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# FEMA – An overview of External Commercial Borrowings (ECB)

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**WIRC – Virtual FEMA Refresher Course**  
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# FEMA - An Overview

- **FEMA 1999**
  - Replaced the draconian Foreign Exchange Regulation Act 1973
  - Appointed date 1 June 2000
- **Aims of FEMA**
  - Facilitate external trade and payments
  - Promotion of foreign exchange markets
- **FEMA Rules / Regulations**
  - Rules notified by the Central Government
  - Regulations notified by the RBI
  - **Consultation betn. Government and RBI**
- **RBI website ([www.rbi.org.in](http://www.rbi.org.in))**
  - A P (Dir Series) - issued from time to time
  - Master Directions – updated now periodically
  - FAQs
- Every Transaction either Current (generally permissible unless prohibited) or Capital Account – (only if and as permitted)
- Several powers /responsibilities delegated to the **AD / Banker by RBI – their role / concurrence critical but primary responsibility is of constituents and their role is compliance & monitoring**

- **Borrowing & Lending in Foreign Currency or Rupees between R/NR is a Capital Account Transaction – permissible only as stipulated.**
- **ECB Framework:**
  - Section 6 of FEMA 1999
  - RBI Regulations: FEMA 1, FEMA 3(R) & FEMA 8 [as amended from time to time]
  - Current ECB Policy enacted vide RBI A.P. Dir Circular No. 17 dated 16 January 2019
  - RBI's A.P. DIR Circulars from time to time
  - RBI Master Direction (updated from time to time) [Earlier RBI Master Circulars]
  - RBI FAQs (updated from time to time)
  - Other items - Monthly ECB Data on RBI Website

***In view of complexities and voluminous content – Always refer, research, debate and then conclude...every time***

# ECB - Data (illustrative purposes only)

External Commercial Borrowings (ECBs) – Data from RBI Bulletins / Website			
<i>(Amount in US\$ Million)</i>			
Particulars	2018-19	2019-20	2020-21
<b>1 Automatic Route</b>			
1.1 Number of ECBs	999	1292	1063
1.2 Amount	28,387	38,011	26,801
<b>2 Approval Route</b>			
2.1 Number of ECBs	21	41	13
2.2 Amount	13,537	14,921	8,456
<b>3 Total (1+2) = Automatic + Approval Route</b>			
3.1 Number of ECBs	1020	1333	1076
3.2 Amount	41,924	52,932	35,257

# New Borrowing & Lending Regulations

- The Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and notified through Notification No. FEMA.3(R)/2018-RB dated December 17, 2018
- FEMA 3R replaced FEMA 3 (Borrowing and Lending in FCY) and FEMA 4 (Borrowing in Lending in INR)
- RBI Operationalized the New ECB framework vide AP (Dir Series) Circular 17 dt. 16 January 2019
- FEMA 3(R) - Use of Credit Card in India by PROI and outside India by PRII not treated as Borrowing or lending in INR /FCY
- New RBI Master Direction relates only to Borrowing & Lending in Foreign Exchange (i.e. INR not updated)
- No PRII can borrow or lend in FCY or INR from or to PROI except as provided in the Act/ Rules/ Regulations

## Key Changes in FEMA 3R / ECB Policy

- a) Definition of External Commercial Borrowings (ECB) and External Commercial Lending (ECL)
- b) Merger of Track I and Track II for FCY ECB
- c) Merger of Track III and Rupee Denominated Bond (RDB) as RD-ECB
- d) Expansion of Eligible Borrowers / Recognized Lenders
- e) Changes in MAMP
- f) All-in-costs ceiling and components changes
- g) Form 83 for LRN subsumed under new Form ECB
- h) PIOs replaced with OCIs for borrowing and lending in INR
- i) Late Submission Fees

# ECB / ECL definition

## Regulation 2(iv) of FEMA 3(R)

- “External Commercial Borrowings (ECB)” means borrowing by an eligible resident entity from outside India in accordance with framework decided by the Reserve Bank in consultation with the Government of India;

## As RBI’s Master Direction

- External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters *given below* apply in totality and not on a standalone basis

- Regulation 2(v) of FEMA 3(R) - “External Commercial Lending (ECL)” means lending by a person resident in India to a borrower outside India in accordance with framework decided by the Reserve Bank in consultation with the Government of India;

## Notes

- i. Regulation 2(x) of FEMA 3(R) - “Indian Entity” means a company incorporated in India under the Companies Act, 2013, as amended from time to time, or a Limited Liability Partnership formed and registered in India under the Limited Liability Partnership Act, 2008, as amended from time to time;
- ii. Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the DBR of RBI;
- iii. Compliance required also with the guidelines issued, if any, by the concerned sectoral or prudential regulator

# ECB Routes

## Automatic Route

- No approval required from RBI - ECB up to USD 750 million or equivalent per financial year irrespective of the category of borrower under automatic route
- Enter into Loan Agreement with Overseas Lender in accordance with ECB Policy
- Obtain LRN from RBI by filing Form ECB through AD Bank (earlier Form 83)
- Drawdown ECB only after LRN
- Monthly filings with RBI through AD Bank in Form ECB-2
- Includes entities under Investigation under FEMA on without prejudice basis (RBI/ AD Bank to inform the relevant agencies of the ECB)

