

# FEMA – ECB & Trade Credits

**WIRC – Workshop on FEMA**

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Change

-0.430

-0.990

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# Statutory Framework

## Statutory Framework

- Section 6(2) of the Foreign Exchange Management Act, 1999
- RBI FEMA Notifications
  - Permissible Capital Account Transaction Regulations 2000 [FEMA 1]
  - Borrowing and Lending in Foreign Exchange Regulations 2000 [FEMA 3]
  - Transfer or Issue of Foreign Security Regulations 2000 [FEMA 120] [FCCB & FCEB]
  - Notifications issued by RBI from time to time amending above
- Circulars issued by RBI
  - A.P. Dir Series Circulars: issued by RBI from time to time
  - Master Circular: Issued once in a year by RBI – 1 July: now updated periodically
- No RBI FAQs on ECB but Monthly Data on ECBs available on RBI website
- Thumb Rule
  - ECB is a Capital Account Transaction – permissible only as stipulated
  - In case of doubt, always avail the Approval Route

# Key Concepts

## Key Concepts

- Ambit / Coverage of ECB
- Automatic v. Approval Route
- Eligible Borrowers
- Recognized Lenders
- End-use restrictions
- End-uses not permitted
- Amount and Maturity
- All-in-cost ceiling
- Guarantees and Security
- Parking of ECB proceeds – overseas and in India
- Other aspects
  - Prior Registration, changes to terms of ECB, pre-payment, etc.

**Note: All the above conditions are cumulative and not standalone**

# Meaning of ECB?

## Ambit and Coverage of ECB

- Borrowings / deemed borrowings from Non Resident Lenders
- Forms of ECB include:
  - Commercial Loans (Banks / Others Recognized Lenders)
  - Securitized Instruments issued to Non-Residents - Floating Rate Notes and Fixed Rate Bonds
  - Non-Convertible, Optionally Convertible or Partly Convertible Preference Shares (w.e.f. 1 May 2007)
  - Trade Credits for imports with Minimum Average Maturity of 3 years - Supplier's / Buyers Credit
  - Foreign Currency Convertible Bonds (FCCB) and Foreign Currency Exchangeable Bonds (FCEB) issued to Non-Residents
- ECB in Indian Rupees
  - Earlier, only permitted for ECB from foreign equity holders (since 23 September 2011)
  - From 3 September 2014, permissible from all Recognized Lenders subject to INR swap undertaken through AD Bank in India

# Available Routes

## Automatic Route

- No approval of the Reserve Bank of India ('RBI') / Government of India
- Prior RBI Registration through Authorized Dealer – Bank ('AD') before availing ECB (Form No. 83 / LRN)
- Post availing ECB, monthly filings with RBI through AD (Form ECB2 with Certificate from CA /CS and AD)

- Cases falling outside Automatic Route and cases mandatorily requiring RBI approval
  - Prior application to the RBI through the AD / Banker (Form ECB)
  - RBI Empowered Committee to consider such application
- Post approval, prior RBI Registration through AD before availing ECB (Form No. 83 / LRN), as under Automatic Route
- Post availing ECB, monthly filings with RBI through AD (Form ECB2 with Certificate from CA /CS and AD)

## Approval Route

## Eligible Borrowers (1/3) -- Automatic Route

### Corporates

- Indian Corporate(s) in Real-Industrial Sector, Infrastructure Sector, specified Service sectors & Miscellaneous services sector
- Specified Service Sector i.e. Hotel, Hospital and Software Sector
- Companies in miscellaneous service sector only from direct / indirect equity holders and group companies i.e. companies engaged in:
  - Training activities (but not educational institutes),
  - R&D activities
  - Companies supporting infrastructure sector
- Note: Trading business, Logistic Services, Financial Services and Consultancy services are not covered.
- Units in SEZ for own requirement – cannot transfer / on-lend other unit or sister concern

Individuals, Trusts (other than Micro Finance) and Non-profit making organizations not eligible to raise ECB

