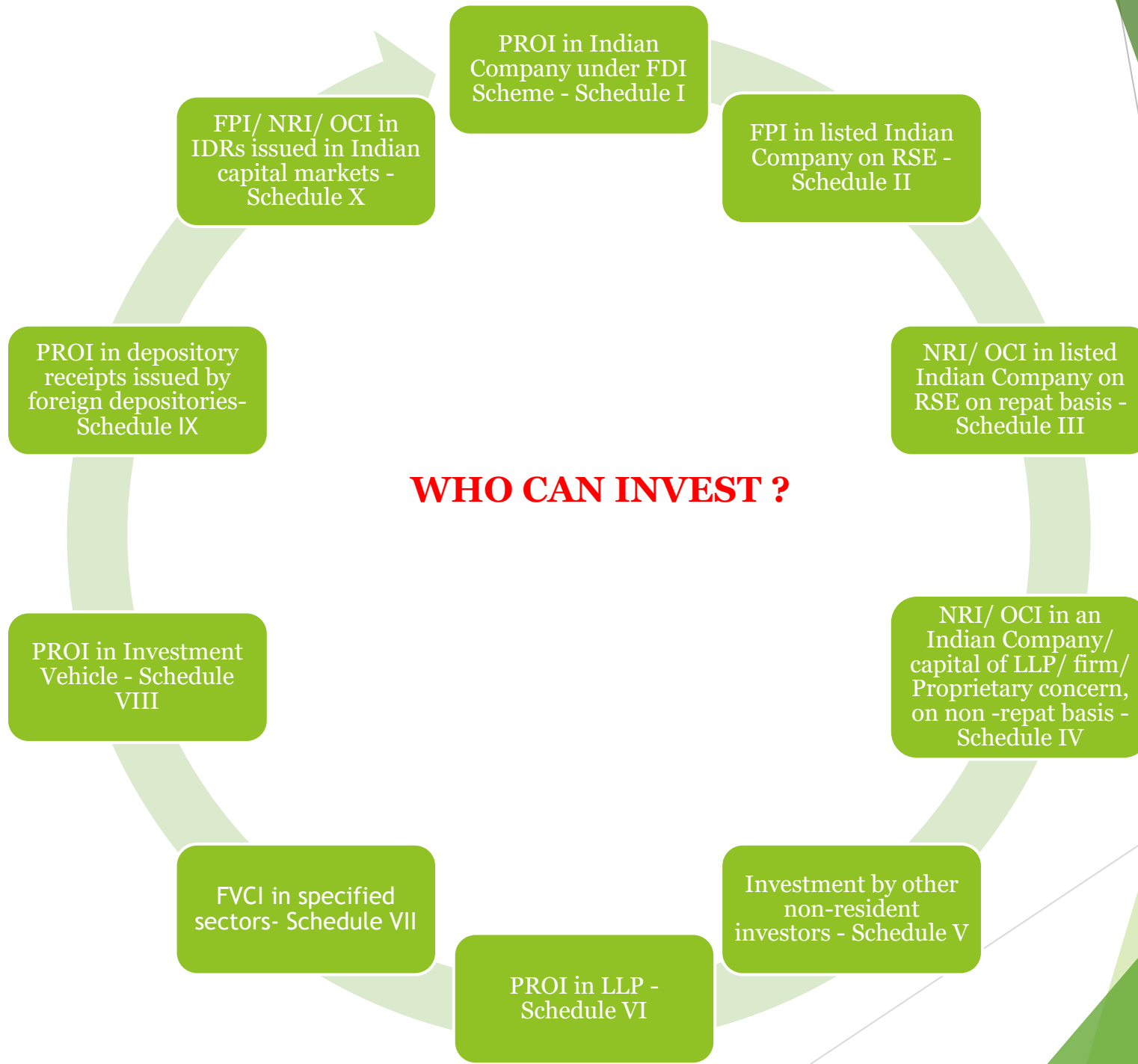
MODE OF INVESTMENT IN NON DEBT INSTRUMENTS



o



WHO CAN INVEST ?



