

# Deloitte Haskins & Sells LLP

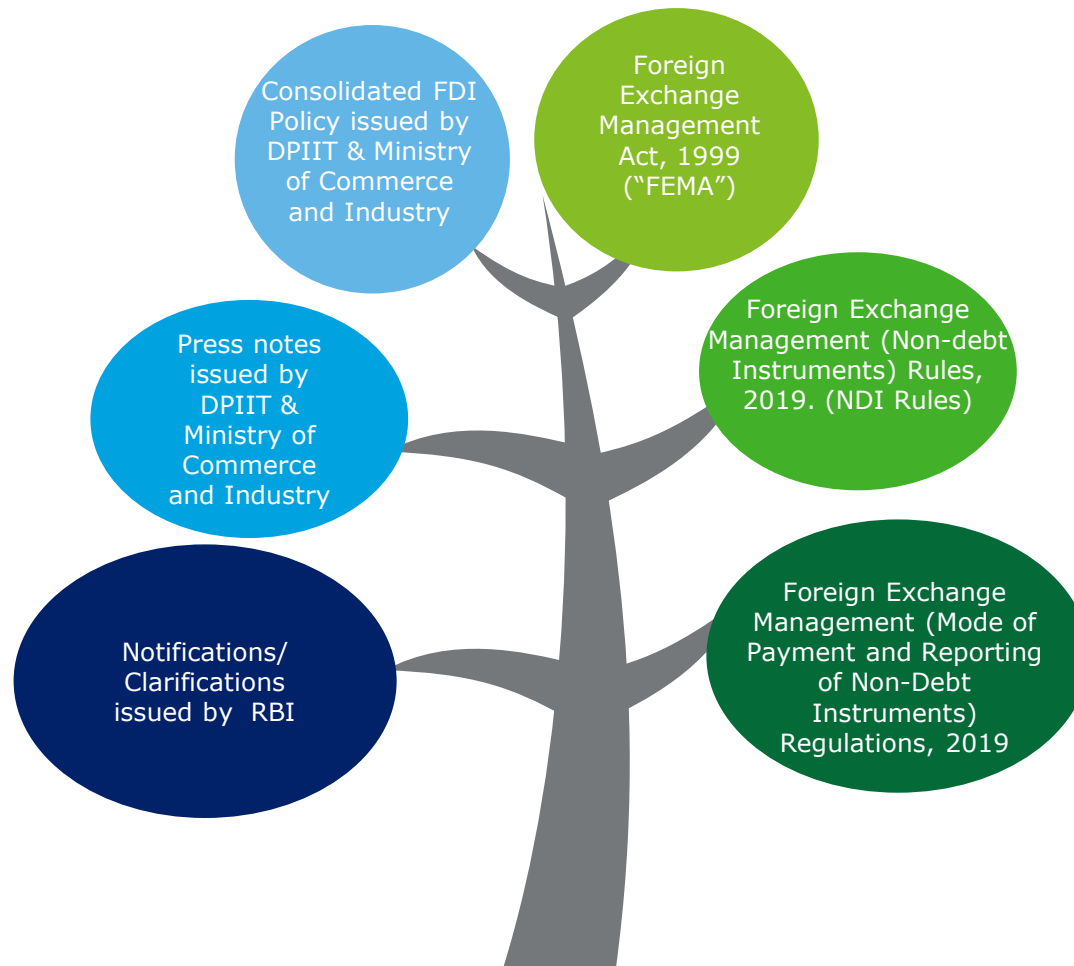
## Foreign Direct Investment

Diverse. Distinctive. Dynamic.

