

EXTERNAL COMMERCIAL BORROWINGS : A PRACTITIONER'S GUIDE



Committee for Capacity Building of CA Firms and Small & Medium
Practitioners (CCBCAF & SMP)

The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

New Delhi

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Foreword

External commercial Borrowings (ECBs) are a key component of India's overall debt. Policy on External commercial Borrowings (ECB) is framed by the Government of India in consultation with RBI. The important aspect of ECB policy is to provide flexibility in borrowings by Indian Corporate, at the same time maintaining prudent limits for total external borrowings. The guiding principles of ECB policy are to keep borrowing maturities long, costs low, and encourage infrastructure and export sector financing which are crucial for overall growth of the economy.

Government has been streamlining / liberalizing ECB procedures in order to enable Indian Corporate, to have greater access to international financial markets. Government has now empowered Reserve Bank of India to give ECB approvals in accordance with the guidelines brought out by the RBI. Corporate are eligible to raise ECB for investment (such as import of capital goods, new projects, modernization/expansion of existing production units) in real estate sector - industrial sector including small and medium enterprises (SME) and infrastructure sector. Infrastructure sector is also permitted to obtain credit enhancements from international banks/international financial institutions/joint venture partners for their domestic rupee denominated borrowing under structural obligations scheme with the approval of RBI.

The Reserve Bank of India ("RBI") has been taking a number of steps to encourage greater foreign lending to the infrastructure sector and allow Indian Corporates borrow internationally on more favorable commercial terms than the significantly more expensive domestic debt. The RBI has also been concerned about the fact that most Indian banks have been nearing the limits which have been set on the amount that can be advanced to certain sectors and certain borrower groups. One of the steps which have been taken by the RBI is several amendments to the ECB regulations to give greater flexibility to Indian companies in the infrastructure sector to avail of ECBs. I am happy to know that the Committee for Capacity Building of CA Firms and Small & Medium Practitioners (CCBCAF & SMP) of our Institute undertook the exercise of bringing out the book on External Commercial Borrowings: A Practitioner's Guide for the benefit of the practitioners.

I appreciate the efforts put in bringing out this book. I appreciate the Chairman of the Committee & his team for publishing the aforesaid book. I

am sure that this publication would be of help to the members for carrying out the professional assignment pertaining to the External Commercial Borrowings.

CA. Jaydeep Narendra Shah
President, ICAI

Preface

An **external commercial borrowing** (ECB) is an instrument used in India to facilitate the access to foreign money by Indian corporations and PSUs (public sector undertakings). ECBs include commercial bank loans, buyers' credit, suppliers' credit, securitized instruments such as floating rate notes and fixed rate bonds etc., credit from official export credit agencies and commercial borrowings from the private sector window of multilateral financial Institutions such as International Finance Corporation (Washington), ADB, AFIC, CDC, etc. ECBs cannot be used for investment in stock market or speculation in real estate. The Reserve Bank of India ("**RBI**") have been taking active steps to encourage greater foreign lending to the infrastructure sector and allow Indian Corporates borrow internationally on more favorable commercial terms than the significantly more expensive domestic debt. The RBI has also been concerned about the fact that most Indian banks have been nearing the limits which have been set on the amount that can be advanced to certain sectors and certain borrower groups. One of the steps which have been taken by the RBI is several amendments to the external commercial borrowing ("ECB") regulations to give greater flexibility to Indian companies in the infrastructure sector to avail of ECBs.

ECB can be accessed under two routes, viz. Automatic Route i.e. Access of funds under Automatic Route does not require RBI/GOI approval. Corporate including hotel, hospital, software sectors (registered under the Companies Act 1956) and Infrastructure Finance Companies (IFCs) except financial intermediaries such as banks, FIs, HFCs, and NBFCs are eligible to raise ECB. Units in SEZs are allowed to raise ECB for their captive requirements. NGOs engaged in micro finance activities are eligible to avail of ECB (subject to certain conditions). Trusts and Non-Profit making organizations are not eligible to raise ECB. ECB can be raised by borrowers from internationally recognized sources such as international banks, international capital markets, multilateral financial institutions (such as IFC, ADB, CDC, etc.)/ Regional Financial Institutions and Government owned Development Financial Institutions, Export Credit Agencies, Suppliers of Equipments, Foreign Collaborators and Foreign Equity Holders (other than erstwhile Overseas Corporate Bodies). Overseas organizations and individuals may provide ECB to NGOs engaged in micro finance activities subject to complying with some safeguards outlined in the RBI circular. The Committee for Capacity Building of CA Firms and Small & Medium Practitioners

(CCBCAF & SMP) has published book on external Commercial Borrowings: A Practitioner's Guide for the benefit of the practitioners.

I place on record my deep sense of gratitude to CA. P. Venkatesan for preparing the draft of this publication thereby sharing his relevant experience and expertise amongst members. I appreciate the efforts put in by the members of CCBCAF & SMP, Working Group on Research & Publications & Dr. Sambit Kumar Mishra, Secretary, CCBCAF & SMP and other officials of the Secretariat who have provided necessary support for publishing the aforesaid book.

With warm regards

Chairman
Committee for Capacity Building of CA Firms and
Small & Medium Practitioners (CCBCAF&SMP), ICAI

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Form ECB

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Chapter 1

Introduction

What are ECBs?

External Commercial Borrowing (ECB) is one of the most important sources of cross border funding for Indian businesses, especially those engaged in large infrastructure projects such as power, telecom, roads, highways, airports, sea ports, industrial parks and such other projects.

The purpose of this book is to provide an updated reference on the rules governing the raising, servicing and repayment of External Commercial Borrowings and Trade Credits.

The different types of transactions which are subject to the ECB Regulations are explained at the beginning of the chapter "Guide on ECB" but, suffice it to say for now, that ECB in its many forms is medium / long term cross border commercial debt. Commercial debt arises when corporates and certain other eligible entities in India raise medium term / long term loans against security or without security or by issue of bonds to non-resident lenders to meet their business needs, most often for the purpose of capital expenditure. If a commercial debt has an average maturity period of 3 years and above, it is called ECB. If it is below 3 years, it is called trade credit. Different rules have been prescribed in the FEMA Regulations for these two types of cross border debt.

Historical Background of the ECB Boom

During the years of low foreign exchange reserves, administered exchange rates and the draconian rules of the erstwhile Foreign Exchange Regulation Act (FERA), 1973, it was very difficult for Indian companies to tap the overseas markets for low cost funding for their projects. Restrictive policies such as the quota-permit-licence raj and high taxes in the 1960's – 1980's had become counterproductive. By 1990-91, India's balance of payments position had become so precarious that we had only enough foreign exchange to import oil for a month.

The Important Place of ECB in India's External Debt

Like many other areas of financial and economic activities after the paradigm shift, external commercial borrowings and trade credits have also grown exponentially in the last few years. The following tables give us an idea of this growth. From US\$ 6227 Million in 1985-86, the outstanding ECBs as of Dec. 2011 have grown to US\$ 100,088 Million, a growth of 1607%. At the end of Dec. 2011, ECB constituted no less than 38.96% of the entire Long Term Debt of the country.

External Commercial Borrowings

(US \$ million)

| Year | Approval | Gross Disbursement | Amortization | Interest | Total Debt Service | Debt Outstanding |
|-------------|----------|--------------------|--------------|----------|--------------------|------------------|
| 1985-86 | 1390 | 1470 | 462 | 499 | 961 | 6227 |
| 1990-91 | 1903 | 1700 | 1191 | 1042 | 2233 | 13909 |
| 1991-92 | 2127 | 2798 | 1146 | 994 | 2140 | 15557 |
| 1992-93 | 2200 | 1001 | 1357 | 917 | 2274 | 15818 |
| 1993-94 | 2585 | 1859 | 1703 | 896 | 2599 | 16650 |
| 1994-95 | 4469 | 2670 | 2513 | 1091 | 3604 | 18037 |
| 1995-96 | 6286 | 4538 | 3311 | 1162 | 4473 | 19024 |
| 1996-97 | 8581 | 7018 | 4032 | 1177 | 5209 | 20261 |
| 1997-98 | 8712 | 7400 | 3411 | 1406 | 4817 | 23946 |
| 1998-99* | 5200 | 6927 | 3153 | 1575 | 4728 | 28182 |
| 1999-00 | 3398 | 2289 | 3460 | 1635 | 5095 | 27530 |
| 2000-01** R | 2837 | 9295 | 5043 | 1683 | 6726 | 30922 |
| 2001-02 R | 2653 | 2909 | 4012 | 1444 | 5456 | 29583 |
| 2002-03 | 2789 | 1904 | 3679 | 923 | 4602 | 28446 |
| ##QE | | | | | | |

* : Disbursements during 1998-99 include US \$ 4230 million draws on account of RBIs.

** : Disbursements during 2000-01 include US \$ 5520 on account of IMDs.

: April 2002 to December 2002.

R : Revised.

QE : Quick Estimates.

Source: Website of Government of India, Ministry of Finance, Department of Economic Affairs.

Composition of India's External Debt

| S. No. | Components | External debt outstanding at end of (US \$ million) | | | | Absolute variation (US \$ million) | | Percentage variation | |
|--------|-------------------------|--|--------------|---------------|--------------|--|---------------------------------|---------------------------|---------------------------|
| | | March 2011 PR | June 2011 PR | Sept. 2011 PR | Dec. 2011 OE | Dec. 2011 over March 2011 (6-3) | Dec. 2011 over Sept. 2011 (6-5) | Dec. 2011 over March 2011 | Dec. 2011 over Sept. 2011 |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| | | (15.8) | (15.6) | (15.2) | (14.9) | | | | |
| 2 | Bilateral | 25,708 | 26,168 | 27,077 | 27,125 | 1,417 | 48 | 5.5 | 0.2 |
| | | (8.4) | (8.3) | (8.4) | (8.1) | | | | |
| 3 | IMF | 6,308 | 6,267 | 6,213 | 6,108 | -200 | -105 | -3.2 | -1.7 |
| | | (2.1) | (2.0) | (1.9) | (1.8) | | | | |
| 4 | Export credit | 18,616 | 18,695 | 19,484 | 19,860 | 1,244 | 376 | 6.7 | 1.9 |
| | | (6.1) | (5.9) | (6.0) | (5.9) | | | | |
| 5 | Commercial Borrowings | 88,750 | 93,352 | 96,781 | 1,00,088 | 11,338 | 3,307 | 12.8 | 3.4 |
| | | (29.0) | (29.5) | (29.9) | (29.9) | | | | |
| 6 | NRI Deposits | 51,682 | 52,897 | 52,304 | 52,497 | 815 | 193 | 1.6 | 0.4 |
| | | (16.9) | (16.7) | (16.1) | (15.7) | | | | |
| 7 | Rupee Debt | 1,601 | 1,568 | 1,422 | 1,307 | -294 | -115 | -18.4 | -8.1 |
| | | (0.5) | (0.5) | (0.4) | (0.4) | | | | |
| 8 | Long-term debt (1 to 7) | 241,139 | 248,421 | 252,403 | 256,895 | 15,756 | 4,492 | 6.5 | 1.8 |
| | | (78.8) | (78.4) | (77.9) | (76.7) | | | | |

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| | | | | | | | | | |
|---|-----------------------------|---------|---------|---------|---------|--------|--------|------|-----|
| 9 | Short-term debt | 64,990 | 68,474 | 71,530 | 78,052 | 13,062 | 6,522 | 20.1 | 9.1 |
| | | 21.2 | 21.6 | 22.1 | 23.3 | | | | |
| 10 | Total External Debt (8 + 9) | 306,129 | 316,895 | 323,933 | 334,947 | 28,818 | 11,014 | 9.4 | 3.4 |
| PR : Partially Revised QE : Quick Estimates | | | | | | | | | |
| Figures in parenthesis indicate their respective percentage to total external debt. | | | | | | | | | |

Source: Website of Government of India, Ministry of Finance, Department of Economic Affairs.

But we have many more miles to go. Every sub-sector of the infrastructure sector in India stands in need of huge infusions of funds. Without world-class infrastructure, the country cannot hope to join the comity of nations which constitutes the developed, leading economies of the world.

Chapter 2

The Legislative and Regulatory Framework for ECB

Section 2(e) of FEMA defines “capital account transaction” as follows:

“Capital account transaction” means a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India; or assets or liabilities in India of persons resident outside India and includes transactions referred to in Sub-section (3) of Section 6.

Section 6 deals with capital account transactions. Sub-section (1) of section 6 states that, subject to sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction. Sub-section (2) provides that Reserve Bank may, in consultation with the Central Government, specify:

- a) any class or classes of capital account transactions which are permissible;
- b) the limit upto which foreign exchange shall be admissible for such transactions.

There is a provision that Reserve Bank shall not impose any restrictions on the drawal of foreign exchange for payments due on account of amortizations of loans or for depreciation of direct investments in the ordinary course of business. Sub-section (3) is without prejudice to the generality of the provisions of sub-section (2) and empowers RBI to lay down regulations to prohibit, restrict or regulate various types of capital account transactions enumerated in Section (6) (3). S.6(3)(d) reads “any borrowing or lending in foreign exchange in whatever form or by whatever name called”. Here then is the legislative mandate for the ECB Regulations.

In exercise of powers conferred by Section (6) (3) (d) of FEMA read with Section 47 (2) (a) which confers power to make regulations in respect of capital account transactions, the Reserve Bank of India (RBI) has issued Notification No. FEMA 3 / 2000 –RB dt. May 03, 2000, notifying the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000. These

regulations, as amended from time to time, constitute the regulatory framework for ECB.

It is important to note that in exercise of the residuary power conferred by Regulation 6 (5), RBI has been issuing various A.P. (DIR Series) Circulars, which have the effect of further amending the Regulations, but some of these amendments are not yet carried out in the Regulations themselves. This will be further explained at the beginning of the chapter, "ECB Guide".

In the previous section, it would have been noticed that the regulatory framework for ECB is contained in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, vide Notification FEMA 3/2000-RB dated 3rd May, 2000, as amended from time to time. Schedule I of the Regulations lays down the rules for ECB under the Automatic Route, Schedule II deals with the Approval Route for ECB and Schedule III deals with Trade Credits.

However, it is important to note that RBI, in exercise of the residuary powers conferred by clause 6(5) of the Regulations, has been effecting various modifications in the Regulations, through A.P. (DIR Series) Circulars. Several of these changes are not reflected in the Regulations. For example, Schedule I still speaks of "Borrowing in Foreign Exchange upto US\$ 500 Million or its equivalent". But RBI has since enhanced this limit to US\$ 750 Million per financial year; vide A.P. (DIR Series) Circular No.27 dated September 23, 2011.

In light of the above, the best way to keep ourselves abreast of the current state of the Rules is to take RBI's Master Circular (MC) dated July 01, 2011 on ECB as the starting point and then consider all the amending circulars issued since that date. This is the approach that has been adopted in constructing this Guide, after taking into account the impact of every A.P. (DIR Series) Circular on ECB, issued between July 01, 2011 and May 31, 2012. All these circulars are listed in Appendix 1, duly cross-referenced to the affected topic in the MC, as well as to the page of this Guide, wherein the particular circular has been discussed. The Regulations on ECB, referred to above, are not reproduced in this book. The Regulations are available at [rbi.org.in>Site Map> FEMA> Notifications](http://rbi.org.in/Site%20Map%20FEMA%20Notifications). The Master Circular is also available at [rbi.org.in>Site Map>Master Circulars](http://rbi.org.in/Site%20Map%20Master%20Circulars). The Master Circular is also not reproduced in

this book as a single document. But each topic of the MC is extracted in italics; that is immediately followed by a Commentary, which highlights all the amendments to that topic between July 01, 2011 and May 31, 2012, with reference to the relevant A.P. (DIR Series) Circulars, as well as any other information/opinions germane to the particular topic. It is hoped that this method will facilitate a comprehensive and updated understanding of each topic of the Master Circular.

Definition/Description of External Commercial Borrowings (ECBs)

“ECB” has not been defined in the Act. The Regulations use the expression “Borrowings in Foreign Exchange”. Even the Master Circular does not define it but enumerates various types of transactions which constitute ECB and hence subject to the ECB Regulations.

External Commercial Borrowings (ECB)

At present, Indian companies are allowed to access funds from abroad in the following methods:

- (a) *External Commercial Borrowings (ECB) refer to commercial loans in the form of bank loans, buyers’ credit, suppliers’ credit, securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares) availed of from non-resident lenders with a minimum average maturity of 3 years.*
- (b) *Foreign Currency Convertible Bonds (FCCBs) mean a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which is payable in foreign currency. Further, the bonds are required to be issued in accordance with the scheme viz., “Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993”, and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part, on the basis of any equity related warrants attached to debt instruments. The ECB policy is applicable to FCCBs. The issue of FCCBs is also required to adhere to the provisions of Notification FEMA No.120/RB-2004 dated July 7, 2004, as amended from time to time.*

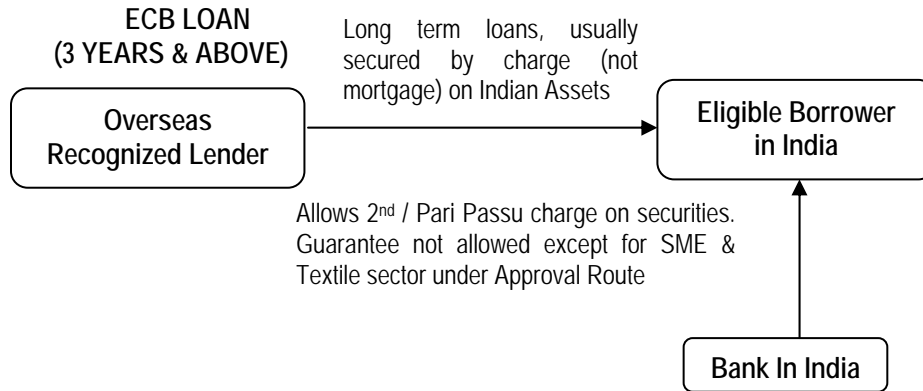
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- (c) *Preference shares (i.e. non convertible, optionally convertible or partially convertible) for issue of which, funds have been received on or after May 1, 2007 would be considered as debt and should conform to the ECB policy. Accordingly, all the norms applicable for ECBs, viz. eligible borrowers, recognised lenders, amount and maturity, end use stipulations, etc. shall apply. Since these instruments would be denominated in Rupees, the rupee interest rate will be based on the swap equivalent of LIBOR plus the spread as permissible for ECBs of corresponding maturity.*
- (d) *Foreign Currency Exchangeable Bond (FCEB) means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing Company and subscribed to by a person who is a resident outside India, in foreign currency and exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly or partly or on the basis of any equity related warrants attached to debt instruments. The FCEB must comply with the "Issue of Foreign Currency Exchangeable Bonds (FCEB) Scheme, 2008", notified by the Government of India, Ministry of Finance, Department of Economic Affairs vide Notification G.S.R.89(E) dated February 15, 2008. The guidelines, rules, etc governing ECBs are also applicable to FCEBs.*

Commentary

It will be useful at this stage to elucidate some of the expressions used in the forgoing description of ECBs given in the Master Circular. It is said that a picture is worth a thousand words. The following diagrammatical representations will further facilitate the understanding of these 3 types of ECB financing, namely, ECB Loan, Buyer's Credit and Supplier's Credit.

The Legislative and Regulatory Framework for ECB

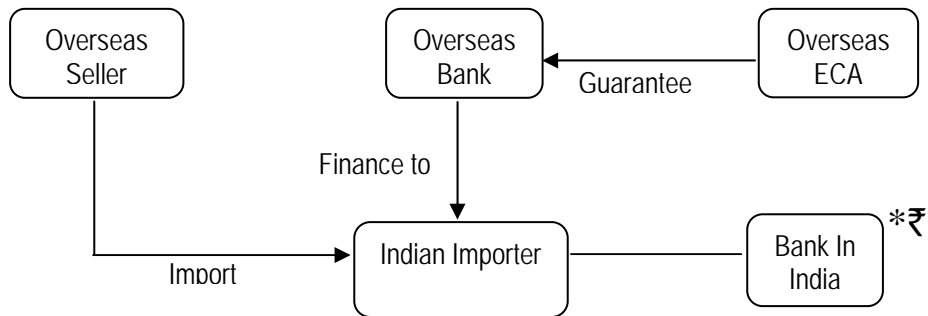


1. Buyer's Credit

A buyers' credit may be understood as an arrangement under which a bank, financial institution or Export Credit Agency (ECA) in the country of the overseas exporter extends a loan either directly to the Indian buyer of the goods or indirectly through a bank in India. The purpose of a buyer's credit is to enable the Indian importer to pay the overseas exporter. Though the objectives of a direct ECB Loan raised by an Indian company and a buyer's credit availed by it are similar and therefore both are covered under ECB Regulations, there are some differences in operation and end-use under the two methods. A direct ECB Loan is a bilateral transaction between the Indian borrower and the overseas lender. It may be utilised either for import of capital goods or for rupee capital expenditure permitted under the ECB Regulations. In order to mitigate the credit risk, the overseas lender usually requires security in the form of immovable property in India. A buyer's credit, on the other hand, is typically a tripartite arrangement under which the overseas financing bank provides financing to the Indian buyer against a guarantee from the buyer's bank in India or an ECA guarantee to mitigate its credit risk. In some cases, a buyer's credit takes the form of a loan to the Indian buyer through his bank in India under a line of credit arrangement with the buyer's bank in India. A Buyer's Credit may be for import of capital or non-capital goods. Here, it is to be noted that issuance of Letter of Guarantee (LG) / Letter of Credit (LC) / Letter of Comfort by a bank of financial institution in India is not permitted under the Automatic Route (which we will discuss in detail in the following pages) for ECB Loan with a maturity of 3 years and above. Such

LG/LC/Letter of Comfort may be permitted under the Approval Route on a case-by- case basis for ECBs with a maturity of 3 years and above, but only for the ECBs raised by the SME sector or by the textile industry. However, in the case of trade credits for periods upto 3 years, such LG/LC/LoU/LoC of the borrower's bank in India is permitted. See discussion on Trade Credits at the end of this.

BUYER'S CREDIT (TRADE CREDIT) UPTO 3 YEARS



*Letter of Guarantee /Letter of Credit /Letter of Undertaking /Letter of Comfort allowed upto USD 20 million per transaction for upto 1 year for import of non-capital goods and upto 3 years for import of capital goods.

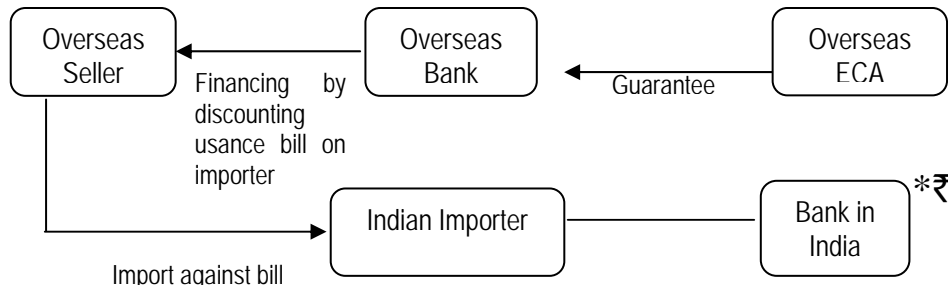
2. Supplier's Credit

In contradistinction to a buyer's credit, a supplier's credit is a method of financing, wherein the overseas exporter extends credit to the Indian importer to finance the purchase of his (the overseas exporter's) goods. Typically, the importer pays a portion of the price as a down payment and accepts a Usance Bill of Exchange for the balance amount and gets his obligation under the Usance Bill co-accepted by his own bank in India. The overseas exporter then discounts the Usance Bill with his bank abroad to realise the balance price of the goods exported by him. A Supplier's Credit can also happen without the aid of a bank, especially in the case of overseas holding company and Indian subsidiary. The ECAs usually play an important role in buyer's credit and supplier's credit transactions. In a buyers' credit, the ECA extends a guarantee to the overseas financing bank for exports made from its country. In the case of a suppliers' credit, the ECA guarantees the bills drawn by the overseas exporter on the Indian importer, before the overseas

The Legislative and Regulatory Framework for ECB

financing bank is requested to discount the bills. This facilitates discounting by the financing bank, since its credit risk is mitigated.

SUPPLIER'S CREDIT (TRADE CREDIT) UPTO 3 YEARS



*Letter of Guarantee /Letter of Credit /Letter of Undertaking /Letter of Comfort allowed for upto USD 20 million per transaction for upto 1 year for import of non-capital goods and upto 3 years for import of capital goods.

It may be noticed that by their very nature, buyer's credit and supplier's credit are meant for financing import of non-capital or capital goods. But direct ECB Loans may be utilised either for importing goods or for rupee capital expenditure, subject to the restrictions in the ECB Regulations as to End-Use, which we shall examine in due course.

1. Para (a) above extracted from the Master Circular stipulates a minimum average maturity period of 3 years for a loan or credit to be covered by the norms set out for ECBs. Credits with a minimum average maturity period of less than 3 years fall under the category of Trade Credits. Trade Credits are dealt with on page 29 of the Master Circular. The rules relating to Trade Credits will be separately explained at the end of this chapter.
2. Foreign Currency Convertible Bonds (FCCBs)
Para (b) of the italicized extract above from the Master Circular spells out the compliance that FCCBs are required to be issued in accordance with the scheme "Issue of FCCBs and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993". For ready reference, this scheme is reproduced as Appendix 2. Amendments and Press Notes on FCCBs are reproduced as Appendices 2A to 2F. Similarly, the notification referred to in para (b) above in relation to

issue of FCCBs, viz, namely Notification FEMA No. 120/RB- 2004 dated July 7, 2004 is reproduced as Appendix 3.

3. Foreign Currency Exchangeable Bonds (FCEBs) :

The notification referred to in para (d) above, namely, Notification G.S.R 89 (E) dated February 15, 2008 on the subject of "Issue of Foreign Currency Exchangeable Bonds (FCEBs) Scheme, 2008" is reproduced as Appendix 4.

4. There are basically two routes for raising ECB, namely, the Automatic Route outlined in paragraph I (A) of the Master Circular and the Approval Route outlined in paragraph I (B) of the Master Circular.

I. (A) Automatic Route

The following types of proposals for ECBs are covered under the Automatic Route.

i) Eligible borrowers

(a) Corporates, including those in the hotel, hospital, software sectors (registered under the Companies Act, 1956) and Infrastructure Finance Companies (IFCs) except financial intermediaries, such as banks, financial institutions (FIs), Housing Finance Companies (HFCs) and Non-Banking Financial Companies (NBFCs) are eligible to raise ECB. Individuals, Trusts and Non-Profit making organizations are not eligible to raise ECB.

(b) Units in Special Economic Zone (SEZ) are allowed to raise ECB for their own requirement. However, they cannot transfer or on-lend ECB funds to sister concerns or any unit in the Domestic Tariff Area. ECB by units in SEZ are also governed by the Press Release F.No.4 (2) / 2002-ECB dated September 15, 2002 issued by Government of India, Ministry of Finance (MOF).

(c) Non-Government Organisations (NGOs) engaged in micro finance activities are eligible to avail of ECB. Such NGOs (i) should have a satisfactory borrowing relationship for at least 3 years with a scheduled commercial bank authorized to deal in foreign exchange in India and (ii) would require a certificate of due diligence on 'fit and proper' status of the Board/ Committee of the borrowing entity from the designated AD bank.

Commentary

- 1) The Master Circular speaks of 3 categories of eligible borrowers, namely, (i) corporates (ii) Units in Special Economic Zones (iii) Non-Governmental Organizations engaged in micro finance. (i) reads as follows: "Corporates including those in the hotel, hospital, software sectors (registered under the Companies Act, 1956) and infrastructure finance companies except financial intermediaries such as banks, financial institutions, housing finance companies and non-banking financial companies are eligible to raise ECB. Individuals, trusts and non-profit making companies are not eligible to raise ECB".

Now, it would be readily noticed that this is an inclusive definition. With an inclusive definition, clarity is always a casualty. The first question that arises is "Are ALL Corporates eligible, other than those that are specifically excluded by this clause"? But it does not appear to be the intent of the regulator to permit all corporates not so excluded to raise ECB. The reasons for this view are as under:

- (a) If it were the intention to permit all corporates not specifically excluded to raise ECB, it would not have been necessary for the Reserve Bank of India (RBI) to issue AP(DIR Series) Circular No.29 dated September 26, 2011, permitting corporates in the service sectors (other than hotel, hospitality and software sectors, already permitted) to raise ECB.
- (b) Another pointer to the conclusion that not all corporates are meant to be permitted to raise ECB is the permitted "End Use" para of the Master Circular [MC page 7 para (v)]. The first category of permitted end use is capital expenditure in the "Real Sector-, Industrial Sector and Infrastructure Sector". ("real sector" has not been defined; but it certainly does not mean "real estate sector" as we shall see-ref. commentary on "End Uses Not Permitted" below). The End Use clause also speaks of "New Projects" but it has not been stated that only new manufacture projects are covered.(there are other permitted end uses such as investments in overseas wholly owned subsidiaries / joint ventures, government disinvestments and spectrum allocation, but those are not germane to the present discussion).

The questions which flow logically are

- (i) Does "Real Sector" include the trading sector or only the manufacturing sector?
- (ii) Apart from manufacture projects, can there not be "new projects" in market survey, product launches, consultancy and research and development? It is relevant to point out that in the context of industrial parks, business / management / architectural consultancy and services are considered "industrial activities". It is not clear if such sectors as marketing would qualify as permitted end uses.