RIGHTS ISSUE/ BONUS ISSUE

- Sectoral cap
- Initial acquisition as per Rules
- Pricing for rights issue
 - Listed company– price determined by company
 - Unlisted company – shall not be less than the price offered to PRII
- Rights issued when shareholder was PRII
shall hold equity instruments (other than share warrants) on non-repatriation basis
- Rights renounced by a resident shareholder in favor of PROI
shall hold equity instruments (other than share warrants) on non-repatriation basis

•

EMPLOYEE STOCK OPTION PLAN (ESOP)

Stock options/ sweat equity shares to employees/ directors resident outside India of the company, holding company, JV, WOS, subsidiaries

Scheme as per Act, 2013 or SEBI (SBEB) Regulations, 2014

Sectoral cap

Government approval

Status of the employee at the time of plan

MERGER OR DEMERGER OR AMALGAMATION OF INDIAN COMPANIES

Transferee or new company may issue equity instruments to existing holders of transferor company resident outside India subject to

- Scheme being approved by NCLT
- Sectoral cap
- New company or transferee company shall not be engaged in sectors prohibited for receiving foreign investment.

PRICING GUIDELINES FOR NDI

Swap of equity instruments

- valuation by SEBI registered Merchant Banker; or
- Investment Banker outside India

Shares by way of subscription to MOA

- at face value
- subject to entry route & sectoral caps.

Share warrants

pricing and price/conversion formula shall be determined upfront.

Pricing guidelines not applicable for investment in equity instruments by PROI on non-repatriation basis.

PRICING GUIDELINES FOR NDI

FRESH ISSUE	PREFERENTIAL ALLOTMENT	RIGHT ISSUE	TRANSFER RESIDENT TO NON RESIDENT	TRANSFER NON RESIDENT TO RESIDENT
A Listed Co.	A Listed Co.	A Listed Co.	A Listed Co.	A Listed Co.
As per SEBI Guidelines	Not less than the price at which preferential allotment can be made under SEBI guidelines	At a price determined by Company	Not less than the price at which preferential allotment can be made under SEBI guidelines	Not to exceed the price at which preferential allotment can be made under SEBI guidelines
Unlisted Co.	Unlisted Co.	Unlisted Co.	Unlisted Co.	Unlisted Co.
Not less than FV of shares arrived by CA/MB based on IAP on ALB	Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB	shall not be at a price less than the price offered to persons resident in India	Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB	Not to exceed FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

TRANSFER OF EQUITY INSTRUMENTS

S. No	Transferor	Transferee	Condition	Reporting/ Compliance
1	A person resident outside India, not being a NRI or OCI or an erstwhile OCB	to any person resident outside India	Transfer by way of sale or gift the equity instruments of an Indian company or units held by Him, also include pursuant to liquidation/merger/demerger and Amalgamation	No requirement of FC-TRS
2	NRI/OCI holding capital instrument on repatriation basis	to any person resident outside India	Transfer of sale/gift is allowed Have to follow the aggregate limit	No requirement of FC-TRS
3	Person Resident outside India	Person Resident in India	Transfer of EI on stock exchange, Transfer and pricing shall be in compliance with RBI guidelinesg	Onus on reporting is on PRII
4	Person Resident outside India	Person Resident in India	If the transfer the EI on non-repatriations basis nothing has to comply	No requirement of FC-TRS
5	A person resident in India	to any person resident outside India	Transfer by way of sale; have to follow secretarial cap, entry route, investment limit and pricing guidelines	Form FC-TRS shall be filed within 60 days of transfer of EI or receipt/remittance of funds whichever is earlier