**Whether IT enables services covered under Software Sector??**

## Eligible Borrowers (2/3)

### -- Automatic Route

#### Financial Sector

- Financial Sector Borrowers – subject to conditions:
  - NBFC – Industrial Finance Companies (IFCs) - for on-lending to infrastructure sector
  - NBFC – Asset Finance Companies (AFCs) - for financing import of infrastructure equipment for leasing to infrastructure projects
  - Note: Other financial institution such as Banks, Financial Institutions, Housing Finance Companies and Non Banking Finance Companies excluded
  - Micro Finance Institutions and Non-Government Organizations engaged in micro finance activities subject to conditions
  - SIDBI or on-lending to MSME Sector
- Holding Companies / Core Investment Companies regulated by RBI can avail ECB for project use in Infrastructure Sector SPVs



## Eligible Borrowers (3/3)

### -- Automatic Route

#### Infrastructure Sector

- Energy - electricity generation, transmission and distribution; Oil pipelines and oil / gas/ LNG / crude oil storage facility; Gas pipelines (includes city gas distribution network)
- Communication – Mobile –Cellular / Fixed / Optic fiber/ Cable networks & Telecom Tower
- Transport – includes: Railways (railway tracks, tunnel, viaduct, bridges, and supporting terminal infrastructure (loading / unloading terminals, stations & buildings); Roads & bridges; Ports and Airports; Inland waterway; Urban public transport (except rolling stock)
- Water & Sanitation (water supply pipelines, solid waste management, water treatment plant, sewage projects, irrigation, storm water drainage system, etc.
- Mining, exploration & refining
- Social & commercial infrastructure
  - Hospital (capital stock and includes medical colleges & para medical training institutes);
  - Hotels with fixed capital investment of INR 200 Cr or more & convention center with fixed capital investment of INR 300 Cr or more; & 3 star or higher category classified hotels located outside cities with population >1 mn – (fixed capital excludes land value)
  - Common infrastructure for industrial park, SEZ & tourism facilities.
  - Fertilizers; Post harvest storage infrastructure; Soil testing laboratories.
  - Cold storage or cold room facility, including for farm level pre-cooling, for preservation or storage of agriculture and allied produce, marine products and meat

## Eligible Borrowers (1/2)

### -- Approval Route

#### Approval Route

- EXIM Bank for On lending
- Banks & FI's participating in Government approved restructuring package in the textile and steel sector to the extent of their investment in the package and assessment by RBI based on prudential norms
- NBFC's from specified Lenders for ECB with MAMP of 5 years to finance import of Infrastructure equipment for leasing to Infrastructure projects
- IFCs (NBFCs) intending to raise ECB beyond 75% of owned funds for On-lending to Infrastructure Sector in compliance with guidelines / framework
- AFCs (NBFCs) intending to raise ECB beyond 75% of owned funds to finance the import of infrastructure equipment for leasing to infrastructure projects
- FCCBs by HFC's satisfying (a) minimum net worth of INR 500 crores, (b) listing on BSE / NSE (c) size of issue of FCCB USD 100 mn; (d) Purpose / plan of utilization of ECB

## Eligible Borrowers (2/2) -- Approval Route

### Approval Route

- SPVs or any other entity set-up to finance infrastructure companies / projects as may be notified by RBI
- Multi State Co-operative Society in manufacturing activity and satisfying prescribed conditions
- SEZ / National Manufacturing Investment Zones developers for providing infrastructure facility within the SEZ / infrastructure sector
- Low cost affordable housing projects – Developers, Builders, HFCs and NHBs.
- Holding Cos / CICs for project use in SPV engaged in infrastructure sector
- SIDBI for on-lending in INR or foreign currency to MSME sector beyond 50 % of their owned funds subject to ceiling of USD 500 mn per financial year.
- Cases falling outside the purview or ceilings stipulated under the of Automatic Route

**Whether ECB by LLP, Partnership firm permissible ??**

# Recognised Lenders

## --Automatic and Approval Route

### Other overseas Lender

- International Banks
- International Capital Markets
- Multilateral Financial Institutions (e.g. IFC, ADB, CDC)
- Government Owned Development Financial Institutions
- Regional Financial Institutions
- Export Credit Agencies
- Suppliers of Equipments
- Foreign Collaborators
- Foreign Equity Holder (Other than erstwhile OCBs) subject to conditions

- Foreign Equity Holders (other than erstwhile OCB) if
  - ECB up to USD 5Mn – directly holds at least 25% paid up equity of borrower company
  - ECB more than USD 5Mn – Holds 25% paid up capital & ECB Liability – Equity ratio does not exceed 4:1 ( 7:1 under the approval route)
- Indirect Equity Holder (Provided the indirect equity holding is at least 51%)
- Group Company (both borrower and lender are subsidiaries of same parent)
- Other overseas organization & Individual lender (only to NGOs / MFIs / Section 25 Companies engaged in Micro finance sector subject to conditions (Certificate of Due Diligence KYC, minimum 2 years relation with the overseas Banker etc.)