Of course, the Regulations do provide that in case of doubt, corporates may approach the RBI under the Approval Route. But if they have to do that, they will lose several months; in short, the very advantage of the Automatic Route. The bottom-line is that without a clear enunciation of policy, the Automatic Route cannot operate automatically.

2] Units in SEZ

Press Release F.No.4(2)/2002- ECB dated September 15, 2002 issued by Government of India, Ministry of Finance, referred to in para I(A), (i)(b) on page 4 of the Master Circular is reproduced for ready reference as Appendix 5. This Press Release announces the decision of the Government to allow Units in SEZs to raise ECB, without maturity restrictions, subject to an annual cap of US\$ 500Million, on a standalone basis, ie., without any recourse to its parent or subsidiary in the mainland or within the SEZ

(ii) *Recognised Lenders*

Borrowers can raise ECB from internationally recognised sources such as (i) international banks, (ii) international capital markets, (iii) multilateral financial institutions (such as IFC, ADB, CDC, etc.) / regional financial institutions and Government owned development financial institutions, (iv) export credit agencies, (v) suppliers of equipments, (vi) foreign collaborators and (vii) foreign equity holders (other than erstwhile Overseas Corporate Bodies (OCBs)).

A "foreign equity holder" to be eligible as "recognized lender" under the automatic route would require minimum holding of paid-up equity in the borrower company as set out below:

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- (i) For ECB up to USD 5 million – minimum paid-up equity of 25 per cent held directly by the lender;*
- (ii) For ECB more than USD 5 million – minimum paid-up equity of 25 per cent held directly by the lender and debt-equity ratio not exceeding 4:1 (i.e. the proposed ECB not exceeding four times the direct foreign equity holding)*

Overseas organisations and individuals complying with following safeguards may provide ECB to Non-Government Organizations (NGOs) engaged in micro finance activities.
- (i) Overseas Organizations proposing to lend ECB would have to furnish to the AD bank of the borrower a certificate of due diligence from an overseas bank, which in turn is subject to regulation of host-country regulator and adheres to the Financial Action Task Force (FATF) guidelines. The certificate of due diligence should comprise the following (i) that the lender maintains an account with the bank for at least a period of two years, (ii) that the lending entity is organised as per the local laws and held in good esteem by the business/local community and (iii) that there is no criminal action pending against it.*
- (ii) Individual Lender has to obtain a certificate of due diligence from an overseas bank indicating that the lender maintains an account with the bank for at least a period of two years. Other evidence /documents such as audited statement of account and income tax return which the overseas lender may furnish need to be certified and forwarded by the overseas bank. Individual lenders from countries wherein banks are not required to adhere to Know Your Customer (KYC) guidelines are not eligible to extend ECB.*

Commentary

1. Change of Recognized Lender :

Previously, any request for change of the lender for an existing ECB was required to be referred by the Authorized Dealer (AD) bank to the RBI for necessary approval. Powers have been delegated to the designated AD category-I banks to approve any request from ECB borrowers for change of lender, subject to the following conditions:
- i. The original lender is an international bank or a multilateral financial institution or a regional financial institution or a government owned

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development financial institution or an export credit agency or supplier of equipment;

- ii. The new lender must also belong to any one of the above mentioned categories ;
- iii. The new lender is a recognized lender as per extant ECB norms;
- iv. There's no other change in the terms and conditions of the ECB;
- v. The ECB is in compliance with the extant guidelines.

It is to be noted that changes in the recognized lender in the remaining 2 categories, namely, foreign equity holder and foreign collaborator, will continue to be examined by RBI.¹

With every change in the recognized lender, there is the procedural requirement to promptly report the change to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Mumbai in Form 83²

2. Condition No.(i) for a foreign equity holder to be eligible as a recognised lender for ECB exceeding US\$ 5 million continues to be that he shall hold not less than 25% of the equity in the borrower company. But Condition No.(ii) has undergone a couple of modifications, since the issue of the Master Circular. In the first place, Debt-Equity Ratio has been re-christened "ECB Equity Ratio". Secondly, "Equity" now includes free reserves including share premium received in foreign currency. In case the company has two or more foreign equity holders, the portion of the share premium brought in by the particular lender shall alone be considered. Thirdly, existing ECB from the same equity holder should be included for computing the ECB-Equity Ratio³. The ECB Equity Ratio, so calculated, should not exceed 4:1.
3. Hitherto, only NGOs engaged in micro finance activities were permitted to avail of ECBs designated in INR under the Automatic Route from overseas organisations and individuals. Now, all eligible borrowers can avail of ECBs designated in INR from the foreign equity holder⁴.

¹ A.P. (DIR Series) Circular No.11 dated September 7, 2011

²Form 83 is reproduced in the appendix entitled "Forms".

³A.P. (DIR Series) Circular No.29 dated 26.09.2011

⁴A.P. (DIR Series) Circular No.27 dated 23.09.2011

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4. The lender of ECB designated in INR is allowed to hedge the currency risk with Indian Authorised Dealers (ADs)⁵.

(iii) *Amount and Maturity*

a) *The maximum amount of ECB which can be raised by a corporate other than those in the hotel, hospital, software sectors is USD 500 million or its equivalent during a financial year.*

b) *Corporates in the services sector viz. hotels, hospitals, software sector are allowed to avail of ECB up to USD 100 million or its equivalent in a financial year for meeting foreign currency and/or Rupee capital expenditure for permissible end-uses. The proceeds of the ECBs should not be used for acquisition of land.*

c) *ECB up to USD 20 million or its equivalent in a financial year with minimum average maturity of three years.*

d) *ECB above USD 20 million or equivalent and up to USD 500 million or its equivalent with a minimum average maturity of five years.*

e) *NGOs engaged in micro finance activities can raise ECB up to USD 5 million or its equivalent during a financial year. Designated AD bank has to ensure that at the time of drawdown the Forex exposure of the borrower is fully hedged.*

f) *ECB up to USD 20 million or equivalent can have call/put option provided the minimum average maturity of three years is complied with before exercising call/put option.*

Commentary

1. The maximum amount of ECB which can be raised by a corporate other than those in hotels, hospitals, and software sectors has been raised from US \$ 500 million or its equivalent to US \$ 750 million or its equivalent during a financial year. Similarly, corporates in the three service sectors, namely, hotels, hospitals, software sectors are now allowed to raise ECB up to US \$ 200 million or its equivalent during a financial year as against US \$ 100 million or its equivalent earlier⁶.

2. As a consequential amendment, it has been stipulated that ECB above US\$ 20 million or equivalent up to US \$ 750 million (500

⁵A.P. (DIR Series) Circular No.63 dated 29.12.2011

⁶A.P. (DIR Series) Circular No.27 dated 23.09.2011

million earlier) or its equivalent shall have a minimum average maturity period (MAMP) of 5 years⁷.

3. MAMP has not been defined in the Regulations or even in the Master Circular. But the concept is simply to consider the period for which each drawdown under each tranche of an ECB has been outstanding and also to consider the effect on the average of any part pre-payment made up to the date of the computation. The RBI has developed an MS-Excel template for computing the MAMP and shared it with the commercial banks.

In case a borrower decides to prepay any ECB, in whole or in part, he will need to obtain this template from his bank and compute the MAMP, since no pre-payment is possible without specific approval of RBI unless the ECB has attained the stipulated minimum average maturity of 3 years or 5 years, as the case may be.

4. Reduction in amount of ECB

Power has now been delegated to the designated AD category-I bank to approve requests from ECB borrowers for reduction in loan amount in respect of ECBs availed under the Automatic Route, subject to the following conditions:

- (i) the consent of the lender for reduction in loan amount has been obtained ;
- (ii) the average maturity period of the ECB is maintained;
- (iii) the monthly ECB-2 returns have been submitted to the Department of Statistics and Information Management (DSIM) of Reserve Bank of India, Mumbai;
- (iv) There is no change in the other terms and conditions of the ECB.⁸

5. Modifications in the Draw-Down Schedule: Hitherto, the ADs have delegated powers to approve changes in the draw-down / repayment schedule of existing ECBs, subject to the condition that the average maturity period is maintained.

But, now, the AD is allowed to approve requests for modification in the drawdown schedule even in cases where the modification results

⁷A.P. (DIR Series) Circular No.64 dated January 05, 2012

⁸ A.P. (DIR Series) Circular No.75 dated February 07, 2012

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in the original average maturity period undergoing a change, subject to the following conditions:

- (i) There are no changes / modifications in the repayment schedule of the ECB;
- (ii) The average maturity period is reduced from the one stated in Form 83 at the time of obtaining Loan Registration Number (LRN).
- (iii) Such reduced period complies with the stipulated MAMP;
- (iv) Any change in the All-in-Cost is only due to change in the AMP;
- (v) The monthly ECB-2 Returns have been submitted to DSIM.⁹
- (vi) *All-in-Cost Ceilings*

All-in-cost includes rate of interest, other fees and expenses in foreign currency except commitment fee, pre-payment fee and fees payable in Indian rupees. The payment of withholding tax in Indian Rupees is excluded for calculating the all-in-cost. The all-in-cost ceilings for ECB are reviewed from time to time. The following ceilings are valid until reviewed:

| <i>Average Maturity Period</i> | <i>All-in-cost Ceilings over 6 months LIBOR*</i> |
|--|--|
| <i>Three years and upto five years</i> | <i>300 basis points</i> |
| <i>More than five years</i> | <i>500 basis points</i> |

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

In the case of fixed rate loans, the swap cost plus margin should be the equivalent of the floating rate plus the applicable margin.

Commentary

1. In respect of ECBs with an AMP of 3-5 years, the all-in-cost ceiling over 6 months' LIBOR for the respective currency of borrowing or applicable benchmark has been increased from 300 basis points (bps) to 350 bps. This change was made subject to review after March 31, 2012¹⁰.

⁹A.P. (DIR Series) Circular No.75 dated February 07, 2012

¹⁰A.P. (DIR Series) Circular No.51 dated 23.11.2011

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2. On a review, RBI has decided to continue the ceilings at 350 bps and 500 bps, for AMP of 3-5 years and over 5 years respectively, for a further period of 6 months, i.e., upto September 30, 2012¹¹.
- v) *End-use*
 - a) *ECB can be raised for investment [such as import of capital goods (as classified by DGFT in the Foreign Trade Policy), new projects, modernization / expansion of existing production units] in real sector – industrial sector including small and medium enterprises (SME), infrastructure sector and specified service sectors namely, hotel, hospital, software in India. Infrastructure sector is defined as (i) power, (ii) telecommunication, (iii) railways, (iv) roads including bridges, (v) seaport and airport, (vi) industrial parks, (vii) urban infrastructure (water supply, sanitation and sewage projects), (viii) mining, exploration and refining and (ix) cold storage or cold room facility, including for farm level pre-cooling, for preservation or storage of agricultural and allied produce, marine products and meat.*
 - b) *Overseas direct investment in Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS) subject to the existing guidelines on Indian Direct Investment in JV/ WOS abroad.*
 - c) *Utilization of ECB proceeds is permitted for first stage acquisition of shares in the disinvestment process and also in the mandatory second stage offer to the public under the Government's disinvestment programme of PSU shares.*
 - d) *For lending to self-help groups or for micro-credit or for bonafide micro finance activity including capacity building by NGOs engaged in micro finance activities.*
 - e) *Payment for Spectrum Allocation.*
 - f) *Infrastructure Finance Companies (IFCs) i.e. Non Banking Financial Companies (NBFCs) categorized as IFCs by the Reserve Bank, are permitted to avail of ECBs, including the outstanding ECBs, upto 50 percent of their owned funds, for on-lending to the infrastructure sector as defined under the ECB policy, subject to their complying with the following conditions:*

¹¹A.P. (DIR Series) Circular No.99 dated March 30, 2012

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- i. Compliance with the norms prescribed in the DNBS Circular DNBS.PD.CCNo. 168/03.02.089/2009-10 dated February 12, 2010.*
- ii. Hedging of the currency risk in full. Designated Authorised Dealer should ensure compliance with the extant norms while certifying the ECB application.*

Commentary

1. "Real Sector" has not been defined. Obviously, the word "Real" has not been used in contra distinction to "Virtual", since the software sector has been specifically named as an eligible borrower to raise ECB. The next question that arises is, does "real sector" include the trading sector or only the manufacturing sector? Again, by "New Project" does the regulator envisage only manufacturing projects? Quite conceivably, there can be new projects in market survey, product launches, consultancy, research and development and a host of other economic activities. However, until such time as clarifications are forthcoming from the regulator on such grey areas, a prospective borrower will be on safer ground in approaching RBI under the Approval Route rather than saving time under the Automatic route but running the risk of committing some violation for want of a clear understanding of what is permitted and what is not.
2. Warehousing is an important segment in the infrastructure sector, but, it has not been included in the above definition of "infrastructure", except to the limited extent of cold storage or cold room facility.
3. "Industrial Park" (IP) is one of the components of the infrastructure sector as defined under the Permitted End-Uses. But IP is not defined in the ECB Regulations or in the Master Circular on ECB. Nor is it defined in RBI's Master Circular on Foreign Direct Investment (FDI) but in the Consolidated Half-yearly FDI Policy brought out by the Department of Industrial Policy & Promotion (DIPP), vide Circular No.1 of 2012 dated April 10, 2012, there is a definition of IP. That and a couple of related definitions are extracted below :
 - (i) "Industrial Park" is a project in which quality infrastructure in the form of developed plots of land or built up space or a combination with common facilities is developed and made available to all the allottee units for the purposes of industrial activity.*

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- (ii) *"Infrastructure" refers to facilities required for functioning of units located in the Industrial Park and includes roads (including approach roads), water supply and sewerage, common effluent treatment facility, telecom network, generation and distribution of power, air - conditioning.*
- (iii) *"Common Facilities" refer to facilities available for all the units located in the Industrial Park and include facilities of power, roads (including approach roads), water supply and sewerage, common effluent treatment, common testing, telecom services, air-conditioning, common facility buildings, industrial canteens, convention/conference halls, parking, travel desk, security service, first aid center, ambulance and other safety services, training facilities and such other facilities meant for common use of the units located in the Industrial Park.*
- (iv) *"Industrial Activity" means manufacturing; electricity; gas and water supply; post and telecommunications; software publishing, consultancy and supply; data processing, database activities and distribution of electronic content; other computer related activities; basic and applied R&D on biotechnology, pharmaceutical sciences/life sciences, natural sciences and engineering; business and management consultancy activities; and architectural, engineering and other technical activities.*

Notice that the word, "infrastructure" means two different things in clause (i) and clause (ii) above. Besides, neither of these means the same thing as "infrastructure" as defined under the Permitted End-Use in the ECB Regulations and the Master Circular on ECB. This is another area where clarifications are required from the policymakers.

Notice that the very definition of "infrastructure" in clause (ii) above is an exercise in redundancy. "Common Facilities" in clause (iii) above cover all the items in clause (ii) and then some. And it is the common facilities area that is deducted from the total area to compute the allocable area, 66% of which must be used for industrial activity in order to render the IP eligible for certain concessions compared to construction development projects under the FDI Regulations.

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4. Interest during construction
As a measure of relaxation in favour of Indian companies in the infrastructure sector, it has been decided to consider interest during construction which is capitalised and is part of the project cost as a permissible end-use¹².
5. Change in End-Use
The designated AD bank has been delegated powers to approve requests from ECB borrowers for change in the end-use in respect of ECBs availed, subject to the following conditions:
 - (i) The proposed end-use is permissible under the Automatic Route;
 - (ii) There is no change in the other terms and conditions of ECB;
 - (iii) The ECB is in compliance with extant guidelines;
 - (iv) The monthly ECB-2 returns have been submitted to DSIM up to date.¹³
6. Roads including bridges are already included in the definition of infrastructure sector and hence are a permitted end-use. It has now been clarified that capital expenditure for the purpose of maintenance and operation of toll systems for roads and highways is also a permitted end-use, provided it forms part of the original project¹⁴.
7. It will be noticed from para (v)(f) of the Master Circular above that infrastructure finance companies which wish to raise ECBs for on-lending to the infrastructure sector must comply with the norms prescribed in the DNBS Circular (DNBS.PD.CCNo. 168/03.02.089/2009-10 dated February 12, 2010). This circular is reproduced for ready reference in Appendix No.6.
 - vi) *End-uses not permitted*
For on-lending or investment in capital market or acquiring a company (or apart thereof) in India by a corporate [investment in Special Purpose Vehicles (SPVs), Money Market Mutual Funds

¹²A.P. (DIR Series) Circular No.27 dated 23.09.2011

¹³ A.P. (DIR Series) Circular No.69 dated 25.01.2012

¹⁴A.P. (DIR Series) Circular No.111 dated 20.04.2012

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(MMMFs), etc., are also considered as investment in capital markets).

- a) *For real estate sector,*
- b) *For working capital, general corporate purpose and repayment of existing Rupee loans.*

Commentary

1. "Real Estate Sector" is included in the list of end-uses not permitted under the Automatic Route [MC page.8 para (vi) (b)]. Similarly, "Real Estate" is not a permitted end-use even under the Approval Route [MC page.16 para (vi) (B)]. Again, in the Consolidated FDI Policy of the Department of Industrial Policy & Promotion (DIPP, "Real Estate Business" has been negated for FDI investment (para 6.2.11.2 Footnote (ii) of the DIPP circular No.1 /FY 2012-13 dated April 10,2012). Interestingly, none of these expressions has been defined in FEMA or the ECB Regulations or even the FDI Regulations, except to clarify that real estate business does not include the development of townships or construction of commercial and residential properties. The only definition (as distinct from negative definitions which state what real estate business is not) one may come across in the FEMA space is in the Regulations governing Overseas Wholly Owned Subsidiaries (WOS)/ Joint Ventures (JV) and in the FAQs on Overseas WOS/JV. There, it says a real estate business means "Buying and selling of real estate". Does this mean that construction projects such as residential project, commercial complex (e.g. multiplex) townships and warehouses fall outside the prohibition and would hence qualify for ECB? Of course "Real Estate" and "Real Estate Business" are not the same thing, but the lack of clear-cut definitions in the Regulations can lead to unintended difficulties or violations.
2. It will be noticed that clause (vi) (c) above prohibits the ECB borrowers to utilise an ECB for repayment of existing rupee loans. However, as a measure of relaxation of this rule, Indian companies in the infrastructure sector are now allowed to utilise 25 percent of an ECB to repay a rupee loan taken earlier for capital expenditure on a completed infrastructure project, provided the balance 75 percent will be applied to a new infrastructure project. It should be noted that even in cases where the ECB itself was raised under the

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Automatic Route, the permission for such rupee utilisation will be under the Approval Route, subject to the following conditions:

- (i) At least 75 percent of the ECB should be utilised for capital expenditure towards new infrastructure project ;
- (ii) In respect of the remaining 25 percent, the refinance shall only be utilized for repayment of the rupee loan availed of for capital expenditure of earlier completed infrastructure project(s) and
- (iii) The refinance shall be utilised only for rupee loans which are outstanding in the books of the financing bank concerned.

These amendments as well as the procedural compliances for getting approval for such rupee utilisation are contained in the following circular.¹⁵

vii) Guarantees

Issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by banks, Financial Institutions and Non-Banking Financial Companies (NBFCs) from India relating to ECB is not permitted.

Commentary

While guarantee are not permitted under the Automatic Route, they are permitted to a limited extent in the Approval Route. For details, see "Guarantee" under the Approval Route below. For Trade Credits (upto 3 years), banks are allowed to issue LG/LC/LoU/LoC, as we shall see in the discussion on Trade Credits below.

viii) Security

The choice of security to be provided to the lender/supplier is left to the borrower. However, creation of charge over immovable assets and financial securities such as shares, in favour of overseas lender is subject to Regulation 8 of Notification No. FEMA 21/RB-2000 dated May 3, 2000 and Regulation 3 of Notification No. FEMA 20/RB-2000 dated May 3, 2000 respectively, as amended from time to time. AD Category – I banks have been delegated powers to convey 'no objection' under the Foreign Exchange Management Act (FEMA), 1999 for creation of charge on immovable assets, financial

¹⁵A.P. (DIR Series) Circular No.25 dated September 23, 2011.

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securities and issue of corporate or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised by the borrower.

Before according 'no objection' under FEMA, 1999, AD Category – I banks should ensure and satisfy themselves that (i) the underlying ECB is strictly in compliance with the extant ECB guidelines, (ii) there exists a security clause in the loan agreement requiring the borrower to create charge on immovable assets / financial securities / furnish corporate or personal guarantee, (iii) the loan agreement has been signed by both the lender and the borrower and (iv) the borrower has obtained Loan Registration Number (LRN) from the Reserve Bank.

On compliance with the above conditions, AD Category – I banks may convey their 'no objection', under FEMA, 1999 for creation of charge on immovable assets, financial securities and issue of personal or corporate guarantee, subject to the conditions indicated below:

- a) *The 'no objection' for creation of charge **on immovable assets** may be conveyed under FEMA, 1999 either in favour of the lender or the security trustee, subject to the following conditions:*
 - i. *'No objection' shall be granted only to a resident ECB borrower.*
 - ii. *The period of such charge on immovable assets has to beco-terminus with the maturity of the underlying ECB.*
 - iii. *Such 'no objection' should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender / security trustee.*
 - iv. *In the event of enforcement / invocation of the charge, the immovable asset (property) will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.*
- b) *AD Category – I banks may convey their 'no objection' under FEMA, 1999 to the resident ECB borrower for **pledge of shares** of the borrowing company held by promoters as well as in domestic associate companies of the borrower to secure the ECB subject to the following conditions:*

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- i. The period of such pledge shall be co-terminus with the maturity of the under-lying ECB*
- ii. In case of invocation of pledge, transfer shall be in accordance with the extant FDI policy.*
- iii. A certificate from the Statutory Auditor of the company that the ECB proceeds have been / will be utilized for the permitted end-use/s.*
- c) The 'no objection' to the resident ECB borrower for issue of **corporate or personal guarantee** under FEMA, 1999 may be conveyed after obtaining:*
 - i. Board Resolution for issue of corporate guarantee from the company issuing such guarantees, specifying names of the officials authorized to execute such guarantees on behalf of the company or in individual capacity.*
 - ii. Specific requests from individuals to issue personal guarantee indicating details of the ECB.*
 - iii. Ensuring that the period of such corporate or personal guarantee is co-terminus with the maturity of the underlying ECB.*

AD Category – I banks may invariable specify that the 'no objection' is issued from the foreign exchange angle under the provisions of FEMA, 1999 and should not be construed as an approval by any other statutory authority or Government under any other law / regulation. If further approval or permission is required from any other regulatory / statutory authority or Government under the relevant laws / regulations, the applicant should take the approval of the authority concerned before undertaking the transaction. Further, the 'no objection' should not be construed as regularizing or validating any irregularities, contravention or other lapses, if any under the provisions of FEMA or any other laws or regulations.

Commentary

1. For ready reference, the regulations referred to on page 9 of the Master Circular, which govern the creation of charges in favour of the overseas lender, are extracted below:

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Regulation 8 of Notification No. FEMA 21/RB-2000 dated May 03, 2000:

Prohibition on Transfer of Immovable Property in India:

Save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India:

Provided that the Reserve bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

Provided further that a bank, which is an authorized dealer, may, subject to the directions issued by the Reserve bank in this behalf, permit a person resident in India or on behalf of such person, to create charge on his immovable property in India in favour of an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB, DATE 3-5-2000).

Regulation 3 of Notification No. FEMA 20/2000-RB dated May 03, 2000:

Restriction on Issue or Transfer of security by a person resident outside India:

Save as otherwise provided in the Act or rules or regulations made there under, no person resident outside India shall issue or transfer any security.

Provided that a security issued prior to and held on the date of commencement of the Regulations shall be deemed to have been issued under these Regulations and shall, accordingly, be governed by these Regulations.

Provided further that the reserve bank may, on an application made to it and for sufficient reasons, permit a person resident outside India to issue or transfer any security, subject to such conditions as may be considered necessary.

2. The most important point to remember in the context of security for ECB is that the ECB borrower is allowed to create only a *charge* but not a *mortgage* in favour of the overseas lender. Charge and Mortgage are defined in the Transfer of Property (TP) Act as under :

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S.58 (a) defines "Mortgage" as "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability".

In a charge, there is no transfer of an interest in the property but the creation of a right of payment out of property specified.¹⁶

"While in the case of a charge, there is no transfer of interest of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein"¹⁷

A mortgage is a jus in rem, a charge a jus ad rem and the practical distinction is that a mortgage is good against subsequent transferees and a charge is only good against subsequent transferees with notice.¹⁸

Here, the regulator's intent obviously is that the overseas lender is entitled only to recover his loan out of the proceeds of sale of the charged immovable property in India but not to acquire any interest in such property through a mortgage, much less take possession of it. Against this background, it is strange that clause (viii) (a) (iv) mandates that in the event of enforcement /invocation of the charge, the immovable asset (property) will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB. What is noteworthy here is that a "person resident in India" as defined in Section 2(v) of FEMA need not be a citizen of India. As per section 2(v), a person shall be considered to be resident in India if he has been in India for more than 182 days in the preceding financial year. Section 2 (v) contains two exceptions. One is in respect of persons who have subsequently gone out of India for employment, business or vocation or otherwise in circumstances indicating an intention to stay outside India for an uncertain period. The other exception is in respect of persons who have come to India- not for employment, nor for business or vocation nor in circumstances indicating an intention to stay in India

¹⁶Mulla on the TP Act 10thEdn.Pages 549 & 928

¹⁷J.K. (Bombay) Pvt.Ltd. v.New Kaiser-i-Hind Spinning & Weaving Co.Ltd. AIR 1970 SC 1041

¹⁸Raja Sri Shiva Prasad v. Beni Madhab AIR 1922 Pat.529

for an uncertain period. Therefore, it follows that a foreign national who was in India for 183 days or more in the preceding financial year and who does not fall under either of the exceptions described above is a person resident in India. Besides, an office, branch or agency in India, owned or controlled by a person resident outside India, is also resident in India as per S.2(v). Can it be the intent of the regulator that when the overseas lender of the ECB is not allowed to have even the limited interest of a mortgagee over the Indian immovable property offered as security for an ECB, it is permissible for a foreign national or such an office, branch or agency to become a full owner of such property with all the incidents of ownership by virtue of being resident in India?

3. See clause (viii) (b) (iii) of the Master Circular extracted above. One of the conditions for an authorized dealer to convey "no objection" under FEMA for pledge of shares of the borrowing company held by promoters as well as in domestic associate companies of the borrower to secure the ECB is a certificate from the statutory auditor of the company that the ECB proceeds have been/will be utilized for the permitted end-use. The first part of the requirement is quite in order, since certificates based on actual facts (historical data of utilization of ECB proceeds) can certainly be issued by the statutory auditor but how can he be expected to give an undertaking that the proceeds will be utilized for the permitted end-use, without compromising his independence, which is the corner stone of the auditing profession? He would be violating the Chartered Accountants Act and Regulations by issuing such a certificate, because, in doing so he would be identifying himself with the directors of the company. RBI may certainly require such an undertaking from the directors but to expect the auditor to give it would be tantamount to asking him to violate his professional article of faith.

ix) Packaging of ECB proceeds

Borrowers are permitted to either keep ECB proceeds abroad or to remit these funds to India, pending utilization for permissible end-uses. ECB proceeds parked overseas can be invested in the following liquid assets:

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- a) *Deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor / Fitch IBCA or Aa3 by Moody's.*
- b) *Treasury bills and other monetary instruments of one year maturity having minimum rating as indicated above, and*
- c) *Deposits with overseas branches / subsidiaries of Indian banks abroad.*

The funds should be invested in such a way that the investments can be liquidated as and when funds are required by the borrower in India.

ECB funds may also be repatriated to India for credit to the borrowers' Rupee accounts with AD Category – I banks in India, pending utilisation for permissible end-uses.

Commentary

This is a dynamic policy provision which has to keep changing, depending upon whether the rupee is going north or south. In August 2007, when the rupee hardened to Rs.45 against the US\$, RBI mandated that ECB meant for foreign currency expenditure should not be brought into India and that even the ECBs or portions thereof which were meant for rupee capital expenditure should be parked abroad until actually required for utilisation in India.

Later, after the rupee fell to less worrying levels from the exporters' point of view, RBI withdrew those restrictions. RBI permitted the borrowers to either keep ECB proceeds abroad or to repatriate the funds to India. That is the position we find in the Master Circular of July 01, 2011 extracted above.

Subsequently, when the rupee started falling against the US dollar, RBI, in an effort to shore up the value of the rupee, brought in a requirement that ECB meant for rupee expenditure must not be parked abroad but must be repatriated into India immediately, thereby signifying that the policy pendulum has swung to the other end in order to meet the emerging situation.¹⁹

¹⁹ A.P. (DIR Series) Circular No.52 dated November 23, 2011.

x) *Prepayment*

Prepayment of ECB up to USD 500 million may be allowed by AD banks without prior approval of Reserve Bank subject to compliance with the stipulated minimum average maturity period as applicable to the loan.

Commentary

It would have been noticed in the section, "Amount and Maturity" that RBI has raised the maximum amount of ECB which can be raised by a corporate other than those in hotels, hospitals, software sectors to US\$ 750 million or equivalent from US\$500 million or equivalent, vide AP(DIR Series) Circular No.27 dated September 23,2011. But the limit for prepayment of ECB under the Automatic Route continues to be US\$500 million. It is not clear whether this is an omission to issue a consequential amendment similar to AP(DIR Series) Circular No.64 dated January 05, 2012 (see "Amount and Maturity" above).

xi) *Refinancing of an existing ECB*

The existing ECB may be refinanced by raising a fresh ECB subject to the condition that the fresh ECB is raised at a lower all-in-cost and the outstanding maturity of the original ECB is maintained.