June 19, 2021



# Legislation- Foreign Direct Investment



# FDI Routes

## Automatic Route

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

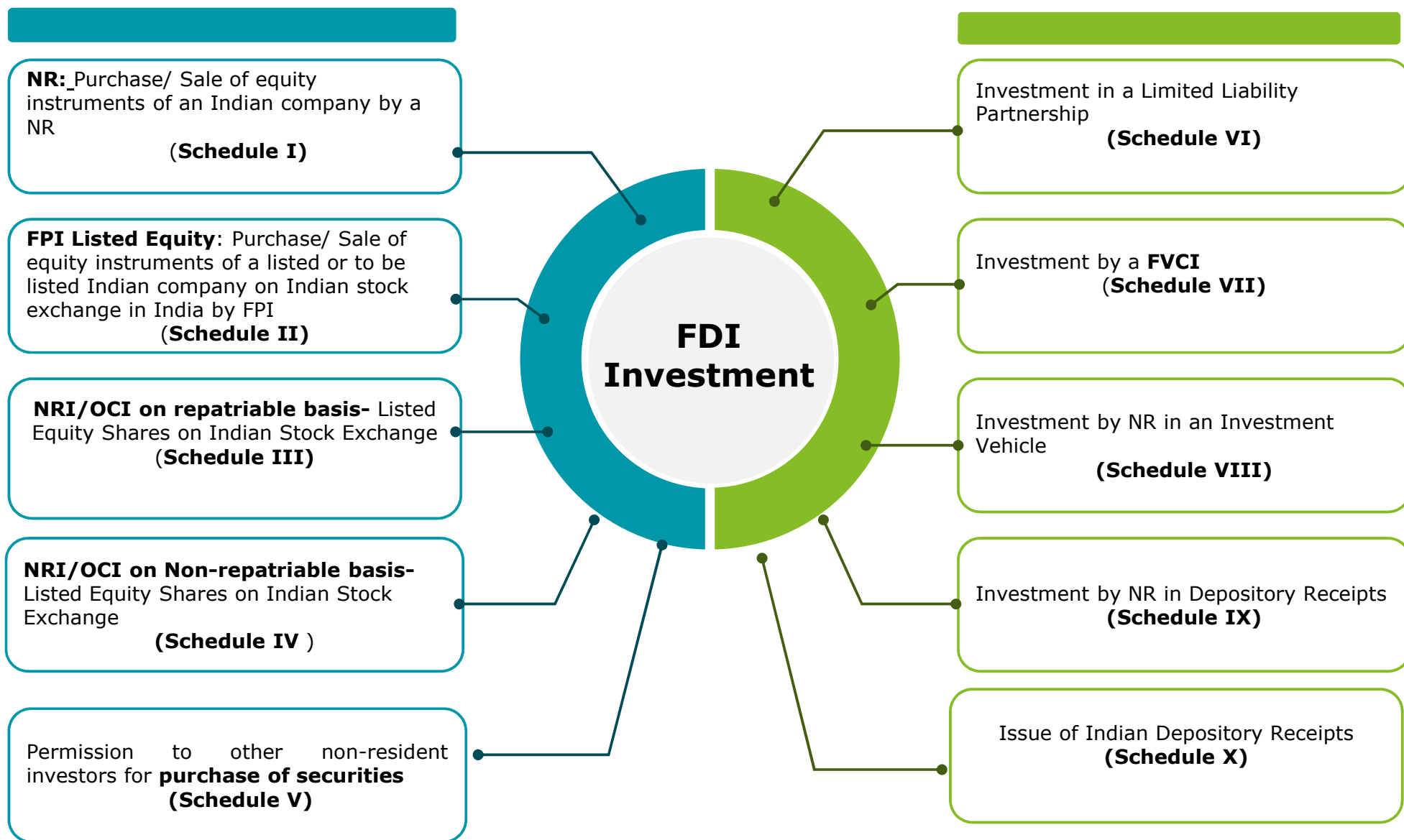
## Approval Route

- Sectors not falling under automatic route.
- 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

- Betting, Gambling & Lottery
- Chit funds & Nidhi company
- Real estate (except construction development and REITs)
- Tobacco products
- Trading in Transferable Development Rights
- Atomic Energy and Railway Operations (other than permitted activities)

# FDI Investment : Key Schedules under NDI Rules



# Amendments in Definition of Capital: Under FDI Policy

From June 1, 2000 till  
APRIL 30, 2007

- Capital includes:
  - a. Equity shares;
  - b. Preference shares;
  - c. Convertible preference shares; and
  - d. Convertible debentures.

From May 1, 2007 to  
June 7, 2007

- Capital includes:
  - a. Equity shares;
  - b. **Fully, compulsorily & mandatorily convertible preference shares;**
  - c. Convertible debentures.

From June 8, 2007 to  
December 29, 2013

- Capital includes:
  - a. Equity shares;
  - b. Fully, compulsorily & mandatorily convertible preference shares;
  - c. **Fully, compulsorily & mandatorily convertible debentures.**

From December 30,  
2013 till June 29,  
2014

- Capital includes:
  - a. Equity shares;
  - b. Fully, compulsorily & mandatorily convertible preference shares;
  - c. Fully, compulsorily & mandatorily convertible debentures
  - d. **Equity shares or compulsorily and mandatorily convertible preference shares/ debentures containing an optionality clause but without any option/ right to exit at an assured return.**

From June 30, 2014  
to till date

- Capital' includes:
  - a. Equity shares;
  - b. Fully, compulsorily & mandatorily convertible preference shares;
  - c. Fully, compulsorily & mandatorily convertible debentures;
  - d. Equity shares or compulsorily and mandatorily convertible preference shares/debentures containing an optionality clause but without any option/ right to exit at an assured price
  - e. Warrants.
- The equity shares shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, and should be mandatorily and fully convertible. Further, 'warrant' includes Share Warrant.