### Foreign Equity Holders

Exclusion of overseas branches / subsidiaries of Indian banks for ECB whose end-use is repayment / refinance of rupee loans raised from domestic banking system under any scheme

**Whether Equity Participation required even in case of Foreign Collaborators??**

## Illustration – ECB Liability - Equity Ratio

**F Co.**

Holds Equity Shares and OCPS

Outside India

India

**A Co.**

**Balance Sheet of A Co. (Rs. In 000)**

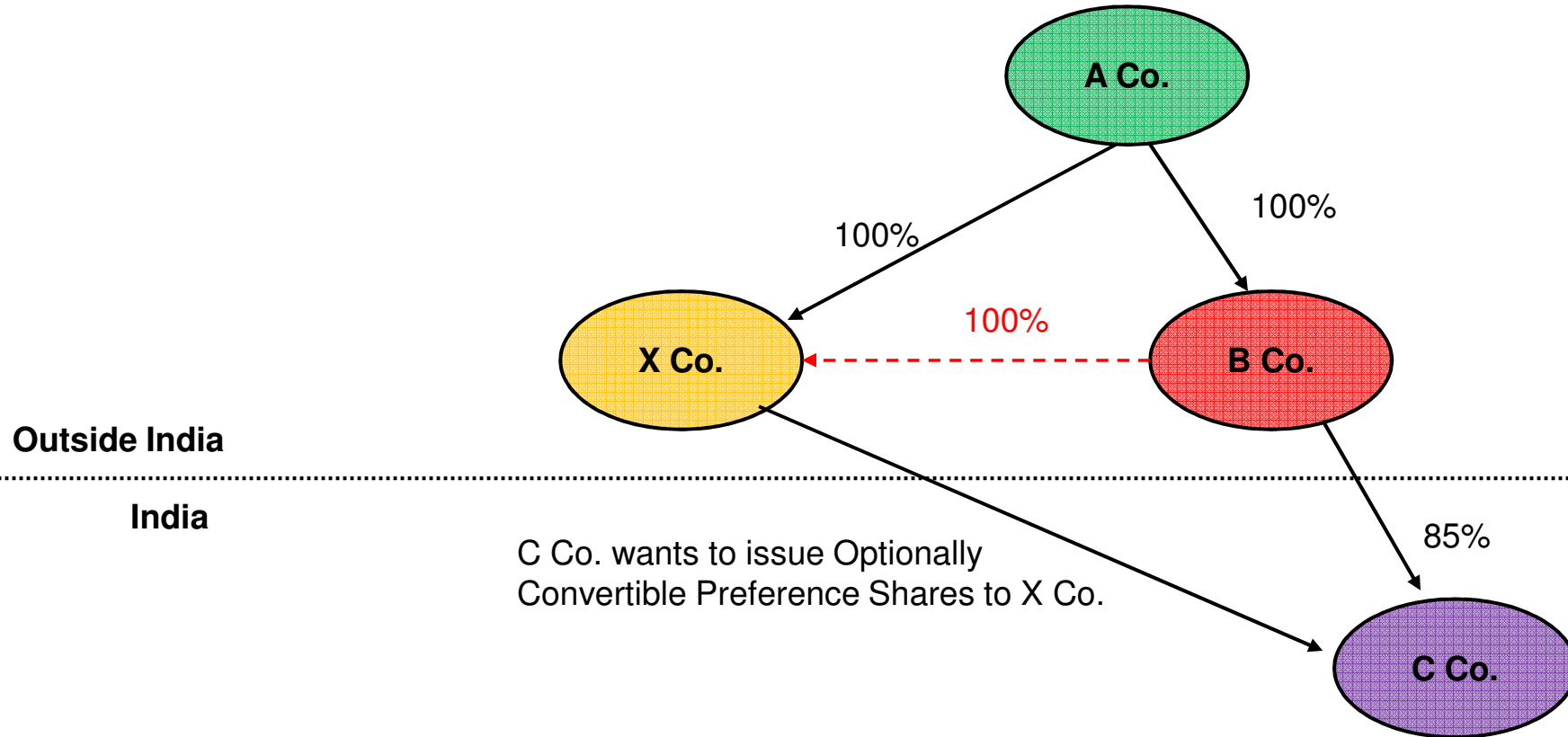
Liability	Amount	Assets	Amount
10,000 Equity Shares of Rs. 10 each	100	Fixed Assets	200
Reserves (incl. share premium received in foreign currency)	200	Other Assets	250
10,000 Optionally convertible - Preference Shares of Rs. 10 issued on 15 June 2006	100		
2,500 optionally convertible - Preference Shares of Rs. 10 each issued on 15 June 2007	25		
ECB	25		
<b>Total</b>	<b>450</b>	<b>Total</b>	<b>450</b>