## Approval Route

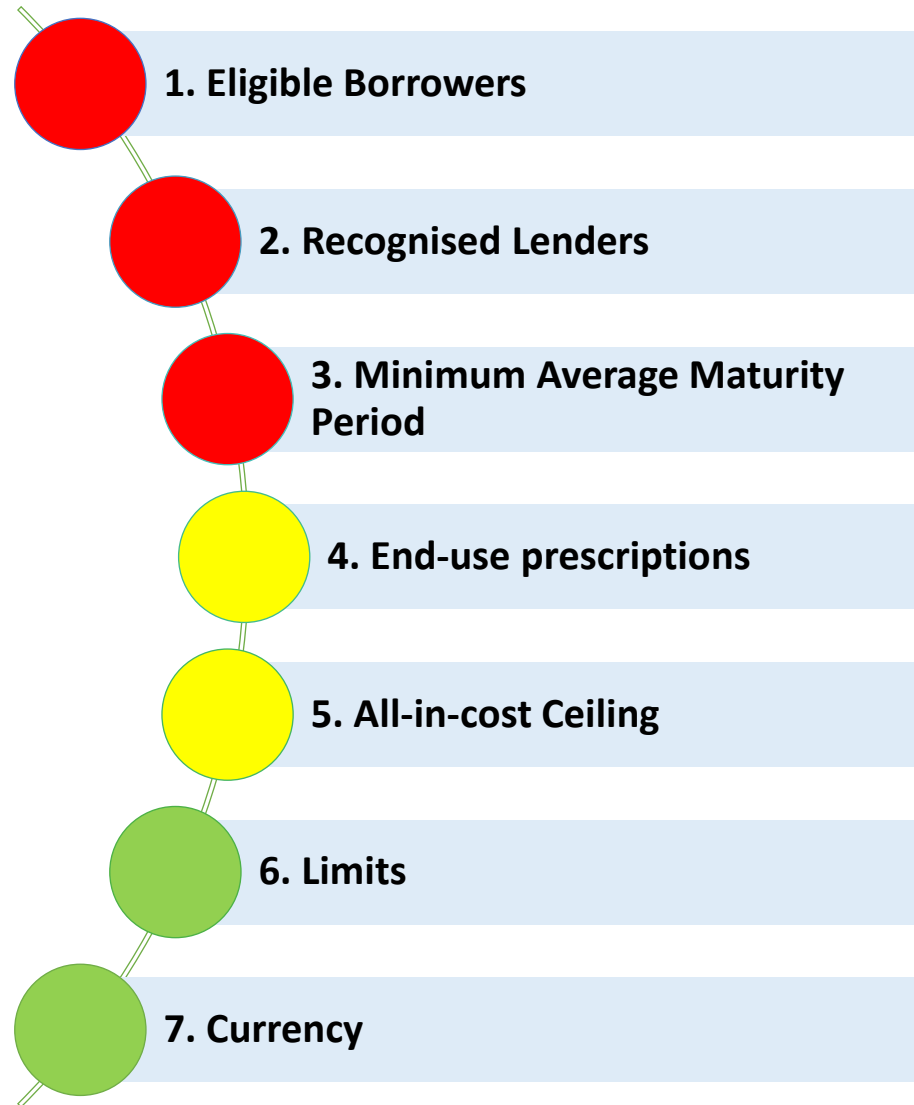
- Prior application to the RBI through the AD Bank (Form ECB)
- Including ECB exceeding threshold of USD 750 Mn per financial year under Automatic Route
- Recommendation of RBI Empowered Committee (Internal RBI & External Members) for application above certain threshold and final decision by RBI
- Factors: merits, macroeconomic situations and overall guidelines
- Post approval, obtain LRN, monthly filings and other compliances as under the Automatic Route
- ***Not all cases outside Automatic Route fall under Approval Route***

**Notes:** This PPT only deals with ECB and Trade Credits. The provisions in respect of other FCY borrowings (by AD Bank, Financial Institutions, Individuals – PRII, Students, etc.,) and FCY Lending as well as those for borrowing and lending in INR between PRII and PROI are separate than the ECB framework

# Cumulative Conditions for ECB

## Cumulative conditions for ECB

- i. Currency – INR & FCY
- ii. Forms of ECBs
- iii. Eligible Borrowers
- iv. Recognized Lenders
- v. MAMP
- vi. All-in-cost ceilings
- vii. other costs
- viii. End-use (Negative List)
- ix. Exchange Rate for conversion
- x. Hedging provisions
- xi. Change in Currency of Borrowings
- xii. Limits and Currency
- xiii. Various other conditions





# Forms of ECB

## FCY ECB (Any freely convertible foreign currency)

- Loans including bank loans
- Floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments);
- Trade credits beyond 3 years;
- FCCBs
- FCEBs
- Financial Lease

## INR ECB

- All instruments / items listed for FCY ECB including trade credits
- Preference shares (other than fully and compulsorily convertible instruments)
- Plain vanilla Rupee denominated bonds ('RDBs') issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.

### Notes

- i. The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors / NRIs – FEMA Debt Instrument Rules .
- ii. Track I and II of earlier ECB policy merged with FCY ECB
- iii. Track III and RBD of earlier ECB policy merged into INR ECB

# Eligible Borrowers and Recognised Lenders

## Eligible Borrowers

- All entities eligible to receive FDI
- Further, following **entities** are also eligible to raise ECB:
  - a) Port Trusts;
  - b) Units in SEZ;
  - c) SIDBI;
  - d) EXIM Bank and
  - e) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies / trusts / cooperatives and Non-Government Organizations (**this category permitted only to raise INR ECB**).

**Note: RBI FAQ Qn 5 - LLPs not eligible borrower as not eligible to receive FDI (LLP eligible to receive Foreign Investment under FEMA NDI [earlier FEMA 20(R)])**

## Recognised Lenders

- The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECBs.
- Additionally, the following are also recognised lenders:
  - Multilateral and Regional Financial Institutions where India is a member country;
  - Individuals can only be permitted if they are foreign equity holders or for subscription to bonds / debentures listed abroad; and
  - Foreign branches / subsidiaries of Indian banks only for FCY ECB (except FCCBs and FCEBs)
  - Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for RDBs issued overseas. (underwriting not allowed by foreign branches/subsidiaries of Indian banks for issuances by Indian banks)

# Minimum Average Maturity Period ('MAMP')

**MAMP for ECB is 3 years (including any put and call option to be only thereafter) except for specified categories mentioned below for which separate MAMP is prescribed.**

Sr.	Category	MAMP
a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per FY	1 year
b)	ECB raised from foreign equity holder for (i) working capital purposes, general corporate purposes; or (ii) for repayment of Rupees loans	5 years
c)	ECB raised for (i) working capital purposes or general corporate purposes; or (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure; or (ii) on-lending by NBFCs for the same purpose	7 years
e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure; (ii) on-lending by NBFCs for the same purpose	10 years

For categories mentioned at (b) to (e) – i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks; ii) the prescribed MAMP will have to be strictly complied with under all circumstances.

Foreign equity holder means: a) Direct foreign equity holder of minimum 25% equity holding by the lender in the borrowing company; b) Indirect equity holder with minimum 51%; or c) Group company with common overseas parent.

**Note: Foreign Equity Holding condition to be fulfilled throughout the tenure of ECB**

**RBI FAQ No. 12 – Illustration of calculation of MAMP**

[[https://rbidocs.rbi.org.in/rdocs/Content/PDFs/12EC160712\\_A6.pdf](https://rbidocs.rbi.org.in/rdocs/Content/PDFs/12EC160712_A6.pdf)]

# ● MAMP - ECB Liability : Equity Ratio

## ECB Liability : Equity Ratio

- In case of FCY ECB from **direct foreign equity holder**  
- Ratio not to exceed 7:1 .
- Not applicable if outstanding ECB (including proposed ECB) is upto USD 5 Mn / its equivalent
- Proposed ECB to be added to all the outstanding ECB for ECB Liability : Equity ratio – except ECB raised for refinancing
- Equity includes - paid-up capital plus **free reserves** (incl. proportionate share premium received in FC) as per latest audited balance sheet.
- *Note Where there is more than one foreign equity holder in the borrowing company, the portion of the share premium in foreign currency brought in by the lender(s) concerned shall only be considered for calculating the ratio. The ratio will be calculated as per latest audited balance sheet.*
- Borrowing entities also to be governed by guidelines on debt equity ratio issued, if any, by the sectoral or prudential regulator concerned

*RBI FAQ No. 16 - Non-convertible Preference Shares not to be included in Equity for ration calculations*