S. No	Transferor	Transferee	Condition	Reporting/Compliance
6	A person resident in India on non-repatriation basis	to any person resident outside India	<ol style="list-style-type: none"> 1. Transfer by way of gift allowed; 2. Prior approval of RBI required; 3. Donee is eligible to hold such security under relevant schedule; 4. Gift does not exceed 5% of the paid up capital of Indian Company or each series of debenture/mutual fund scheme; 5. Adherence of sectoral cap; 6. Donor and donee shall be relative as per CA, 2013; 7. Value of security transferred together with transferred to any other PROI in a FY does not exceed USD 50K 	
7	NRI / OCI or an eligible investor holding equity instruments or units on non-repatriation basis	Person Resident outside India	<p>Transfer by sale; have to follow secretarial cap, entry route, investment limit and pricing guidelines</p> <p>Transfer by gift;</p> <p>Transfer by way of gift with the prior approval of RBI</p> <ul style="list-style-type: none"> • gift does not exceed 5% of the paid up capital of the Indian company. • applicable sectoral cap in the Indian company is not breached. • donor and the donee shall be “relatives” as per CA, 2013. • Value of security transferred does not exceed the rupee equivalent of USD 50000 	Onus on reporting is on Transferee (non-repatriable basis)
9	NRI / OCI or an eligible investor on non-repatriation	NRI/ OCI/eligible investor	Transfer by way of gift and the transferee shall hold it on non repatriable basis.	No requirement of FC-TRS

Foreign investment in India - Reporting in Single Master Form

FIRMS was made online in two phases:

- First phase: Entity master was made available online (i.e 07 June, 2018)s
- Second phase: Implementation of SMF (i.e. 01 Sep, 2018)

With effect from September 01, 2018, five forms viz., FC-GPR, FC-TRS, LLP-I, LLP-II and CN were being made available for filing in SMF

•With effect from October 23, 2018 the other three forms viz., ESOP, DI, and DRR were made available for filing.

REPORTING UNDER NDI RULES

Name of the form	Purpose of filling	TO be filed with	Prescribed limit of filling
Form Foreign Currency- Gross Provisional Return(FCG-PR)	An Indian company issuing equity instruments to a person resident outside India and where such issue is reckoned as Foreign Direct Investment	Single Master Form	Not later than thirty days from the date of issue of equity instruments
Form Foreign Currency- Transfer of Shares (FC-TRS):	<ul style="list-style-type: none"> ❖ Filing of return of transfer of equity instruments between PROI; (repatriable)/PROI (non-repatriable) and PROI (repatriable)/PRI. ❖ Onus on reporting is on PRI Transferor/PRI Transferee or PROI (non repatriable); ❖ Transfer of equity instruments by way of sale between a PROI holding equity instruments on a non-repatriable basis and PRI is not required to be reported in Form FC-TRS; ❖ Transfer of equity instruments on stock exchange by a PROI shall be reported by such person in Form FC-TRS; ❖ Transfer of equity instruments prescribed in rule9(6) (Deferred consideration), shall be reported in Form FC-TRS on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/ transferee; ❖ Transfer of 'participating interest / rights' in oil fields shall be reported Form FC-TRS. 	Single Master Form	Form FC-TRS shall be filed within 60 days of transfer of equity instruments or receipt/remittance of funds whichever is earlier

Name of the form	Purpose of filling	TO be filed with	Prescribed limit of filling
Annual Return on Foreign Liabilities and Assets (FLA):	An Indian Company which has received FDI or an LLP which has received investment by way of capital contribution in the previous year including the current year	Single Master Form	Shall submit form FLA to the Reserve Bank on or before the 15th day of July of each year.
Form Employees' Stock Option (ESOP):	An Indian company issuing employees' stock option to persons resident outside India who are its employees/directors or employees/directors of its holding company/joint venture / wholly owned overseas subsidiary/subsidiaries	Single Master Form	Filing of Form ESOP within 30 days of issuance of ESOP
Form Depository Receipt Return (DRR)	Reporting of issue/ transfer of depository receipts (ADR/ GDR) issued in accordance with the Depository Receipt Scheme, 2014 by the Domestic Custodian. <i>(W.e.f 13.11.20 the hardcopy filing of form DRR that has been discontinued. The domestic custodian may continue to report the form DRR on FIRMS</i>	Single Master Form	within 30 days of close of the issue.
Form LLP (I):	LLP receiving amount of consideration for capital contribution and acquisition of profit shares. Note: All FIRC's and KYC shall be filed as necessary documents along with the form.	Single Master Form	within 30 days from the date of receipt of the amount of consideration