# Eligible Investee Entities & Type of Instrument

## Eligible Investee Entities

- ✓ Indian companies as per Sectoral Cap;
- ✓ Partnership Firm/ Proprietary Concern by NRI/PIO on non repatriation basis;
- ✓ Partnership Firm/Proprietary Concern on repatriable basis subject to approval of Government of India ;
- ✓ Startup companies can issue equity/ equity linked instruments or debt instruments or convertible notes;
- ✓ LLPs in sectors wherein FDI is 100% allowed through automatic route & no FDI linked performance condition; and
- ✓ SEBI registered Trust and 'Investment Vehicle' (REIT/INVIT/AIF) by VCF.

## Type of Instrument for FDI

- ✓ Equity shares (including partly paid-min.25% upfront-balance 12 months),
- ✓ Share warrants-min.25% upfront-balance 18 months;
- ✓ Fully compulsory and mandatorily convertible debentures into Equity Shares;
- ✓ Fully compulsory and mandatorily preference shares into Equity Shares
- ✓ Convertible Notes by Start Ups
- ✓ Capital Contribution in LLP
- ✓ Depository Receipts / Foreign Currency Convertible Bond
- ✓ Sponsored ADR/ GDRs

# FDI in LLP

## Eligible Investor:-

A NR (except a citizen of land bordering country); or

An entity incorporated outside India (except an entity in land bordering country), not being a FPI/FII/FVCI.

## Mode of Investment:-

Capital Contribution; and  
Profit Share" will fall under the category of reinvestment of earnings.

**Eligibility Criteria:-** LLP is operating in sector where **100% FDI is permitted without any performance linked conditions.**

**Downstream Investment:-** company or LLP engaged in sectors in which 100% FDI is allowed under the automatic route and there are no FDI linked performance conditions. Onus shall be on the Indian company / LLP accepting downstream investment to ensure compliance with the conditions.

**Conversion of Company into LLP:-** Conversion of Indian Company having FDI can be converted into LLP only in case if it is engaged in a sector where 100% FDI is permitted without any performance linked conditions.

**Mode of Payment:-** by way of inward remittance through normal banking channels; or by debit to NRE/FCNR(B) account of the person concerned, maintained with an AD Category-I bank.

## Pricing:-

**Issue:** Minimum FMV as per IAP certified by CA/Cost Accountant/RV.

## Transfer:

**Resident to NR-** NR to pay minimum FMV of capital contribution/profit share of a LLP.

**NR to Resident:** Resident to charge minimum FMV of the capital contribution/profit share of a LLP.

# Other Inbound Investments

## Rights/ Bonus Issue

- Share Warrants not allowed;
- Adherence of sectoral cap;
- Compliance of Companies Act 2013;
- **Pricing:-**
  - **Unlisted Company-** not less than price offered to residents;
  - **Listed Company-** Price determined by Company.
  - Pricing guidelines applicable on NR getting rights from Residents by way renunciation.
- Funds brought from overseas or out of funds held in NRE/ FCNR(B)/ Escrow A/c;
- Mode of payment and attendant conditions for such transactions shall be specified by RBI.
- Person who was resident at the time of original acquisition of shares shall hold the share on non-repatriation basis.

## Merger/ Demerger/ Amalgamation/ Arrangement

- Scheme of Merger/Demerger approved by NCLT/competent authority:-
  - May issue equity instruments to existing holders subject to compliance of entry route, sectoral caps etc.;
  - GOI approval on breach of sectoral caps;
  - Transferor/transferee Company not to engage in activity prohibited for FDI.
  - SEBI compliances for Listed Companies.
  - Issue of Redeemable Instruments out of General Reserve under Scheme of Arrangement in terms of Companies Act 2013

## ESOP/ Sweat Equity

- Employee, Directors of Company/ HC /JV/WOS are eligible;
- Scheme as per Companies Act 2013 or SEBI;
- Adherence of Sectoral cap;
- Issuance by Company under approval route shall require prior approval;
- GOI approval for issuance of shares to citizen of countries sharing land border with India;
- Person who was resident at the time of grant of shares shall hold the share on non-repatriation basis.



# Conversion of ECB, Royalty and other Legitimate Dues

Conversion of following Legitimate Dues into Shares/Convertible Debentures is permitted:

## Legitimate Dues

- Lump-sum technical know how fee ;
- Royalty;
- ECB (other than import dues deemed as ECB or Trade Credit as per RBI guidelines);
- Import of capital goods/machinery/equipment (excluding second hand machinery) and pre-operative/pre - incorporation expenses including payment of rent etc.;
- other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999.

## Conditions

- sectoral cap and pricing guidelines under FEMA 20 and FDI needs to be adhered;
- GOI Approval for conversion in sectors where FDI is restricted as per FDI Policy;
- Rate of Conversion shall be the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion. However, RBI will have no objection if the borrower company wishes to issue equity shares/convertible debentures for a **rupee amount less than that arrived at as mentioned above** by a mutual agreement with the ECB lender.
- Conversion should be net of taxes.