\*Proposed ECB of Rs. 50,000

1. *Equity = Paid Up capital + Free Reserves + Share premium received in foreign currency as per latest audited balance sheet*
2. *ECB liability to include existing plus proposed*

**Determining the ECB Liability - Equity Ratio**

# Illustration Group Company



**Whether C Co. can issue Optionally Convertible Preference Shares to X Co.?**

## Key Permitted End - Uses (1/2)

### Automatic Route (1/2)

- Investment such as import of Capital Goods, New projects, Modernization / expansion of existing production units
- Direct investment in overseas JVs / WOS subject to guidelines
- First and subsequent stages of acquisition of shares in disinvestment process for PSU shares
- Interest during construction for Indian Companies which are in the Infrastructure sector
- Lending to self help groups / capacity building or for micro credit or for micro finance activity by NGO
- Payment for 2 G Spectrum Allocation (Telecom Sector) to successful bidders
- RBI categorized NBFC – IFC for on-lending to Infrastructure Sector subject to conditions and AFC for financing import of infrastructure equipment for leasing to infrastructure projects.
- SIDBI – lending to MSME as stipulated

**Whether acquisition of Land permissible under Automatic / Approval route if part of New Project, Modernization / expansion of existing Production Units?**

## Key Permitted End – Uses (2/2)

### Automatic Route (2/2)

- Manufacturing & Infrastructure Sector - for Import of services, technical know-how and payment of license fees as part of import of capital goods subject to conditions
- Capital Expenditure for maintenance and operations of toll systems for roads and highway
- General corporate purposes including for working capital for manufacturing / infrastructure & specified service sector subject to conditions mainly:
  - only from direct Foreign Equity Holder, minimum Maturity of 7 years, no prepayment
- Bridge Finance for import of capital goods (Infrastructure Co. only)

- Most parameters of Automatic Route continue
- Specifically permitted under the Approval Route
  - Repayment of rupee loans from domestic banking system by infrastructure sector to the extent of 25% of fresh ECB for refinancing of rupee loan availed from domestic banking system towards capex of earlier completed infrastructure projects and 75% ECB used for new infrastructure projects (except power 40% and 60%) .
  - Bridge Finance for import of capital goods (Infrastructure Co. only)
  - Working capital for Civil Aviation Sector (up to 31 March 2016 subject to various conditions)

### Approval Route

**Whether Working Capital includes old balance?**



# Key Schemes under Approval Route

## USD 10 bn scheme

- Indian Companies in manufacturing, infrastructure sector and hotel sector can avail ECB for repayment of Rupee loans taken from domestic banks for capital expenditure or for fresh capital expenditure
- Indian companies making investment in JV / WOS / assets abroad
- ECB can be availed to repay INR loans subject to foreign exchange earning capacity and repayment of ECB of therefrom
- Foreign exchange earning track record for three years, various ceilings and conditions stipulated

- Developers / builders may avail ECB for low cost affordable housing projects provided the Companies have minimum 3 years of experience, have good track record in terms of quality and delivery etc.
- HFCs / NHB is also eligible for low cost affordable housing units subject to prescribed conditions.