*Whether CCPS to be included in the Ratio?*

*Whether CCDs to be included in the Ratio?*

*Ratio does not apply to INR ECB and INR ECB should be excluded from denominator as well for computing the Ratio*

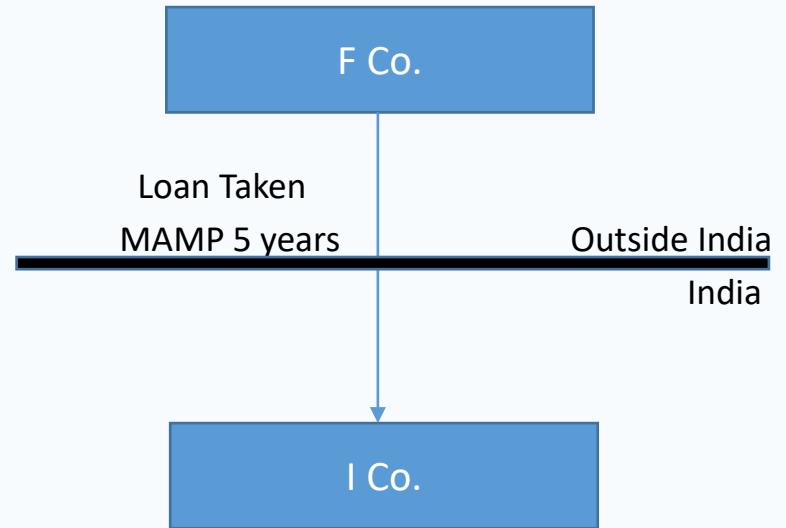
*Ratio should not apply to ECB raised from Indirect Foreign Equity Holder & and Group Company with common overseas Parent*

*RBI FAQ No.18 – Any debit balance in the P&L as per latest Audited FS to be deducted from Equity for the Ratio*

# Case Study 1

- F Co. is an eligible lender and I Co. is an eligible borrower
- Under the erstwhile FEMA regulations, I Co. raises an ECB of USD 100 million for MAMP of 5 years
- Under the new ECB framework, whether the MAMP for the above purpose can be revised from 5 years to 3 years?

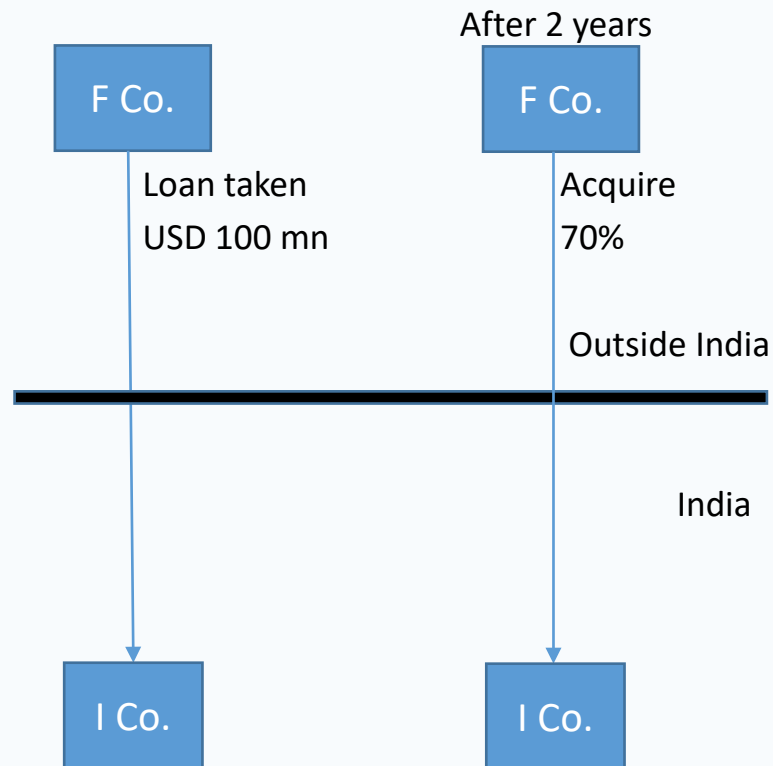
**Whether MAMP can be revised to 3 years?**



# Case Study 2

- F Co. is an eligible lender and I Co. is an eligible borrower
- F Co. and I Co. are not related
- I Co. raises an ECB of USD 100 million for working capital purpose for MAMP of 10 years
- Post 2 years, F Co. acquires 70% holding in I Co. and has become foreign equity holder (Direct)

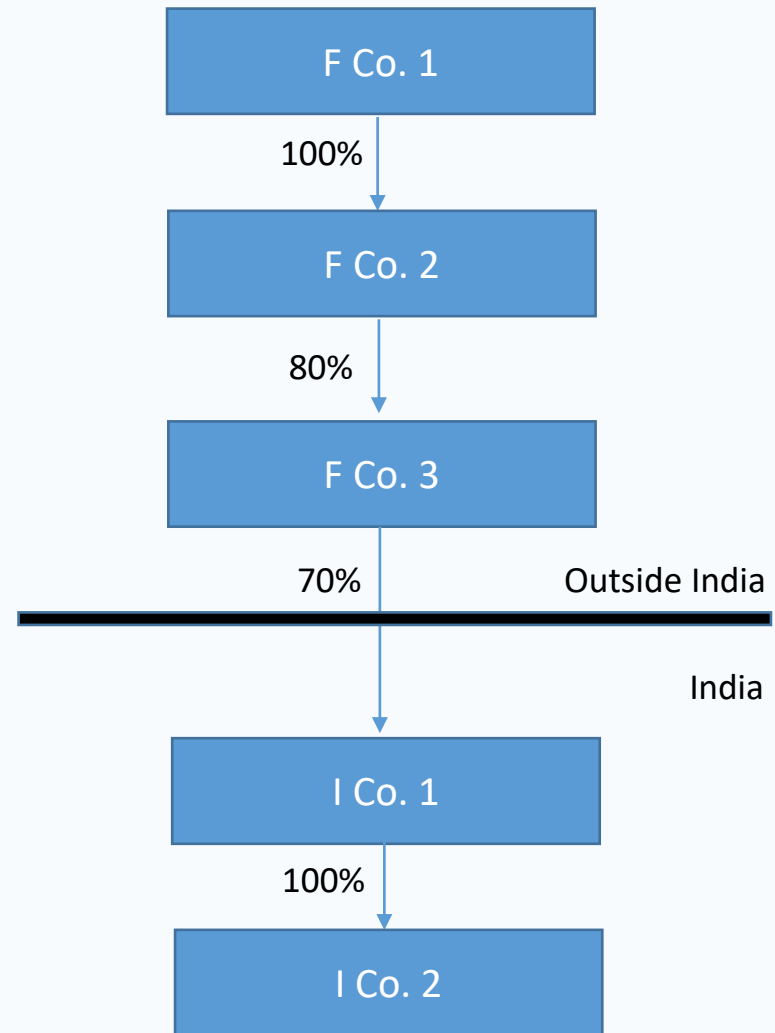
**Whether the prescribed MAMP can be reduced to 5 years post acquisition?**



# Case Study 3

- F Co. 3 is an eligible lender and I Co.1 & I Co. 2 are both eligible borrowers
- F Co. 3 is the ultimate holding company of the Group.
- Issue – how to calculate Indirect equity?