Commentary

RBI has permitted the redemption of Foreign Currency Convertible Bonds (FCCBs) through the refinancing method under the Automatic Route, subject to the following conditions:

- (i) Fresh ECBs/FCCBs shall be raised with the stipulated average maturity period and applicable all-in-cost ceiling as per the extant ECB guidelines.
- (ii) The amount of fresh ECB/FCCB shall not exceed the outstanding redemption value at maturity of the outstanding FCCBs.
- (iii) The fresh ECB/FCCB shall not be raised 6 months prior to the maturity date of the outstanding FCCBs.
- (iv) The purpose of ECB/FCCB shall be clearly mentioned as "Redemption of Outstanding FCCBs" in Form 83 at the time of obtaining Loan Registration No. from the Reserve Bank.

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- (v) The designated AD-category I bank should monitor the end-use of funds.
- (vi) ECB/FCCB beyond US\$500 million for the purpose of redemption of an existing FCCB will be under the Approval Route.
- (vii) ECB/FCCB availed for the purpose of refinancing the existing outstanding FCCB will be reckoned as part of the limit of USD 500 million available under the Automatic Route as per the extant norms.
- (viii) While restructuring FCCBs involving change in the conversion price is not permissible, restructuring which does not involve such change will be considered under the Approval Route.²⁰

xii) Debt Servicing

The designated AD bank has the general permission to make remittances of installments of principal, interest and other charges in conformity with the ECB guidelines issued by Government / Reserve Bank of India from time to time.

xiii) Procedure

Borrowers may enter into loan agreement complying with the ECB guidelines with recognized lender for raising ECB under Automatic Route without the prior approval of the Reserve Bank.

The borrower must obtain a Loan Registration Number (LRN) from the Reserve Bank of India before drawing down the ECB. The procedure for obtaining LRN is detailed in para II (i) (b).

Commentary

1. For cancellation of LRN, power has been delegated to Authorised Dealers²¹.
2. Consequent on the requirement laid down by A.P. (DIR Series) Circular No.52 dated 23.11.2011 that ECB meant for rupee utilisation shall be immediately repatriated to India, there is now a procedural requirement to help RBI to monitor compliance. The procedural requirement is that, henceforth, the Form 83 shall specify the break up between proposed foreign currency utilisation and rupee utilisation of the proposed ECB²².

²⁰ AP(DIR Series) Circular No.01 dated July 04,2011

²¹A.P. (DIR Series) Circular No.69 dated 25.01.2012.

²²A.P. (DIR Series) Circular No.119 dated May 07, 2012.

I. (B) Approval Route

i. Eligible Borrowers

The following types of proposals for ECB are covered under the Approval Route:

- a) On lending by the EXIM Bank for specific purposes will be considered on a case by case basis.*
- b) Banks and financial institutions which had participated in the textile or steel sector restructuring package as approved by the Government are also permitted to the extent of their investment in the package and assessment by the Reserve Bank based on prudential norms. Any ECB availed for this purpose so far will be deducted from their entitlement.*
- c) ECB with minimum average maturity of 5 years by Non-Banking Financial Companies (NBFCs) from multilateral financial institutions, reputable regional financial institutions, official export credit agencies and international banks to finance import of infrastructure equipment for leasing to infrastructure projects.*
- d) Infrastructure Finance Companies (IFCs) i.e. Non-Banking Financial Companies (NBFCs), categorized as IFCs, by the Reserve Bank, are permitted to avail of ECBs, including the outstanding ECBs, beyond 50 per cent of their owned funds, for on-lending to the infrastructure sector as defined under the ECB policy, subject to their complying with the following conditions: i) compliance with the norms prescribed in the DNBS Circular DNBS.PD.CCNo.168 / 03.02.089 / 2009-10 dated February 12, 2010 ii) hedging of the currency risk in full. Designated Authorised Dealer should ensure compliance with the extant norms while certifying the ECB application.*
- e) Foreign Currency Convertible Bonds (FCCBs) by Housing Finance Companies satisfying the following minimum criteria: (i) the minimum net worth of the financial intermediary during the previous three years shall not be less than Rs. 500 crores, (ii) a listing on the BSE or NSE, (iii) minimum size of FCCB is USD 100 million and (iv) the applicant should submit the purpose / plan of utilization of funds.*
- f) Special Purpose Vehicles, or any other entity notified by the Reserve Bank, set up to finance infrastructure companies / projects*

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exclusively, will be treated as Financial Institutions and ECB by such entities will be considered under the Approval Route.

- g) Multi-State Co-operative Societies engaged in manufacturing activity and satisfying the following criteria i) the Co-operative Society is financially solvent and ii) the Co-operative Society submits its up-to-date audited balance sheet.*
- h) SEZ developers can avail of ECBs for providing infrastructure facilities within SEZ, as defined in the extant ECB policy like (i) power, (ii) telecommunication, (iii) railways, (iv) roads including bridges, (v) sea port and airport, (vi) industrial parks, (vii) urban infrastructure (water supply, sanitation and sewage projects), (viii) mining, exploration and refining and (ix) cold storage or cold room facility, including for farm level pre-cooling, for preservation or storage of agricultural and allied produce, marine products and meat.*
- i) Corporates in the services sector viz. hotels, hospitals and software sector can avail of ECB beyond USD 100 million per financial year.*
- j) Corporates which have violated the extant ECB policy and are under investigation by the Reserve Bank and / or Directorate of Enforcement are allowed to avail of ECB only under the approval route.*
- k) Cases falling outside the purview of the automatic route limits and maturity period indicated at paragraph A (iii).*

Commentary:

1. With reference to clause I (d) above, it is to be noted that it has now been decided that the designated AD Category – I banks should certify the Leverage Ratio (i.e., outside liabilities/owned funds) of infrastructure financial companies desirous of availing ECBs under the approval route, while forwarding such proposals to the Reserve Bank of India.²³
2. With reference to clause (i) (i) above, the following points are relevant:
 - (i) We have already seen in the section on Amount & Maturity under the Automatic Route, that the limit for hotels, hospitals and software

²³A.P. (DIR Series) Circular No. 70 dt. January 25, 2012.

companies under the Automatic Route has been increased from USD 100 Million to US\$ 200 Million. There seems to have been an inadvertent omission to make a consequential amendment in clause (i) (i) above;

- (ii) Apart from hotels, hospitals and software sector companies, other service sector companies can also now avail ECB but only from foreign equity holders. ECB from indirect equity holders may be considered provided the indirect equity holding by the lender in the Indian Company is atleast 51%. ECB from a group company may also be permitted provided both the borrower and foreign lender are subsidiaries of the same parent. While submitting these proposals, it may be ensured that total outstanding stock of ECBs (including the proposed ECBs) from a foreign equity lender does not exceed seven times the equity holding either directly or indirectly of the lender (in case of lending by a group company, equity holdings by the common parent would be reckoned).²⁴
- 3. Developers of National Manufacturing Investment Zones (NMIZs) have now been included as eligible borrowers to raise ECB under the approval route for providing infrastructure facilities within the NMIZs.²⁵

ii. Recognised Lenders

- (a) *Borrowers can raise ECB from internationally recognised sources such as (i) international banks, (ii) international capital markets, (iii) multilateral financial institutions (such as IFC, ADB, CDC, etc.)/ regional financial institutions and Government owned development financial institutions, (iv) export credit agencies, (v) suppliers' of equipment, (vi) foreign collaborators and (vii) foreign equity holders (other than erstwhile OCBs).*
- (b) *From 'foreign equity holder' where the minimum paid-up equity held directly by the foreign equity lender is 25 per cent but ECBs: equity ratio exceeds 4:1 (i.e. the proposed ECB exceeds four times the direct foreign equity holding).*

²⁴ A.P. (DIR Series) Circular No. 29 dt. September 26, 2011.

²⁵ A.P. (DIR Series) Circular No. 85 dt. February 29, 2012.

Commentary:

1. Change of recognised lender: As a measure of simplification of the existing procedures, it has been decided to delegate powers to the designated AD. Category – I banks to approve requests from ECB borrowers with respect to change in the recognised lender when the original lender is an International Bank or a Multi Lateral Financial Institution or a Regional Financial Institution or a Government owned Development Financial Institution or an Export Credit Agency or supplier of equipment and the new lender also belongs to any one of the above mentioned categories, subject to the authorized dealer ensuring compliance with the following conditions:
 - i. The new lender is a recognised lender as per the extant ECB norms;
 - ii. There is no change in the other terms and conditions of ECB;
 - iii. The ECB is in compliance with the extant guidelines.

However, changes in the recognised lenders in case of foreign equity holders and foreign collaborators will continue to be examined by the Reserve Bank. The changes in the recognised lender should be promptly reported to the Department of Statistics and Information Management, Reserve Bank of India, Mumbai, in Form 83.²⁶

iii. Amount and Maturity

Corporates in the services sector viz. hotels, hospitals and software sector are allowed to avail of ECB beyond USD 100 million or its equivalent in a financial year for meeting foreign currency and/ or Rupee capital expenditure for permissible end-uses. The proceeds of the ECBs should not be used for acquisition of land.

Corporates can avail of ECB of an additional amount of USD 250 million with average maturity of more than 10 years under the approval route, over and above the existing limit of USD 500 million under the automatic route, during a financial year. Other ECB criteria, such as end-use, recognized lender, etc., need to be complied with. Prepayment and call/put options, however, would not be permissible for such ECB up to a period of 10 years.

Commentary:

1. Bridge finance for infrastructure sector:

²⁶ A.P.(DIR Series) Circular No.11 dt.Sep.07,2011

Considering the specific needs of the infrastructure sector, it has been decided to allow Indian companies which are in the infrastructure sector as defined in the ECB Regulations to import capital goods by availing of short term credit (including buyer's / supplier's credit) in the nature of bridge finance under the approval route subject to the following conditions;

- i. the bridge finance shall be replaced with a long term ECB;
- ii. the Long term ECB shall comply with all the extant ECB norms, and
- iii. prior approval shall be sought from Reserve Bank for replacing bridge finance with a long term ECB

The designated AD Category – I bank shall monitor the end-use of funds and banks in India will not be permitted to provide any form of guarantees. The AD bank shall evidence the import of capital goods, by verifying the bill of entry.²⁷

2. ADs are now empowered to approve changes / modifications in the drawdown / repayment schedules of ECBs already availed, subject to the condition that the average maturity period as declared while obtaining the LRN is maintained.

It has now been decided that the designated AD Category – I bank may approve requests from ECB borrowers for changes / modification in the drawdown schedule resulting in the original average maturity period undergoing change, subject to ensuring the following conditions:

- i. there are no changes / modifications in the repayment schedule of the ECB;
- ii. the average maturity period of the ECB is reduced as against the original average maturity period stated in the Form 83 at the time of obtaining the LRN;
- iii. such reduced average maturity period complies with the stipulated minimum average maturity period as per the extant ECB guidelines;
- iv. the change in all-in-cost is only due to the change in the average maturity period and the ECB complies with the extant guidelines

²⁷ A.P. (DIR Series) Circular No. 26 dt. September 23, 2011.

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- v. the monthly ECB returns in respect of the LRN have been submitted to DSIM.²⁸
- 3. Hotels, hospitals and software companies are now allowed to raise upto US\$ 200 Million per Financial Year (FY) under the Automatic Route. Similarly, other corporates are allowed to raise upto US\$ 750 Million per FY under the Automatic Route. Hence the above clause (iii) of the MC needs a consequential amendment. For details and Circular No., see under Automatic Route>Amount & Maturity.
- iv. *All-in-cost ceilings*

All-in-cost includes rate of interest, other fees and expenses in foreign currency except commitment fee, pre-payment fee, and fees payable in Indian Rupees. The payment of withholding tax in Indian Rupees is excluded for calculating the all-in-cost.

The all-in-cost ceilings for ECB are reviewed from time to time. The following ceilings are valid until reviewed:

| <i>Average maturity period</i> | <i>All-in-cost Ceilings over 6 months LIBOR*</i> |
|---|--|
| <i>Three years and up to five years</i> | <i>300 basis points</i> |
| <i>More than five years</i> | <i>500 basis points</i> |

** for the respective currency of borrowing or applicable benchmark*

In the case of fixed rate loans, the swap cost plus the margin should be the equivalent of the floating rate plus the applicable margin

Commentary:

- 1. For ECBs with an average maturity period of 3-5 years, the all-in-cost ceiling over 6 months' LIBOR for the respective currency of borrowing or applicable benchmark was raised from 300 bps to 350 bps. This change was made subject to review by March 31, 2012.²⁹
- 2. On a review, Reserve Bank of India has decided to continue the enhanced all-in-cost ceilings of 350 bps and 500 bps for ECBs with an average maturity of 3-5 years and over 5 years respectively, for a further period of 6 months ending September 30, 2012.³⁰

²⁸A.P. (DIR Series) Circular No. 75 dt. February 07, 2012.

²⁹ A.P. (DIR Series) Circular No. 51 dt. November 23, 2011.

³⁰ A.P. (DIR Series) Circular No. 99 dt. March 30, 2012.

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- v. *End-use*
 - a) *ECB can be raised only for investment [such as import of capital goods (as classified by DGFT in the Foreign Trade Policy), implementation of new projects, modernization/expansion of existing production units] in real sector - industrial sector including small and medium enterprises (SME) and infrastructure sector - in India. Infrastructure sector is defined as (i) power (ii) telecommunication (iii) railways (iv) roads including bridges (v) sea port and airport (vi) industrial parks (vii) urban infrastructure (water supply, sanitation and sewage projects) (viii) mining, exploration and refining and (ix) cold storage or cold room facility, including for farm level pre-cooling, for preservation or storage of agricultural and allied produce, marine products and meat.*
 - b) *Overseas direct investment in Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS) subject to the existing guidelines on Indian Direct Investment in JV/WOS abroad.*
 - c) *The payment by eligible borrowers in the Telecom sector, for spectrum allocation may, initially, be met out of Rupee resources by the successful bidders, to be refinanced with a long-term ECB, under the approval route, subject to the following conditions:*
 - i. *The ECB should be raised within 12 months from the date of payment of the final instalment to the Government;*
 - ii. *The designated AD - Category I bank should monitor the end-use of funds;*
 - iii. *Banks in India will not be permitted to provide any form of guarantees; and*
 - iv. *All other conditions of ECB, such as eligible borrower, recognized lender, all-in-cost, average maturity, etc, should be complied with.*
 - d) *The first stage acquisition of shares in the disinvestment process and also in the mandatory second stage offer to the public under the Government's disinvestment programme of PSU shares.*
- vi. *End-uses not permitted*
 - a) *For on-lending or investment in capital market or acquiring a company (or a part thereof) in India by a corporate except Infrastructure Finance Companies (IFCs), banks and financial institutions eligible under paragraph I (B) (i) (a), (b) and (d).*

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- b) *For real estate.*
- c) *For working capital, general corporate purpose and repayment of existing Rupee loans.*

Commentary:

- a. As a measure of relaxation of the general rule that the repayment of existing rupee loans is not a permitted end-use, Reserve Bank of India has decided to allow Indian companies in the infrastructure sector, where "infrastructure" is as defined under the extant ECB guidelines, to utilise 25% of the fresh ECB, towards refinancing of rupee loans availed from the domestic banking system, under the approval route, subject to the following conditions:
 - i. At least 75% of the fresh ECB proposed to be raised should be utilised for capital expenditure towards new infrastructure project(s) as defined under the ECB guidelines;
 - ii. In respect of the remaining 25%, the refinancing shall only be utilised for repayment of the rupee loan availed of for capital expenditure of earlier completed infrastructure projects;
 - iii. The refinance shall be utilised only for the rupee loans which are outstanding in the books of the financing bank concerned.

Certain procedural requirements for seeking Reserve Bank of India's approval for such utilisation for repayment of rupee loans have also been prescribed.³¹
- b. As a measure of further relaxation in favour of power companies, Indian companies in the power sector are now allowed to utilise 40% of the fresh ECB, towards refinancing of rupee loans availed from the domestic banking system, under the approval route, subject to the condition that at least 60% of the fresh ECB should be utilised for fresh capital expenditure for infrastructure projects.³²
- c. As a measure of relaxation of the general rule in clause (vi) (c) above that working capital is not a permitted end use, the financially beleaguered civil aviation sector has been granted some relief. The companies in civil aviation sector are now allowed to raise ECB for working capital, under the approval route, subject to the following conditions:

³¹A.P. (DIR Series) Circular No. 25 dt. September 23, 2011.

³² A.P. (DIR Series) Circular No. 111 dt. April 20, 2012.

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- i. Airline companies registered under the Companies Act, 1956 and possessing scheduled operator permit licence from DGCA for passenger transportation are eligible to avail of ECB for working capital;
- ii. ECB will be allowed to the airline companies based on the cash flow, foreign exchange earnings and its capacity to service the debt;
- iii. The ECB for working capital should be raised within 12 months from the date of issue of the circular;
- iv. The ECB can be raised with a minimum average maturity period of three years and
- v. The overall ECB ceiling for the entire civil aviation sector would be USD One Billion and the maximum permissible ECB that can be availed by an individual airline company will be USD 300 million. This limit can be utilised for working capital as well as refinancing of the outstanding working capital rupee loan(s) availed of from the domestic banking system. Airline companies desirous of availing of such ECBs for refinancing their working capital rupee loans may submit the necessary certification from the domestic lender/s regarding the outstanding rupee loan/s.³³

vii. *Guarantee*

Issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by banks, financial institutions and NBFCs relating to ECB is not normally permitted. Applications for providing guarantee/standby letter of credit or letter of comfort by banks, financial institutions relating to ECB in the case of SME will be considered on merit subject to prudential norms.

With a view to facilitating capacity expansion and technological up-gradation in Indian textile industry, issue of guarantees, standby letters of credit, letters of undertaking and letters of comfort by banks in respect of ECB by textile companies for modernization or expansion of textile units will be considered under the Approval Route subject to prudential norms.

³³A.P.(DIR Series) Circular no.113 dt.24-04-2012

Commentary:

Guarantees are prohibited under the automatic route. Even under the approval route, there are only two exceptions to the general prohibition. These are the Small & Medium Enterprise (SME) sector and the Indian Textile Industry.

viii. Security

*The choice of security to be provided to the lender / supplier is left to the borrower. However, creation of charge over immovable assets and financial securities, such as shares, in favour of the overseas lender is subject to Regulation 8 of Notification No. FEMA 21/RB-2000 dated May 3, 2000 and Regulation 3 of Notification No. FEMA 20/RB-2000 dated May 3, 2000 as amended from time to time, respectively. Powers have been delegated to Authorised Dealer Category I banks to issue necessary NOCs under FEMA as detailed in para I (A) (viii) *ibid*.*

Commentary:

The two FEMA Regulations referred to above have been reproduced in the section on "Security" under the Automatic Route above for ready reference.

ix. Packaging of ECB proceeds

Borrowers are permitted to either keep ECB proceeds abroad or to remit these funds to India, pending utilization for permissible end-uses.

ECB proceeds parked overseas can be invested in the following liquid assets (a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/ Fitch IBCA or Aa3 by Moody's; (b) Treasury bills and other monetary instruments of one year maturity having minimum rating as indicated above and (c) deposits with overseas branches / subsidiaries of Indian banks abroad. The funds should be invested in such a way that the investments can be liquidated as and when funds are required by the borrower in India. ECB funds may also be repatriated to India for credit to the borrowers' Rupee accounts with AD Category - I banks in India pending utilization for permissible end-uses.

Commentary:

- i. The option to keep ECB proceeds abroad or to remit the funds to India pending utilisation for permissible end-use, has recently been taken away. It has been decided that the proceeds of ECB to the extent they are meant for rupee expenditure must be repatriated to India immediately and credited to the borrower's rupee bank account in India. Only the ECB proceeds meant for foreign currency expenditure may be retained abroad. The rupee funds, pending utilisation in India, shall not be used for investment in capital markets or real estate or for inter-corporate lending.³⁴
- x. *Prepayment*
 - a) *Prepayment of ECB up to USD 500 million may be allowed by the AD bank without prior approval of the Reserve Bank subject to compliance with the stipulated minimum average maturity period as applicable to the loan.*
 - b) *Pre-payment of ECB for amounts exceeding USD 500 million would be considered by the Reserve Bank under the Approval Route.*

Commentary:

- a. While the limit for raising ECB even under the Automatic route has been raised from USD 500 million or equivalent to USD 750 million or equivalent, the limit for prepayment of ECB without RBI approval continues to be USD 500 million. Prepayment exceeding USD 500 million will be considered by RBI under the Approval Route.
- b. RBI has developed an MS – Excel template for computing the minimum average maturity period and shared it with the commercial banks. A borrower who wishes to prepay his ECB should obtain this template from his bank and compute the minimum average maturity period and ensure that his ECB has attained the MAMP before making a request to his bank to effect the remittance by way of full or partial pre payment of his ECB.
- xi. *Refinancing of an existing ECB*

Existing ECB may be refinanced by raising a fresh ECB subject to the condition that the fresh ECB is raised at a lower all-in-cost and the outstanding maturity of the original ECB is maintained.

³⁴ A.P. (DIR Series) Circular no. 52 dt. November 23, 2011.

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Commentary:

1. The requirement that the fresh ECB should be raised at a lower all-in-cost has been relaxed. Now the fresh ECB may be raised at a higher all-in-cost than that of the old ECB under the Approval Route, subject to the condition that the enhanced all-in-cost does not exceed the all-in-cost ceiling prescribed as per extant guidelines,³⁵
2. Indian companies in the civil aviation sector have been allowed to raise working capital with a company limit of USD 300 million and the overall industry limit of USD 1 billion for working capital purposes. These companies are allowed to utilise this limit either directly for working capital purposes or for refinancing outstanding working capital rupee loans availed of from the domestic banking system.³⁶

For more details, please see commentary under “End-Uses not Permitted” under Approval Route.

xii. Debt Servicing

The designated AD bank has general permission to make remittances of instalments of principal, interest and other charges in conformity with the ECB guidelines issued by Government / Reserve Bank from time to time.

xiii. Procedure

Applicants are required to submit an application in form ECB through designated AD bank to the Chief General Manager-in-Charge, Foreign Exchange Department, Reserve Bank of India, Central Office, External Commercial Borrowings Division, Mumbai – 400 001, along with necessary documents.

Commentary:

1. Cancellation of Loan Registration Number (LRN): The designated AD. Category – I bank is permitted to directly approach the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Mumbai for cancellation of LRN subject to the following conditions:

³⁵A.P. (DIR Series) Circular No. 112 dt. April 20, 2012.

³⁶A.P. (DIR Series) Circular no. 113 dt. April 24, 2012.

- i. No drawdown for the said LRN has taken place.
- ii. The monthly ECB-2 returns till date in respect of the LRN have been submitted to DSIM.³⁷
2. The Form 83 report should specify the proposed break-up of ECB utilisation in foreign currency and Indian rupees to enable RBI to monitor compliance with the requirement of A.P. (DIR Series) Circular no. 52 dt. November 25, 2011 that the INR utilization component of the ECB must be immediately repatriated to India.³⁸
3. Form ECB in which application for permission to raise ECB under the approval route is required to be made is reproduced in the appendix entitled, "Forms".

xiv. Foreign Currency Exchangeable Bonds

Foreign Currency Exchangeable Bond (FCEB) means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing Company and subscribed to by a person who is a resident outside India, in foreign currency and exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments. The FCEB may be denominated in any freely convertible foreign currency.

Eligible Issuer: *The Issuing Company shall be part of the promoter group of the Offered Company and shall hold the equity share/s being offered at the time of issuance of FCEB.*

Offered Company: *The Offered Company shall be a listed company, which is engaged in a sector eligible to receive Foreign Direct Investment and eligible to issue or avail of Foreign Currency Convertible Bond (FCCB) or External Commercial Borrowings (ECB)*

Entities not eligible to issue FCEB: *An Indian company, which is not eligible to raise funds from the Indian securities market, including a company which has been restrained from accessing the securities market by the SEBI shall not be eligible to issue FCEB.*

³⁷ A.P. (DIR Series) Circular no. 69 dt. January 25, 2012.

³⁸ A.P. (DIR Series) Circular no. 119 dt. May 07, 2012.

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Eligible subscriber: Entities complying with the Foreign Direct Investment policy and adhering to the sectoral caps at the time of issue of FCEB can subscribe to FCEB. Prior approval of the Foreign Investment Promotion Board, wherever required under the Foreign Direct Investment policy, should be obtained.

Entities not eligible to subscribe to FCEB: Entities prohibited to buy, sell or deal in securities by the SEBI will not be eligible to subscribe to FCEB.

End-use of FCEB proceeds:

Issuing Company:

- (i) *The proceeds of FCEB may be invested by the issuing company overseas by way of direct investment including in Joint Ventures or Wholly Owned Subsidiaries abroad, subject to the existing guidelines on overseas investment in Joint Ventures / Wholly Owned Subsidiaries.*
- (ii) *The proceeds of FCEB may be invested by the issuing company in the promoter group companies.*

Promoter Group Companies: Promoter group companies receiving investments out of the FCEB proceeds may utilize the amount in accordance with end-uses prescribed under the ECB policy.

End-uses not permitted: The promoter group company receiving such investments will not be permitted to utilise the proceeds for investments in the capital market or in real estate in India.

All-in-cost: The rate of interest payable on FCEB and the issue expenses incurred in foreign currency shall be within the all-in-cost ceiling as specified by Reserve Bank under the ECB policy.

Pricing of FCEB: At the time of issuance of FCEB the exchange price of the offered listed equity shares shall not be less than the higher of the following two:

- I. *The average of the weekly high and low of the closing prices of the shares of the offered company quoted on the stock exchange during the six months preceding the relevant date; and*
- II. *The average of the weekly high and low of the closing prices of the shares of the offered company quoted on a stock exchange during the two week preceding the relevant date.*

Average Maturity: Minimum maturity of FCEB shall be five years. The exchange option can be exercised at any time before redemption. While exercising the exchange option, the holder of the FCEB shall take delivery of the offered shares. Cash (Net) settlement of FCEB shall not be permissible.

Parking of FCEB proceeds abroad: The proceeds of FCEB may be retained and / or deployed overseas by the issuing / promoter group companies in accordance with the policy for the ECB or repatriated to India for credit to the borrowers' Rupee accounts with AD Category I banks in India pending utilization for permissible end-uses. It shall be the responsibility of the issuing company to ensure that the proceeds of FCEB are used by the promoter group company only for the permitted end-uses prescribed under the ECB policy. The issuing company should also submit audit trail of the end-use of the proceeds by the issuing company / promoter group companies to the Reserve Bank duly certified by the designated AD bank.

Operational Procedure: Issuance of FCEB shall require prior approval of the Reserve Bank under the Approval Route for raising ECB. The Reporting arrangement for FCEB shall be as per the extant ECB policy.

xv) *Empowered Committee*

Reserve Bank has set up an Empowered Committee to consider proposals coming under the Approval Route.

II. **REPORTING ARRANGEMENTS AND DISSEMINATION OF INFORMATION**

i. *Reporting Arrangements*

a) *With a view to simplifying the procedure, submission of copy of loan agreement is dispensed with.*

b) *For allotment of Loan Registration Number (LRN), borrowers are required to submit Form 83, in duplicate, certified by the Company Secretary (CS) or Chartered Accountant (CA) to the designated AD bank. One copy is to be forwarded by the designated AD bank to the Director, Balance of Payments Statistics Division, Department of Statistics and Information Systems (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051. (Note: copies of loan agreement and offer documents for FCCB are not required to be submitted with Form 83).*

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- c) *The borrower can draw-down the loan only after obtaining the LRN from DSIM, Reserve Bank.*
- d) *Borrowers are required to submit ECB-2 Return certified by the designated AD bank on monthly basis so as to reach DSIM, Reserve Bank within seven working days from the close of month to which it relates. [Note: All previous returns relating to ECB viz. ECB 3 – ECB 6 have been discontinued with effect from January 31, 2004].*
- ii) *Dissemination of Information*
For providing greater transparency, information with regard to the name of the borrower, amount, purpose and maturity of ECB under both Automatic and Approval routes are put on the Reserve Bank's website, on a monthly basis, with a lag of one month to which it relates.

Commentary:

Form 83 and Form ECB – 2 have been reproduced in the appendix entitled, "Forms".

III. STRUCTURED OBLIGATIONS

Borrowing and lending of Indian Rupees between two residents does not attract any provisions of the Foreign Exchange Management Act, 1999. In cases where a Rupee loan is granted against the guarantee provided by a non-resident, there is no transaction involving foreign exchange until the guarantee is invoked and the non-resident guarantor is required to meet the liability under the guarantee. The non-resident guarantor may discharge the liability by i) payment out of rupee balances held in India or ii) by remitting the funds to India or iii) by debit to his FCNR(B)/NRE account maintained with an AD bank in India. In such cases the non-resident guarantor may enforce his claim against the resident borrower to recover the amount and on recovery he may seek repatriation of the amount if the liability is discharged either by inward remittance or by debit to FCNR (B)/NRE account. However, in case the liability is discharged by payment out of Rupee balances the amount recovered can be credited to the NRO account of the non-resident guarantor.