## Low Cost Affordable Housing

## Take Out Finance

- Eligible to borrowers in the sea port, airports, roads including bridges and power sectors for new projects
- Subject to tripartite agreement between the domestic bank, recognized lenders and Indian company to take-out of the INR loan with ECB within 3 years of Commercial Operation Date

# End uses not Permitted / Parking of ECB proceeds

## End Use not permitted

- On lending, investment in capital markets (investment in SPV, Money Markets & Mutual Funds) or acquiring an Indian Company (or part thereof)
- For Real Estate Sector
- For working capital, general corporate purpose and repayment of existing rupee loans (except as permitted)
- Acquisition of Land

## Whether acquisition of undertaking by way of slump sale permissible?

- ECB proceeds for foreign currency expenditure may be parked overseas or remitted to India pending utilization
- Proceeds parked overseas permitted to be invested in the following liquid assets outside India subject to liquidation as and when the funds required in India
  - Deposits or Certificates of Deposit with credit rating of at least AA- by specified credit rating agency
  - Treasury bills or monetary instruments with one year maturity
  - Deposits with overseas branch / subsidiaries of Indian banks
- ECB for Rupee expenditure to be remitted to India immediately
- ECB for Rupee expenditure can be placed on term deposits with AD for maximum period of 6 months pending utilization subject to certain conditions

## Parking of ECB proceeds

# Amount and Maturity - How much and for what period?

## Automatic Route

Sector	Maximum Amount (During FY)
Real - Industrial / Infrastructure	: USD 750 Mn or its equivalent
Hotels, Hospital and Software (Service)	: USD 200 Mn or its equivalent
NGOs and MFIs engaged in Micro Finance Activity	: USD 10 Mn or its equivalent
NBFC-IFCs, NBFC-AFC and SIDBI	: Up to 75% (50% for SIDBI) of their Owned Funds subject to ceilings

### Minimum Average Maturity:

- For ECBs up to USD 20 Mn – of 3 years
- For ECBs more than USD 20 Mn –of 5 years

ECB upto 20 Mn USD can have call / put option subject to MAM criteria of 3 years

Sector	Maximum Amount (During FY)
Real - Industrial / Infrastructure	: Beyond USD 750 Mn or its equivalent
Hotels, Hospital and Software (Service)	: Beyond USD 200 Mn or its equivalent
NBFC-IFCs, NBFC-AFC	: Beyond 75% of their Owned Funds

## Approval Route

Note: Illustration for calculating Minimum Average Maturity available in the RBI circular

# All-in-cost Ceilings

## All-in-cost Ceilings

- **Components:**
  - Rate of Interest
  - Other fees
  - Expenses in foreign currency
- **Specific Exclusions:**
  - Commitment fees,
  - Pre-payment fees, and
  - Fees payable in Indian Rupees
  - Withholding Tax paid in Indian Rupees

Average Maturity Period	All-in-cost Ceilings over 6 month LIBOR*
3-5 Years	350 Basis Points
More than 5 Years	500 Basis Points
Rate of Penal Interest not to be more than 2% of all-in-cost of ECB	

*\*For the respective currency of borrowing or applicable benchmark*

**LIBOR to be considered as on which date??**

# Prepayment / Refinancing

## Prepayment

- Prepayment permissible under Automatic Route subject to the following:
  - Up to USD 500 million allowed without prior approval subject to compliance of minimum average maturity period as applicable to ECB
  - Prepayment not permissible in case of ECB taken for General Corporate purpose

- Refinancing permitted under Automatic Route subject to the following conditions:
  - Fresh ECB is raised at a lower all-in-cost
  - Outstanding maturity of the original ECB is maintained.
  - Fresh ECB is not availed from overseas branches / Indian subsidiaries of Indian banks

## Refinancing

# Conversion of ECB into Equity

## Conditions

- Activity of the company is covered under automatic route or FIPB / GoI approval is obtained
- Foreign equity holding post conversion is within sectoral caps
- Share pricing should be as per pricing guidelines issued under FEMA
- Conversion Rate – Exchange Rate on date of agreement or lower as per mutual discussion

## Full Conversion

- File form FC-GPR
- File form ECB-2 within seven working days from end of month of conversion and mention “ECB wholly converted to equity”
- No filling in subsequent month