Name of the form	Purpose of filling	TO be filed with	Prescribed limit of filling
Form LLP (II):	Disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident (or vice versa)	Single Master Form	within 60 days from the date of receipt of funds
LEC(FII)	AD Bank to report to RBI in Form LEC (FII) the purchase/ transfer of equity instruments by FPIs on the stock exchanges in India.		<i>This Form has been discontinued w.e.f. 13.11.2020</i>
LEC(NRI)	AD Bank to report to RBI in Form LEC (NRI) the purchase/ transfer of equity instruments by NRI/OCI on the stock exchanges in India		
Form InVI:	An Investment vehicle which has issued its units to a person resident outside India shall file Form InVI		30 days from the date of issue of units.
Downstream Investment	An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of these Regulations, shall notify the Secretariat for Industrial Assistance, DPIIT within 30 days of such investment, even if equity instruments have not been allotted, along with the modality of investment in new/existing ventures (with/without expansion programme).		within 30 days of such investment even if equity instruments have not been allotted

Name of the form	Purpose of filling	TO be filed with	Prescribed limit of filling
Form Convertible Notes (CN):	Issue of CN to a PROI by an Indian startup company; or Transfer of CN to or from PROI.	Single Master Form	shall file Form CN within 30 days of such issue/transfer

Mode of Payment and Remittance of sale proceeds:

Schedule	Transaction	Mode of payment	Remittance of sale proceeds
I	<p>Purchase or sale of equity instruments of an Indian company by a Person resident outside India)</p>	<p>The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in NRE/FCNR(B)/Escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.</p> <ul style="list-style-type: none"> • Issue of equity shares by an Indian company against any funds payable by it to the investor • Swap of equity instruments. 	<p>The sale proceeds (net of taxes) of the instruments may be remitted outside India or may be credited to the NRE/ FCNR (B) account of the person concerned.</p>
II	<p>Investments by Foreign Portfolio Investors(FPI)</p>	<p>The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in a foreign currency account and/ or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the FEM (Deposit) Regulations, 2016.</p> <p>Provided balances in SNRR account shall not be used for making investment in units of Investment Vehicles other than the units of domestic mutual fund.</p> <p>The foreign currency account and SNRR account shall be used only and exclusively for the purpose of this schedule.</p>	<p>The sale proceeds (net of taxes) of the instruments and units of domestic mutual fund may be remitted outside India or credited to a foreign currency account or a SNRR account of the FPI.</p> <p>The sale proceeds (net of taxes) of units of investment vehicles other than domestic mutual fund may be remitted outside India or</p>