The Reserve Bank vide its Notification No. FEMA.29/ RB-2000 dated September 26, 2000 has granted general permission to a resident, being a principal debtor to make payment to a person resident

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outside India, who has met the liability under a guarantee. Accordingly, in cases where the liability is met by the non-resident out of funds remitted to India or by debit to his FCNR(B)/NRE account, the repayment may be made by credit to the FCNR(B)/NRE/NRO account of the guarantor provided, the amount remitted/credited shall not exceed the rupee equivalent of the amount paid by the non-resident guarantor against the invoked guarantee.

The facility of credit enhancement by eligible non-resident entities may be extended to domestic debt raised through issue of capital market instruments, such as debentures and bonds, by Indian companies engaged exclusively in the development of infrastructure and by the Infrastructure Finance Companies (IFCs), which have been classified as such by the Reserve Bank in terms of the guidelines contained in the circular DNBS.PD. CC No. 168 / 03.02.089 / 2009-10 dated February 12, 2010, subject to the following conditions:

- i. Credit enhancement should be provided by multilateral / regional financial institutions and Government owned development financial institutions;*
- ii. The underlying debt instrument should have a minimum average maturity of seven years;*
- iii. Prepayment and call / put options are not permissible for such capital market instruments up to an average maturity period of 7 years;*
- iv. Guarantee fee and other costs in connection with credit enhancement will be restricted to a maximum 2 per cent of the principal amount involved;*
- v. On invocation of the credit enhancement, if the guarantor meets the liability and if the same is permissible to be repaid in foreign currency to the eligible non-resident entity, the all-in-cost ceilings, as applicable to the relevant maturity period of the Trade Credit / ECBs, is applicable to the novated loan. The all-in-cost ceilings, depending on the average maturity period, are applicable as follows:*

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| <i>Average maturity period of the loan on invocation`</i> | <i>All-in-cost Ceilings over 6 months LIBOR*</i> |
|---|--|
| <i>Up to three years</i> | <i>200 basis points</i> |
| <i>Three years and up to five years</i> | <i>300 basis points</i> |
| <i>More than five years</i> | <i>500 basis points</i> |

** for the respective currency of borrowing or applicable benchmark*

- vi. In case of default and if the loan is serviced in Indian Rupees, the applicable rate of interest would be the coupon of the bonds or 250 bps over the prevailing secondary market yield of 5 years Government of India security, as on the date of novation, whichever is higher;*
- vii. IFCs proposing to avail of the credit enhancement facility should comply with the eligibility criteria and prudential norms laid down in the circular DNBS.PD.CC No.168 / 03.02.089 / 2009-10 dated February 12, 2010 and in case the novated loan is designated in foreign currency, the IFC should hedge the entire foreign currency exposure; and*
- viii. The reporting arrangements as applicable to the ECBs would be applicable to the novated loans.*

Commentary:

As per extant guidelines, credit enhancement is permitted to be provided by multilateral / regional Financial Institutions and Government owned development Financial Institutions for domestic debt raised through issue of capital market instruments such as debentures and bonds by Indian Companies engaged exclusively in the development of infrastructure and by the Infrastructure Financial Companies which have been classified as such by RBI under the Approval Route.

It has now been decided to further liberalise the policy relating to structured obligations to permit direct foreign equity holder(s) as per extant ECB Guidelines (with minimum holding of 25% of the paid up capital) and indirect foreign equity holder holding atleast 51% of the paid up capital to provide credit enhancement to Indian companies engaged exclusively in the development of infrastructure as defined

under the extant ECB guidelines and by the IFCs classified as such by RBI.

It is to be noted that henceforth all the non resident entities are permitted to offer credit enhancement under the automatic route and no prior approval will be required from RBI. All other terms and conditions mentioned in Para 4 (ii to viii) of A.P. (DIR Series) Circular No. 40 dt. March 02, 2010 will remain unchanged.³⁹

IV. TAKE-OUT FINANCE

*As per the extant norms, refinancing of domestic Rupee loans with ECB is not permitted. However, keeping in view the special funding needs of the infrastructure sector, a scheme of take-out finance has been put in place. Accordingly, take-out financing arrangement through ECB, under the **Approval Route**, has been permitted for refinancing of Rupee loans availed of from the domestic banks by eligible borrowers in the **sea port and airport, roads including bridges and power sectors** for the development of new projects, subject to the following conditions:*

- i. The corporate developing the infrastructure project should have a tripartite agreement with domestic banks and overseas recognized lenders for either a **conditional** or **unconditional** take-out of the loan within three years of the scheduled Commercial Operation Date (COD). The scheduled date of occurrence of the take-out should be clearly mentioned in the agreement.*
- ii. The loan should have a minimum average maturity period of seven years.*
- iii. The domestic bank financing the infrastructure project should comply with the extant prudential norms relating to take-out financing.*
- iv. The fee payable, if any, to the overseas lender until the take-out shall not exceed 100 bps per annum.*
- v. On take-out, the residual loan agreed to be taken- out by the overseas lender would be considered as ECB and the loan should be designated in a convertible foreign currency and all extant norms relating to ECB should be complied with.*

³⁹A.P. (DIR Series) Circular No. 28 dt. September 26, 2011.

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- vi. *Domestic banks / Financial Institutions will not be permitted to guarantee the take-out finance.*
- vii. *The domestic bank will not be allowed to carry any obligation on its balance sheet after the occurrence of the take-out event.*
- viii. *Reporting arrangement as prescribed under the ECB policy should be adhered to.*

V. **COMPLIANCE WITH ECB GUIDELINES**

The primary responsibility to ensure that ECB raised / utilised are in conformity with the ECB guidelines and the Reserve Bank regulations / directions is that of the borrower concerned and any contravention of the ECB guidelines will be viewed seriously and will invite penal action under FEMA 1999 (cf. A. P. (DIR Series) Circular No. 31 dated February 1, 2005). The designated AD bank is also required to ensure that raising / utilisation of ECB is in compliance with ECB guidelines at the time of certification.

VI. **CONVERSION OF ECB INTO EQUITY**

- (i) *Conversion of ECB into equity is permitted subject to the following conditions:*
 - a. *The activity of the company is covered under the Automatic Route for Foreign Direct Investment or Government (FIPB) approval for foreign equity participation has been obtained by the company, wherever applicable.*
 - b. *The foreign equity holding after such conversion of debt into equity is within the sectoral cap, if any,*
 - c. *Pricing of shares is as per the pricing guidelines issued under FEMA, 1999 in the case of listed/ unlisted companies.*
- (ii) *Conversion of ECB may be reported to the Reserve Bank as follows:*
 - (a) *Borrowers are required to report **full conversion of outstanding ECB into equity** in the form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in form ECB-2 submitted to the DSIM, RBI within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" should be clearly indicated on top of the ECB-2 form. Once reported, filing of ECB-2 in the subsequent months is not necessary.*

- (b) *In case of partial conversion of outstanding ECB into equity, borrowers are required to report the converted portion in form FC-GPR to the Regional Office concerned as well as in form ECB-2 clearly differentiating the converted portion from the unconverted portion. The words "ECB partially converted to equity" should be indicated on top of the ECB-2 form. In subsequent months, the outstanding portion of ECB should be reported in ECB-2 form to DSIM*

Commentary:

Forms FC-GPR and Form ECB – 2 referred to above are reproduced in the appendix entitled, "Forms".

VII. CRYSTALLISATION OF ECB

AD banks desiring to crystallize their foreign exchange liability arising out of guarantees provided for ECB raised by corporates in India into Rupees, may make an application to the Chief General Manager-in-Charge, Foreign Exchange Department, External Commercial Borrowings Division, Reserve Bank of India, Central Office, Mumbai 400 001, giving full details viz., name of the borrower, amount raised, maturity, circumstances leading to invocation of guarantee /letter of comfort, date of default, its impact on the liabilities of the overseas branch of the AD bank concerned and other relevant factors.

VIII. ECB UNDER THE ERSTWHILE USD 5 MILLION SCHEME

Designated AD banks are permitted to approve elongation of repayment period for loans raised under the erstwhile USD 5 Million Schemes, provided there is a consent letter from the overseas lender for such re-schedulement without any additional cost. Such approval with existing and revised repayment schedule along with the Loan Key/Loan Registration Number should be initially communicated to the Chief General Manager-in-Charge, Foreign Exchange Department, ECB Division Reserve Bank of India, Central Office, Mumbai within seven days of approval and subsequently in ECB - 2.

IX. RATIONALIZATION OF PROCEDURES - DELEGATION OF POWERS TO AD

Any changes in the terms and conditions of the ECB after obtaining LRN from DSIM, RBI required the prior approval of RBI. The powers

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have been delegated to the designated AD Category-I banks to approve the following requests from the ECB borrowers, subject to specified conditions:

(a) Changes/modifications in the drawdown/repayment schedule

Designated AD Category-I banks may approve changes/modifications in the drawdown/repayment schedule of the ECBs already availed, both under the approval and the automatic routes, subject to the condition that the average maturity period, as declared while obtaining the LRN, is maintained. The changes in the drawdown/repayment schedule should be promptly reported to the DSIM, RBI in Form 83. However, any elongation/rollover in the repayment on expiry of the original maturity of the ECB would require the prior approval of the Reserve Bank.

b) Changes in the currency of borrowing

Designated AD Category-I banks may allow changes in the currency of borrowing, if so desired, by the borrower company, in respect of ECBs availed of both under the automatic and the approval routes, subject to all other terms and conditions of the ECB remaining unchanged. Designated AD banks should, however, ensure that the proposed currency of borrowing is freely convertible.

c) Change of the AD bank

Designated AD Category-I banks may allow change of the existing designated AD bank by the borrower company for effecting its transactions pertaining to the ECBs subject to No-Objection Certificate (NOC) from the existing designated AD bank and after due diligence.

d) Changes in the name of the Borrower Company

Designated AD Category-I banks may allow changes in the name of the borrower company subject to production of supporting documents evidencing the change in the name from the Registrar of Companies.

Commentary:

1. Form 83 referred to above is reproduced in the appendix entitled, "Forms".

2. With reference to the requirement under clause IX (b) above that designated AD. Banks should ensure that the proposed currency of borrowing is freely convertible, it is to be noted that Indian companies in the infrastructure sector as defined under the extant ECB guidelines are now allowed to raise ECB designated in Renminbi (RMB) under the Approval Route, subject to an annual cap of USD 1 billion pending further review. Such approval will be valid for 3 months, within which period the loan agreement should be executed. Form 83 for allotment of LRN should be submitted to DSIM, RBI, Mumbai within seven days from the date of execution of the agreement, failing which the RBI approval will stand cancelled. No bank guarantee is permitted.

There is a consequential procedural permission to the AD. Bank to open Nostro accounts in Renminbi.⁴⁰

Part-II : Trade Credits for Imports into India

Trade Credits' (TC) refer to credits extended for imports directly by the overseas supplier, bank and financial institution for maturity of less than three years. Depending on the source of finance, such trade credits include suppliers' credit or buyers' credit. Suppliers' credit relates to credit for imports into India extended by the overseas supplier, while buyers' credit refers to loans for payment of imports into India arranged by the importer from a bank or financial institution outside India for maturity of less than three years. It may be noted that buyers' credit and suppliers' credit for three years and above come under the category of External Commercial Borrowings (ECB) which are governed by ECB guidelines.

a) Amount and Maturity

AD banks are permitted to approve trade credits for imports into India up to USD 20 million per import transaction for imports permissible under the current Foreign Trade Policy of the DGFT with a maturity period up to one year (from the date of shipment). For import of capital goods as classified by DGFT, AD banks may approve trade credits up to USD 20 million per import transaction with a maturity period of more than one year and less than three

⁴⁰ A.P. (DIR Series) Circular No. 30 dt. September 27, 2011.

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years (from the date of shipment). No roll-over/extension will be permitted beyond the permissible period.

AD banks shall not approve trade credit exceeding USD 20 million per import transaction.

b) *All-in-cost Ceilings*

The current all-in-cost ceilings are as under:

| <i>Maturity period</i> | <i>All-in-cost Ceilings over 6 months LIBOR*</i> |
|---|---|
| <i>Up to one year</i> | <i>200 basis points</i> |
| <i>More than one year but less than three years</i> | |

** for the respective currency of credit or applicable benchmark*

The all-in-cost ceilings include arranger fee, upfront fee, management fee, handling/ processing charges, out of pocket and legal expenses, if any.

c) *Guarantee*

AD banks are permitted to issue Letters of Credit/guarantees/Letter of Undertaking (LoU) /Letter of Comfort (LoC) in favour of overseas supplier, bank and financial institution, up to USD 20 million per transaction for a period up to one year for import of all non-capital goods permissible under Foreign Trade Policy (except gold, palladium, platinum, Rodium, silver etc.) and up to three years for import of capital goods, subject to prudential guidelines issued by Reserve Bank from time to time. The period of such Letters of credit / guarantees / LoU / LoC has to be co-terminus with the period of credit, reckoned from the date of shipment.

d) *Reporting Arrangements*

AD banks are required to furnish details of approvals, drawal, utilisation, and repayment of trade credit granted by all its branches, in a consolidated statement, during the month, in form TC (format in Annex IV) from April 2004 onwards to the Director, Division of International Finance, Department of Economic Analysis and Policy, Reserve Bank of India, Central Office Building, 8th floor, Fort, Mumbai – 400 001 (and in MS-Excel file through email) so as to

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reach not later than 10th of the following month. Each trade credit may be given a unique identification number by the AD bank.

AD banks are required to furnish data on issuance of LCs / guarantees / LoU / LoC by all its branches, in a consolidated statement, at quarterly intervals (format in Annex V) to the Chief General Manager-in-Charge, Foreign Exchange Department, ECB Division, Reserve Bank of India, Central Office Building, 11th floor, Fort, Mumbai – 400 001 (and in MS-Excel file through email) from December 2004 onwards so as to reach the Department not later than 10th of the following month.

Commentary:

1. The all-in-cost ceiling vide clause (b) above was increased from 200 bps to 350 bps, subject to review by 31st March 2012. ⁴¹
2. On a review, RBI has decided to continue the all-in-cost ceiling of 350 basis points for a further period of 6 months upto September 30, 2012. The ceiling will include arrangement fee, upfront fee, management fee, handling / processing charges, out-of-pocket and legal expenses if any. ⁴²

⁴¹ A.P. (DIR Series) Circular No. 44 dt. September 15, 2011.

⁴² A.P. (DIR Series) Circular No. 100 dt. March 30, 2012.

Chapter 3

Professional Opportunities for ICAI Members in the ECB Space

In the ECB Space, the members of the Institute have the following significant roles to play:

1. Indian companies, especially those in the infrastructure sector with large funding requirements, may wish to take the bond issue funding route through a funding agency abroad. This type of proposal would involve the preparation of a project report with financial projections for the entire period of the proposed loan. In preparing such a project report, care will have to be taken to ensure that all assumptions and projections made are fully in compliance with the Indian Companies Act, Income Tax Act, FEMA, SEBI Act, and any other Indian Laws and Regulations which impinge upon different aspects of the proposed transactions. At the same time, the projections must also be presented in a format which will be in line with the funding and reporting norms of the overseas funding organisation. Our members, equipped as they are with knowledge of these laws and regulations as well as with expertise in the preparation of financial projections, are well positioned to undertake such professional assignments.
2. Both under the Automatic Route and Approval Route of ECB, a Report in the prescribed Form No. 83 is required to be submitted by the borrower to the Department of Statistics and Information Management, Reserve Bank of India, Mumbai, for allotment of Loan Registration Number (LRN). No drawdown of the ECB is possible until the LRN is allotted by RBI. It is noteworthy that the Form 83 Report is required to be certified by a Chartered Accountant or a Company Secretary.
3. Chartered Accountants can also undertake preparation of the ECB loan agreement and related documents which form the basis for the Form 83 Report.
4. Once an LRN is allotted for an ECB, the borrower is required to submit a monthly return in Form ECB-2 throughout the tenor of the

loan, whether or not there has been a drawdown or an interest payment or a part repayment transaction in a particular month. ECB-2 Return is also required to be certified by the company's full-time secretary or by a practising Chartered Accountant. In cases where the company does not have a full time secretary, this certification work is usually entrusted to the company's Statutory Auditor.

5. In the event of conversion of ECB into equity, the fair value of the equity share will have to be computed under the Discounted Free Cash Flow Method and certified by a Chartered Accountant. This is another area where the members will have a role to play.
6. In the issue of Foreign Currency Convertible Bonds and Foreign Currency Exchangeable Bonds, the borrower will need the services of a Chartered Accountant for structuring the funding plan, fixing the terms of issue and working out the terms of conversion, duly taking into consideration the applicable regulations.
7. For a pre-payment of ECB, the borrower will have to demonstrate that the ECB has attained the stipulated Minimum Average Maturity Period. This is usually done by a Chartered Accountant, using the template provided by RBI to the Commercial Banks.
8. Members could also play a useful role in negotiating with the overseas lender on behalf of the Indian borrower-client and fixing reasonable terms and conditions for the proposed ECB.

Appendix 1

List of the various amendments made to the ECB Regulations from 1 July 2011 (the date of RBI's Master Circular (MC) No.9/2011-12/ECB) till May 31, 2012, cross-referenced to the Master Circular as well as to the page of the Ready Referencer wherein each topic and its changes have been discussed :

Note: The sequence is topical (as per the MC) and not chronological.

| S. No. | A.P.[DIR Series] Circular No. & Date | Topic Amended – Master Circular (MC) Topic Reference | MC Page No. Para No. Referencer Page No. | Amendments Made |
|--------|--------------------------------------|--|--|---|
| 1 | 11 / 07.09.2011 | Auto Route-Recognised Lenders(RL) | 5 Para (ii) Refr Pg 22-25 | Power to approve change of RL (except Foreign Collaborators and Foreign Equity Holders) (FEH) delegated to Authorised Dealers.(ADs) |
| 2 | 27/ 23.09.2011 | Auto Route- RL | 5 Para (ii) Refr Pg 22-25 | ECB designated in INR may be availed but only from FEH |
| 3 | 63/ 29.12.2011 | Auto Route – RL | 5 Para (ii) Refr Pg 22-25 | The lender of INR designated ECB can also hedge the currency risk with Indian ADs |
| 4 | 29/ 26.09.2011 | Auto Route – RL - FEH lending over USD 5 Million | 5 Para (ii)(ii) Refr Pg 22-25 | Debt- Equity Ratio renamed ECB-Equity Ratio. ECB now includes not only proposed ECB but also any existing ECB from |

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| | | | | |
|----|-------------------|--------------------------------------|---|--|
| | | | | same FEH. Equity now includes proportionate free reserves attributable to the FEH. |
| 5 | 27/ 23.09.2011 | Auto Route – Amount & Maturity | 6 Para (iii) (a)&(b) Refr Pg 25-29 | Limit raised for : Hotel , Hospital & Software Sector corporates from USD 100 million to USD 200 million ; For other Corporates from USD 500 Million to USD 750 Million. |
| 6 | 64/ 05.01.2012 | Auto Route- Amount & Maturity | 6 Para (iii) (a) Refr Pg 25-29 | This is a consequential amendment. For ECB above USD 20 Million and upto USD 750 Million (500 Million hitherto), the Minimum Average Maturity Period (MAMP) shall be five years. |
| 6A | 75/07-02-2012 | Do | Do | ADs empowered to approve reduction in ECB Amount & change in drawdown schedule |
| 7 | 51/ 23.11.2011 | Auto Route – All – in- Cost Ceilings | 7 Para (iv) Refr Pg 29-30 | For ECB with Average Maturity Period (AMP) of 3 to 5 years, ceiling raised from 300bps to 350bps over 6 month |

Appendix 1

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|----|-------------------|--|--|---|
| 7A | 99/30-03-2012 | Do | Do | LIBOR for the loan currency. Above ceilings to hold good for Apr-Sep 2012 |
| 8 | 27/ 23.09.2011 | Auto Route –End Uses Permitted- Infrastructure Sector | 7 Para(v) (a) Refr Pg 30-35 | ECB now permitted for interest during construction in infra projects. |
| 9 | 69/ 25.01.2012 | Auto Route- End Uses Permitted | 7 Para (v) | Power is now delegated to ADs to approve changes in End –Uses. |
| 9A | 111/20-04-2012 | Do | Refr Pg 30-35 Do | ECB may be used for Toll Systems |
| 10 | 25/ 23.09.2011 | AutoRoute – End Uses Not Permitted – Repayment of existing Rupee loans | 8 Para (vi) (c) Refr Pg 35-37 | Infra companies allowed to utilise 25% of ECB to repay INR loan for capex on completed infra project, if 75% is to be applied to new infra project. |
| 11 | 52/ 23.11.2011 | Auto Route- Parking of ECB Proceeds | 11 Para (ix) Refr Pg 45-46 | ECB proceeds meant for INR expenditure should not be parked abroad but must be brought in immediately. |
| 12 | 01/ 04.07.2011 | Auto Route- Refinancing of existing ECB | 11 Para (xi) Refr Pg 47-48 | Foreign Currency Convertible Bonds (FCCBs) are now allowed to be refinanced under the Auto Route. |

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|-----|--------------------|--|--|--|
| 13 | 69/ 25.01.2012 | Auto Route- Procedure | 12 Para (xiii) Refr Pg 48- 49 | For cancellation of Loan Registration Number (LRN), power is now delegated to ADs. |
| 13A | 119/07-05- 2012 | Do | Do | Breakup of FC & INR utilization to be disclosed in Form 83 |
| 14 | 70/ 25.01.2012 | Approval Route- Eligible Borrowers – Infrastructure Finance Companies(IFCs) | 12-13 Para (d) Pg.13 Refr Pg 49- 53 | ADs to certify Leverage Ratio of IFCs seeking to raise ECB beyond 50% of owned funds. |
| 14A | 85/29-02- 2012 | Approval Route- Eligible Borrowers –NMIZ Developers | Do | NMIZ Developer has been included in eligible borrowers under the Approval Route |
| 15 | 11/ 07.09.2011 | Approval Route- Recognised Lenders | 14 Para (ii) (a) Refr Pg 53- 54 | Power delegated to ADs to approval changes of RL except for Foreign Collaborators & FEH |
| 16 | 26/ 23.09.2011 | Approval Route – Amount & Maturity | 13 Para (iii) Refr Pg 54- 56 | Infra companies now allowed to avail short term credit as bridge Finance of import of capital goods under Approval Route. |
| 16A | 75/07-02- 2012 | Do | Do | ADs empowered to approve change in drawdown schedule |
| 17 | 51/ 23.11.2011 | Approval Route - All – in- Cost Ceilings | 15 Para (iv) | For ECB with Average Maturity Period (AMP) of 3 to 5 years, ceiling raised |

Appendix 1

| | | | | |
|-----|-------------------|---|--|---|
| | | | Refr Pg 57-58 | from 300bps to 350bps over 6 month LIBOR for the loan currency. |
| 18 | 25/ 23.09.2011 | Approval Route – End Uses Not Permitted- Repayment of existing rupee loans | 16 Para(vi)(c) Refr Pg 59-62 | Infra companies allowed to utilize 25% of ECB to repay INR loan for capex on completed infra project, if 75% is to be applied to new infra project. |
| 18A | 111/20-04-2012 | Do | Do | Power cos. allowed to use 40% to repay rupee loans & 60% on new project |
| 18B | 113/24-04-2012 | Approval Route – End Uses Not Permitted- Utilization of ECB for Working Capital | Do | Indian civil Aviation Cos. are now allowed to raise ECB for Working Capital |
| 19 | 52/ 23.11.2011 | Approval Route- Parking of ECB Proceeds | 17 Para(ix) Refr Pg 63-64 | ECB proceeds meant for INR expenditure should not be parked abroad, but must be brought in immediately. |
| 19A | 112/20-04-2012 | Approval Route- Refinancing of ECB | 18 Para (xi) Refr Pg 66 | FEH now included in list of eligible NR entities who can offer credit enhancement under the Auto Route. |
| 20 | 28/ 26.09.2011 | Structured Obligations | 22 Para(iii) | |

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| | | | | |
|-----|-------------------|--|---------------------------|---|
| | | | Refr Pg 73-77 | |
| 21 | 30/ 27.09.2011 | Changes in Currency Of Borrowing | 28 Refr Pg 82-84 | Infra companies may now raise ECB under Approval Route in RNB |
| 22. | 44/ 15.11.2011 | Trade Credit For Imports into India-- All – in- Cost Ceiling | 29 Part II Para (b) | Ceiling raised for all maturities less than 3 years from 200 to 350 bps above 6 months' LIBOR for the currency of credit. |
| 22A | 100/30-03-2012 | Do | Refr Pg 84-87 | The above ceiling to continue for Apr-Sep.2012 |

Appendix 2

Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993

Central Government hereby notifies the following Scheme, for facilitating Issue of Foreign Currency Convertible Bonds and Ordinary Shares Through Global Depository Mechanism by Indian Companies, namely :

Short title and commencement

1. (1) This Scheme may be called the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

(2) It shall be deemed to have come into force with effect from the first day of April, 1992.

Definitions

2. In this Scheme, unless the context otherwise requires :

- (a) Domestic Custodian Bank means a banking company which acts as a custodian for the ordinary shares or foreign currency convertible bonds of an Indian company which are issued by it against global depository receipts or certificates;
- (b) Foreign Currency Convertible Bonds means bonds issued in accordance with this scheme and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part, on the basis of any equity related warrants attached to debt instruments;
- (c) Global Depository Receipts means any instrument in the form of a depository receipt or certificate (by whatever name it is called) created by the Overseas Depository Bank outside India and issued to non-resident investors against the issue of ordinary shares or Foreign Currency Convertible Bonds of issuing company;

- (d) Issuing company means an Indian company permitted to issue Foreign Currency Convertible Bonds or ordinary shares of that company against Global Depositary Receipts;
- (e) Overseas Depositary Bank means a bank authorised by the issuing company to issue global depositary receipts against issue of Foreign Currency Convertible Bonds or ordinary shares of the issuing company;
- (f) the words and expressions not defined in the Scheme, but defined in the Income-tax Act, 1961 (43 of 1961), or the Companies Act, 1956 (1 of 1956), or the Securities and Exchange Board of India Act, 1992 (15 of 1992), or the Rules and Regulations framed under these Acts, shall have the meaning respectively assigned to them, as the case may be, in the Income-tax Act or the Companies Act, or the Securities and Exchange Board of India Act;
- (g) ¹[(g) a software company means a company engaged in manufacture or production of software where not less than 80% of the company's turnover is from software activities;
- (h) information technology software and information technology services means the companies which deal with such activities as defined in recommendation No. 19(a) and (b) of the notification dated 25th July, 1998, issued by the Planning Commission.]

Eligibility for issue of convertible bonds or ordinary shares of issuing company

3. (1) An issuing company desirous of raising foreign funds by issuing Foreign Currency Convertible Bonds or ordinary shares for equity issues through Global Depositary Receipt is required to obtain prior permission of the Department of Economic Affairs, Ministry of Finance, Government of India:

- ²[(i) An Indian Company may sponsor an issue of ADRs/GDRs with an overseas depository against shares held by its shareholders at a price to be determined by the Lead Manager, in respect of :
 - (a) Divestment by shareholders of their holdings of Indian companies listed in India.
 - (b) Divestment by shareholders of their holdings of Indian companies not listed in India but which are listed overseas.

- (ii) Such a facility would be available *pari passu* to all categories of shareholders of the company whose shares are being sold in the ADR/GDR market overseas.
- (iii) An approved intermediary under the scheme, would be an Investment Banker registered with the Securities and Exchange Commission in the USA, or under Financial Services Authority in U.K., or the appropriate regulatory authority in Germany, France, Singapore or in Japan.
- (iv) Such issues would need to conform to the Foreign Direct Investment Policy and other mandatory statutory requirements and detailed guidelines issued in this regard. The provisions of paragraph (4B) of Schedule I to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 as notified by Reserve Bank of India *vide* Notification No. FEMA 41/2001-RB, dated March 2, 2001, would also need to be adhered to.]

³[(1)(A) *An Indian company, which is not eligible to raise funds from the Indian capital market including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) will not be eligible to issue (i) Foreign Currency Convertible Bonds and (ii) Ordinary Shares through Global Depositary Receipts under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993.*

(1)(B) *Unlisted Indian Companies issuing Global Depositary Receipts/Foreign Currency Convertible Bonds shall be required to simultaneously list in the Indian Stock Exchange(s).]*

⁴[(1)(Ba) *The unlisted companies issuing Global Depositary Receipts/Foreign Currency Convertible Bonds that have taken verifiable effective steps , before 31st August, 2005 would be exempt from the requirement of prior or simultaneous listing provided these companies complete their issues latest by 31st December, 2005.*

Explanation : *Effective steps , for the above purpose, will mean the following*

- (a) *That the company has completed due diligence and filed offering circular in the overseas exchange(s); or*
- (b) *That approval of overseas exchange(s) has been obtained; or*
- (c) *That the payment of listing fees is made; or*

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- (d) *Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.*

It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for effective steps .]

¹*[(1)(C) Erstwhile Overseas Corporate Bodies (OCBs) who are not eligible to invest in India through the portfolio route and entities prohibited to buy, sell or deal in securities by SEBI will not be eligible to subscribe to (i) Foreign Currency Convertible Bonds and (ii) Ordinary Shares through Global Depository Receipts under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.]*

(2) An issuing company seeking permission under sub-paragraph (1) shall have a consistent track record of good performance (financial or otherwise) for a minimum period of three years, on the basis of which an approval for finalising the issue structure would be issued to the company by the Department of Economic Affairs, Ministry of Finance.

(3) On the completion of finalisation of issue structure in consultation with the Lead Manager to the issue, the issuing company shall obtain the final approval for proceeding ahead with the issue from the Department of Economic Affairs.