- a) How many levels to be considered / permissible for Indirect Equity Holder?**
- b) Whether ECB permissible to I Co 1. from F Co. 1?**
- c) Whether I Co. 2 can avail ECB from F Co. 2?**



## Regulation 2(xiv) - FEMA 3R

- “Restricted End Uses” shall mean end uses where borrowed funds cannot be deployed and shall include the following:
  - a. In the business of chit fund or Nidhi Company;
  - b. Investment in capital market including margin trading and derivatives;
  - c. **Agricultural or plantation activities;**
  - d. **Real estate activity or construction of farmhouses;**
  - e. **Trading in Transferrable Development Rights (TDR), where** TDR shall have the meaning as assigned to it in the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2015.

**Note: The above will apply to ECB as well all borrowing / lending in Rupees**

## As RBI’s Master Direction (ECB)

- The negative list, for which the ECB proceeds cannot be utilised, would include the following:
  - a. **Real estate activities.**
  - b. Investment in capital market.
  - c. **Equity investment.**
  - d. Working capital purposes, except in case of ECB mentioned at (b) and (c) of Slide 11.
  - e. General corporate purposes, except in case of ECB mentioned at (b) and (c) of Slide 11.
  - f. Repayment of Rupee loans, except in case of ECB mentioned at (d) and (e) of Slide 11.
  - g. On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at (c), (d) and (e) of Slide 11.



## Real Estate – FEMA 3R

““Real Estate Activity” means any activity involving

- (i) own or leased property for buying, selling and renting of commercial and residential properties or land; and also includes
- (ii) activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate.

Excluding

- i. development of integrated township,
- ii. purchase/ long term leasing of **industrial land** as part of new project/modernisation or expansion of existing units; or
- iii. any activity under ‘infrastructure sub-sectors’ as given in the HM List of Infrastructure sub-sectors approved by the Government of India vide Notification F. No. 13/06/2009-INF, **as amended/ updated from time to time**

## As RBI’s Master Direction

““Real Estate Activity” means any activity involving

- (i) own or leased property for buying, selling and renting of commercial and residential properties or land; and also includes
- (ii) activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate.

Excluding

- i. Construction / development of industrial parks / **integrated township / SEZ**
- ii. purchase/ long term leasing of **industrial land** as part of new project/modernisation or expansion of existing units or
- iii. any activity under ‘infrastructure definition

***For the purpose of ECB, “Exploration, Mining and Refinery” sectors are deemed as in the infrastructure sector***

# Key RBI FAQs on End-Use

*Q. 23. Is the reimbursement of expenditure incurred in the past a permissible end-use under the ECB framework?*

**Ans: This is not a permissible end-use under the ECB framework.**

*Q. 24. Can ECB be availed of for making equity investment domestically or buying goodwill?*

**Ans: No. Equity investment either directly or indirectly (through purchase of goodwill) is not permitted.**

*Q. 25. Can ECB be availed of for making contribution in an LLP?*

**Ans: No, it is not permitted.**

*Q. 27. Can ECB proceeds be used by eligible resident borrowers for investment in their overseas JV/WOS as per the extant overseas investment guidelines?*

**Ans: Yes. ECB proceeds can be utilized for overseas investment as permitted under the overseas investment guidelines.**

*Q. 28. Is on-lending treated as working capital for borrowers who are engaged in the business of on-lending?*

**Ans: For the purpose of ECB, on-lending by borrowers who are engaged in the business of on-lending is not treated as working capital. Additionally, the borrowers shall need to adhere to the guidelines issued by the concerned sectoral or prudential regulator in this regard.**

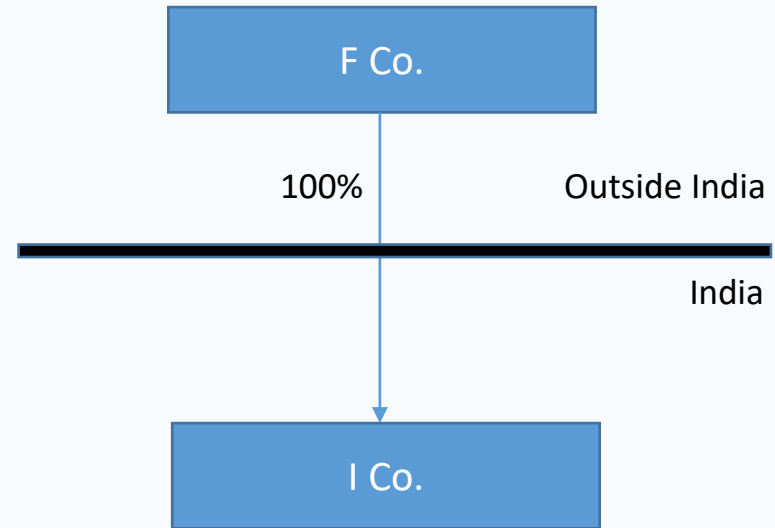
*Q. 29. Can the housing finance companies raise ECB for on-lending to individual borrowers exclusively for flats/units in the affordable housing projects as defined in Harmonised Master List of Infrastructure Sub-sectors notified by Government of India?*

**Ans: Yes.**

# Case Study 4

- F Co. is an eligible lender and I Co. is an eligible borrower

- I Co. intends to avail ECB from its holding F Co. for acquiring non agricultural land for purpose of using it as industrial land in new project. Is this permissible?**
- Whether I Co. can use ECB proceeds for acquiring agricultural land and then converting into non agricultural land for an industrial project?**



# All-in-Cost ceiling & Other Costs

- **All in costs = Benchmark rate plus 450 bps spread**
  - **FCY ECB Benchmark rate:** 6 months LIBOR or 6 months interbank interest rate applicable to currency of borrowing for e.g. EURIBOR
  - **INR ECB / Trade credit Benchmark rate:** Prevailing yield of the Government of India securities of corresponding maturity.
  - For Fixed rate loans, the swap cost plus spread should not be more than the floating rate plus applicable spread
- **All-in-cost Components –**
  - Rate of Interest, other fees, expenses, charges, guarantee fees, Export Credit Agency charges whether in FCY or INR but does not include:
    - Commitment fees
    - Withholding Tax paid in Indian Rupees
- **Other costs: Prepayment charge/ Penal interest**, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and **will be outside the all-in-cost ceiling.**
- Additionally, for **FCCBs**, the issue related expenses should not exceed 4 per cent of the issue size and in case of private placement, these expenses should not exceed 2 per cent of the issue size, etc.
- Various components of all-in-cost have to be paid by the borrower without taking recourse to the drawdown of ECB (also relevant for Trade Credits) i.e. **ECB / Trade Credit proceeds cannot be used for payment of interest / charges [RBI FAQs 22: permitted for ECB for project finance provided interest is during construction period and capitalized by borrower}**