## Reporting Requirements

- **Reporting Requirement in case** :- Form FC-GPR to be filed with RBI within 30 days of issue;
- **Reporting Requirement in case of ECB:-** The company shall report the conversion of ECB into equity in ECB-2 Return of the respective month in case of full conversion of ECB. In case of partial conversion of ECB, the converted portion shall be reported in form FC-GPR and non-converted portion in Form ECB-2.

**Pre-incorporation/ pre-operative expenses shall include amounts remitted to Investee Company's account, to the investor's account in India if it exists, to any consultant, attorney or to any other material/ service provider for expenditure relating to incorporation or necessary for commencement of operations.**

# Transfer of Equity Instrument

S. No	Transferor	Transferee	Compliance/Conditions
1.	NR other than NRI/OCI/OCB	R	1. Transfer by sale/gift allowed including transfer pursuant to liquidation/merger/demerger and Amalgamation
2.	NRI/OCI holding capital instrument on <b>repatriation</b> basis	NR	1. Transfer by sale/gift allowed; 2. In case NRI/OCI breaches the aggregate NRI/OCI limit or sectoral limit, the NRI/OCI may sell capital instrument to a R within time limit as stipulated by RBI
3.	NRI / OCI or an eligible investor holding equity instruments or units on <b>non-repatriation</b> basis	NR	1. Transfer by way of sale. 2. Adherence of entry route/sectoral cap/investment limits/pricing guidelines and other attendant conditions.
4.	NR	R	1. Transfer by way of sale on Stock Exchange; 2. Sale shall be as per the manner as specified by SEBI; 3. Transfer and pricing shall be in compliance with RBI guidelines; 4. Where equity instrument is held on non-repatriation basis aforementioned conditions shall not apply.
5.	R	NR	1. Transfer by way of sale; 2. Adherence of entry route/sectoral cap/investment limits/pricing guidelines and other attendant conditions.
6.	R holding equity instruments/Units on non-repatriation basis	NR	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 NR in a FY does not exceed USD 50K

# Transfer of Equity Instrument

S. No	Transferor	Transferee	Compliance/Conditions
7.	NRI / OCI or an eligible investor holding equity instruments or units on non-repatriation basis	NR	Transfer by way of gift with the prior approval of RBI <ul style="list-style-type: none"><li>• gift does not exceed 5% of the paid up capital of the Indian company.</li><li>• applicable sectoral cap in the Indian company is not breached.</li><li>• donor and the donee shall be "relatives" as per CA, 2013.</li><li>• Value of security transferred does not exceed the rupee equivalent of USD 50000</li></ul>
8.	NRI / OCI or an eligible investor holding equity instruments or units on non-repatriation basis	NRI/ OCI/eligible investor	Transfer by way of gift and the transferee shall hold it on non-repatriable basis.

# Pricing Norms – Evolution

## June 1, 2000 - APRIL 6, 2010- CCI

Not less than for:

- a. **Listed company:** as per SEBI guidelines
- b. **Unlisted company:** Fair value arrived by Chartered Accountant as per guidelines issued by the erstwhile Controller of Capital Issues i.e. higher of the value determined by:
  - a. Net Asset Value Method; and
  - b. Intrinsic Value Method.

## APRIL 7, 2010 - July 7, 2014- DCF

Not Less than:

- a. **Listed company:** as per SEBI guidelines
- b. **Unlisted company:** Fair valuation of shares done by a SEBI registered Category - I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India

## July 8, 2014 till date- IAP on ALP

Not less than:

- a. **Listed company:** as per SEBI guidelines
- b. **Unlisted company:** As per any internationally accepted pricing methodology on arm's length basis.

# Pricing of Instrument

## Fresh Issue

### Fresh Issue

- **Listed**  
As per SEBI Guidelines
- **Unlisted**
  - Not less than FV of shares arrived by CA/MB based on IAP on ALB
- Non applicability of pricing norms on MOA subscription shares. Only Face Value

## Preferential Allotment & Right Issue

### Preferential Allotment

- **Listed**  
Not less than the price at which preferential allotment can be made under SEBI guidelines
- **Unlisted**  
Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

### Right Issue

- **Listed**  
At a price determined by Company
- **Unlisted**  
shall not be at a price less than the price offered to persons resident in India

## Transfer of Shares

### Transfer R to NR

- **Listed**
  - Not less than the price at which preferential allotment can be made under SEBI guidelines
- **Unlisted**  
Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

### NR to R

- **Listed** –Not to exceed the price at which preferential allotment can be made under SEBI guidelines
- **Unlisted** Not to exceed FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