Explanation. For the purposes of sub-paragraphs (2) and (3) issue structure means any of the requirements which are provided in paragraphs 5 and 6 of this Scheme.

(4) The Foreign Currency Convertible Bonds shall be denominated in any convertible foreign currency and the ordinary shares of an issuing company shall be denominated in Indian rupees.

(5) When an issuing company issues ordinary shares or bonds under this Scheme, that company shall deliver the ordinary shares or bonds to a Domestic Custodian Bank who will, in terms of agreement, instruct the Overseas Depository Bank to issue Global Depository Receipt or Certificate to non-resident investors against the shares or bonds held by the Domestic Custodian Bank.

(6) A Global Depository Receipt may be issued in the negotiable form and may be listed on any international stock exchanges for trading outside India.

(7) The provisions of any law relating to issue of capital by an Indian company shall apply in relation to the Issue of Foreign Currency Convertible Bonds or the ordinary shares of an issuing company and the issuing company shall obtain the necessary permission or exemption from the appropriate authority under the relevant law relating to issue of capital.

Issue of Global Depository Receipts

²[3A. Indian companies engaged in Information Technology Software and Information Technology Services, are eligible to offer to their non-resident/resident permanent employees (including Indian and Overseas working directors) global depository receipts against the issue of ordinary shares under the scheme subject to the operational guidelines/conditions issued from time to time by the Government.]

¹[3B. Indian companies engaged in Information Technology Software and Information Technology Services as defined in recommendation No. 19(a) and (b) of the Notification dated 25-7-1998 issued by the Planning Commission, are eligible to offer also to the non-resident/resident permanent employees (including Indian and overseas working directors) of their subsidiary companies, incorporated in India or abroad and engaged in Information Technology Software and Information Technology Services, Global Depository Receipts against the issue of ordinary shares under the Scheme subject to the eligibility conditions and operational guidelines/conditionalities announced from time to time by the Government.]

²[3C. Indian companies registered in India and engaged in the following sectors/areas, where 80 per cent of turnover is from these sectors/areas of the operation/business of the company in the three previous financial years are eligible to offer global depository receipts against the issue of ordinary shares under the Scheme to their non-resident/resident permanent employees (including Indian and overseas working directors) and also of their subsidiary companies, incorporated in India or abroad, subject to the eligibility conditions and operation guidelines/conditionalities announced from time to time by the Government:

- (i) Information Technology (as defined in the recommendation No. 19(a) and (b) of Gazette Notification dated 25th July, 1999, issued by the Planning Commission) and Entertainment Software.
- (ii) Pharmaceuticals.
- (iii) Biotechnology.

- (iv) Any other activities within the knowledge-based sector as notified by the Government from time to time.

These norms would also be available for multi-product diversified companies which do not conform to the criteria of 80 per cent turnover as mentioned above but having an average annual export earnings of Rs. 100 crores from the sectors mentioned above in the three previous financial years.]

Limits of foreign investment in the issuing company

4. The ordinary shares and Foreign Currency Convertible Bonds issued against the Global Depository Receipts shall be treated as direct foreign investment in the issuing company. The aggregate of the foreign investment made either directly or indirectly (through Global Depository Receipts Mechanism) shall not exceed 51 per cent of the issued and subscribed capital of the issuing company :

Provided that the investments made through Offshore Funds or by Foreign Institutional Investors will not form part of the limit laid down in this paragraph.

Issue structure of the Global Depository Receipts

5. (1) A Global Depository Receipt may be issued for one or more underlying shares or bonds held with the Domestic Custodian Bank.

(2) The Foreign Currency Convertible Bonds and Global Depository Receipts may be denominated in any freely convertible foreign currency.

(3) The ordinary shares underlying the Global Depository Receipts and the shares issued upon conversion of the Foreign Currency Convertible Bonds will be denominated only in Indian currency.

(4) The following issues will be decided by the issuing company with the Lead Manager to the issue, namely :

- (a) public or private placement;
- (b) number of Global Depository Receipts to be issued;
- (c) the issue price;

¹[(ca) Listed Companies - *The pricing should not be less than the higher of the following two averages:*

- (i) *The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date;*

- (ii) *The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date.*

The relevant date means the date thirty days prior to the date on which the meeting of the general body of shareholders is held, in terms of section 81(1A) of the Companies Act, 1956, to consider the proposed issue.]

²[(ca)(i) *Listed companies - The companies issuing Global Depository Receipts that have taken verifiable effective steps, before 31st August, 2005 would be exempt from the requirement of the pricing guidelines at para 5(4)(ca) provided these companies complete their issues latest by 31st December, 2005.*

Explanation : Effective steps, for the above purpose, will mean the following:

- (a) *That the company has completed due diligence and filed offering circular in the overseas exchange(s); or*
- (b) *That approval of overseas exchange(s) has been obtained; or*
- (c) *That the payment of listing fees is made; or*
- (d) *Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.*

It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for effective steps.]

¹[(cb) *Unlisted companies - The pricing should be in accordance with Reserve Bank of India Regulations notified under Foreign Exchange Management Act, 1999.]*

³[(cc) *The companies going in for an offering in the domestic market and a simultaneous or immediate follow on offering (within 30 days of domestic issue) through ADR/GDR issues wherein GDRs/ADRs are priced at or above the domestic price, would be exempt from the requirement given at (ca)(i) and (ii) above. Companies going for such simultaneous or immediate follow on offering in the ADR/GDR market will have to take SEBI's approval for such issue, which will specify the percentage to be offered in the domestic and ADR/GDR markets.]*

- (d) *the rate of interest payable on Foreign Currency Convertible Bonds; and*

(e) the conversion price, coupon, and the pricing of the conversion options of the Foreign Currency Convertible Bonds.

¹[(e)(i) Listed Companies - *The conversion price of the Foreign Currency Convertible Bonds should be in accordance with para 5(4)(ca) ibid.*]

²[(e)(i)(a) Listed companies - *The companies issuing Foreign Currency Convertible Bonds that have taken verifiable effective steps, before 31st August, 2005 would be exempt from the requirement of the pricing guidelines at para 5(4)(e)(i) provided these companies complete their issues latest by 31st December, 2005.*

Explanation: *Effective steps, for the above purpose, will mean the following:*

- (a) *That the company has completed due diligence and filed offering circular in the overseas exchange(s); or*
- (b) *That approval of overseas exchange(s) has been obtained; or*
- (c) *That the payment of listing fees is made; or*
- (d) *Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.*

It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for effective steps.]

¹[(e)(ii) Unlisted Companies - *The conversion price of the Foreign Currency Convertible Bonds should be in accordance with Reserve Bank of India Regulations notified under Foreign Exchange Management Act, 1999.*]

(5) There would be no lock-in-period for the Global Depository Receipts issued under this Scheme.

Listing of the Global Depository Receipts

6. The Global Depository Receipts issued under this Scheme may be listed on any of the Overseas Stock Exchanges, or over the counter exchanges or through Book Entry Transfer Systems prevalent abroad and such receipts may be purchased, possessed and freely transferable by a person who is a non-resident within the meaning of section 2(q) of the Foreign Exchange Regulation Act, 1973 (46 of 1973), subject to the provisions of that Act.

Transfer and redemption.

7. (1) A non-resident holder of Global Depositary Receipts may transfer those receipts, or may ask the Overseas Depositary Bank to redeem those receipts. In the case of redemption, Overseas Depositary Bank shall request the Domestic Custodian Bank to get the corresponding underlying shares released in favour of the non-resident investor, for being sold directly on behalf of the non-resident, or being transferred in the books of account of the issuing company in the name of the non-resident.

³[(1A) The Global Depositary Receipts redeemed and underlying shares sold in terms of para 7(1) of the Scheme may be re-issued to the extent of such redemption and sale made in the domestic market. Such re-issuance will be in terms of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 as amended from time to time and the guidelines issued in this regard.]

(2) In case of redemption of the Global Depositary Receipts into underlying shares, a request for the same will be transmitted by the Overseas Depositary Bank to the Domestic Custodian Bank in India, with a copy of the same being sent to the issuing company for information and record.

(3) On redemption, the cost of acquisition of the shares underlying the Global Depositary Receipts shall be reckoned as the cost on the date on which the Overseas Depositary Bank advises the Domestic Custodian Bank for redemption. The price of the ordinary shares of the issuing company prevailing in the Bombay Stock Exchange or the National Stock Exchange on the date of the advice of redemption shall be taken as the cost of acquisition of the underlying ordinary shares.

(4) For the purposes of conversions of Foreign Currency Convertible Bonds, the cost of acquisition in the hands of the non-resident investors would be the conversion price determined on the basis of the price of the shares at the Bombay Stock Exchange, or the National Stock Exchange, on the date of conversion of Foreign Currency Convertible Bonds into shares.

Taxation on Foreign Currency Convertible Bonds

8. (1) Interest payments on the bonds, until the conversion option is exercised, shall be subject to deduction of tax at source at the rate of ten per cent.

(2) Tax on dividend on the converted portion of the bond shall be subject to deduction of tax at source at the rate of ten per cent.

(3) Conversion of Foreign Currency Convertible Bonds into shares shall not give rise to any capital gains liable to income-tax in India.

(4) Transfers of Foreign Currency Convertible Bonds made outside India by a non-resident investor to another non-resident investor shall not give rise to any capital gains liable to tax in India.

Taxation on shares issued under Global Depository Receipt Mechanism.

9. (1) Under the provisions of the Income-tax Act, income by way of dividend on shares will be taxed at the rate of 10 per cent. The issuing company shall transfer the dividend payments net after deduct tax at source to the Overseas Depository Bank.

(2) On receipt of these payments of dividend after taxation, the Overseas Depository Bank shall distribute them to the non-resident investors proportionate to their holdings of Global Depository Receipts evidencing the relevant shares. The holders of the Depository Receipts may take credit of the tax deducted at source on the basis of the certification by the Overseas Depository Bank, if permitted by the country of their residence.

(3) All transactions of trading of the Global Depository Receipts outside India, among non-resident investors, will be free from any liability to income-tax in India on capital gains therefrom.

(4) If any capital gains arise on the transfer of the aforesaid shares in India to the non-resident investor, he will be liable to income-tax under the provisions of the Income-tax Act. If the aforesaid shares are held by the non-resident investor for a period of more than twelve months from the date of advice of their redemption by the Overseas Depository Bank, the capital gains arising on the sale thereof will be treated as long-term capital gains and will be subject to income-tax at the rate of 10 per cent under the provisions of section 115AC of the Income-tax Act. If such shares are held for a period of less than twelve months from the date of redemption advice, the capital gains arising on the sale thereof will be treated as short-term capital gains and will be subject to tax at the normal rates of income-tax applicable to non-residents under the provisions of the Income-tax Act.

(5) After redemption of the Depository Receipts into underlying shares, during the period, if any, which these shares are held by the redeeming non-resident foreign investor who has paid for these shares in foreign exchange at the time of purchase of the Global Depository Receipt, the rate of taxation of income by way of dividends on these shares would continue to be at the rate of 10 per cent, in accordance with section 115AC(1) of the Income-tax

Act. The long-term capital gains on the sale of these redeemed underlying shares held by non-resident investors in the domestic market shall also be charged to tax at the rate of 10 per cent, in accordance with the provisions of section 115AC(1).

(6) When the redeemed shares are sold on the Indian Stock Exchanges against payment in rupees, these shares shall go out of the purview of section 115AC of the Income-tax Act and income therefrom shall not be eligible for the concessional tax treatment provided thereunder. After the transfer of shares where consideration is in terms of rupees payment, the normal tax rates would apply to the income arising or accruing on these shares.

(7) Deduction of tax at source on the amount of capital gains accruing on transfer of the shares would be made in accordance with sections 195 and 196C of the Income-tax Act.

Application of avoidance of double taxation agreement in case of Global Depository Receipts.

10. (1) During the period of fiduciary ownership of shares in the hands of the Overseas Depository Bank, the provisions of Avoidance of Double Taxation Agreement entered into by the Government of India with the country of residence of the Overseas Depository Bank will be applicable in the matter of taxation of income from dividends from underlying shares and interest on Foreign Currency Convertible Bonds.

(2) During the period, if any, when the redeemed underlying shares are held by the non-resident investor on transfer from fiduciary ownership of the Overseas Depository Bank, before they are sold to resident purchasers, the Avoidance of Double Taxation Agreement entered into by the Government of India with the country of residence of the non-resident investor will be applicable in the matter of taxation of income from the dividends from the said underlying shares, or interest on Foreign Currency Convertible Bonds, or any capital gain arising out of transfer of underlying shares.

Gift-tax and wealth-tax.

11. The holding of the depository receipts in the hands of non-resident investors and the holding of the underlying shares by the Overseas Depository Bank in a fiduciary capacity and the transfer of the Global Depository Receipts between non-resident investors and the Overseas Depository Bank shall be exempt from wealth-tax under the Wealth-tax Act, 1957 (27 of 1957), and from gift-tax under the Gift-tax Act, 1958 (18 of 1958).

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ADDITIONAL INFORMATION TO BE FILED BY COMPANIES APPLYING FOR PERMISSION TO FLOAT GLOBAL ISSUES

1. Name of the company and address for communication :
2. Existing business :
3. Profile on proposed expansion/Diversification project with break-up requirements of rupee and F.E. Components :

4. Existing resources:

| EQUITY | Year ending in March | | |
|----------------------------------|----------------------|------|------|
| | 1993 | 1992 | 1991 |
| (i) Authorised capital | | | |
| (ii) Issued and paid-up capital | | | |
| (iii) Reserves and surplus : | | | |
| (a) General reserve | | | |
| (b) Development rebate reserve | | | |
| (c) Investment allowance reserve | | | |
| (d) Capital reserve | | | |
| (e) Other reserves | | | |

| DEBT | Year ending in March | | |
|---|----------------------|------|------|
| | 1993 | 1992 | 1991 |
| (i) Secured loans : | | | |
| (a) Banks and FIs. | | | |
| (b) Debentures | | | |
| (c) Other loans | | | |
| (ii) Unsecured loans | | | |
| Deposits and loans | | | |
| Deferred Liabilities | | | |
| (iii) Current liabilities over drafts from banks and other short-term borrowings. | | | |

- (i) Authorised capital
 - (ii) Issued and paid-up capital
 - (iii) Reserves and surplus :
 - (a) General reserve
 - (b) Development rebate reserve
 - (c) Investment allowance reserve
 - (d) Capital reserve
 - (e) Other reserves
- (i) Secured loans :
 - (a) Banks and FIs.
 - (b) Debentures
 - (c) Other loans
 - (ii) Unsecured loans
 - Deposits and loans
 - Deferred Liabilities
 - (iii) Current liabilities over drafts from banks and other short-term borrowings.
5. Fixed assets
 - (i) Gross block
 - (ii) Additions and accretions during the year
 - (iii) Depreciation
 - (iv) Net block

II. Work-in-progress

- 6. (i) Sales and other income
- (ii) Operating expenses
- (iii) Interest on loans
- (iv) Profit before depreciation
- (v) Depreciation
- (vi) Profit before tax
- (vii) Provision for taxation
- (viii) Profit before appropriations
- (ix) Dividend and other appropriations
- (x) Profit transferred to general reserves

| Year ending in March | | |
|----------------------|------|------|
| 1993 | 1992 | 1991 |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

7. Capacity and utilisation

| Products | Year | Units | Installed capacity P.A. | Production during the year | Capacity utilisation percentage |
|----------|------|-------|-------------------------|----------------------------|---------------------------------|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

8. Financial results and management ratios

- (i) Net worth
- (ii) Capital employed
- (iii) Capital-turnover ratio
- (iv) Equity-debt ratio (long-term)
- (v) Profitability

| Year ending in March | | |
|----------------------|------|------|
| 1993 | 1992 | 1991 |
| | | |
| | | |
| | | |
| | | |

(a) Profit margin

$$\frac{\text{Net profit}}{\text{Income}} \times 100 = \text{percentage}$$

(b) Return on equity

$$\frac{\text{Net profit}}{\text{Equity}} \times 100 = \text{percentage}$$

(c) Return on net worth

$$\frac{\text{Net profit}}{\text{Net Worth}} \times 100 = \text{percentage}$$

(d) Return on total investment

$$\frac{\text{Net profit}}{\text{Total Investment}} \times 100 = \text{percentage}$$

(e) Return on total capital employed

$$\frac{\text{Net profit}}{\text{Resources}} \times 100 = \text{percentage}$$

(vi) Liquidity ratio

$$\text{Current ratio} = \frac{\text{Current assets}}{\text{Current liabilities}}$$

(vii) Revenue per worker

$$\text{for the year} = \frac{\text{Income}}{\text{Total employment}}$$

9. Statutory liabilities

(Disputed and otherwise) and defaults

10. Defaults in respect of interest/instalments to loans from banks/financial institutions

| | | |
|--|--|--|
| | | |
|--|--|--|

11. Exports and imports :

- (a) Free on board value exports
- (b) Exported to (Countries)
- (c) Imports
 - (i) Capital equipment
 - (ii) Materials, components, consumables
- (d) Other foreign currency expenditure
- (e) Foreign debt liabilities

| | | |
|--|--|--|
| | | |
|--|--|--|

12. Salient features of the prospective corporate plans and diversification proposals with special reference to foreign exchange requirements.

Format of approval for finalising the issue structure

F. No.
Government of India
Ministry of Finance, Department of Economic Affairs
(Investment Division)
New Delhi

Dated the.....

To

M/s.

Subject : Your application for a GDR/ADR/IDR issue for an amount of.....

Dear Sir,

I am directed to refer to your letter No.....dated.....on the subject mentioned above and to convey Government of India s approval in principle to the mobilisation of foreign currency resources equivalent to.....through issue of GDR/ADR/IDRs to cover the Foreign Currency needs for your..... projects and other related corporate needs.

2. The approval is subject to the understanding that the foreign currency resources raised through the proposed issue should be mandatorily remitted to India immediately after the issue.

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3. This approval is valid for a period of six months from the date of issue of this letter.

4. You are now requested to finalise the detailed parameters of the proposed GDR/ADR/IDRs offering for consideration and final approval by the Government of India.

Yours faithfully
Director (Foreign Investments)

Tel :

*INDICATIVE ITEMS OF FINAL APPROVAL FOR FOREIGN CURRENCY
CONVERTIBLE BOND ISSUES*

Issuer
Lead Manager
Co. Lead Manager(s)
Principal amount
Currency
Issue price (and premium, if any)
Coupon (and payment dates)
Conversion premium
Maturity
Listing of bonds
Optional redemption by issuer (Call)
Optional redemption by investor (Put)
Form and denomination Status
Cross default provisions
Negative pledge provisions
Taxation
Commissions
Reimbursible expenses
Governing laws

*INDICATIVE ITEMS IN THE FINAL APPROVAL FOR EURO-EQUITY
ISSUES THROUGH GDR MECHANISM*

Issuer
Lead Manager
Co. Lead Manager(s)
Overseas Depository Institution
Indian Custodian
Issue structure and denomination (No. of underlying shares represented by the GDRs).
Issue amount (Principal amount)
Greenshoe Option (Additional amount in percentage terms which may be retained if offered) warrants attached, if any
Currency of Issue
G.D.R. Listing
Underlying shares listing
Standstill period (No further equity shares, or interests in equity shares, for a specified time period from the date of issue)
Trading provision
Settlement provisions
Selling commission
Underwriting commission and management fees
Legal expenses, printing expenses, Depository fees, and other out of pocket expenses.
Taxation
Governing laws.

Notification : *No. GSR 700(E), dated 12-11-1993.*

CLARIFICATION ONE

A scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) was notified by the Government of India in November, 1993. Revisions/modifications in the operative guidelines for Euro-issues are announced from time to time. In the

External Commercial Borrowings: A Practitioner's Guide

background of developments in recent months, it has become necessary to carry out the following revisions in the existing policy until further review.

- (i) All FCCBs shall be subject to the following revised maximum spreads over six months LIBOR, for the respective currency in which the loan is being raised or the applicable benchmark(s), as the case may be :

| <i>Type of Projects</i> | Existing <i>(all-in cost)</i> | <i>New</i> <i>(all-in cost)</i> |
|-------------------------|---|------------------------------------|
| Normal Projects | 200 | 150 |
| Infrastructure | 300 | 250 |
| Long term | 350 | 300 |

- (ii) FCCBs for meeting rupee expenditure under automatic route to be hedged unless there is a natural hedge in the form of uncovered foreign exchange receivables, which will be ensured by Authorized Dealers (ADs).
- (iii) FCCBs exceeding USD 50 million would be permitted for the following end uses only (a) Financing import of equipment and (b) Foreign exchange needs of infrastructure projects.
- (iv) No financial intermediary (viz., a bank, DFI, or NBFC) will be allowed access to FCCBs or to provide guarantees.
- (v) FCCBs pending utilization would need to be parked overseas.

2. The above amendments to the FCCB guidelines will come into force from the date of issue of Notification of regulations/directions.

Press Release : *F. No. 15/9/2003-NRI, dated 1-1-2004.*

CLARIFICATION TWO

A Scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme was notified by the Government of India on 12th November, 1993. Revisions/modifications in the operative guidelines of the Scheme have been made from time to time.

In order to bring the ADR/GDR guidelines in alignment with SEBI's guidelines on domestic capital issues, amendment to the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, was made on 31st August, 2005.

In order to remove hardship, due to the amendment of 31st August, 2005, to Indian companies that have taken verifiable effective steps, before 31st

August, 2005 and incurred costs for overseas issues, the Government made further amendment to the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, on 14th September, 2005.

Representations from Industry have been received for exemption from pricing guidelines to the companies which are going for simultaneous or immediate sequential offering of GDRs/ADRs and domestic equity shares wherein GDRs/ADRs are priced at or above the domestic price.

The above request has been examined in Government and it has been decided that the companies going in for an offering in the domestic market and a simultaneous or immediate follow on offering (within 30 days of domestic issue) through ADR/GDR issues wherein GDRs/ADRs are priced at or above the domestic price, would be exempt from the requirement of the revised pricing guidelines. Companies going for such simultaneous or immediate follow on offering in the ADR/GDR market will have to take SEBI's approval for such issue, which will specify the percentage to be offered in the domestic and ADR/GDR markets.

It is also clarified that in terms of amendment to the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, dated 31st August, 2005, unlisted companies, which have already issued Global Depository Receipts/Foreign Currency Convertible Bonds in the international market, and are to list in the domestic market, would be required to do so by 31st March, 2006.

However all other conditions contained in the amendment dated 31st August, 2005 including that for (i) eligibility of issuer and (ii) eligibility of subscriber would continue to be applicable to all companies.

Press Release : Dated 17-11-2005.

CLARIFICATION THREE

1. A Scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) was notified by the Government of India on 12th November, 1993. Revisions/modifications in the operative guidelines of the Scheme have been made from time to time.
2. With a view to further liberalising the scheme, it has been decided by the Government to allow unlisted Indian companies to sponsor an issue of ADRs/GDRs with an overseas depository against shares held by its shareholders, subject to the following conditions :

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- (i) Such a facility would be available *pari passu* to all categories of shareholders of the company whose shares are being sold in the ADR/GDR market overseas.
- (ii) Unlisted companies which had issued FCCBs, ADRs/GDRs prior to 31st August, 2005 and are not making profit may be permitted to sponsor issues against existing shares held by its shareholders and will be permitted to comply with listing condition on the domestic stock exchanges within three years of having started making profit.
- (iii) Unlisted companies which have not issued FCCBs, ADRs/GDRs prior to 31st August, 2005 would require prior or simultaneous listing in the domestic stock exchanges for issuing FCCBs, ADRs/GDRs or sponsor such issues against existing shares under the scheme.
- (iv) Such issues would need to conform to the FDI policy and other mandatory statutory requirements. The provisions of paragraph (4B) of Schedule I to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 as notified by Reserve Bank of India *vide* Notification No. FEMA 41/2001-RB, dated March 2, 2001, would also need to be adhered to.

Press Note : *Dated 28-6-2006.*

Appendix 2A

Press Releases - December 2008

Guidelines for prepayment/buyback of FCCB issues by the Indian Companies

1. A Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) was notified by the Government of India in November, 1993. Liberalisations in the policy are announced from time to time.
2. With a view to further liberalising the scheme, it has been decided by the Government to allow Indian companies to prepay the existing FCCBs subject to the following conditions:-
 - a. This provision of pre-payment (premature purchase) of existing FCCBs will be available upto 31st March, 2009. The existing condition of minimum maturity period for redemption of bonds is put on hold till 31st March, 2009.
 - b. The initiation power/right of prepayment is vested with the issuer of Bonds and not with the holder of bonds. However, the actual pre-payment is subject to the consent of the holder of the bond.
 - c. The bonds purchased from the holders must be cancelled and should not be re-issued or re-sold.
 - d. This prepayment scheme of FCCBs will not have any effect on the bondholders of Indian Companies not opting this window or on the non-participating bondholders of Indian companies opting this window.
 - e. Buyback should be routed through the designated Authorised Dealer for the FCCB.
 - f. Companies should open escrow account with the branch or subsidiary of an Indian bank overseas or an international bank to ensure that the funds are used only for the buyback.
3. This scheme is available under both automatic route and approval route.
4. Auto Route: Buyback of FCCBs under the auto route are allowed for cases where:

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- i. the funds used for the buyback represent either existing foreign currency funds held abroad or in India or in EEFC accounts; and
 - ii. fresh ECBs is raised in conformity with the current ECB norms. Where fresh ECB is co-terminus with the residual maturity of the original FCCB but is less than three years, the all-in-cost ceiling should not exceed 6 months Libor plus 200 bps, as applicable to short-term borrowing.
 - iii. minimum discount of 15 per cent on the book value.
5. Approval Route: Indian companies are allowed to buyback out of Rupee resources, representing internal accruals, subject to the following conditions:
 - i. rupee resources represent internal accruals to be evidenced by Chartered Accountant's and designated AD's certificates;
 - ii. the amount does not exceed USD 50 million of the redemption value of the FCCB per company; and
 - iii. minimum discount of 25 per cent on the book value.

F.No.9/4/2008-ECB

New Delhi, dated the 6th December, 2008

The Press Information Bureau is requested to give wide publicity to this Press Note.

(K.P. Krishnan)

Joint Secretary to the Government of India

Press Information Officer,

Press Information Bureau,

Shastri Bhavan, New Delhi

Appendix 2B

Government of India
Ministry of Finance
Department of Economic Affairs
Capital Markets Division
(ECB Section)

Press Note

Subject: Amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993"

A scheme for issue of Foreign Currency Convertible Bonds and Ordinary shares (through Depository Receipts Mechanism) was notified in 1993 (here in after referred to as "the scheme") to allow the Indian Corporate sector to access global capital markets through issue of Foreign Currency Convertible Bonds (FCCBs) / Equity Shares under the Global Depository Receipt Mechanism (GDR) and American Depository Receipt Mechanism (ADR). The scheme has been amended from time to time since then.

2. In order to bring the pricing norm under the scheme in alignment with the pricing norms for qualified institutions placements (QIP) issued by Securities and Exchange Board of India (SEBI) the Government amended the pricing norms under the scheme, vide Press Note dated 27th November, 2008.

3. Government has received representations from companies seeking permission to revise the conversion price of FCCBs issued prior to 27th November, 2008 (i.e. the date when the new pricing norms came into effect) to the conversion price as per new pricing norms. The matter was examined by the Government in consultation with RBI and SEBI. In view of the problems being faced by companies, it has now been decided by the Government to provide a window of 6 months under the scheme to interested companies to revise their conversion price as per new pricing norms. This will be effective from the date of issue of this Press Note. The revision of conversion price of FCCBs would be subject to the following conditions:

- (i) The issuing company shall ensure that the revision of price and consequent issue of shares may not breach FDI limit;
- (ii) The issuing company shall take approval from its Board as well as from its shareholders;

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- (iii) The issuing company shall enter into a fresh agreement with the FCCB holders in terms of renegotiation of the conversion price.
- 4 The company will be permitted to revise its conversion price after getting the approval of the Reserve Bank of India.
- 5 The above amendments in FCCBs policy will come into force immediately.
-

F.No.9/3/2009-ECB

dated 15th February, 2010.

The Press Information Bureau is requested to give wide publicity to this Press Note.

(Dr. K. P. Krishnan)
Joint Secretary to the Government of India

Press Information Officer
Press Information Bureau
Shastri Bhawan
New Delhi

Copy for information and further necessary action to:

1. The Deputy Governor, RBI, Central Office, Mumbai
2. The Executive Director, SEBI, Mumbai
3. Director (Technical), NIC camp at North Block, New Delhi

(Dr. K. P. Krishnan)
Joint Secretary to the Government of India

F. No. 15/4/2004-NRI
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF ECONOMIC AFFAIRS
(CAPITAL MARKET DIVISION)

PRESS NOTE

Subject: Amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993."

A Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) was notified by the Government of India on 12th November, 1993. Revisions/modifications in the operative guidelines of the Scheme have been made from time to time.

2. With a view to further liberalising the scheme, it has been decided by the Government to allow unlisted Indian companies to sponsor an issue of ADRs/GDRs with an overseas depository against shares held by its shareholders, subject to the following conditions:-

- (i) Such a facility would be available pari-passu to all categories of shareholders of the company whose shares are being sold in the ADR/GDR market overseas.
- (ii) Unlisted companies which had issued FCCBs, ADRs/GDRs prior to 31st August, 2005 and are not making profit may be permitted to sponsor issues against existing shares held by its shareholders and will be permitted to comply with listing condition on the domestic stock exchanges within three years of having started making profit.
- (iii) Unlisted companies which have not issued FCCBs, ADRs/GDRs prior to 31st August, 2005 would require prior or simultaneous listing in the domestic stock exchanges for issuing FCCBs, ADRs/GDRs or sponsor such issues against existing shares under the scheme.