*RBI FAQs Q. No. 21 -All-in-cost should be within the applicable ceiling at all times, for e.g., giving interest in the first year and much lower in second year so as to comply on an average is not permitted*

- **Individual limit of borrowing**

- ECB up to USD 750 million or equivalent per financial year irrespective of the category of borrower under automatic route
- Any amount exceeding the above – Approval Route

- **Currency:**

- ECB can be raised in any freely convertible foreign currency as well as in Indian Rupees as stipulated

- **Change of currency of ECB**

- ECB from one convertible foreign currency to any other convertible foreign currency as well as to INR is freely permitted (at an exchange rate prevailing on the date of agreement or less than that rate with consent of ECB Lender).
- Change of currency from INR to any foreign currency is, however, not permitted.
- In respect of FCY ECB, for change in foreign currency, the exchange rate to be the rate prevailing on the date of agreement
- In respect of FCY ECB, for conversion to INR, the exchange rate shall be the rate prevailing on the date of settlement

# ECB - Parking of ECB proceeds

## I. Parking of ECB proceeds Abroad

- ECB for foreign currency expenditure can be parked abroad pending utilization;
- Till utilization, can be invested in liquid assets
  - Certificate of deposits or other products offered by Banks rated not less than AA (-) by Standard and Poor/ Fitch IBCA / Aa3 Moody's)
  - Treasury bills / other monetary instruments of one year maturity having minimum rating as indicated above,
  - Deposits with foreign branches / subsidiaries of Indian banks abroad)

## II. Parking of ECB proceeds Domestically

- ECB for Rupee expenditure to be immediately repatriated to India;
- Can be invested in term deposits for maximum period of 12 months cumulatively
- The term deposit to be kept in unencumbered position
- Unutilized ECB proceeds drawn down on or before 1 March 2020 can be parked in term deposits with AD Category-I banks in India prospectively for an additional period up to 1 March 2022 [RBI AP (Dir Series) Circular No 1 dated 7 April 2021 on account of Covid-19].
- Funds have to be shifted to non-interest bearing account or returned back to the lender beyond 12 months /permitted period [ RBI FAQs No. 43 – FD cannot be renewed after completion of the maximum permitted period

# Refinancing & Conversion

## Refinancing existing ECB

- Refinancing of existing ECB by raising fresh ECB is permitted provided:
  - No reduction in outstanding maturity of the original borrowing;
  - all-in-cost of fresh ECB to be lower than all-in-cost of existing ECB
  - Multiple borrowings: weighted outstanding maturity / weighted average costs
- Refinancing of ECBs raised under previous ECB framework – permitted subject to Borrower being an Eligible Borrower under extant framework
- Fresh ECB is not availed from overseas branches / Subsidiaries of Indian banks except for highly rated corporates (AAA) and Maharatna / Navratna PSUs

## Converting ECB into equity: Permitted subject to:

- Activity of borrowing company covered under automatic route or required government approval is obtained for FDI;
- Conversion not to breach applicable sectoral cap under FDI policy;
- Compliance with pricing guidelines (FV on date of conversion);
- Consent of other lenders;
- Full / part conversion of ECB permitted
- Conversion at exchange rate on the date of agreement or any lesser rate with mutual consent
- If Borrower has other credit facilities in India, guidelines of RBI DBR complied with

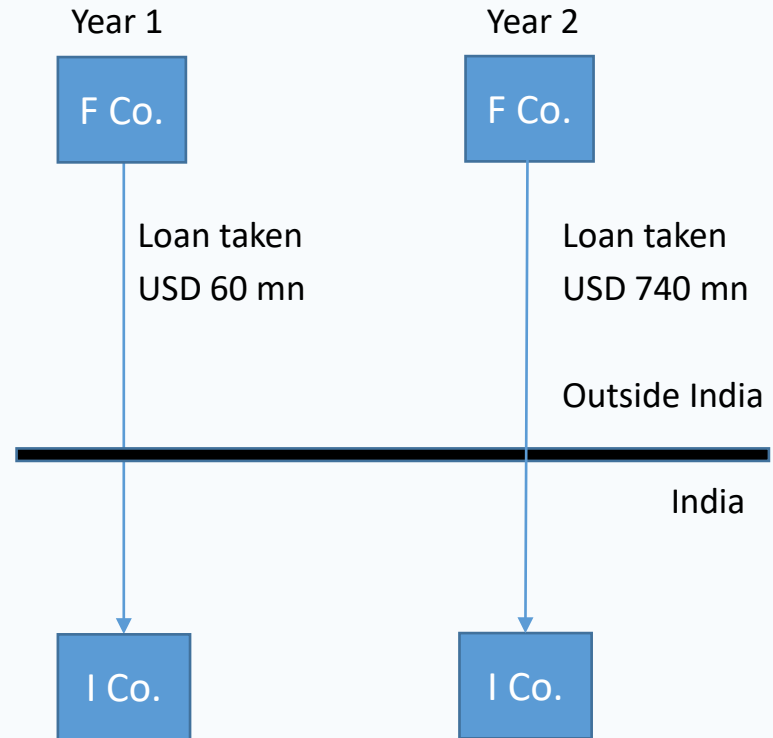
**RBI FAQs No. 26 - Refinancing of INR ECB with FCY ECB is not permitted.**

**RBI FAQ No. 41 - ECB interest can be converted into equity subject to applicable conditions**

# Case Study 5

- F Co. is an eligible lender and I Co. is an eligible borrower
- In Year 1, I Co. raised ECB of USD 60 million.
- In Year 2, I Co. raised ECB of USD 740 millions
- In Year 2, I Co. proposes to refinance its earlier ECB raised in Year 1 of USD 60 millions

**Whether the refinancing of ECB of USD 60 mn will be considered as exceeding the limit of ECB of 750 USD mn per financial year and therefore require prior RBI approval?**