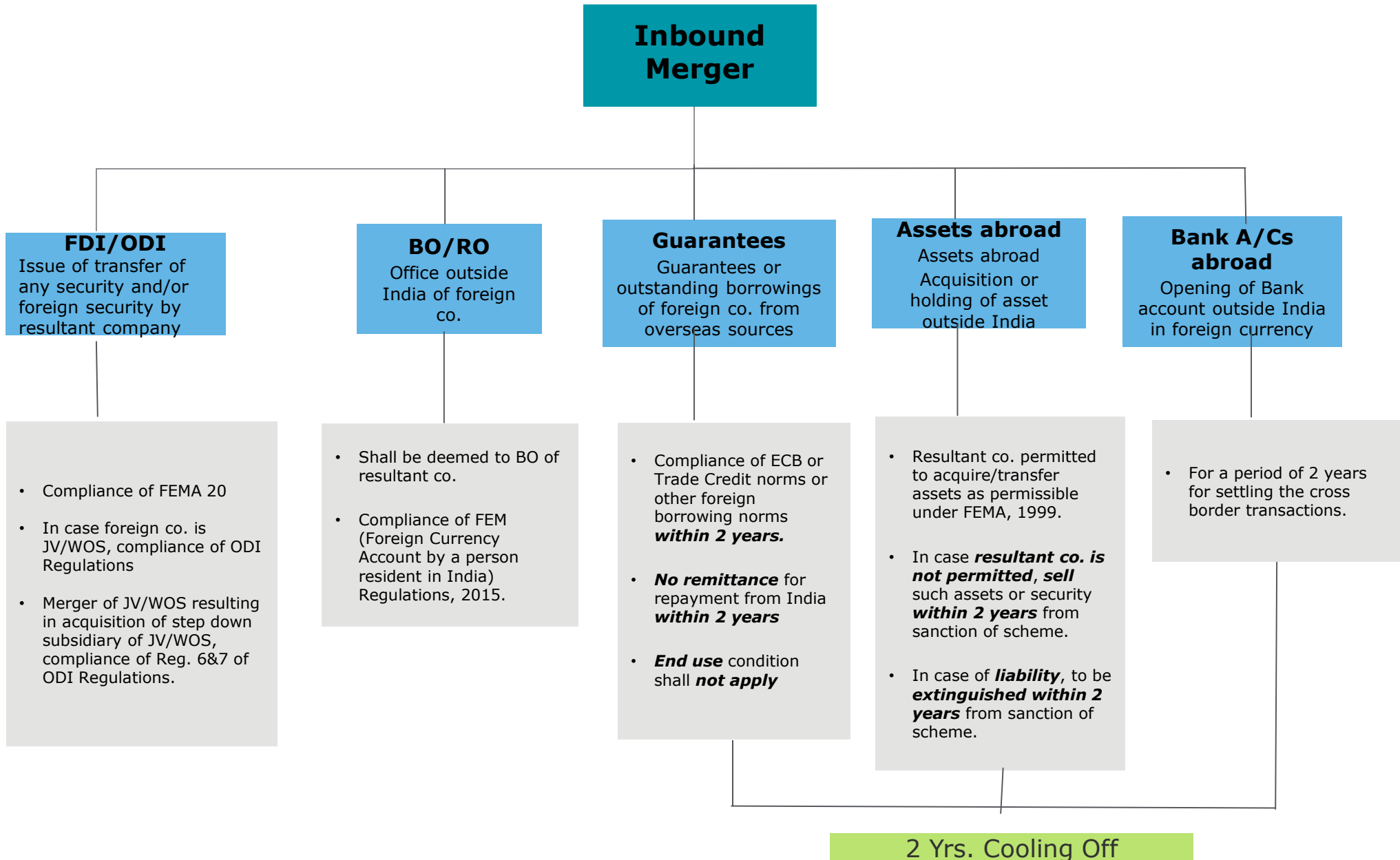
a. The price/conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA regulations.

b. Pricing guidelines for equity shares, CCPS, CCD with optionality clauses will be as per pricing/valuation guidelines issued by RBI from time to time.



# Overview on Cross Border Merger

# Inbound Merger



## Miscellaneous Compliances- FEMA

Regulatory actions w.r.t. non-compliance, contravention, violation to be completed prior to merger

Any transaction w.r.t. cross border merger shall be deemed to have prior approval of RBI as required under rule 25A Companies (Compromise, Arrangements and Amalgamations) Rules, 2016