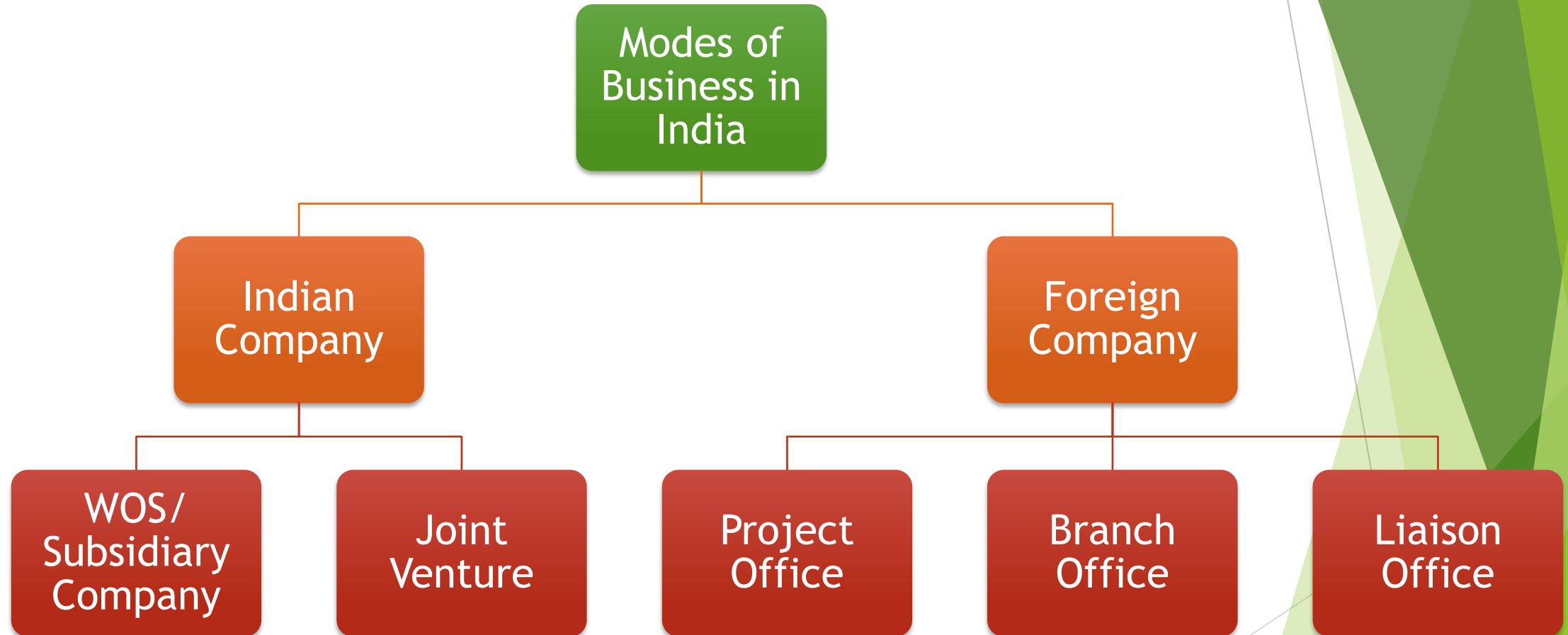
Schedule	Transaction	Mode of payment	Remittance of sale proceeds
III	Purchase or sale of Investments by NRI or (OCI) on R basis	<ul style="list-style-type: none"> The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in a Non-Resident External (NRE) account maintained in accordance with the FEM (Deposit) Regulations, 2016. The account shall be used exclusively for putting through transactions permitted under this Schedule. Investment in units of domestic mutual fund shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B) account. Subscription to National Pension System shall be paid as IR from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account 	<p>The sale proceeds (net of taxes) of equity instruments may be remitted outside India or may be credited to NRE (PIS) account of the person concerned.</p> <p>The sale proceeds (net of taxes) of units of mutual funds and subscription to National Pension System may be remitted outside India or may be credited to NRE (PIS)/FCNR(B)/NRO account of the person concerned at the option of the NRI/OCI investor.</p>

Schedule	Transaction	Mode of payment	Remittance of sale proceeds
IV	Investment by NRI or OCI on non repatriation basis)	<p>A. Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP</p> <p>The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the FEM (Deposit) Regulations, 2016.</p>	<p>The sale/maturity proceeds (net of applicable taxes) of equity instruments or units or disinvestment proceeds of a LLP shall be credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid;</p> <p>(2) The amount invested in equity instruments of an Indian company or the consideration for contribution to the capital of a LLP and the capital appreciation thereon shall not be allowed to be repatriated abroad.</p>
		<p>B. Investment in a firm or a proprietary concern.</p> <p>The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the FEM (Deposit) Regulations, 2016.</p>	<p>(1) The disinvestment proceeds shall be credited only to the NRO account of the person concerned, irrespective of the type of account from which the consideration was paid;</p> <p>(2) The amount invested for contribution to the capital of a firm or a proprietary concern and the capital appreciation thereon shall not be allowed to be repatriated abroad.</p>