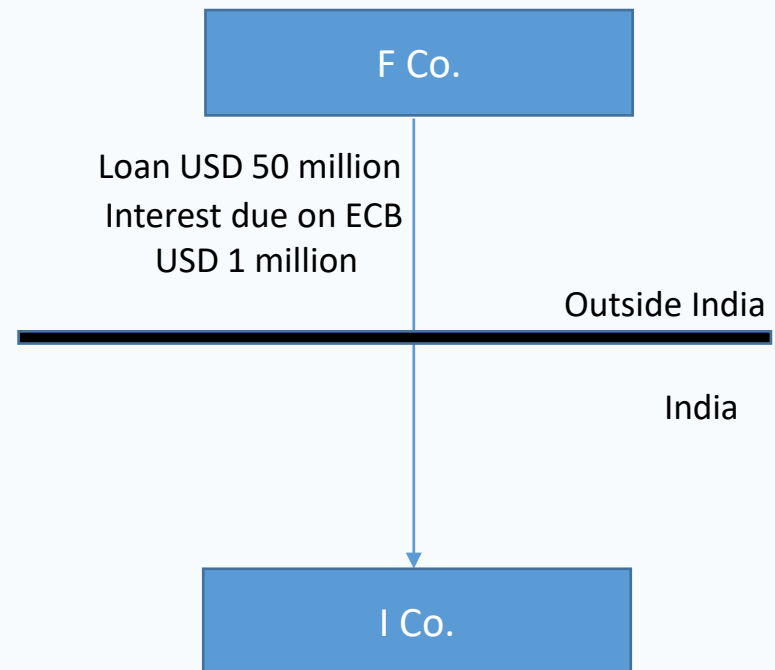




# Case Study 6

- F Co. is an eligible lender and I Co. is an eligible borrower
- Due to COVID impact, I Co is not able to comply with its original repayment schedule and interest obligations
- F Co. wants to convert the loan along with interest into equity before MAMP of say 3 years.

- a) Whether conversion into equity before MAMP is permissible?**
- b) If I Co. wants to write off the interest amount, is it permissible?**



# Hedging Requirements

## Hedging Framework: Foreign Currency Denominated:

- To follow guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator
- For Infrastructure space companies
  - Requires board approved risk management policy and Mandatory hedge of 70% of ECB exposure if average maturity is less than 5 years
  - AD Bank to verify the above and report to RBI through ECB 2 returns.
  - Exception to Oil Marketing Companies as stipulated (Special Scheme not discussed here)

## Operational aspects of Hedging:

- **Coverage:** Hedge required to cover principal and interest from the day liability created in books of borrower
- **Tenor and rollover:** Minimum tenor of 1 year of financial hedge required with periodic rollover to ensure ECB exposure is not unhedged at any point
- **Natural Hedge:** Natural hedge, in lieu of financial hedge, to be considered to the extent of offsetting projected cash flows / revenues in matching currency, net off of all projected outflows, within same accounting year

## INR Denominated

- Lender's hedging through permitted derivative products with AD Category I banks in India
- Foreign Lender can also access domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on back to back basis

# Security / Creation of charge

## Security for Raising ECB

AD Banks are permitted to allow creation of charge on i) immovable assets, ii) movable assets, iii) financial securities, and iv) issue of corporate and/or personal guarantees in favor of overseas lender / security trustee, to secure the ECB to be raised / raised by the borrower. The creation of security to be co-terminus with underlying ECB subject to security clause in Loan Agreement and NOC from Indian Lenders

## Creation of Charge on Immovable Property

- Security shall be subject to FEMA (Acquisition and Transfer of Immovable Property in India) Regulation 2000;
- Permission should not be construed as permission to acquire immovable property by overseas lender / security trustee;
- In case of enforcement / invocation, property should be sold to person resident in India and proceeds shall be repatriated to liquidate the outstanding ECB

## Creation of Charge on Movable Assets

In case of enforcement / invocation of charge, the claim of the lender will be restricted to outstanding claim against ECB. (NOC from Indian lenders for moving encumbered movable assets outside India)

## Creation of Charges over Financial securities:

Below arrangements are permitted:

- Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower
- Pledge on other financial securities, viz. bonds and debentures, mutual funds etc. in the name of ECB borrower / promoter
- Security interest over all current and future loan assets and all current assets of the borrower
- In case of invocation of pledge, transfer as per extant FDI / RFPI Policy / **FEMA 20R (now NDI Rules)**

<b>Issue of Corporate and Personal Guarantee - Possible subject to below conditions / documents:</b>	<b>Issuance of Guarantee, etc. by Indian Banks and Financial Institutions</b>
<ul style="list-style-type: none"> <li>• A copy of Board Resolution with details specified.</li> <li>• Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.</li> <li>• Compliance with the Foreign Exchange Management (Guarantees) Regulations, 2000.</li> <li>• ECB can be credit enhanced / guaranteed / insured by overseas party if it is recognised lender under extant ECB guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• Issuance of Guarantee, Letter of credit, letter of undertaking or letter of comfort by Indian banks, All India Financial Institutions and NBFCs (financial intermediaries) relating to ECB is not permitted.</li> <li>• Indian financial intermediaries (Banks, NBFCs or All India Financial Institutions) cannot invest in FCCBs / FCEBs in any manner.</li> </ul>

### **Non-resident guarantee for domestic fund based and non-fund based facilities availed by Residents:**

- The non-resident guarantor may discharge the said liability of Resident borrower by: i) payment out of rupee balance held in India or ii) by remitting the funds to India or iii) by debit to FCNR(B) / NRE account
- Non-resident guarantor may enforce his claim against resident borrower to recover the amount and on recovery amount can be repatriated subject to certain conditions
- General permission to resident borrower to make payment to non-resident who has met the liability under a guarantee subject to conditions

# Reporting Requirements

**Form ECB:** Borrower is required to submit Form ECB in duplicate with AD Bank. AD Bank will forward one copy to the Director, Balance of payments statistics division, Department of Statistics and Information Management, RBI.

**Loan Registration Number:** Any draw-down in respect of ECB as well as payment of any fee / charges for ECB should happen only after obtaining LRN from RBI.

**Changes in terms and conditions of ECB:** – revised Form ECB should be submitted with RBI DSIM within **7 days** of such changes

**Monthly filings:** Borrower to submit Form ECB-2 on monthly basis with AD Bank so as to reach to DSIM within **7 working days** from the close of the month. All filings up to date for past ECB / FCCB before new ECB / FCCB, etc. It requires compliance certificate from CS / CA apart from that of AD-Bank.

## **Reporting on Conversion of ECB into equity :**

- Partial Conversion – Converted portion to be reported in Form FC-GPR and appropriately reported in monthly Form ECB2 – “ECB Partially converted into Equity”
- Full Conversion – Entire portion to be reported in Form FC-GPR and appropriately reported in monthly Form ECB2 – “ECB fully converted into Equity”
- For conversion of ECB into equity in phases, reporting through ECB 2 Return will also be in phases.