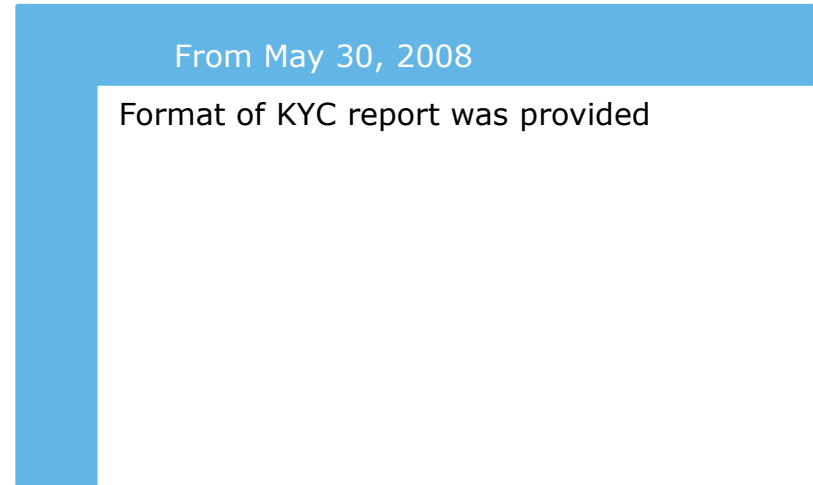
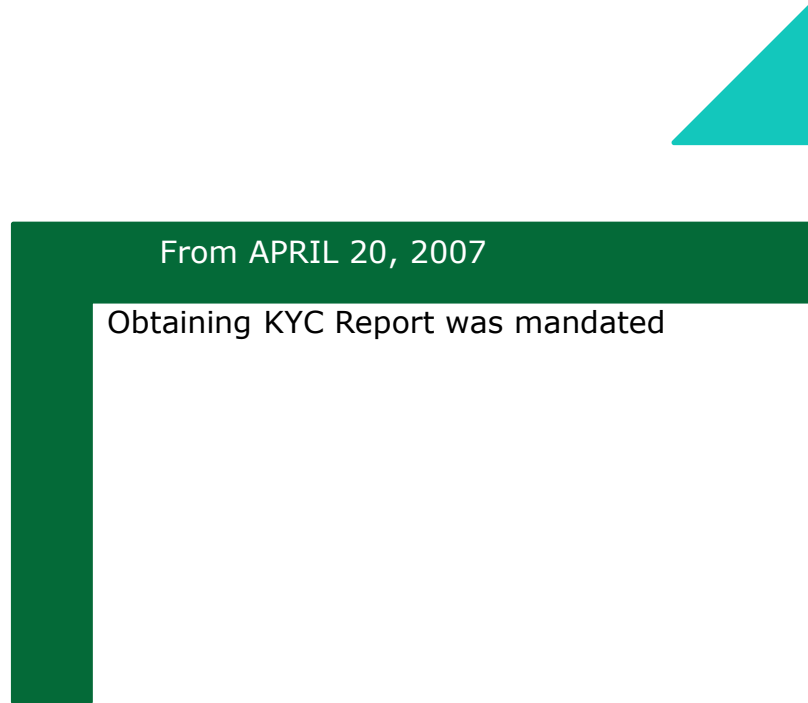
Certificate from MD, WTD and CS, if available, ensuring compliances to be submitted to NCLT.



A dimly lit office scene showing a business meeting. In the foreground, a desk is covered with financial documents, including bar charts and line graphs. A pair of glasses and a pen are resting on the papers. A glass of water is visible on the left. In the background, two men in suits are seated at a table, one holding a tablet. The overall atmosphere is professional and focused.

# Reporting under NDI Rules

# KYC - Evolution



# Reporting of Remittance- Evolution of Form ARF

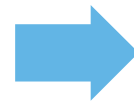
**June 1, 2000 - August 21, 2008**

- A report indicating:
  - i) Name and address of the foreign investors
  - ii) Date of receipt of funds and their rupee equivalent
  - iii) Name and address of the authorised dealer through whom the funds have been received, and
  - iv) Details of the Government approval, if any.
- Should be submitted directly to RBI, not later than 30 days from the date of receipt of the amount of consideration.