Schedule	Transaction	Mode of payment	Remittance of sale proceeds
V	Investment by other non resident investors	The amount of consideration shall be paid out of inward remittances from abroad through banking channels.	The sale/ maturity proceeds (net of taxes) may be remitted abroad.
VI	Investment in a Limited Liability Partnership	Payment by an investor towards capital contribution of an LLP shall be made by way of an IR through banking channels or out of funds held in NRE or FCNR(B) account maintained in accordance with the FEM (Deposit) Regulations, 2016.	The disinvestment proceeds may be remitted outside India or may be credited to NRE or FCNR(B) account of the person concerned.
VII	Investment by a Foreign Venture Capital Investor	<p>(1) The amount of consideration shall be paid as IR from abroad through banking channels or out of funds held in a foreign currency account and/or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the FEM (Deposit) Regulations, 2016.</p> <p>(2) The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.</p>	The sale/maturity proceeds (net of taxes) of the securities may be remitted outside India or may be credited to the foreign currency account or a Special Non-resident Rupee Account of the FVCI.

Schedule	Transaction	Mode of payment	Remittance of sale proceeds
VIII	(Investment by a person resident outside India in an Investment Vehicle)	The amount of consideration shall be paid as IR from abroad through banking channels or by way of swap of shares of a Special Purpose Vehicle or out of funds held in NRE or FCNR(B) account maintained in accordance with the FEM (Deposit) Regulations, 2016.	The sale/maturity proceeds (net of taxes) of the units may be remitted outside India or may be credited to the NRE or FCNR(B) account of the person concerned.
IX	(Issue of Indian Depository Receipts)	NRIs or OCIs may invest in the IDRs out of funds held in their NRE/FCNR(B) account, maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.	Redemption/conversion of IDRs into underlying equity shares of the issuing company shall be a compliance the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

VARIOUS MODES FOR FOREIGN COMPANIES BUSINESS IN INDIA



FEM (Establishment in India of a Branch Office or Liaison Office or a Project Office or any other Place of Business) Regulations, 2016

Branch office any establishment described as such by the company. [*Schedule 1*]

Liaison office place of business to act as channel of communication between Head Office and Indian entities. [*Schedule 2*] does not undertake any commercial/ trading/ industrial activity, directly or indirectly.

Project office place of business in India to represent interests of a foreign company executing a project in India excludes a liaison office.

Site office sub-office of project office established at the site of project excludes liaison office

LIAISON OFFICE	BRANCH OFFICE	PROJECT OFFICE
Represent parent company in India	Export/import of goods	PO shall not undertake or carry on any other activity other than the activity relating and incidental to execution of the project.
Promote export import from/to India	Rendering professional or consultancy services(AD Category - I banks are directed not to grant any approval to any branch office, project office, liaison office or other place of business in India under FEMA for the purpose of practicing legal profession in India. NOV 23 Circular 07 RBI)	
Promote technical / financial Collaborations between parent/group companies and companies in India	Carrying out research work in which the parent company is engaged	
Act as a communication channel between the parent company and Indian Entities.	Promoting technical or financial collaborations between Indian companies and parent or overseas group company	
	Representing the parent company in India and acting as buying/ selling agent in India	
	Rendering services in Information Technology and development of software in India	
	Rendering technical support to the products supplied by parent/group companies	
	Representing a foreign airline/ shipping company	

Prohibition for BO/LO/ PO

- Prior approval BO/LO/PO
- Except
- A Banking Company
- Insurance Company
- PROI in SEZ

Approval for BO/LO/PO

- Eligibility
- Profit track record and Net worth
- Permissible Activities
- Validity

Steps need to follow for establishment of LO/BO/PO

APPLICANT AND
AUTHORISED
REPRESENTATIVE

SUBMISSION THE
DOCUMENTS WITH AD

AFTER RECEIVING
UIN/INTIMATION FROM AD,
REGISTRATION WITH ROC
in FC1, POLICE AUTHORITY
AND OTHER DEPT.