External Commercial Borrowings: A Practitioner's Guide

- (iv) Such issues would need to conform to the FDI policy and other mandatory statutory requirements. The provisions of paragraph (4B) of Schedule I to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 as notified by Reserve Bank of India vide Notification No. FEMA 41/2001-RB, dated March 2, 2001, would also need to be adhered to.

F.No.15/4/2004-NRI

New Delhi, dated the 28th June, 2006.

The Press Information Bureau is requested to give wide publicity to this Press Note.

(K.P. Krishnan)

Joint Secretary to the Government of India

Press Information Officer,
Press Information Bureau,
Shastri Bhavan, New Delhi

Appendix 2D

**TO BE PUBLISHED IN THE GAZETTE OF INDIA (EXTRAORDINARY)
UNDER PART- II SECTION- 3, SUB-SECTION (i)**

**F.No.15/4/2004-NRI
Ministry of Finance
(Department of Economic Affairs)**

New Delhi, Dated the 31st August, 2005

NOTIFICATION

**Foreign Currency Convertible Bonds and Ordinary Shares (Through
Depository Receipt Mechanism) (Amendment) Scheme, 2005.**

G.S.R. No.-----, Central Government hereby amend the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, namely: -

1. This Scheme may be called the issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2005.
2. The Scheme shall be deemed to have come into force from the date of publication of Notification; and
3. In the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993;

After paragraph 3(1), the following sub-paragraph shall be inserted; namely:-

3(1)(A). An Indian company, which is not eligible to raise funds from the Indian capital market including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) will not be eligible to issue (i) Foreign Currency Convertible Bonds and (ii) Ordinary Shares through Global Depository Receipts under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

3(1)(B). Unlisted Indian Companies issuing Global Depository Receipts/Foreign Currency Convertible Bonds shall be required to simultaneously list in the Indian Stock Exchange(s).

3(1)(C). Erstwhile Overseas Corporate Bodies (OCBs) who are not eligible to invest in India through the portfolio route and entities prohibited to buy, sell or deal in securities by SEBI will not be eligible to subscribe to (i) Foreign Currency Convertible Bonds and (ii) Ordinary Shares through Global

External Commercial Borrowings: A Practitioner's Guide

Depository Receipts under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

In Paragraph 5 sub-paragraph (4) (c) shall read as follows:-

5(4)(ca) Listed Companies – The pricing should not be less than the **higher of the following two averages:**

(i) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date;

(ii) The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date.

The “relevant date” means the date thirty days prior to the date on which the meeting of the general body of shareholders is held, in terms of section 81 (IA) of the Companies Act, 1956, to consider the proposed issue.

5(4)(cb) Unlisted Companies – The pricing should be in accordance with Reserve Bank of India Regulations notified under Foreign Exchange Management Act, 1999.

In Paragraph 5 sub-paragraph (4) (e) (i) and (4) (e) (ii) shall be inserted, namely:

5(4)(e)(i) Listed Companies – The conversion price of the Foreign Currency Convertible Bonds should be in accordance with para 5(4)(ca) *ibid*.

5(4)(e)(ii) Unlisted Companies – The conversion price of the Foreign Currency Convertible Bonds should be in accordance with Reserve Bank of India Regulations notified under Foreign Exchange Management Act, 1999.

(F.No.15/4/2004-NRI)

(U.K. SINHA)

JOINT SECRETARY TO THE GOVERNMENT OF INDIA.

Foot Note:

(1). The Principal Scheme, viz., Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.), was published in the Gazette of India, Extraordinary, Part II-Section 3 – Sub-section (i) on the 12th November 1993/Kartika 21, 1915). (Notification GSR No. 700 (E) dated 12th November, 1993).

- (2) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 1999 was published in the Gazette of India, Extraordinary, Part II - Section 3 – Subsection (i) on the 11th November 1999/ Kartika 20, 1921. (Notification GSR. NO. 764 (E), dated 10th November 1999).
- (3) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 1999 was published in the Gazette of India, Extraordinary, Part II - Section 3 – Subsection (i) on the 19th June 2000/Jyaistha 29, 1922. (Notification GSR. NO. 544 (E), dated 16th June 2000).
- (4) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme- II, 2000 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Sub-section (i) on 14th November, 2000/Kartika 23,1922. (Notification GSR. NO. 865 (E), dated 10th November 2000).
- (5) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme- III, 2000 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Sub-section (i) on 14th November, 2000/Kartika 23,1922. (Notification GSR. NO. 866 (E), dated 10th November 2000).
- (6) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2001 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Subsection (i) on 21st September, 2001/Bhadra 30,1923. (Notification GSR. No. 687(E), dated 18th September, 2001).
- (7) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2002 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Subsection (i) on 13th February, 2002/Magha 24,1923. (Notification GSR. No. 100(E), dated 13-02-2002).
- (8) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt

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Mechanism) (Amendment) Scheme II, 2002 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Sub-section (i) on 30th, July 2002/Sravana 8, 1924. (Notification GSR. No. 532 (E), dated 29-07-2002).

(9) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme III, 2002 was published in the Gazette of India (Extraordinary) under Part-II Section-3 Sub-section (i) on 2nd, December 2002/Agrahayana 11, 1924. (Notification GSR. No. 789 (E), dated 2-12-2002).

Appendix 2E

**F.No.15/4/2004-NRI
Ministry of Finance
(Department of Economic Affairs)**

New Delhi, Dated the 14th September, 2005

NOTIFICATION

Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Second Amendment) Scheme, 2005.

G.S.R. (E).- Central Government hereby amend the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, namely :-

1. This Scheme may be called the issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Second Amendment) Scheme, 2005.
2. The Scheme shall be deemed to have come into force from the date of publication of Notification.
3. In the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993;

After paragraph 3(1)(B), the following sub-paragraph shall be inserted, namely:-

3(1)(Ba) The unlisted companies issuing Global Depository Receipts/Foreign Currency Convertible Bonds that have taken verifiable "effective steps," before 31st August, 2005 would be exempt from the requirement of prior or simultaneous listing provided these companies complete their issues latest by 31st December, 2005.

Explanation: "Effective steps," for the above purpose, will mean the following:

- (a) That the company has completed due diligence and filed offering circular in the overseas exchange(s); or
- (b) That approval of overseas exchange(s) has been obtained; or
- (c) That the payment of listing fees is made; or
- (d) Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.

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It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for "effective steps."

4. After Paragraph 5, sub-paragraph (4) (ca), the following sub-paragraph shall be inserted, namely:-

5(4)(ca)(i) Listed companies- The companies issuing Global Depository Receipts that have taken verifiable "effective steps," before 31st August, 2005 would be exempt from the requirement of the pricing guidelines at para 5(4)(ca) provided these companies complete their issues latest by 31st December, 2005.

Explanation: "Effective steps," for the above purpose, will mean the following:

- (a) That the company has completed due diligence and filed offering circular in the overseas exchange(s); or
- (b) That approval of overseas exchange(s) has been obtained; or
- (c) That the payment of listing fees is made; or
- (d) Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.

It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for "effective steps."

5. After Paragraph 5, sub-paragraph (4) (e) (i), the following sub-paragraph shall be inserted, namely:-

5(4)(e)(i)(a) Listed Companies- The companies issuing Foreign Currency Convertible Bonds that have taken verifiable "effective steps," before 31st August, 2005 would be exempt from the requirement of the pricing guidelines at para 5(4)(e)(i) provided these companies complete their issues latest by 31st December, 2005.

Explanation: "Effective steps," for the above purpose, will mean the following:

- (a) That the company has completed due diligence and filed offering circular in the overseas exchange(s); or
- (b) That approval of overseas exchange(s) has been obtained; or

- (c) That the payment of listing fees is made; or
- (d) Approval of the Reserve Bank of India under Foreign Exchange Management Act, 1999, where applicable, for meeting issue related expenses has been obtained.

It is clarified that private placements of issues, where no offering circular was placed before the overseas exchange(s), would not qualify for "effective steps."

(F.No.15/4/2004-NRI)

(U.K.SINHA)

JOINT SECRETARY TO THE GOVERNMENT OF INDIA

Foot Note:

(1). The Principal Scheme, viz., Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism Scheme, 1993), was published in the Gazette of India, Extraordinary, Part II – Section 3 – Subsection (i) on the 12th November 1993/Kartika 21, 1915). (Notification GSR No. 700 (E) dated 12th November, 1993).

(2) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme. 1999 was published in the Gazette of India, Extraordinary, Part II – Section 3 – Sub-section (i) on the 11th November 1999/Kartika 20, 1921. (Notification GSR. No. 764 (E), dated 10th November 1999).

(3) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme. 1999 was published in the Gazette of India, Extraordinary, Part II – Section 3 – Sub-section (i) on the 19th June 2000/Jyaistha 29, 1922. (Notification GSR. No. 544 (E), dated 16th June 2000).

(4) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme II, 2000 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on the 14th November, 2000 /Kartika 23, 1922. (Notification GSR. No.865 (E), dated 10th November 2000).

(5) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme-III, 2000 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on 14th November 2000/Kartika 23, 1922. (Notification GSR. No. 866 (E), dated 10th November 2000).

(6) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme 2001 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on 21st September, 2001/Bhadra 30, 1923. (Notification GSR. No. 687 (E), dated 18th September, 2001).

(7) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2002 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on 13th February 2002/Magha 24, 1923. (Notification GSR. No. 100 (E), dated 13th February 2002).

(8) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme-II, 2002 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on the 30th July 2002/Sravana 8, 1924. (Notification GSR. No. 532 (E), dated 29th July 2002).

(9) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme III, 2002 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on 2nd December 2002/Agrahayana 11,1924 (Notification GSR. No. 789 (E), dated 2nd December 2002).

(10) Amendment in the Original Scheme carried in Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2005 was published in the Gazette of India, (Extraordinary), under Part II – Section 3 – Sub-section (i) on 31st August 2005/Bhadra 9,1927 (Notification GSR. No. 553 (E), dated 31st August 2005).

Ministry of Finance
Department of Economic Affairs

31st July, 2008

Proposed changes in the ADR/GDR's Pricing guidelines

The "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993" was initiated in 1993 to allow the Indian Corporate sector to access global capital markets through issue of Foreign Currency Convertible Bonds (FCCBs)/Equity Shares under the Global Depository Receipt Mechanism (GDR) and American Depository Receipt Mechanism (ADR). The Scheme has been amended several times since then.

2. In order to bring the ADR/GDR guidelines in alignment with SEBI's guidelines on domestic capital issues, Government, vide Press Note dated August 31, 2005, amended the pricing guidelines for Indian listed companies issuing FCCB/ADR/GDR. The present pricing clause, thus, reads as under:

"Listed Companies – The pricing should not be less than the higher of the following two averages:

(i) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date;

(ii) The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two week preceding the relevant date.

The "relevant date" means the date thirty days prior to the date on which the meeting of the general body of shareholders is held, in terms of section 81 (IA) of the Companies Act, 1956, to consider the proposed issue."

3. In the normal circumstances the extant pricing norms provides protection from price manipulation by the Issuer in domestic market.

4. In the recent period, Government has received a number of representations from corporates that the extant pricing norms affect them adversely in the falling market.

5. In order to remove hardship to companies in a falling market, Government is considering to modify the pricing guidelines for ADR/GDR issues. The proposal is to amend the parameter (i) of the pricing norms to

'two months' in place of 'six months'. In addition the definition of 'the relevant date' for such issues is also proposed to be modified as per SEBI (DIP) guidelines on preferential allotment and qualified institutions placements (QIP).

6. After the incorporation of proposed changes, the new pricing norms for ADR/GDR issues will read as under:

"Listed Companies – The pricing should not be less than the higher of the following two averages:

*(i) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the **two** months preceding the relevant date;*

(ii) The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two week preceding the relevant date.

*The "relevant date" means the date **when the Board of the issuing company passes the resolution authorizing the proposed issue.***

7. Comments of the public are invited on the proposed changes mentioned above. Comments may be sent to Shri A.M. Bajaj, Director (External Market), Department of Economic Affairs, Ministry of Finance, Room No.71, North Block, New Delhi 110001 by mail or at am.bajaj@nic.in by e-mail within the next 15 days.

FEMA

Rules/Regulations

Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004

Notification No. GSR 757(E) [No. FEMA 120/RB-2004], dated 7-7-2004, issued by Foreign Exchange Department, RBI

In exercise of the powers conferred by clause (a) of sub-section (3) of section 6 and section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of Notification No. FEMA 19/RB 2000 dated 3rd May, 2000, as amended from time to time the Reserve Bank of India makes the following regulations relating to transfer or issue of any foreign security by a person resident in India, namely :—

1. Short title and commencement

- (i) These Regulations may be called the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004.
- (ii) They shall come in force from the date of their publication in the Official Gazette.

Definitions

- 2. In these Regulations, unless the context otherwise requires:
 - (a) "Act" means Foreign Exchange Management Act, 1999, (42 of 1999);
 - (b) "authorised dealer" means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Act;
 - (c) "American Depository Receipt" (ADR) means a security issued by a bank or a depository in United States of America (USA) against underlying rupee shares of a company incorporated in India;
 - (d) "Core Activity" means an activity carried on by an Indian entity turnover wherefrom constitutes not less than 50% of its total turnover in the previous accounting year;
 - (e) "Direct investment outside India" means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares

of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment.

- (f) "Financial commitment" means the amount of direct investment by way of contribution to equity and loan and 50 per cent of the amount of guarantees issued by an Indian party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary;
- (g) "Foreign Currency Convertible Bond" (FCCB) means a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which is payable in foreign currency;
- (h) "Form" means the forms annexed to these Regulations;
- (i) "Global Depository Receipt" (GDR) means a security issued by a bank or a depository outside India against underlying rupee shares of a company incorporated in India;
- (j) "Host country" means the country in which the foreign entity receiving the direct investment from an Indian party is registered or incorporated;
- (k) "Indian party" means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932 making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank : —
Provided that when more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian party"
- (l) "Investment banker" means an Investment banker registered with the Securities and Exchange Commission in USA, or the Financial Services Authority in UK, or appropriate regulatory authority in Germany, France, Singapore or Japan;
- (m) "Joint Venture (JV)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party makes a direct investment;
- (n) "Mutual Fund" means a Mutual Fund referred to in clause (23D) of section 10 of the Income-tax Act, 1961;
- (o) "Net worth" means paid up capital and free reserves;

- (p) "Real estate business" means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges;
- (q) "Wholly Owned Subsidiary (WOS)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian party;
- (r) "Agricultural Operations" means agricultural operations as defined in the 'National Bank for Agriculture and Rural Development Act, 1981'
- (s) Words and expressions used but not defined in these Regulations shall have the meanings respectively assigned to them in the Act.

Prohibition on issue or transfer of foreign security

3. Save as otherwise provided in the Act or rules or regulations made or directions issued thereunder, no person resident in India shall issue or transfer any foreign security:—

Provided that the Reserve Bank may, on application made to it, permit any person resident in India to issue or transfer any foreign security.

Purchase and sale of foreign security by a person resident in India

4. A person resident in India
- (a) may purchase a foreign security out of funds held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency Accounts) Regulations, 2000;
 - (b) may acquire bonus shares on the foreign securities held in accordance with the provisions of the Act or rules or regulations made thereunder;
 - (c) when not permanently resident in India, may purchase a foreign security from out of his foreign currency resources outside India;
 - (d) may sell the foreign security purchased or acquired under clauses (a), (b) or (c).

Explanation.—For the purpose of this clause, 'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

PART I

DIRECT INVESTMENT OUTSIDE INDIA

Prohibition on Direct Investment outside India

5. Save as otherwise provided in the Act, rules or regulations made or directions issued thereunder, or with prior approval of the Reserve Bank,

- (1) no person resident in India shall make any direct investment outside India; and
- (2) no Indian party shall make any direct investment in a foreign entity engaged in real estate business or banking business.

Permission for Direct Investment in certain cases

6. (1) Subject to the conditions specified in sub-regulation (2), (and Regulation 7 in case investment in financial services sector) an Indian party may make direct investment in a Joint Venture or Wholly Owned Subsidiary outside India.

(2) (i) The total financial commitment of the Indian party in Joint Ventures/Wholly Owned Subsidiaries shall not exceed 100% of the net worth of the Indian Party as on the date of the last audited balance sheet;

*Explanation:—*For the purpose of the limit of 100% of the net worth the following shall be reckoned, namely:

- (a) cash remittance by market purchase and/or equivalent rupee investments in case of Nepal and Bhutan;
- (b) capitalisation of export proceeds and other dues and entitlements as mentioned in Regulation 11;
- (c) fifty per cent of the value of guarantees issued by the Indian party to or on behalf of the joint venture company or wholly owned subsidiary;
- (d) investment in agricultural operations through overseas offices or directly;
- (e) External Commercial Borrowing in conformity with other parameters of the ECB guidelines.

Notwithstanding anything contained in these Regulations investment in Pakistan shall not be permitted.

(ii) The direct investment is made in an overseas JV or WOS engaged in a bona fide business activity.

(iii) The Indian Party is not on the Reserve Bank's Exporters caution list/list of defaulters to the banking system circulated by the Reserve Bank or under investigation by any investigation/enforcement agency or regulatory body.

(iv) The Indian party has submitted up to date returns in Form APR in respect of all its overseas investments;

(v) The Indian Party routes all transactions relating to the investment in a Joint Venture/Wholly Owned Subsidiary through only one branch of an authorised dealer to be designated by it.

*Explanation:—*The Indian Party may designate different branches of authorised dealers for different Joint Ventures/Wholly Owned Subsidiaries outside India.

(vi) The Indian Party submits Form ODA, duly completed, to the designated branch of an authorised dealer.

(3) Investment under this Regulation may be funded out of one or more of the following sources, namely :—

(i) out of balance held in the Exchange Earners' Foreign Currency account of the Indian party maintained with an authorised dealer in accordance with Regulation 4 of Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000;

(ii) drawal of foreign exchange from an authorised dealer in India not exceeding 100% of the net worth of the Indian Party as on the date of last audited balance sheet;

*Explanation:—*For the purpose of the limit of 100% of the net worth the following shall be reckoned, namely:

(a) cash remittance by market purchase;

(b) capitalisation of export proceeds and other dues and entitlements as mentioned in Regulations 11 and 12;

(c) fifty per cent of the value of guarantees issued by the Indian party to or on behalf of the Joint Venture Company or Wholly Owned Subsidiary;

(d) utilisation of the amount raised by issue of ADRs/GDRs by the Indian party;

(e) External Commercial Borrowing in conformity with other parameters of the ECB guidelines.

Explanation:—For the purpose of reckoning net worth of an Indian party, the net worth of its holding company (which holds at least 51% stake in the Indian Party) or its subsidiary company (in which the Indian party holds at least 51% stake) may be taken into account to the extent not availed of by the holding company or the subsidiary independently and has furnished a letter of disclaimer in favour of the Indian Party;

Provided further that the ceiling mentioned in sub-clause (2)(i) shall not apply where the investment is made out of balances held in its EEFC account, maintained in accordance with the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000, as amended from time to time.

(4) An Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture/Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian Party has made investment by way of contribution to the equity capital of the Joint Venture.

(5) An Indian Party may make direct investment without any limit in any foreign security out of the proceeds of its international offering of shares through the mechanism of ADR and/or GDR :—

Provided that

- (a) the ADR/GDR issue has been made in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 and the guidelines issued thereunder from time to time by the Central Government;
 - (b) the Indian Party files with the designated authorised dealer in Form ODA full details of the investment proposed.
- (6)(a) For the purposes of investment under this Regulation by way of remittance from India in an existing company outside India, the valuation of shares of the company outside India shall be made,—
- (i) where the investment is more than USD 5 (Five) million, by a Category I Merchant Banker Registered with Securities and Exchange Board of India (SEBI), or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and
 - (ii) in all other cases, by a Chartered Accountant or a Certified Public Accountant.

(b) For the purposes of investment under this Regulation by acquisition of shares of an existing company outside India where the consideration is to be paid fully or partly by issue of the Indian party's shares, the valuation of shares of the company outside India shall in all cases, be carried out by a Category I Merchant Banker registered with the Securities and Exchange Board of India (SEBI) or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country.

General Permission for Investment in Agricultural Operations Overseas Directly or through Overseas Offices

6A. A person resident in India being a company incorporated in India or a partnership firm registered under Indian Partnership Act, 1932, may undertake agricultural operations including purchase of land incidental to such activity either directly or through their overseas offices;

Provided that—

- (a) the Indian party is otherwise eligible to make investment under Regulation 6 and that such investment is within the overall limits as specified in Regulation 6.
- (b) for the purposes of investment under this regulation by acquisition of land overseas the valuation of the land is certified by a certified valuer registered with the appropriate valuation authority in the host country.

General Permission for Investment in Equity of a Company Registered Overseas

6B. A person resident in India, being an individual or a listed Indian company or a mutual fund registered in India, may invest in

- (a) the shares of an overseas company which is listed on a recognised stock exchange and has in its name share holding of not less than 10% in any listed Indian company as on 1st January of the year of investment;
- (b) the rated bonds/fixed income securities issued by companies at (a) above:

Provided that—

- (i) in the case of investment by a listed Indian company, the investment shall not exceed 25% of its net worth as on the date of its last audited balance sheet;

- (ii) in the case of investment by a Mutual Fund, the investment shall not exceed the ceiling stipulated by Securities & Exchange Board of India (SEBI) from time to time;
- (iii) every transaction relating to purchase and sale of shares of the overseas company or bonds/securities shall be routed through the designated branch of an authorised dealer in India.

Investment in Financial Services Sector

7. (1) Subject to the Regulations in Part I, an Indian party may make investment in an entity outside India engaged in financial services activities:

Provided that the Indian party

- (i) has earned net profit during the preceding three financial years from the financial services activities;
- (ii) is registered with the regulatory authority in India for conducting the financial services activities;
- (iii) has obtained approval from the concerned regulatory authorities both in India and abroad, for venturing into such financial sector activity;
- (iv) has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

(2) any additional investment by an existing JV/WOS or its step down company in the Financial Services Sector shall be made only after complying with the conditions stipulated in sub-clause (1).

Investment in a foreign security by swap or exchange of shares of an Indian company

8. (1) An Indian Party may acquire shares of a foreign company, engaged in bona fide business activity in exchange of ADRs/GDRs issued to the latter in accordance with the scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued thereunder from time to time by the Central Government;

Provided that

- a. the Indian Party has already made an ADR and/or GDR issue and that such ADRs/GDRs are currently listed on any stock exchange outside India;

such investment by the Indian Party does not exceed amount equivalent to 10 times the export earnings of the Indian Party during the preceding financial year as reflected in its audited balance-sheet, inclusive of all investments made under Regulations in Part I.

- b. the ADR and/or GDR issue for the purpose of acquisition is backed by underlying fresh equity shares issued by the Indian Party;
- c. the total holding in the Indian Party by persons resident outside India in the expanded capital base, after the new ADR and/or GDR issue, does not exceed the sectoral cap prescribed under the relevant regulations for such investment;
- d. the valuation of the shares of the foreign company is made,—
 - (i) as per the recommendations of the Investment Banker if the shares are not listed on any stock exchange; or
 - (ii) based on the current market capitalization of the foreign company arrived at on the basis of monthly average price on any stock exchange abroad for the three months preceding the month in which the acquisition is committed and over and above, the premium, if any, as recommended by the Investment Banker in its due diligence report in other cases.

(2) Within 30 days from the date of issue of ADRs and/or GDRs in exchange for acquisition of shares of the foreign company under sub-regulation (1), the Indian Party shall submit a report in Form ODG to the Reserve Bank.

Approval of the Reserve Bank in certain cases

9. (1) An Indian Party, which does not satisfy the eligibility norms under Regulation 6 or 7 or 8, may apply to the Reserve Bank for approval.

(2) Application for direct investment in Joint Venture/Wholly Owned Subsidiary outside India, or by way of exchange for shares of a foreign company, shall be made in Form ODI, or in Form ODB, as applicable.

(2A) An application made under sub-regulation (2) in Form ODI

- (a) for the purpose of investment by way of remittance from India, in an existing company outside India, shall be accompanied, by the valuation of shares of the company outside India, made—
 - (i) where the investment is more than USD 5 (five) million, by a Category I Merchant Banker registered with SEBI or an

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- Investment Banker/Merchant Banker registered with the appropriate regulatory authority in the host country; and
- (ii) in all other cases, by a Chartered Accountant or a Certified Public Accountant
- (b) for the purposes of investment by acquisition of shares of an existing company outside India where the consideration is to be paid fully or partly by issue of the Indian party's shares, shall be accompanied by the valuation carried out by a Category I Merchant Banker registered with the SEBI or an Investment Banker/Merchant Banker registered with the appropriate regulatory authority in the host country.
- (3) The Reserve Bank may, inter alia, take into account following factors while considering the application made under sub-regulation (2):
- (a) Prima facie viability of the Joint Venture/Wholly Owned Subsidiary outside India;
 - (b) Contribution to external trade and other benefits which will accrue to India through such investment;
 - (c) Financial position and business track record of the Indian Party and the foreign entity;
 - (d) Expertise and experience of the Indian Party in the same or related line of activity of the Joint Venture or Wholly Owned Subsidiary outside India.

Unique Identification Number

10. Reserve Bank will allot a Unique Identification Number for each Joint Venture or Wholly Owned Subsidiary outside India and the Indian Party shall quote such number in all its communications and reports to the Reserve Bank and the authorized dealer.

Investment by capitalization

11. (1) An Indian Party may make direct investment outside India in accordance with the Regulations in Part I by way of capitalisation in full or part of the amount due to the Indian Party from the foreign entity towards:—

- (i) payment for export of plant, machinery, equipment and other goods/software to the foreign entity;
- (ii) fees, royalties, commissions or other entitlements due to the Indian Party from the foreign entity for the supply of technical know-how, consultancy, managerial or other services :

Provided that where the export proceeds have remained unrealised beyond a period of six months from the date of export, and fees, royalties, commissions or other entitlements of the Indian party have remained unrealised from the date on which such payment is due, such proceeds shall not be capitalised without the prior permission of the Reserve Bank.

(2) An Indian Software exporter may receive in the form of shares upto 25% of the value of exports to an overseas software start up company without entering into JV agreement by filing an application with the Reserve Bank through the Authorised Dealer.

Export of Goods towards Equity-Procedure

12. (1) An Indian Party exporting goods/software/plant and machinery from India towards equity contribution in a Joint Venture or Wholly Owned Subsidiary outside India shall declare it on GR/SDF/SOFTEX form, as the case may be, which shall be superscribed as "Exports against equity participation in the JV/WOS abroad", and also quoting Identification Number, if already allotted by Reserve Bank.

(2) Notwithstanding anything contained in Regulation 11 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000, the Indian Party shall, within 15 days of effecting the shipment of the goods, submit to the Reserve Bank a custom certified copy of the invoice through the branch of an authorised dealer designated by it.

(3) An Indian Party capitalising exports under Regulation 11 shall, within six months from the date of export, or any further time as allowed by Reserve Bank, submit to Reserve Bank copy/ies of the share certificate/s or any document issued by the Joint Venture or Wholly Owned Subsidiary outside India to the satisfaction of Reserve Bank evidencing the investment from the Indian Party together with the duplicate of GR/SDF/SOFTEX form through the branch of an authorised dealer designated by it.

Post investment changes/additional investment in existing JV/WOS

13. A JV/WOS set up by the Indian party as per the Regulations may diversify its activities/set up step down subsidiary/alter the shareholding pattern in the overseas entity :

Provided the Indian party reports to the Reserve Bank, the details of such decisions taken by the JV/WOS within 30 days of the approval of those decisions by the competent authority concerned of such JV/WOS in terms of local laws of the host country, and, include the same in the Annual

Performance Report required to be forwarded annually to the Reserve Bank in terms of Regulation 15.

Acquisition of a foreign company through bidding or tender procedure

14. (1) On being approached by an Indian Party, which is eligible under the Regulations to make investment outside India, an authorised dealer may allow remittance towards earnest money deposit or issue a bid bond guarantee on its behalf for participation in bidding or tender procedure for acquisition of a company incorporated outside India,

(2) On the Indian Party winning the bid,

- (i) the authorised dealer may allow further remittances towards acquisition of the foreign company, subject to the ceilings specified in Regulation 6; and
- (ii) the Indian Party shall submit through the authorised dealer concerned a report to the Reserve Bank in Form ODA within 30 days of effecting the final remittance.

(3) For participation in bidding or tender procedure for acquisition of a company incorporated outside India which does not fall within the provisions of sub-regulation (1), the Reserve Bank may, on application in Form ODI, allow remittance of foreign exchange towards earnest money deposit or permit the authorised dealer in India to issue a bid bond guarantee, subject to such terms and conditions as the Reserve Bank may stipulate.

(4) In case the Indian Party is successful in the bid but the terms and conditions of acquisition of a company outside India are,—

- (a) not in conformity with the provisions of Regulations in Part I, or different from those for which approval under sub-regulation (3) was obtained, the Indian Party shall submit application in Form ODI to Reserve Bank for obtaining approval for the foreign direct investment in the manner specified in Regulation 9, or
- (b) in conformity with the provisions of the Regulations in Part I or are same as those for which approval under sub-regulation (3) was obtained, the Indian Party shall submit a report to the Reserve Bank, giving details of the remittances made, within 30 days of effecting the final remittance.