## Partial Conversion

- File Form FC-GPR
- File form ECB-2 within seven working days from end of month of conversion for the amount converted and outstanding and mention “ECB partially converted to equity”
- Continue to file ECB-2 to RBI for outstanding portion

## Procedure

**Whether conversion of interest accrued and outstanding on ECB into Equity permissible?**

# Routing of funds raised abroad to India

## Funds raised abroad

- **RBI A. P. Dir Series Circular No. 41 dated 25 Nov 2014**
  - Indian companies or AD-Banks are not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for any borrowing by overseas holding / associate / group companies except for permitted purposes.
  - Funds raised abroad by overseas holding / associate / subsidiary / group company of Indian companies with support of the Indian company or AD-Bank cannot be used in India unless they confirm to the general / special permission granted under relevant regulations
  - Any such structures construed as contravention of the FEMA regulations

## Creation of Security (1/2)

### Immoveable Assets

- Security in compliance with FEMA Regulations
- NOC not to be construed as permission to acquire immovable property in India by non-resident lender
- In case of enforcement / invocation of charge immovable property to be sold only to person resident in India
- Sale proceeds to be repatriated for repayment of the ECB

- For pledge of shares, shares can be shares of borrower company held by promoters as well as in domestic associate companies of borrower
- Other securities that can be pledged are bonds & debentures, Govt. securities, Govt. Savings Certificates, Deposit receipts of securities, UTI units and MFs.
- Security interest over all current & future loan assets & current assets including Rupee accounts can be used as security.
- In case of invocation of pledge, transfer should be as per extant FDI / FII policy

### Financial Securities

### Movable Assets

- Enforcement / invocation of charge restricted to outstanding claim against the ECB
- Encumbered movable assets can be taken out of country



## Creation of Security (2/2)

### Corporate / Personal Guarantee

- Security in compliance with FEMA Regulations
- Board resolution specifying names of the authorised officials authorised to execute such guarantee
- Specific requests fro individuals to issue personal guarantee

- ECB complies with the extant guidelines
- Existence of a security clause in the loan agreement
- Loan agreement signed between Lender and Borrower
- NOC obtained, wherever necessary
- Borrower has obtained RBI Registration - LRN