LO

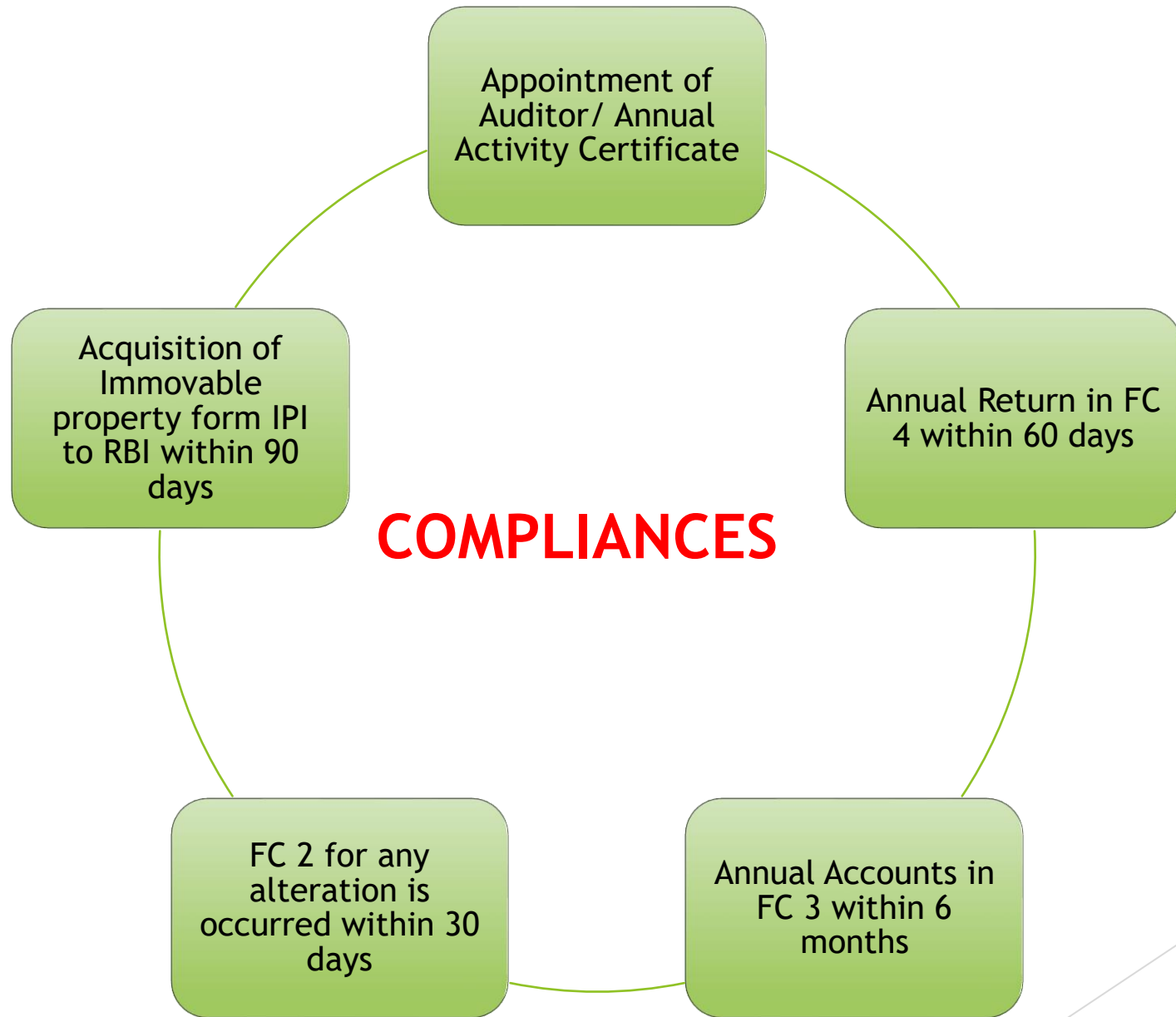
- **Credit-** Fund from parent company/head office and sale proceeds of assets etc.
- **Debit-** Only for meeting local expenses in order to run the office.

BO

- **Credit-** Fund received from parent co. and legitimate receivables process of its business operations
- **Debit-** Meeting the local expenses

PO

- **Credit-** Fund received from parent co. and amount received from client for execution of project
- **Debit-** Meeting the local expenses



Thank You

CS Devender Suhag
Secretary of NIRC of ICSI
8130586611
devendercs@gmail.com