**August 22, 2008 - May 29, 2008- Introduction of Reporting Form**

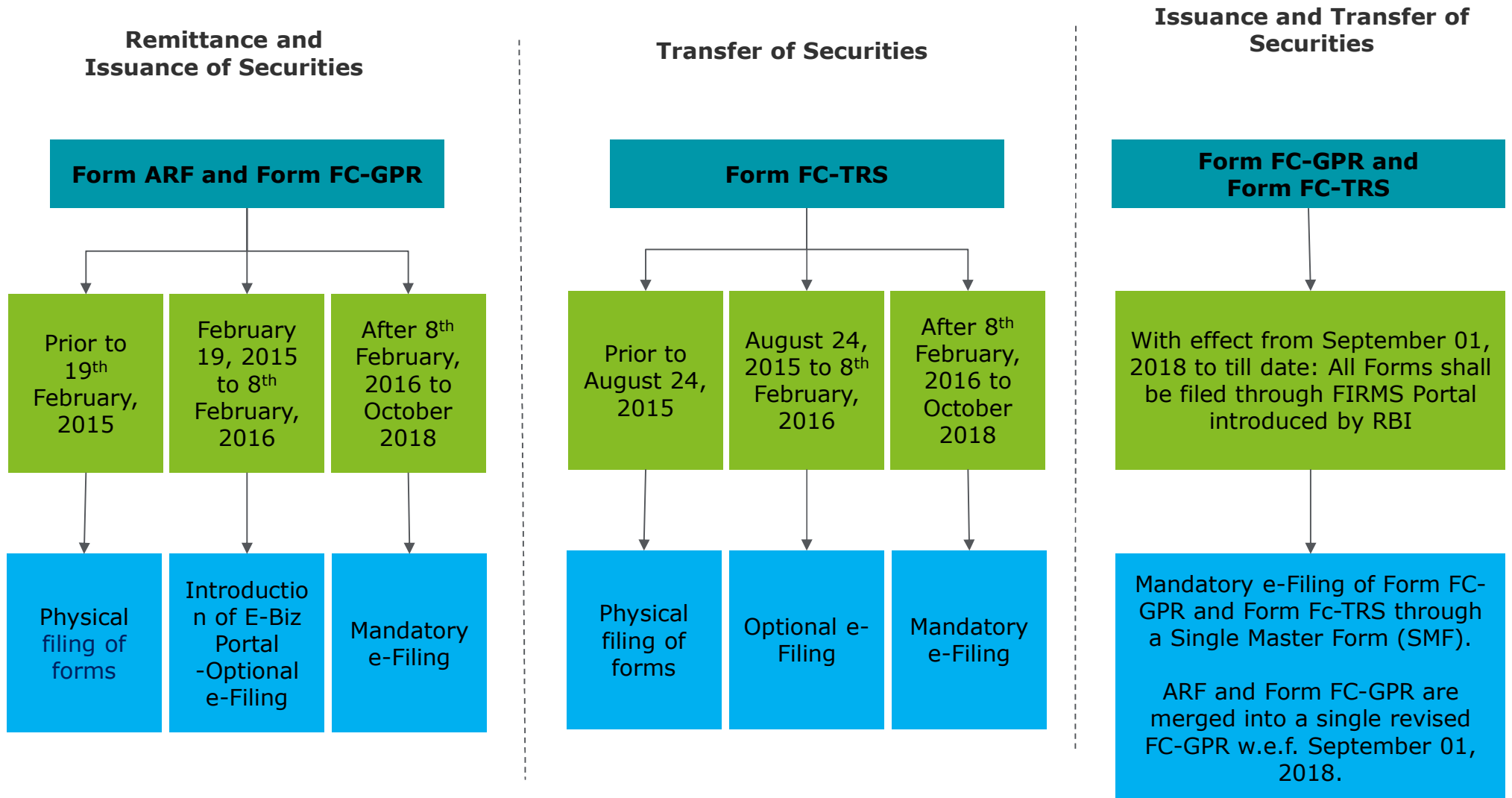
- Reporting of remittance was mandated in Form specified in Annex C to the Schedule I.



**May 30, 2008 till Sep 2018 - Filing of KYC with form and reporting through AD Bank**

- Reporting to be made together with:
  - a. Copy/ies of the FIRC/s evidencing the receipt of the remittance
  - b. KYC report on the non-resident investor.
- not later than 30 days from the date of receipt of the amount of consideration through AD Bank to RBI

# Mode of Reporting of Form FC-GPR and Form FC-TRS- Evolution



\*Further, Form LLP-I, LLP-II, Form CN, Form ESOP, Form DI and Form DRR are also to be filed online through SMF only.

# Annual Return on Foreign Liabilities and Assets- Evolution

**From April 20, 2007 till May 29, 2008- FC-GPR Part B**

Form FC-GPR Part B, which is an annual report of all investments made in the company during a financial year, with RBI by **June 30<sup>th</sup>**, every year



**From May 30, 2008 till March 14, 2011- Change in deadline of submission of Form FC-GPR Part B**

Form FC-GPR- Part-B, which is an annual report of all investments made in the company during a financial year, with RBI by **July 31<sup>st</sup>** every year



**From March 15, 2011 till June 2019- FLA Return submission through email**

Form FC-GPR Part-B replaced by FLA (**FLA**) to be submitted by **July 15<sup>th</sup>** of every year.



**From June 2019 to Till date: Online filing of FLA Return**

Annual Return on Foreign Liabilities and Assets to be filed through FLAIR Portal introduced for filing the FLA Return on or before **July 15<sup>th</sup>** of every year.