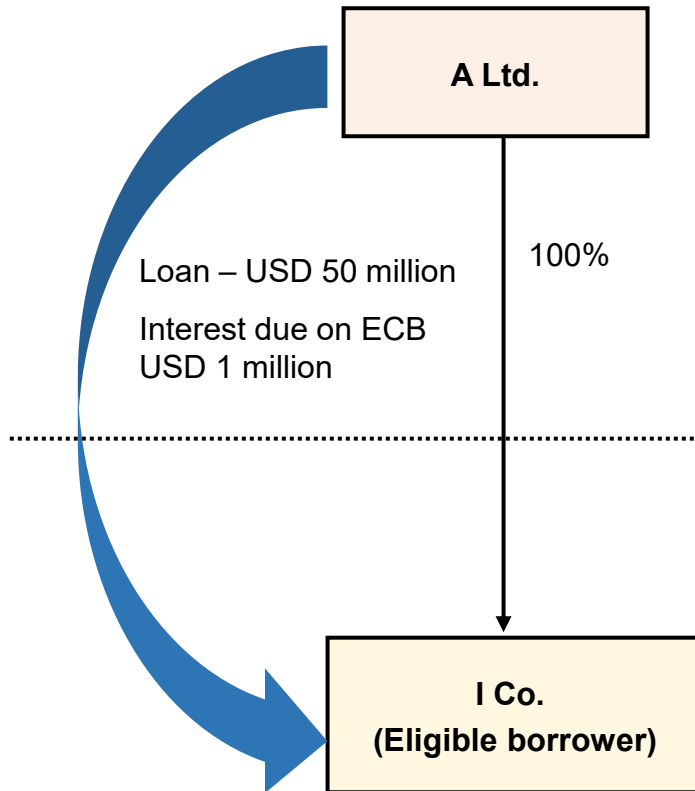
# Late submission fees (LSF)

Delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns can be regularized by payment of LSF as under:

Sr. No.	Type of Return / Form	Period of delay	Applicable LSF
1	Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
2	Form ECB 2 / Form ECB	Up to three years from due date of submission / date of drawdown	INR 50,000 per year
3	Form ECB 2 / Form ECB	Beyond three years from due date of submission / date of drawdown	INR 100,000 per year

- LSF allows regularizing reporting delays without having to go to RBI for compounding (RBI FAQ 40 – applies to Nil returns)
- Non-payment of LSF treated as a contravention of reporting provision and subject to compounding or adjudication as provided in FEMA
- Form ECB and Form ECB 2 reporting contraventions treated separately.
- RBI FAQ No. 39 – LSF applicable to ECB2 submitted from February 2019 and onwards (re January 19 transactions)

# Case Study 7



- I Co. is eligible Borrower as per the ECB Guidelines
- A Ltd is eligible lender as per ECB Guidelines
- I Co. has not submitted ECB 2 Return with the AD Bank within the prescribed timelines for certain reasons.
- I Co. now wants to make remittance for loan towards interest / principal.

Whether AD Bank will allow remittance if I Co. gives satisfactory reasons for non filing of ECB 2 Return?

# Powers delegated to AD Banks (illustrative) *(not for FCCB / FCEB)*

<ul style="list-style-type: none"><li>i. Change / Modification in Drawdown / Repayment Schedule</li><li>ii. Change in Currency of Borrowing</li><li>iii. Change in AD Bank (subject to no objection certificate from earlier AD Bank)</li><li>iv. Change in name of borrower Company</li><li>v. Transfer of ECB (on re-organization at the borrower level – merger/demerger/ acquisition as per law)</li><li>vi. Change in Recognised Lender</li><li>vii. Change in name of Lender</li></ul>	<ul style="list-style-type: none"><li>viii. Prepayment of ECB (provided MAMP is maintained)</li><li>ix. Cancellation of LRN (only if no draw-down)</li><li>x. Change in End-use (only for Automatic Route)</li><li>xi. Change in all-in-costs</li><li>xii. Reduction in amount of ECB</li><li>xiii. Refinancing of existing ECB (provided the fresh ECB is raised at a lower all-in-cost and residual maturity is not reduced)</li><li>xiv. Extension of matured but unpaid ECB (subject to conditions)</li></ul>
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While permitting changes, AD Bank should ensure –

- Revised average maturity / all-in-cost are in conformity with applicable guidelines
- RBI DBR Prudential guidelines complied for credit facilities from Indian Banks or their Overseas Branches / Subs
- ECB continues to be in compliance with applicable guidelines
- Changes to be communicated in Form ECB / ECB-2 within 7 days of the changes being effected.



# ECB Rules for Start Ups

<b>Eligibility</b>	<ul style="list-style-type: none"> <li>An <b>entity</b> recognised as a Startup by the Central Government as on date of raising ECB</li> </ul>
<b>Amount, Average Maturity &amp; All-in-costs</b>	<ul style="list-style-type: none"> <li>Amount - USD three million or equivalent per financial year either in INR or any other convertible foreign currency or a combination of both</li> <li>Ratio - Leverage ratio and ECB Liability – Equity Ratio is not applicable.</li> <li>Maturity - Minimum average maturity period of 3 years</li> <li>All-in-cost - Mutually agreed between the borrower and lender</li> </ul>
<b>Recognised Lender</b>	<ul style="list-style-type: none"> <li>Lender / investor to be a resident of FATF compliant country</li> <li><b>Not permissible from Overseas branches / subsidiaries of Indian banks or overseas WOS / JV of an Indian company</b></li> </ul>
<b>Form and End-use</b>	<ul style="list-style-type: none"> <li>Form - Loans or non-convertible or optionally convertible or partially convertible preference shares.</li> <li>End Use - For any expenditure in connection with the business of borrower</li> </ul>
<b>Currency and conversion</b>	<ul style="list-style-type: none"> <li>Denominated in any freely convertible currency or in INR or a combination thereof (Hedging recommended but not mandatory)</li> <li>Conversion of ECB into equity is freely permitted – rate as per date of agreement</li> </ul>
<b>Security and Guarantee</b>	<ul style="list-style-type: none"> <li>Security = movable, immovable, intangible assets (including patents, IPRs), financial securities, etc.</li> <li>Issuance of corporate or personal guarantee is allowed. NR guarantee only if Eligible Lender as above. Banks / FIs / NBFCs cannot issue any guarantee, LoC, etc.</li> </ul>
<b>Others</b>	<ul style="list-style-type: none"> <li><b>Other provisions of ECB continue to apply and start-ups not eligible as above can choose normal ECB route as well. Start-up to have appropriate risk management policy for FX exposure arising from FCY ECB.</b></li> </ul>

# ECB for entities under restructuring / refinancing stressed assets

- **Eligible Borrowers**

- An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan
- Eligible corporate borrower (SMA2 / NPA) in manufacturing / infrastructure sector who have availed INR loan for capital expenditure can raise ECB for repayment of such loans under one time settlement with Lenders

- **Special provisions for Lender Banks**

- Lenders Bank allowed to sell such Loans to ECB Lenders subject to ECB policy (sell to be other than Indian BO / Sub of Indian Banks)

- **Approval Route for Eligible borrowers participating in the Corporate Insolvency Resolution Process under IBC 2016 as resolution applicants**

- Eligible Borrowers can raise ECB from all recognised lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee term loans of the target company.