### Conditions for Security

Period of charge should be co-terminus with the maturity of ECB

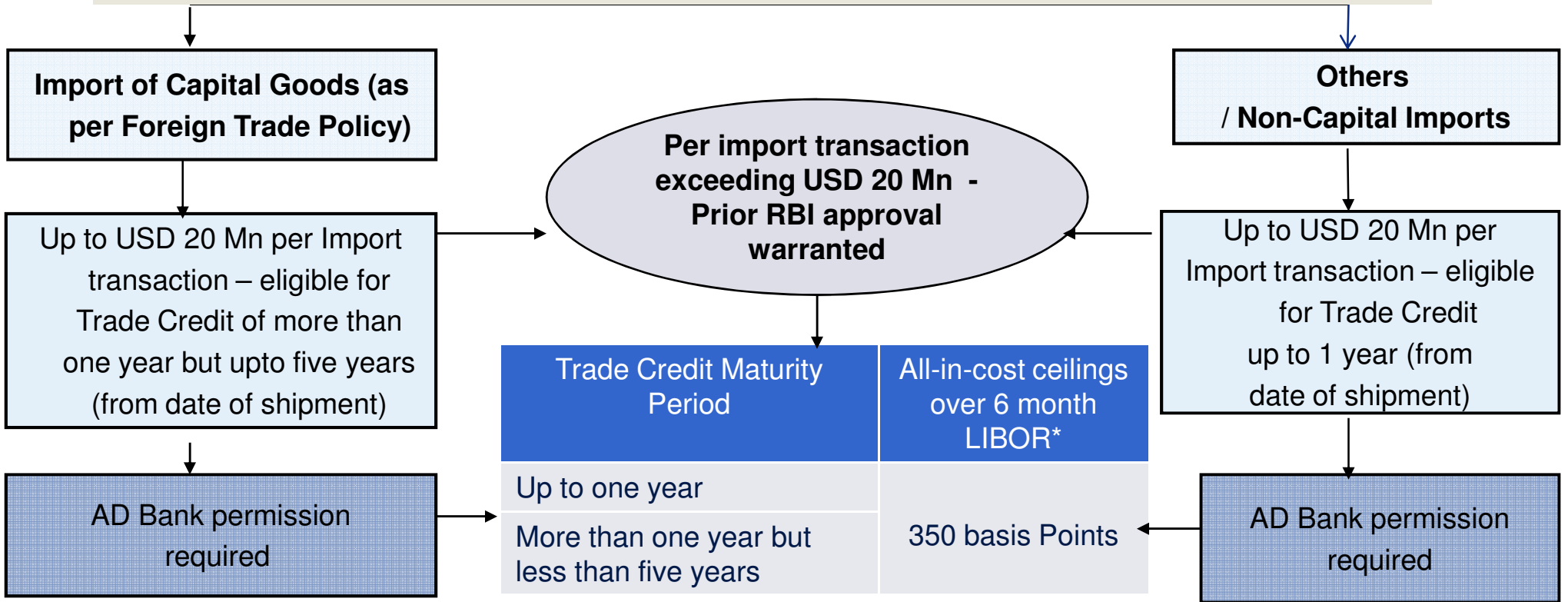
# Delegation of Powers to Bankers

## To approve changes in terms & conditions

- Change in Currency of borrowing
- Change in Bankers
- Change in the name of the borrower
- Changes in recognised lender
- Change in name of lender
- Cancellation of LRN
- Change in the end-use of ECB proceeds
- Reduction in amount of ECB
- Transfer of ECB from one company to another
- Changes / modifications in the drawdown / repayment schedule
- Reduction in the all-in-cost of ECB

# Trade Credits (1/2)

**Trade Credits = Credit extended for Imports and includes Suppliers and Buyers Credits**  
**Suppliers Credit = Extended by Overseas Supplier**  
**Buyers Credit = Extended by Banks / Financial Institution outside India**



*\*for the respective currency of credit or applicable benchmark*  
*Note: Ab-initio contract period for trade credit should be 6 months*

**Whether import of services covered?? Particularly services like installation services??**

### Miscellaneous Points

#### Guarantee

- AD banks are permitted to issue Letter of Credit/Guarantees in favour of overseas supplier, bank and financial institution
- The period of such guarantee to be co-terminus with the period of credit and for capital goods period not to exceed three years

#### Compliance Requirement

##### • Trade Credit

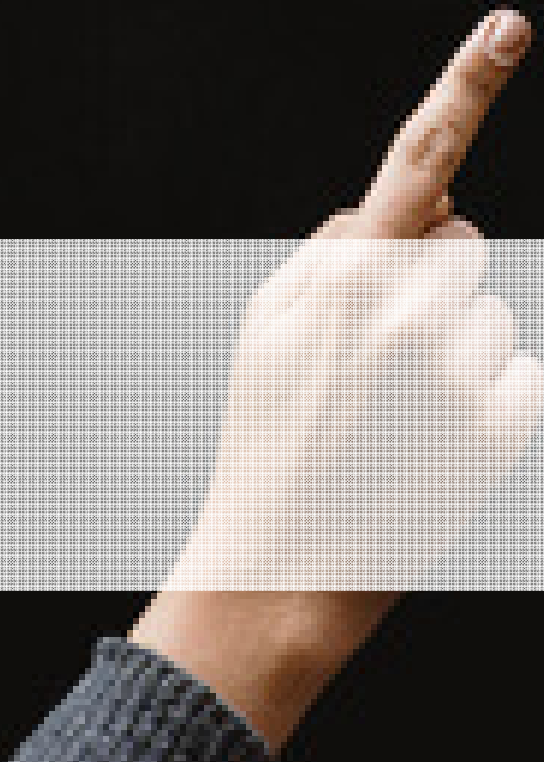
- AD banks to furnish details of approvals, drawal, utilization and repayment of trade credit granted by its all branches in the prescribed manner in form TC
- Details to be sent to Director, Division of International Trade and Finance, Department of Economic Policy and Research and in excel file through e-mail to [deapdif@rbi.org.in](mailto:deapdif@rbi.org.in)
- The details to be furnished within 10 days from the end of the month

##### • Guarantee

- Details of issuance of LCs / letter of credit etc to be furnished in consolidated statement in quarterly intervals in the prescribed manner

Why

not?



. question and answer

# Thank You



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