Obligations of the Indian Party

15. An Indian Party, which has acquired foreign security in terms of the Regulations in Part I, shall—

- (i) receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months, or such further period as Reserve Bank may permit, from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian Party or the date on which the amount due was allowed to be capitalised;
- (ii) repatriate to India, all dues receivable from the foreign entity, like dividend, royalty, technical fees etc., within 60 days of its falling due, or such further period as the Reserve Bank may permit;
- (iii) submit to the Reserve Bank every year within 60 days from the date of expiry of the statutory period as prescribed by the respective laws of the host country for finalisation of the audited accounts of the Joint Venture/Wholly Owned Subsidiary outside India or such further period as may be allowed by Reserve Bank, an annual performance report in Form APR in respect of each Joint Venture or Wholly Owned Subsidiary outside India set up or acquired by the Indian Party and other reports or documents as may be stipulated by the Reserve Bank.

Explanation—It will be in order for individual partners to hold shares for and on behalf of the firm in an overseas JV/WOS in the individual name if the host country regulations or operational requirements warrant such holdings, subject to the condition that the entire funding for such investment is done by the firm.

Transfer by way of sale of shares of a JV/WOS outside India

16. (1) An Indian party may transfer by way of sale to another Indian party who complies with the provisions of Regulation 6 above, or to a person resident outside India, any share of security held by him in a Joint Venture or Wholly Owned Subsidiary outside India :

Provided that—

- (i) the sale does not result in any write off of the investment made;
- (ii) the sale is effected through a stock exchange where the shares of the overseas Joint Venture or Wholly Owned Subsidiary are listed;

- (iii) if the shares are not listed on the stock exchange, and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant/Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the Joint Venture or Wholly Owned Subsidiary;
 - (iv) the Indian party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements, and/or export proceeds from the Joint Venture or Wholly Owned Subsidiary;
 - (v) the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
 - (vi) the Indian party is not under investigation by CBI/ED/SEBI/IRDA or any other regulatory authority in India.
- (2) Sale proceeds of shares/securities shall be repatriated to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares/securities and documentary evidence to this effect shall be submitted to the Regional office of the Reserve Bank through the designated authorized dealer.
- (3) An Indian party, which does not satisfy the criteria specified at sub-regulation (1) above, shall apply to the Reserve Bank for permission to transfer by way of sale of shares of a JV/WOS outside India which may be granted subject to such conditions as the Reserve Bank may consider appropriate.

Transfer by way of Sale of Shares involving Write-off

17. Where the transfer by way of sale of shares or security referred to in sub-regulation (1) of Regulation 16 by any Indian party listed on any stock exchange in India, is for a price less than the amount invested in the share or the security transferred,—

- 1. where the difference between the said value and the sale price does not exceed the percentage approved by the Reserve Bank, from time to time, of the Indian party's actual export realisation of the previous year, the Indian party may write off to the extent of the difference, the capital invested in the overseas JV/WOS;
- 2. where such difference is more than the percentage approved by the Reserve Bank, from time to time, of the Indian party's actual export

realisation of the previous year, the Indian party shall apply to the Reserve Bank for permission to write-off the capital invested, which permission may be granted subject to such conditions as the Reserve Bank considers appropriate.

Pledge of Shares of Joint Ventures and Wholly Owned Subsidiaries

18. An Indian Party may transfer, by way of pledge, shares held in a Joint Venture or Wholly Owned Subsidiary outside India as a security for availing of fund based or non-fund based facilities for itself or for the Joint Venture or Wholly Owned Subsidiary from an authorised dealer or a public financial institution in India.

PART II

INVESTMENTS ABROAD BY INDIVIDUALS IN INDIA

Prior Permission of the Reserve Bank for Direct Investment by a Proprietary Concern in India

19. A proprietary concern in India may apply to the Reserve Bank in Form ODB for permission to accept shares of a company outside India in lieu of fees due to it for professional services rendered to the said company:

Provided that :—

- (a) the value of the shares accepted from each company outside India shall not exceed fifty per cent of the fees receivable by the Indian concern from that company; and
- (b) the Indian concern's shareholding in any one company outside India by virtue of shares accepted as aforesaid shall not exceed ten per cent of the paid-up capital of the company outside India, whose shares are accepted.

Investment by Individuals

20. (1) A Resident individual may apply to the Reserve Bank for permission to acquire shares in a foreign entity offered as consideration for professional services rendered to the foreign entity.

(2) Reserve Bank may, after taking into account, inter alia the following factors, grant permission subject to such terms and conditions as are considered necessary:

- (i) credentials and net worth of the individual and the nature of his profession.

- (ii) the extent of his forex earnings/balances in his EEFC and/or RFC account;
- (iii) financial and business track record of the foreign entity;
- (iv) potential for forex inflow to the country;
- (v) other likely benefits to the country.

PART III

INVESTMENTS IN FOREIGN SECURITIES OTHER THAN BY WAY OF
DIRECT INVESTMENT

Prohibition on issue of foreign security by a person resident in India

21. (1) Save as otherwise provided in the Act or in sub-regulation (2), no person resident in India shall issue or transfer a foreign security.

(2) A person resident in India, being an Indian Company or a Body Corporate created by an Act of Parliament.

- (i) may issue FCCBs not exceeding USD 500 million to a person resident outside India in accordance with and subject to the conditions stipulated in Schedule I.
- (ii) may issue FCCBs beyond US \$ 500 million with the specific approval of the Reserve Bank.

(3) The company/body corporate referred to in sub-regulation (2), issuing the FCCBs shall, within 30 days from the date of issue, furnish a report to the Reserve Bank giving the details and documents as under:

- (a) Total amount for which FCCBs have been issued;
- (b) Names of the investors resident outside India and number of FCCBs issued to each of them;
- (c) The amount repatriated to India through normal banking channels and/or the amount received by debit to NRE/FCNR accounts in India of the investors (duly supported by bank certificate).

Permission for purchase/acquisition of foreign securities in certain cases

22. (1) A person resident in India being an Individual may acquire foreign securities:—

- (i) by way of gift from a person resident outside India; or

- (ii) issued by a company incorporated outside India under Cashless Employees Stock Option Scheme:—

Provided it does not involve any remittance from India, or

- (iii) by way of inheritance from a person whether resident in or outside India.

(2) A person resident in India, being an individual, who is an employee or a director of Indian office or branch of a foreign company or of a subsidiary in India of a foreign company or of an Indian company in which foreign equity holding is not less than 51 per cent, may purchase the equity shares offered by the said foreign company.

(3) An authorised dealer may allow the remittance by the person eligible to purchase the shares in terms of sub-regulation (2):—

Provided that the condition specified in that sub-regulation is fulfilled.

(4) A person resident in India may transfer by way of sale the shares acquired in terms of sub-regulations (1) and (2) above:

Provided that the proceeds thereof are repatriated immediately on receipt thereof and in any case not later than 90 days from the date of sale of such securities.

Transfer of a foreign security by a person resident in India

23. A person resident in India, who has acquired or holds foreign securities in accordance with the provisions of the Act, rules or regulations made thereunder, may transfer them by way of pledge for obtaining fund based or non-fund based facilities in India from an authorised dealer.

General Permission for Acquisition of foreign securities as qualification/ rights shares

24. (1) A person resident in India being an individual may

- (a) acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a director in the company:

Provided that,—

- (i) the number of shares so acquired shall be the minimum required to be held for holding the post of director and in any case shall not exceed 1 per cent of the paid-up capital of the company, and

- (ii) the consideration for acquisition of such shares does not exceed the ceiling as stipulated by RBI from time to time.
- (b) acquire foreign securities by way of rights shares in a company incorporated outside India:
Provided that the right shares are being issued by virtue of holding shares in accordance with the provisions of the law for the time being in force,
- (c) where such person is an employee or a director of the Indian promoter company, acquire by way of purchase shares of a Joint Venture or Wholly Owned Subsidiary outside India of the Indian promoter company, in the field of software :

Provided that—

- (1) (i) the consideration for purchase does not exceed the ceiling as stipulated by RBI from time to time.
- (ii) the shares so acquired do not exceed 5% of the paid-up capital of the Joint Venture or Wholly Owned Subsidiary outside India, and
- (iii) after allotment of such shares, the percentage of shares held by the Indian promoter company, together with shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment.
- (2) A person resident in India, being an individual holding qualification/rights shares in terms of sub-regulation (a) or (b) above may sell the shares so acquired, without prior approval, provided the sale proceeds are repatriated to India through banking channels and documentary evidence is submitted to the authorized dealer.
- (3) An Indian software company may allow its resident employees (including working directors) to purchase foreign securities under the ADR/GDR linked stock option schemes:

Provided that the consideration for purchase does not exceed the ceiling as stipulated by RBI from time to time.

Prior permission of Reserve Bank in certain cases

25. A person resident in India being an individual seeking to acquire qualification shares in a company outside India beyond the limits laid down in

the proviso to clause (a) of sub-regulation (1) of Regulation 24 shall apply to the Reserve Bank for prior approval.

Investment by Mutual Funds

26. Mutual Funds may purchase foreign securities subject to such terms and conditions as it may be notified by SEBI from time to time.

SCHEDULE I

[See Regulation 21(2)(i)]

**Automatic Route for Issue of Foreign Currency Convertible Bonds
(FCCBs)**

- (i) The FCCBs to be issued will have to conform to the Foreign Direct Investment Policy (including Sectoral Cap and Sectors where FDI is permissible) of the Government of India as announced from time to time and the Reserve Bank's Regulations/directions issued from time to time.
- (ii) The issue of FCCBs shall be subject to a ceiling of USD 500 million in any one financial year.
- (iii) Public issue of FCCBs shall be only through reputed lead managers in the international capital market. In case of private placement, the placement shall be with banks, or with multilateral and bilateral financial institutions, or foreign collaborators, or foreign equity holder having a minimum holding of 5% of the paid up equity capital of the issuing company. Private placement with unrecognized sources is prohibited.
- (iv) The maturity of the FCCB shall not be less than 5 years. The call & put option, if any, shall not be exercisable prior to 5 years.
- (v) Issue of FCCBs with attached warrants is not permitted.
- (vi) The "all in cost" will be on par with those prescribed for External Commercial Borrowing (ECB) schemes specified in the Schedule to Notification No: FEMA 3/2000-RB dated 3rd May, 2000. The "all in cost" shall include coupon rate, redemption premium, default payments, commitment fees, and fronting fees, if any, but shall not include the issue related expenses such as legal fees, lead managers fees, out of pocket expenses.

External Commercial Borrowings: A Practitioner's Guide

- (vii) The FCCB proceeds shall not be used for investment in Stock Market, and may be used for such purposes for which ECB proceeds are permitted to be utilized under the ECB schemes.
- (viii) FCCBs are allowed for corporate investments in industrial sector, especially infrastructure sector. Funds raised through the mechanism may be parked abroad unless actually required.
- (ix) FCCBs for meeting rupee expenditure under automatic route to be hedged unless there is a natural hedge in the form of uncovered foreign exchange receivables, which will be ensured by Authorised Dealers.
- (x) Financial intermediaries (viz. a bank, DFI, or NBFC) shall not be allowed access to FCCBs, except those Banks and financial intermediaries that have participated in the Textile or Steel Sector restructuring package of the Government/RBI subject to the limit of their investment in the package.
- (xi) Banks, FIs, NBFCs shall not provide guarantee/letter of comfort etc. for the FCCB issue.
- (xii) The issue related expenses shall not exceed 4% of issue size and in case of private placement, shall not exceed 2% of the issue size.
- (xiii) The issuing entity shall, within 30 days from the date of completion of the issue, furnish a report to the concerned Regional Office of the Reserve Bank of India through a designated branch of an Authorized Dealer giving the details and documents as under :
 - (a) The total amount of the FCCBs issued,
 - (b) Names of the investors resident outside India and number of FCCBs issued to each of them

Appendix 4

TO BE PUBLISHED IN THE GAZETTE OF INDIA (EXTRAORDINARY)
UNDER PART-II, SECTION-3, SUB SECTION(i)

MINISTRY OF FINANCE
(DEPARTMENT OF ECONOMIC AFFAIRS)

New Delhi, the 15th February , 2008.

NOTIFICATION

G.S. R.89(E) – The Central Government hereby notifies the following scheme for facilitating issue of Foreign Currency Exchangeable Bonds by Indian Companies, namely:-

1. **Short title and commencement** - (1) This scheme may be called the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008.
(2) It shall come into force on the date of notification in the Official Gazette.
2. **Definitions** - In this scheme, unless the context otherwise requires, -
 - (a) "Foreign Currency Exchangeable Bond" means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing Company and subscribed to by a person who is a resident outside India in foreign currency and exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments.
 - (b) "Issuing Company" means an Indian company as defined in the Companies Act, 1956 (1 of 1956), which is eligible to issue Foreign Currency Exchangeable Bond.
 - (c) "Offered Company" means an Indian company as defined in the Companies Act, 1956 (1 of 1956) whose equity share/s shall be offered in exchange of the Foreign Currency Exchangeable Bond.
 - (d) "Promoter Group" has the same meaning as defined in the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000.
3. **Eligibility Conditions and subscription of Foreign Currency Exchangeable Bonds** - (1) The Issuing Company shall be part of the promoter group of the Offered Company and shall hold the equity

share/s being offered at the time of issuance of Foreign Currency Exchangeable Bond.

(2) The Offered Company shall be a listed company which is engaged in a sector eligible to receive Foreign Direct Investment and eligible to issue or avail of Foreign Currency Convertible Bond or External Commercial Borrowings.

(3) An Indian Company, which is not eligible to raise funds from the Indian securities market, including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India shall not be eligible to issue Foreign Currency Exchangeable Bond.

(4) The subscriber to the Foreign Currency Exchangeable Bond shall comply with the Foreign Direct Investment policy and adhere to the sectoral caps at the time of issuance of Foreign Currency Exchangeable Bond. Prior approval of Foreign Investment Promotion Board, wherever required under the Foreign Direct Investment policy, should be obtained. Entities prohibited to buy, sell or deal in securities by Securities and Exchange Board of India will not be eligible to subscribe to Foreign Currency Exchangeable Bond.

4. **End-use requirements** - (1) The proceeds of Foreign Currency Exchangeable Bond may be invested by the issuing company in the promoter group companies. The promoter group company receiving such investments shall be required to use the proceeds in accordance with end uses prescribed under the External Commercial Borrowings policy. The promoter group company receiving such investments will not be permitted to utilize the proceeds for investments in the capital market or in real estate in India.

(2) The proceeds of Foreign Currency Exchangeable Bond may be invested by the issuing company overseas by way of direct investment including in Joint Ventures or Wholly Owned Subsidiaries subject to the existing guidelines on Indian Direct Investment in Joint Ventures or Wholly Owned Subsidiaries abroad.

5. **Operational Procedure** - (1) Prior approval of the Reserve Bank of India shall be required for issuance of Foreign Currency Exchangeable Bond.

(2) The Foreign Currency Exchangeable Bond may be denominated in any freely convertible foreign currency.

6. **Pricing and Maturity** - (1) The rate of interest payable on Foreign Currency Exchangeable Bond and the issue expenses incurred in foreign currency shall be within the all in cost ceiling as specified by Reserve Bank of India under the External Commercial Borrowings policy.

(2) At the time of issuance of Foreign Currency Exchangeable Bond the exchange price of the offered listed equity shares shall not be less than the higher of the following two :-

- (i) the average of the weekly high and low of the closing prices of the shares of the offered company quoted on the stock exchange during the six months preceding the relevant date; and
- (ii) the average of the weekly high and low of the closing prices of the shares of the offered company quoted on a stock exchange during the two week preceding the relevant date.

Explanation- For the purpose of this sub-scheme, "relevant date" means, the date on when the Board of the issuing company passes the resolution authorizing the issue of Foreign Currency Exchangeable Bond.

(3) The minimum maturity of the Foreign Currency Exchangeable Bond shall be five years for purposes of redemption. The exchange option can be exercised at any time before redemption. While exercising the exchange option, the holder of the Foreign Currency Exchangeable Bond shall take delivery of the offered shares. Cash (Net) settlement of Foreign Currency Exchangeable Bonds shall not be permissible.

7. **Mandatory Requirements:** - (1) The Issuing Company shall comply with the provisions of the Companies Act, 1956 (1 of 1956) and obtain necessary approvals of its Board of Directors and shareholders if applicable. The Offered Company shall also obtain the approval of its Board of Directors in favour of the Foreign Currency Exchangeable Bond proposal of the issuing company.

(2) The Issuing Company intending to offer shares of the offered company under Foreign Currency Exchangeable Bond shall comply with all the applicable provisions of the Securities and Exchange Board of India Act, Rules, Regulations or Guidelines with respect to disclosures of their shareholding in the Offered Company.

(3) The Issuing Company shall not transfer, mortgage or offer as collateral or trade in the offered shares under Foreign Currency Exchangeable Bond from the date of issuance of the Foreign Currency Exchangeable Bond till the date of exchange or redemption. Further, the Issuing Company shall keep the offered shares under Foreign Currency Exchangeable Bond free from all encumbrances from the date of issuance of the Foreign Currency Exchangeable Bond till the date of exchange or redemption.

8. **Retention and deployment of proceeds of Foreign Currency Exchangeable Bond:-** The proceeds of the Foreign Currency Exchangeable Bond shall be retained and/or deployed overseas in accordance with the policy for the proceeds of External Commercial Borrowings.
9. **Taxation on Exchangeable Bonds -** (1) Interest payments on the bonds, until the exchange option is exercised, shall be subject to deduction of tax at source as per the provisions of sub-section (1) of section 115 AC of the Income Tax Act, 1961 (43 of 1961).
- (2) Tax on dividend on the exchanged portion of the bond shall be in accordance with the provisions of sub-section (1) of section 115 AC of the Income Tax Act, 1961 (43 of 1961).
- (3) Exchange of Foreign Currency Exchangeable Bonds into shares shall not give rise to any capital gains liable to income-tax in India.
- (4) Transfers of Foreign Currency Exchangeable Bonds made outside India by an investor who is a person resident outside India to another investor who is a person resident outside India shall not give rise to any capital gains liable to tax in India.

F.No.4/21/2006-ECB

Sd/-

(Dr. K.P. KRISHNAN)

JOINT SECRETARY TO THE GOVERNMENT OF INDIA

ECB

Circular/Press Note

Changes made by the Government in External Commercial Borrowings Guidelines

PRESS RELEASE NO. 4(2)/2002-ECB, DATED 15-9-2002

The Government had issued the last consolidated ECB Guidelines in July 1999, subsequent amendments to these guidelines were made for streamlining/ liberalising ECB procedures in order to enable Indian corporates to have greater access to international financial markets. The last being the Press Release dated 3-7-2002. Taking into account changes in external financial markets, requirements of corporates, and with a view to liberalising further ECB approvals, the Government has decided to make the following changes in the ECB Guidelines:

Recognised lender

I. Applicants will be free to raise ECB from any internationally recognized source such as banks, export credit agencies, suppliers of equipment, foreign collaborators, foreign equity holders, international capital markets, etc. Offers from unrecognised sources will not be entertained and this would also be applicable for ECBs below USD 5 Million.

Prepayment of External Commercial Borrowings (ECBs)

II. Prepayment of ECBs has been delegated to RBI. It is now proposed that prepayment of ECBs will be permitted without any limit and also without any of the existing conditions given in para 1(a) to (d) of RBI's A.P. (DIR Series) Circular No. 8, dated August 5, 2002. This window of prepayment would be effective upto 31st March, 2003. It would also be subject to review keeping in view the market conditions. The Reserve Bank of India will issue necessary Press Note incorporating the above, revised prepayment guidelines.

Deletion of end-use restrictions in respect of investments in real estate Sector

III. It has been decided to drop the restrictions of end-use for ECB proceeds for investment in real estate sector. Henceforth, ECB could be raised for the development of integrated townships as defined by Ministry of Commerce and Industry, Department of Industrial Policy and Promotions SIA (FC Division) Press Note 3 (2002 series, dated 4-1-2002). On the issue of

maturity for such FDBs, it has been decided that the existing maturity guidelines would be applicable.

Maximum eligibility under auto-route and corresponding maturity

IV. In terms of ECB Guidelines, it has been decided that:

- (a) A borrower can raise up to a maximum of USD 50 Million under autoroute during a given financial year;
- (b) In case a borrower decides to raise more than one ECB in a given financial year for the ECBs upto USD 20 Million the minimum average maturity would be three years. For amounts in excess of USD 20 Million, the average maturity would need to be five years.

Ineligibility of Trust and non-profit making organisations to access ECBs

V. The issue of eligibility of Trust and non-profit making organisations to access ECB was considered and it has been decided that there would be no change in the current ECB policy and Trusts/non-profit making organisations would continue to be ineligible to raise ECBs.

Removal of restrictions on External Commercial Borrowings (ECBs) being raised by the Units in Special Economic Zones (SEZs)

VI. In the EXIM policy for 2002-2007 announced on 31st March, 2002 it has been indicated that units in SEZs will be permitted to avail all ECBs for maturity of less than 3 years. To operationalise this decision of the Government conveyed through the EXIM policy the following amendments are proposed for units in SEZs:

- (a) Units in SEZs may be allowed to raise External Commercial Borrowings without any maturity restriction but through recognized banking channels and strictly on a "stand alone basis".
- (b) By "stand alone" it is meant that units in the SEZs would be completely isolated from financial contacts with their subsidiaries or their parent in the mainland or within the SEZs as far as repayment of ECB interest/principal is concerned. Therefore, in effect only those units, which are either subsidiary/branch of a company registered outside India or where a company is registered independently for operating in one or more zone in the country, would qualify for stand along criteria. Borrowers in the SEZs are to be allowed to raise ECB under the special window as announced in the EXIM Policy. They would service

the loan (principal + Interest + any other fee, charge etc.) out of proceeds generated by the SEZ units.

- (c) There would be an annual cap of US\$ 500 million for such units in SEZs to avail this facility. Reserve Bank of India (RBI) would monitor the overall cap. Necessary Guidelines will be issued by RBI in this regard.
- (d) Treatment of debt :
 - (i) According to IMF classification the debts incurred by units in SEZs would be treated as external debt of India.
 - (ii) However, this debt would be separately and uniquely identified while explaining that the units in SEZs will not have access to the foreign exchange reserves of India for purposes of servicing the debt.

2. The above amendments would be effective from the date of issue of notification of such regulations/directions.

RBI/2009-10/316

DNBS.PD. CC No. 168 / 03.02.089 /2009-10

February 12 , 2010

All Non-Banking Financial Companies
excluding Residuary Non-Banking Companies

Dear Sir,

Infrastructure Finance Companies

Please refer to paragraph 178 of the Second Quarter Review of the Monetary Policy for the year 2009-10. NBFCs-ND-SI engaged predominantly in infrastructure financing have represented to the Reserve Bank that there should be a separate category of infrastructure financing NBFCs in view of the critical role played by them in providing credit to the infrastructure sector. Currently, the Reserve Bank has classified NBFCs under three categories, viz., Asset Finance Companies, Loan companies and Investment Companies. It has now been decided to introduce a fourth category of NBFCs as "Infrastructure Finance Companies"(IFCs).

2. Accordingly, it is advised that the present classification of NBFCs stands modified to include IFCs. An IFC is defined as non deposit taking NBFC that fulfills the criteria mentioned below:

- i) a minimum of 75 per cent of its total assets should be deployed in infrastructure loans as defined in Para 2(viii) of the Non Banking Financial (Non Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007;
- ii) Net owned funds of Rs. 300 crore or above;
- iii) minimum credit rating 'A' or equivalent of CRISIL, FITCH, CARE, ICRA or equivalent rating by any other accrediting rating agencies
- iv) CRAR of 15 percent (with a minimum Tier I capital of 10 percent).

3. IFCs may exceed the concentration of credit norms as provided in paragraph 18 of the aforesaid Directions as under:

- (i) in lending to
 - (a) any single borrower by ten per cent of its owned fund; and
 - (b) any single group of borrowers by fifteen per cent of its owned fund;

- (ii) in lending and investing (loans/investments taken together) by
 - (a) five percent of its owned fund to a single party; and
 - (b) ten percent of its owned fund to a single group of parties.
- (iii) The extant norms for investment for both single party and single group of parties will remain same as in Para 20 of the Directions referred to above.

4. The present norms relating to infrastructure loan as laid out in Para 20 of the aforesaid Directions will continue for NBFCs that do not meet the criteria to be classified as IFCs.

5. Since the classification for the purpose of income recognition, asset classification and provisioning norms is based on asset specification, the extant prudential norms will continue as hitherto.

6. The companies satisfying the above conditions may approach the Regional Office in the jurisdiction of which their Registered Office is located, along with the original Certificate of Registration (CoR) issued by the Bank for classification as Infrastructure Finance Companies. Their request must be supported by a certificate from their Statutory Auditors confirming the asset /income pattern of the company as on March 31, of the latest financial year. The change in classification would be incorporated in the Certificate of Registration issued by the Bank as NBFC-ND-IFC.

7. The onus of including only eligible assets for the purpose of classification as IFC shall be that of the company concerned.

8. A copy of the amending Notification No. DNBS.213 / CGM(ASR)-2010 dated February 12, 2010 is enclosed for compliance.

Yours faithfully,

(A.S.Rao)

Chief General Manager In-Charge

RESERVE BANK OF INDIA
DEPARTMENT OF NON-BANKING SUPERVISION
CENTRAL OFFICE
CENTRE I, WORLD TRADE CENTRE,
CUFFE PARADE, COLABA,
MUMBAI 400 005.

Notification No. DNBS. 213 / CGM(ASR)-2010 dated February 12, 2010

The Reserve Bank of India, having considered it necessary in public interest and being satisfied that, for the purpose of enabling the Bank to regulate the credit system to the advantage of the country, it is necessary to amend the Non-Banking Financial (Non- Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007, contained in Notification No. DNBS. 193/DG(VL)-2007 dated February 22, 2007 (hereinafter referred to as the Directions), in exercise of the powers conferred by sections 45J, 45JA and 45L of the Reserve Bank of India Act, 1934 (2 of 1934) and of all the powers enabling it in this behalf, hereby directs that the said Directions shall be amended with immediate effect as follows, namely -

1. Amendment of paragraph 1-

In sub-paragraph (3), at the end of clause (i) the words, "including an infrastructure finance company", shall be inserted.

2 Amendment of paragraph 2 -

(1) In sub-paragraph (1), after clause (vii), the following clause (viiia) shall be inserted .

"(viiia) 'Infrastructure Finance Company' means a non-banking finance company which deploys at least 75 per cent of its total assets in infrastructure loans"

(2) In sub-paragraph (1), in clause (viii), after sub-clause (h), the following sub-clause (ha) shall be inserted.

"(ha) laying down and/or maintenance of gas, crude oil and petroleum pipelines"

(3) In sub-paragraph (1), in clause (viii), sub-clause (k), viz, "construction of educational institutions and hospitals" shall be deleted.

3. Insertion of new paragraph -

After paragraph 19, the following paragraph 19A shall be inserted-

"Requirements for Infrastructure Finance Company -

19A. An Infrastructure Finance Company shall, -

- i. not accept deposits from the public;
- ii. have net owned funds of Rs. 300 crore or above;
- iii. have a minimum credit rating 'A' or equivalent of CRISIL, FITCH, CARE, ICRA or equivalent rating by any other accredited rating agencies; and
- iv. have a CRAR of 15 percent (with a minimum Tier I capital of 10 percent).

4. Amendment of paragraph 20 –

(1) After sub-paragraph (12), the following sub-paragraph (12A) shall be inserted.

"(12A) Infrastructure Finance Companies may exceed the concentration of credit norms as provided in paragraph 18 of the aforesaid Directions,

- (i) in lending to
 - (a) any single borrower, by ten per cent of its owned fund; and
 - (b) any single group of borrowers, by fifteen per cent of its owned fund;
- (ii) in lending to and investing in, (loans/investments taken together)
 - (a) a single party, by five percent of its owned fund; and
 - (b) a single group of parties, by ten percent of its owned fund.