# Standard Operating Procedure (SOP) for Untraceable Entities

- New concept
- Action plan to be undertaken by the AD Banks and RBI against untraceable entities in contravention of reporting provisions under the New ECB Framework, for eight quarters or more
- Stricter compliance requirements in relation to ineligibility for untraceable entities

**Untraceable Entities:** Any borrower who has raised ECB will be treated as 'untraceable entity', if:

- Entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/reply in negative for a period of not less than two quarters with documented communication/reminders numbering 6 or more; and it fulfills both the following conditions:
  - a) Entity not found to be operative at the registered office during the visits by the officials; and
  - b) Entities have not submitted Statutory Auditor's Certificate for last two years or more

**Action:** The followings actions are to be undertaken in respect of 'untraceable entities':

- File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country;
- **No fresh ECB application by the entity should be examined/processed by the AD bank;**
- ED to be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- No inward remittance or debt servicing will be permitted under auto route.

# Trade Credits

- TC refer to credits extended directly by the overseas supplier, bank, financial institutions and other permitted recognised lenders for imports of capital/non-capital goods.
- TC includes Suppliers credit (Overseas Supplier himself) & Buyers credit (By Overseas Banks & Financial Institutions, Foreign equity holder(s) & Financial Institutions in IFSCs located in India)

**Automatic Route** – AD Bank is permitted to approve TC in FCY / INR :

- a. Up to USD 150 mn or equivalent per import transaction for oil / gas refining & marketing, airline & shipping cos.
- b. Up to USD 50 mn or equivalent per import transaction for others

**Approval Route** - TC for import of capital and non-capital goods beyond limit specified in automatic route

## Maturity Prescription (with no roll / extension)

- **Import of non-capital goods** - Up to 1 year from the date of shipment or operating cycle whichever is less.
- **Import of capital goods** - Up to 3 years from date of shipment.

**Reporting-** Monthly reporting in Form TC by AD Category 1 Banks (not later than 10<sup>th</sup> of the following month) / Quarterly reporting – Issuance of Bank Guarantees.

## Other points

- All in costs: Benchmark rate plus 250 basis points spread. Includes interest rate, other fee, expense, charges, guarantee fee whether in FCY or INR
- AD Banks permitted to issue Guarantee in favor of overseas supplier, bank or financial institution not exceeding TC Amount and the period.
- Importer can also offer security of movable assets / immovable property / corporate or personal guarantee subject to conditions

**Trade Credits scheme for SEZ / FTWZ / DTA:** (i) TC can be raised by unit or developer in SEZ including FTWZ for purchase of capital /non-capital goods within SEZ including FTWZ or different SEZ including FTWZ; (ii) DTA unit is also allowed to raise Trade Credit for purchase of capital /non-capital goods from a unit or a Developer of SEZ including FTWZ

# Selected ECB Issues

## **RBI Guidelines on Funds raised overseas by overseas holding / association / subsidiary / group companies**

- Indian companies or their AD banks are not allowed to issue direct or indirect guarantee or create any contingent liability or offer any security for borrowings by overseas holding / association / subsidiary / group companies except for purposes explicitly permitted in the relevant regulations
- Funds raised overseas by above entities with support from Indian companies and AD Banks cannot be used in India (except general or special permission outside India).
- Strict penal action for violation

***Ref: RBI A.P. (Dir Series) Circular No. 41 dt. 25 November 2014***

## **Items of Compounding for ECB**

- End-use not complied with
- Eligible Borrower conditions not complied
- Loans from un-recognized borrowers
- MAM not complied
- LRN / ECB/ ECB 2 Filing / compliances not undertaken (now under LSF)
- Undue gain even if interest free loan (except when converted)
- Deemed ECB
  - Overdue imports payables
  - Overdue current account payables
  - On-behalf payments by overseas entities
  - Exports Advance without underlying especially when sought to be refunded

# Things to Watch Out!

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***ECB for LLPs***

***ECB for CSR Sector especially trust /  
societies / foundations***

***ECB upto certain threshold without  
any conditions***

***Issues surrounding overseas loan in  
Cross Border Merger provisions***

***Market determined All-in-Cost ceiling  
Isn't interest a current account  
transaction?***



**Questions**

**Answers**

**THANK YOU ALL FOR YOUR ATTENTION !**

**CA Shabbir Motorwala**

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# Annexure 1 - Infrastructure Space Companies

## Definition:

- Companies in the infrastructure sector\*;
- NBFC undertaking infrastructure financing;
- Holding Companies / Core Investment Companies undertaking infrastructure financing;
- Housing Financing Companies regulated by National Housing Bank; and
- Port Trusts (constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908)

*\* Infrastructure Sector: It has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors, approved by Government of India vide Notification No. 13/06/2009-INF, as amended / updated from time to time. For ECB, "Exploration, Mining and Refinery" sectors will be deemed as in the infrastructure sector. Refer Annexure 2 - Next slide for this list*



# Annexure 2 - Infrastructure Sector - Harmonized Master List (Illustrative)

Category	Infrastructure sub-sectors	Category	Infrastructure sub-sectors
1. Transport and logistics	<ul style="list-style-type: none"> <li>• Roads and bridges</li> <li>• Ports</li> <li>• Shipyards</li> <li>• Inland Waterways</li> <li>• Airport</li> <li>• Railway track including electrical &amp; signaling system, tunnels, viaducts, bridges</li> <li>• Railway rolling stock along with workshop and associated maintenance facilities</li> <li>• Railway terminal infrastructure including stations and adjoining commercial infrastructure</li> <li>• Urban Public Transport (except rolling stock in case of urban road transport)</li> <li>• Logistics Infrastructure</li> <li>• Bulk Material Transportation Pipelines</li> </ul>	4. Communication	<ul style="list-style-type: none"> <li>• Telecommunication (fixed network)</li> <li>• Telecommunication towers</li> <li>• Telecommunication &amp; Telecom Services</li> </ul>
2. Energy	<ul style="list-style-type: none"> <li>• Electricity Generation</li> <li>• Electricity Transmission</li> <li>• Electricity Distribution</li> <li>• Oil/Gas/Liquefied Natural Gas storage facility</li> </ul>	5. Social and Commercial Infrastructure	<ul style="list-style-type: none"> <li>• Education Institutions (capital stock)</li> <li>• Sports Infrastructure</li> <li>• Hospitals (capital stock)</li> <li>• Tourism infrastructure viz. (i) three-star or higher category classified hotels located outside cities with population of more than 1 million, (ii) ropeways and cable cars</li> <li>• Common infrastructure for Industrial Parks and other parks with industrial activity such as food parks, textile parks, Special Economic Zones, tourism facilities and agriculture markets</li> <li>• Post-harvest storage infrastructure for agriculture and horticultural produce including cold storage</li> <li>• Terminal markets</li> <li>• Soil-testing laboratories</li> <li>• Cold Chain</li> <li>• Affordable Housing</li> <li>• Affordable Rental Housing Complex</li> </ul>
3. Water and Sanitation	<ul style="list-style-type: none"> <li>• Solid Waste Management</li> <li>• Water supply pipelines</li> <li>• Water treatment plants</li> <li>• Sewage collection, treatment and disposal system</li> <li>• Irrigation (dams, channels, embankments, etc.)</li> <li>• Storm Water Drainage System</li> </ul>		