# Reporting under NDI Rules

S. No	Form	Particulars
1.	<b>FC-GPR</b>	<ul style="list-style-type: none"> <li>Reporting of issuance of equity instruments where such instruments are reckoned as FDI within 30 days of issuance of equity instrument.</li> </ul>
2.	<b>FLA</b>	<ul style="list-style-type: none"> <li>FLA for receipt of FDI in the previous year(s) including the current year to be submitted with RBI by <b>15<sup>th</sup> day of July</b> of each year.</li> </ul>
3.	<b>FC-TRS</b>	<ul style="list-style-type: none"> <li>Filing of return of transfer of equity instruments between NR (repatriable)/NR (non-repatriable) and NR (repatriable)/R.</li> <li>Onus on reporting is on R Transferor/R Transferee or NR (non-repatriable);</li> <li>Transfer of equity instruments by way of sale between a NR holding equity instruments on a non-repatriable basis and R is not required to be reported in Form FC-TRS;</li> <li>Transfer of equity instruments on stock exchange by a NR shall be reported by such person in Form FC-TRS;</li> <li>Transfer of equity instruments prescribed in rule9(6) (<b>Deferred consideration</b>), shall be reported in Form FC-TRS on receipt of <b>every tranche</b> of payment. The onus of reporting shall be on the resident transferor/ transferee;</li> <li>Transfer of 'participating interest / rights' in oil fields shall be reported Form FC-TRS.</li> <li>Form FC-TRS shall be filed within 60 days of transfer of equity instruments or receipt/ remittance of funds whichever is earlier</li> </ul>
4.	<b>ESOP</b>	<ul style="list-style-type: none"> <li>Filing of Form ESOP within 30 days of issuance of ESOP</li> </ul>

# Reporting under NDI Rules

S. No	Form	Particulars
5.	<b>DRR</b>	<ul style="list-style-type: none"> <li>Domestic Custodian shall report in Form DRR, the issue/ transfer of depository receipts within 30 days of close of the issue.</li> </ul>
6.	<b>LLP (I)</b>	<ul style="list-style-type: none"> <li>LLP to submit Form LLP (I) within 30 days of receipt of consideration for capital contribution and acquisition of profits</li> </ul>
7.	<b>LLP (II)</b>	<ul style="list-style-type: none"> <li>Disinvestment/ transfer of capital contribution or profit share between a R and NR (or vice versa) shall be filed within 60 days from the date of receipt of funds.</li> </ul>
8.	<b>LEC(FII)</b>	<ul style="list-style-type: none"> <li>AD Bank to report to RBI in Form LEC (FII) the purchase/ transfer of equity instruments by FPIs on the stock exchanges in India.</li> </ul>
9.	<b>LEC(NRI)</b>	<ul style="list-style-type: none"> <li>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</li> </ul>
10.	<b>Downstream Investment</b>	<ul style="list-style-type: none"> <li>An Indian entity or an investment vehicle making downstream investment in another Indian entity shall notify the <b>Secretariat for Industrial Assistance, DPIIT within 30 days of such investment</b>, even if equity instruments have not been allotted, along with the modality of investment in new / existing ventures (with / without expansion programme).</li> <li><b>Form DI:</b> 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 shall file <b>Form DI with the RBI within 30 days from the date of allotment of equity instruments.</b></li> </ul>
11.	<b>Form InVI</b>	<ul style="list-style-type: none"> <li>Investment vehicle which has issued its units to a NR shall file <b>Form InVI</b> within 30 days from the date of issue of units.</li> </ul>
12.	<b>CN</b>	<ul style="list-style-type: none"> <li>The Indian startup company issuing Convertible Notes to NR shall report such inflows to AD Bank in <b>Form CN</b> within 30 days of such issue.</li> <li>R, who may be a transferor or transferee of Convertible Notes issued by an Indian startup company shall report such transfers to or from a NR, as the case may be, in <b>Form CN</b> to AD Bank within 30 days of such transfer.</li> <li>(The AD Bank shall submit consolidated statements to RBI.</li> </ul>

## Requirement of filing Form FC TRS

Transferor	Transferee	Applicability
Resident	Resident	×
Resident	Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	✓
Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	Resident	✓
Non-Resident/ NRI /OCI/eligible investor <b>on non- repatriable</b> basis	Non-Resident( <i>including NRI/OCI on repatriable basis</i> )	✓
Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	Non-Resident/ NRI/OCI/eligible investor on non- repatriable basis	✓
Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	Indian Company purchasing shares pursuant to buyback/ capital reduction	✓
Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	Non-Resident ( <i>including NRI/OCI on repatriable basis</i> )	×
NRI /OCI/eligible investor on non- repatriable basis	Non- Resident( <i>including NRI/OCI on non- repatriable basis</i> )	×
Resident	Non- Resident( <i>including NRI/OCI on non- repatriable basis</i> )	×



# Discussion



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