(A S Rao)
Chief General Manager In-Charge

Appendix 7

Form 83

Reporting of loan agreement details under Foreign Exchange Management Act, 1999
(for all categories and any amount of ECB)

Instructions:

1. The borrower is required to submit completed Form 83, in duplicate, certified by the Company Secretary (CS) or Chartered Accountant (CA) to the designated Authorised Dealer (AD). One copy is to be forwarded by the designated AD to the Director, Balance of Payments Statistics Division, Department of Statistical Analysis and Computer Services (DESACS), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051 within 7 days from the date of signing loan agreement between borrower and lender for allotment of loan registration number.
2. Do not leave any column blank. Furnish complete particulars against each item. Where any particular item is not applicable write "N.A." against it.
3. All dates should be in format YYYY/MM/DD, such as 2004/01/21 for January 21, 2004.
4. Before forwarding Form 83 to the Reserve Bank, the Authorised Dealer must scrutinise all the related original documents and ensure that the form is complete in all respects and in order.
5. If space is not sufficient for giving full information/particulars against any item, a separate sheet may be attached to the form and serially numbered as Annex.
6. Firms/companies obtaining sub-loans through DFIs/FIs/banks/NBFCs etc. should not complete this form but approach the concerned financial institution directly for reporting.

| | | | | | | | | | | | |
|---------------------------|-------------|-----------------|--|--|--|---------------------|--|--|--|--|--|
| FOR RBI (DESACS) Use only | | Loan_key: | | | | | | | | | |
| CS-DRMS Team | Received on | Action Taken on | | | | Loan Classification | | | | | |
| | | | | | | | | | | | |

Agreement Details (To be filled by borrowers of External Commercial Borrowings)

| | | | | | | | | | | | | |
|--|--|--|--|--|--|---|--|-----------------------|--|---|--|--|
| Part A: Basic Details | | | | | | | | | | | | |
| ECB Title / Project | | | | | | | | | | | | |
| Registration Number | | | | | | | | | | | | |
| No. and Date of RBI approval (if applicable) | | | | | | | | | | | | |
| Loan Key Number (allotted by RBI/ Govt.) | | | | | | | | | | | | |
| Agreement Date (YYYY/MM/DD) | | | | | | / | | | | / | | |
| Currency Name | | | | | | | | Currency Code (SWIFT) | | | | |
| Amount (in FC) | | | | | | | | (For RBI Use) | | | | |
| Guarantee Status | | | | Guarantor (Name, Address, contact number etc.) | | | | | | | | |

| | | | | | | | | |
|---|--|--|--|--|--|---------------------|--|--|
| (Use code as per Box ↓ ↓ | | | | | | Multi Currency Type | | |
| Name and address of the Borrower (Block Letters) | | | | Name and address of lender / foreign supplier / lesser (Block Letters) | | | | |
| Contact Person's Name: Designation: Phone No. : Fax no. : E-mail ID : | | | | Country: E-mail ID : | | | | |
| (For RBI DESACS use) | | | | (For RBI DESACS use) | | | | |

| | | | | | | | | | | | | | | | |
|---|----------------------|--------------------------|----------------------|--|--|---|--|---|---|---|---|----------------------|----------------------|----------------------|----------------------|
| Borrower's Category (Tick in appropriate box) | | | | Lender's Category | | | | | | | | | | | |
| Public Sector Unit | | Private Sector Unit | | <input type="checkbox"/> Multi-lateral Financial Institution <input type="checkbox"/> Foreign Government (Bilateral Agency) <input type="checkbox"/> Export Credit Agency <input type="checkbox"/> Indian Commercial Bank branch abroad <input type="checkbox"/> Other Commercial Bank <input type="checkbox"/> Supplier of Equipment <input type="checkbox"/> Leasing Company <input type="checkbox"/> Foreign Collaborator / Foreign Equity Holder (Please provide details of foreign equity holding in the borrower company below) <input type="checkbox"/> International Capital Market <input type="checkbox"/> Other (Specify) | | | | | | | | | | | |
| Detailed category (tick below) <input type="checkbox"/> Bank <input type="checkbox"/> NBFC Reg. No. <input type="text"/> <input type="checkbox"/> Financial Institution (Other than NBFC) <input type="checkbox"/> Corporate <input type="checkbox"/> NGOs engaged in micro finance activity <input type="checkbox"/> Other (Specify) | | | | | | | | | | | | | | | |
| Details of foreign equity holding of the lender in borrower company: (a) Share in paid-up equity of the borrower (%) | | | | (b) Amount of paid-up equity | | | | | | | | | | | |
| Specify Authorised Dealer's Name, and bank code | | | | Lender's Reference / IBRD No. (if it is a IBRD loan) | | | | | | | | | | | |
| Bank Code Part I: | | | | | | | | | | | | | | | |
| Part II: | | | | | | | | | | | | | | | |
| Fax: | | | | | | | | | | | | | | | |
| E-mail ID: | | | | | | | | | | | | | | | |
| Part B: Other Details | | | | | | | | | | | | | | | |
| ECB approval Scheme (Tick in appropriate Box) | | | | Maturity Details | | | | | | | | | | | |
| Automatic Route | | <input type="checkbox"/> | | Effective Date of the Loan | | <input type="text"/> | | | | | | | | | |
| Approval Route | | <input type="checkbox"/> | | Last Date of Disbursement | | <input type="text"/> | | | | | | | | | |
| Approved by Govt. | | <input type="checkbox"/> | | Maturity Date (Last payment date) | | <input type="text"/> | | | | | | | | | |
| | | <input type="checkbox"/> | | Grace Period (Year/Month) | | <table border="1"> <tr> <td>Y</td> <td>Y</td> <td>M</td> <td>M</td> </tr> <tr> <td><input type="text"/></td> <td><input type="text"/></td> <td><input type="text"/></td> <td><input type="text"/></td> </tr> </table> | | Y | Y | M | M | <input type="text"/> | <input type="text"/> | <input type="text"/> | <input type="text"/> |
| Y | Y | M | M | | | | | | | | | | | | |
| <input type="text"/> | <input type="text"/> | <input type="text"/> | <input type="text"/> | | | | | | | | | | | | |
| | | <input type="checkbox"/> | | | | | | | | | | | | | |

External Commercial Borrowings: A Practitioner's Guide

| | | Economic Sector /Industry Code (See Box 3) | | | |
|---|---|--|---|-------------------------------------|--------------------------------------|
| Purpose of Borrowings Code (See box2) | | | | | |
| - If Import, specify the Country of Import (if more than one country, attach details): | | | | | |
| Type of ECB | | | | | |
| <input type="checkbox"/> | Buyers' Credit | <input type="checkbox"/> | Suppliers' Credit | | |
| <input type="checkbox"/> | Line of Credit | <input type="checkbox"/> | Export Credit from Bilateral Sources | | |
| <input type="checkbox"/> | Commercial loan / Syndicated Loan (attach sheet for percentage distribution among lenders) | <input type="checkbox"/> | Securitised instruments - Bonds, CP, FRN etc. | | |
| <input type="checkbox"/> | Financial Lease | <input type="checkbox"/> | Others (Specify) | | |
| <input type="checkbox"/> | Refinancing of old ECBs: Reg No. of the old ECB | | | | |
| Approval No. | Date: | Amount refinanced: | Reason: | | |
| Hedging risks using <input type="checkbox"/> Interest rate swap <input type="checkbox"/> Currency swap <input type="checkbox"/> Others (specify) _____ | | | | | |
| Part C: Schedule of transactions | | | | | |
| Interest Payment Schedule: | | | | | |
| First Payment Date | / / | | Number of Payments in a Year | | |
| Fixed Rate | | | | | |
| Floating Rate: Base | Margin | Cap Rate: | Floor Rate: | | |
| Schedule of Draw Down | | | | | |
| Tranche No | Date (YYYY/MM/DD) (Please see note below) | Currency | Amount | If more than one equal installments | |
| | | | | Total Number of drawals | No. of drawals in a calendar year |
| | | | | | |
| | | | | | |
| <p>Note: 1. In the case of import of goods or services, date of import may be furnished against date of draw down.</p> <p>2. In the case of financial lease date of acquisition (import) of the goods is to be mentioned as date of draw down.</p> <p>3. In the case of securitized instruments, date of issue may be shown as date of draw down</p> <p>4. In case more than equal draw down transactions are shown in a row above, date of first transaction to be mentioned.</p> | | | | | |
| Principal Repayment Schedule | | | | | |
| Date (YYYY/MM/DD) (First repayment date) | Currency | Amount in FC in each transaction | If more than one equal installments | | Annuity Rate (if annuity payment) |
| | | | Number of installments | No. of payments in a calendar year | |
| | | | | | |
| | | | | | |

| Please tick in appropriate Boxes if those options are there in the loan agreement : Can be executed after date (s) | Call Option : | Percent of Debt | Put Option | Percent of Debt | |
|---|--------------------------|------------------|-----------------------|--------------------------------|--------------------------|
| | | | | | |
| Note: In the case of annuity payments, please indicate each equal instalment of principal and interest amount with rate. In the case of principal repayment using a percentage profile, percentages may also be indicated. | | | | | |
| Penal Interest for late payment | | Fixed | % per annum or Base : | Margin: | |
| Commitment Charges | | % per annum of : | | % of Undrawn | |
| Other Charges | | Amount | | | |
| Nature of Charge (Specify) | Expected Date of Payment | Currency | Amount | In case of many equal payments | |
| | | | | No. of payments in a year | Total number of payments |
| | | | | | |
| PART D : ECB availed in the current & previous three financial years-(not applicable for the first time borrower) | | | | | |
| Year | Registration No. | Currency | Loan Amount | Amount disbursed | Amount outstanding* |
| | | | | | |
| | | | | | |

* net of repayments, if any, on the date of application.

- We hereby certify that the particulars given above are true and correct to the best of our knowledge and belief. No material information has been withheld and / or misrepresented.

Place : _____ Stamp _____
 (Signature of the Authorised Official of the Company)
 Date : _____ Name : _____ Designation : _____
 (Signature of Company Secretary / Chartered Accountant)
 Stamp Name : _____

[For use of Authorised Dealer]

We certify that the borrower is our customer and the particulars given in this form are true and correct to the best of our knowledge and belief. Furthermore, the ECB is in compliance with ECB guidelines.

Place : _____ Stamp _____
 (Signature of Authorised Official)
 Date : _____ Name : _____ Designation: _____
 Designation : _____
 Name of the bank/branch _____
 Bank Code : _____

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| BOX 1: Guarantee Status Code | | | BOX 2: Purpose of Borrowings Code | | |
|------------------------------|------|--|-----------------------------------|------|---|
| Sr. No | Code | Description | Sr. No | Code | Description |
| 1 | GG | Govt. of India guarantee. | 1 | IC | Import of capital goods |
| | CG | Public Sector guarantee | 2 | RL | Local sourcing of capital goods (Rupee expenditure) |
| 2 | PB | Public Sector Bank Guarantee. | 3 | SL | On-lending or sub-lending |
| 3 | FI | Financial Institution Guarantee. | 4 | RP | Repayment of earlier ECB |
| 4 | MB | Multilateral /Bilateral Institution Guarantee. | 5 | NP | New project |
| 5 | PG | Private Bank Guarantee | 6 | ME | Modernisation/Expansion of existing units |
| 6 | PS | Private Sector Guarantee | 7 | PW | Power |
| 7 | MS | Mortgage of Assets / Security | 8 | TL | Telecommunication |
| 8 | OG | Other Guarantee | 9 | RW | Railways |
| 9 | NN | Not Guaranteed | 10 | RD | Roads |
| | | | 11 | PT | Ports |
| | | | 12 | IS | Industrial parks |
| | | | 13 | UI | Urban infrastructure |
| | | | 14 | OI | Overseas investment in JV/WOS |
| | | | 15 | DI | PSU Disinvestment |
| | | | 16 | TS | Textile/Steel Restructuring Package |
| | | | 17 | MF | Micro finance activity |
| | | | 18 | OT | Others (Pl. specify) |

| BOX 3 : Industry codes to be used | | | |
|-----------------------------------|-----------------------------------|-------------------|-----|
| Industry Group Name | Industry Description | Code | |
| PLANTATIONS | TEA | 111 | |
| | COFFEE | 112 | |
| | RUBBER | 113 | |
| | OTHERS | 119 | |
| | | | |
| MINING | COAL | 211 | |
| | METAL | 212 | |
| | OTHERS | 219 | |
| PETROLEUM & PERTOLEUM PRODUCTS | | 300 | |
| MANUFACTURING | | | |
| AGRICULTURAL PRODUCTS (400) | FOOD | 411 | |
| | BEVERAGES | 412 | |
| | SUGAR | 413 | |
| | CIGARETTES & TOBACCO | 414 | |
| | BREWERIES & DISTILLERIES | 415 | |
| | OTHERS | 419 | |
| | TEXTILE PRODUCTS (420) | COTTON TEXTILE | 421 |
| | | JUTE & COIR GOODS | 422 |
| | | SILK & RAYON | 423 |
| | | OTHER TEXTILE | 429 |
| TRANSPORT EQUIPMENT (430) | AUTOMOBILES | 431 | |
| | AUTO ACCESSORIES & PARTS | 432 | |
| | SHIP BUILDING EQUIPMENTS & STORES | 433 | |
| | RAILWAY EQUIPMENT & STORES | 434 | |
| | OTHERS | 439 | |

| | | |
|--|---|-----|
| MACHINERY & TOOLS (440) | TEXTILE MACHINERY | 441 |
| | AGRICULTURAL MACHINERY | 442 |
| | MACHINE TOOLS | 443 |
| | OTHERS | 449 |
| METAL & METAL PRODUCTS (450) | FERROUS (IRON & STEEL) | 451 |
| | NON-FERROUS | 452 |
| | SPECIAL ALLOYS | 453 |
| | OTHERS | 459 |
| ELECTRICAL, ELECTRONIC GOODS & MACHINERY (460) | ELECTRICAL GOODS | 461 |
| | CABLES | 462 |
| | COMPUTER HARDWARE & COMPUTER BASED SYSTEMS | 463 |
| | ELECTRONIC VALVES, TUBES & OTHERS | 464 |
| | OTHERS | 469 |
| CHEMICALS & ALLIED PRODUCTS (470) | FERTILIZERS | 471 |
| | DYES & DYES STUFF | 472 |
| | MEDICINES & PHARMACEUTICALS | 473 |
| | PAINTS & WARMISHING | 474 |
| | SOAPS, DETERGENTS, SHAMPOOS, SHAVING PRODUCT | 475 |
| | OTHERS | 479 |
| OTHERS of Manufacturing (480) | CEMENT | 481 |
| | OTHER BUILDING MATERIALS | 482 |
| | LEATHER & LEATHER PRODUCTS | 483 |
| | WOOD PRODUCTS | 484 |
| | RUBBER GOODS | 485 |
| | PAPER & PAPER PRODUCTS | 486 |
| | TYPEWRITERS & OTHER OFFICE EQUIPMENT | 487 |
| | PRINTING & PUBLISHING | 488 |
| | MISCELLANEOUS | 489 |
| TRADING | | 500 |
| CONSTRUCTION & TURN KEY PROJECTS | | 600 |
| TRANSPORT | | 700 |
| UTILITIES (800) | POWER GENERATION, TRANSMISSION & DISTRIBUTION | 811 |
| | OTHERS | 812 |
| BANKING SECTOR SERVICES | | 888 |
| TELECOMMUNICATION SERVICES | | 900 |
| SOFTWARE DEVELOPMENT SERVICES | | 911 |
| | TECHNICAL ENGINEERING & CONSULTANCY SERVICES | 912 |
| | TOURS & TRAVEL SERVICES | 913 |
| | COLD STORAGE, CANNING & WAREHOUSING SERVICES | 914 |
| | MEDIA ADVERTISING & ENTERTAINMENT SERVICES | 915 |
| FINANCIAL SERVICES | | 916 |
| TRANSPORT SERVICES | | 917 |
| OTHERS (NOT CLASSIFIED ELSEWHERE) | | 919 |
| | | 999 |

Form ECB

**Application for raising
External Commercial Borrowings (ECB)
under Approval Route**

Instructions

The complete application should be submitted by the applicant through the designated authorised dealer to the Chief General Manager-In-Charge, Foreign Exchange Department, Central Office, ECB Division, Reserve Bank of India, Mumbai 400 001.

Documentation:

Following documents, (as relevant) certified by authorised dealer, should be forwarded with the application:

- (i) A copy of offer letter from the overseas lender/supplier furnishing complete details of the terms and conditions of proposed ECB.
- (ii) A copy of the import contract, proforma/commercial invoice/bill of lading.

PART-A- GENERAL INFORMATION ABOUT THE BORROWER

1. Name of the applicant
(BLOCK LETTERS)
Address

2. Status of the applicant
i) Private Sector
ii) Public Sector

PART-B-INFORMATION ABOUT THE PROPOSED ECB

| | Currency | Amount | US\$ equivalent |
|------------------------|----------|--------|-----------------|
| 1. Details of the ECB | | | |
| (a) Purpose of the ECB | | | |

(b) Nature of ECB [Please put (x) in the appropriate box]

| | |
|--|--|
| (i) Suppliers' Credit | |
| (ii) Buyers' Credit | |
| (iii) Syndicated Loan | |
| (iv) Export Credit | |
| (v) Loan from foreign collaborator/equity holder (with details of amount, percentage equity holding in the paid-up equity capital of the borrower company) | |
| (vi) Floating Rate Notes | |
| (vii) Fixed Rate Bonds | |
| (viii) Line of Credit | |
| (ix) Commercial Bank Loan | |
| (x) Others (please specify) | |

(c) Terms and conditions of the ECB

| | |
|--|---|
| (i) Rate of interest | : |
| (ii) Up-front fee | : |
| (iii) Management fee | : |
| (iv) Other charges, if any (Please specify) | : |
| (v) All-in-cost | : |
| (vi) Commitment fee | : |
| (vii) Rate of penal interest | : |
| (viii) Period of ECB | : |
| (ix) Details of call/put option, if any. | : |
| (x) Grace / moratorium period | : |
| (xi) Repayment terms (half yearly/annually/bullet) | : |
| (xii) Average maturity | : |

2. Details of the lender

Name and address of the lender/supplier

3. Nature of security to be provided, if any.

PART C – INFORMATION ABOUT DRAW DOWN AND REPAYMENTS

| Proposed Schedule | | | | | | | | |
|-------------------|------|--------|------------------------|------|--------|------------------|------|--------|
| Draw-down | | | Repayment of Principal | | | Interest Payment | | |
| Month | Year | Amount | Month | Year | Amount | Month | Year | Amount |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

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PART D – ADDITIONAL INFORMATION

1. Information about the project

- i) Name & location of the project :
- ii) Total cost of the project : Rs. USD
- iii) Total ECB as a % of project cost :
- iv) Nature of the project :
- v) Whether Appraised by financial institution/bank :
- vi) Infrastructure Sector :
 - a) Power
 - b) Telecommunication
 - c) Railways
 - d) Roads including bridges
 - e) Ports
 - f) Industrial parks
 - g) Urban infrastructure - Water supply, Sanitation and sewerage.
- vii) Whether requires clearance from any statutory authority? If yes, furnish the name of authority, clearance no. and date.

| 2. ECB already availed -(not applicable for the first time borrower) | | | | | |
|--|------------------|----------|-------------|------------------|---------------------|
| Year | Registration No. | Currency | Loan Amount | Amount disbursed | Amount outstanding* |
| 2003-04 | | | | | |
| 2002-03 | | | | | |
| 2001-02 | | | | | |

* net of repayments, if any, on the date of application.

PART E – CERTIFICATIONS

1. By the applicant

We hereby certify that -

- (i) the particulars given above are true and correct to the best of our knowledge and belief
- (ii) the ECB to be raised will be utilised for permitted purposes

Place _____
Date _____ Stamp _____

(Signature of Authorised Official of the applicant)

Name: _____
Designation _____
Phone No. _____
Fax _____
E-mail _____

2. By the authorised dealer –

We hereby certify that –

- (i) the applicant is our customer.
- (ii) we have scrutinised the application and the original letter of offer from the lender/supplier and documents relating to proposed borrowing and found the same to be in order.

(Signature of Authorised Official)

Place _____
Date _____ Stamp _____

Name _____
Name of the Bank/branch _____
A.D.Code _____

ECB - 2

Reporting of actual transactions of External Commercial Borrowings (ECB)
under Foreign Exchange Management Act, 1999
(for all categories and any amount of loan)

Return for the Month of _____.

1. This return should be filled in for all categories of ECB. It should be submitted within 7 working days from the close of the month through the designated Authorised Dealer to the Director, Department of Statistical Analysis and Computer Services (DESACS), Balance of Payments Statistics Division, Reserve Bank of India, C-8/9, Bandra-Kurla Complex, Bandra (East), Mumbai-400 051. If there is no transaction during a particular period, a **Nil return** should be submitted.
2. Please do not leave any column blank. Furnish complete particulars against each item. Where any particular item is not applicable write "N.A." against it.
3. All dates should be in format YYYY/MM/DD, such as 2004/01/21 for January 21, 2004.
4. Borrowers obtaining sub-loans through DFIs/Banks/NBFCs etc. should not complete this form as the concerned financial institution would directly submit ECB-2.
5. Before forwarding the return to Reserve Bank (DESACS), the Company Secretary / Chartered Accountant must scrutinise related original documents and ensure that the return is complete and in order as per ECB guidelines issued by Government/RBI.
6. The unique Loan Identification Number (LIN)/RBI Registration Number (in case of loan approved prior to February 01, 2004) must be specified as allotted by RBI. Similarly, the Loan Registration Number (since February 01, 2004) has to be specified.
7. If space is not sufficient for giving full information against any item, a separate sheet may be attached to the return and serially numbered as Annex.
8. For Purpose of utilization of drawdowns, following codes may be used.

| BOX 1: Purpose of Utilisation Code | | | | | |
|------------------------------------|------|--|-----|------|--|
| No. | Code | Description | No. | Code | Description |
| 1 | IC | Import of capital goods | 10 | ME | Modernisation /Expansion of existing units |
| 2 | IN | Import of non-capital goods | 11 | PW | Power |
| 3 | RL | Local sourcing of capital goods (Rupee expenditure) | 12 | TL | Telecommunication |
| 4 | RC | Working capital (Rupee expenditure) | 13 | RW | Railways |
| 5 | SL | On-lending or sub-lending | 14 | RD | Roads |
| 6 | RP | Repayment of earlier ECB | 15 | PT | Ports |
| 7 | IP | Interest payments | 16 | IP | Industrial parks |
| 8 | HA | Amount held abroad | 17 | UI | Urban infrastructure |
| 9 | NP | New project | 18 | OT | Others (Pl. specify) |

9. For source of funds for remittances, following codes are to be used.

| BOX 2: Source of Funds for remittance | | |
|---------------------------------------|------|------------------------------|
| No. | Code | Description |
| 1 | A | Remittance from India |
| 2 | B | Account held abroad |
| 3 | C | Exports proceeds held abroad |
| 4 | D | Conversion of equity capital |
| 5 | E | Others (Specify) |

| | | | | | | | | | | | | | | |
|---------------------------|--|-------------|--|-----------------|--|---------------------|--|--|--|--|--|--|--|--|
| FOR RBI (DESACS) Use only | | | | Loan_key | | | | | | | | | | |
| CS-DRMS Team | | Received on | | Action Taken on | | Loan Classification | | | | | | | | |
| | | | | | | | | | | | | | | |

Part A: Loan Identification Particulars

| | | | | | | | | | | | | | | |
|--------------------------------|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| Loan Registration Number (LRN) | | | | | | | | | | | | | | |
|--------------------------------|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

| Loan Amount | | | Borrower Particulars | |
|------------------|----------|--------|---|--|
| | Currency | Amount | Name and address of the Borrower (Block Letters) | |
| As per Agreement | | | Contact Person's Name: Designation: Phone No. : Fax no. : E-mail ID : | |
| | | | | |
| Revised | | | | |
| | | | | |

Part B: Actual Transaction Details

1. Draw-down during the month :

| Tranche No. | Date (YYYY/MM/DD) (Please see note below) | Currency | Amount | Amount of loan committed but not yet drawn at the end of the month (in loan currency) | |
|-------------|--|----------|--------|---|--------|
| | | | | Currency | Amount |
| | | | | | |
| | | | | | |
| | | | | | |

Note: 1. In the case of import of goods or services, date of import may be furnished against date of draw-down.
 2. In the case of financial lease date of acquisition of the goods is to be mentioned as date of draw-down.
 3. In the case of securitised instruments, date of issue may be shown as date of draw-down

2. Schedule of balance amount of loan to be drawn in future:

| Tranche No | Expected Date (YYYY/MM/DD) of drawdown | Currency | Amount | If more than one equal installment | |
|------------|--|----------|--------|------------------------------------|-----------------------------------|
| | | | | Total number of drawals | No. of drawals in a calendar year |
| | | | | | |
| | | | | | |

3. Details of utilisation of draw-downs during the month:

| Tranche No. | Date (YYYY/MM/DD) | Purpose codes (See BOX 1) | Country | Currency | Amount | Fresh Disbursement/ From A/c held abroad |
|-------------|-------------------|---------------------------|---------|----------|--------|--|
| | | | | | | |
| | | | | | | |

4. Amount parked abroad outstanding as on beginning of the month _____:

| Date (YYYY/MM/DD) | Name of bank and branch | Account No. | Currency | Amount |
|-------------------|-------------------------|-------------|----------|--------|
| | | | | |
| | | | | |

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5. Utilisation of amount parked abroad.

| Date (YYYY/MM/DD) | Name of bank and branch | Account No. | Currency | Amount | Purpose |
|-------------------|-------------------------|-------------|----------|--------|---------|
| | | | | | |
| | | | | | |

6. Debt Servicing during the month -

| Tranche No. | Purpose | Date of Remittance | Currency | Amount | Source of remittance (See Box 2) | Prepayment of Principal (Y/N)* |
|-------------|------------------|--------------------|----------|--------|----------------------------------|--------------------------------|
| | Principal | | | | | |
| | Interest @ rate | | | | | |
| | Others (Specify) | | | | | |

* In case of prepayment please provide details: Automatic Route / Approval No. Date: Amount:

7. Derivative transactions (Interest rate, Currency swap) during the month (if any) -

| Type of Swap | Swap Dealer | | Counter party | | Implementation Date |
|--------------------|-------------|---------|---------------|---------|---------------------|
| | Name | Country | Name | Country | |
| Interest Rate swap | | | | | |
| Currency swap | | | | | |
| Others (specify) | | | | | |

| Tranche No. | New Currency | Interest Rate on the New Currency | New Interest Rate on the Loan Currency | Maturity Date of the swap deal |
|-------------|--------------|-----------------------------------|--|--------------------------------|
| | | | | |
| | | | | |

8. Revised Principal Repayment Schedule (if revised / entered into Interest rate swap)

| Date (YYYY/MM/DD) (First repayment date) | Currency | Amount in Foreign Currency in each transactions | If more than one equal installments | | Annuity Rate (if annuity payment) |
|---|----------|---|-------------------------------------|--|-----------------------------------|
| | | | Total Number of installments | No. of payments in a calendar year (1, 2, 3, 4, 6, 12) | |
| | | | | | |
| | | | | | |
| | | | | | |

9. Amount of outstanding loan at the end of the month :

Currency _____ Amount: _____

(For RBI Use)

We hereby certify that the particulars given above are true and correct to the best of our knowledge and belief. No material information has been withheld and / or misrepresented.

Place : _____ Stamp _____
 Date : _____ (Signature of Authorised Official)
 Name : _____
 Designation : _____

(For Borrower's use)

Certificate from Company Secretary / Chartered Accountant

We hereby certify that the ECB availed in terms of approval granted by Government or RBI or under approval route / automatic route is duly accounted in the books of accounts. Further, ECB proceeds have been utilised by the borrower for the purpose of _____. We have verified all the related documents and records connected with the utilisation of ECB proceeds and found these to be in order and in accordance with the terms and conditions of the loan agreement and with the approval granted by GoI(MoF) or RBI or under approval route / automatic route and is in conformity with the ECB Guidelines issued by the Government.

Place : _____
Date : _____

Authorised Signatory
Name & Address
Registration No. _____ [Stamp]

Certificate by an Authorised Dealer

We hereby certify that the information furnished above with regard to debt servicing, outstandings and repayment schedule is true and correct as per our record.

Place : _____ [Stamp]
Date : _____

Signature of Authorised Dealer
Name : _____
Designation : _____
Name & Address of
Authorised Dealer
Uniform Code No. _____

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FC-GPR

PART - A

(To be filed by the company through its Authorised Dealer Category – I bank with the Regional Office of the RBI under whose jurisdiction the Registered Office of the company making the declaration is situated as and when shares / convertible debentures are issued to the foreign investor, along with the documents mentioned in item No. 4 of the undertaking enclosed to this Form)

| | |
|---|----------------------|
| Permanent Account Number (PAN) of the investee company given by the Income Tax Department | <input type="text"/> |
| Date of issue of shares / convertible debentures | <input type="text"/> |

| No. | Particulars | (In Block Letters) |
|-----|--|--------------------------------|
| 1. | Name | |
| | Address of the Registered Office | |
| | State | |
| | Registration No. given by Registrar of Companies | |
| | Whether existing company or new company (strike off whichever is not applicable) | Existing company / New company |
| | If existing company, give registration number allotted by RBI for FDI, if any | |
| | Telephone | |
| | Fax | |
| | e-mail | |

| | | |
|----|--|----------------------------------|
| 2. | Description of the main business activity NIC Code | |
| | Location of the project and NIC code for the district where the project is located | |
| | Percentage of FDI allowed as per FDI policy | |
| | State whether FDI is allowed under Automatic Route or Approval Route (strike out whichever is not applicable) | Automatic Route / Approval Route |
| 3 | Details of the foreign investor / collaborator* | |
| | Name Address Country Constitution / Nature of the investing Entity [Specify whether 1. Individual 2. Company 3. FI 4. FVCI 5. Foreign Trust 6. Private Equity Fund 7. Pension / Provident Fund 8. Sovereign Wealth Fund (SWF) ¹ 9. Partnership / Proprietorship Firm 10. Financial Institution 11. NRIs / PIO 12. Others (please specify)] Date of incorporation | |

* If there is more than one foreign investor/collaborator, separate Annex may be included for items 3 and 4 of the Form.

¹ SWF means a Government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from the official reserves of the monetary authorities.

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| | | | | | | | | |
|----------|--|--|----------------------|----------|------------|---------|---|-------------------|
| 4 | Particulars of Shares / Convertible Debentures Issued | | | | | | | |
| (a) | Nature and date of issue | | | | | | | |
| | | <i>Nature of issue</i> | <i>Date of issue</i> | | | | <i>Number of shares/ convertible debentures</i> | |
| | 01 | IPO / FPO | | | | | | |
| | 02 | Preferential allotment / private placement | | | | | | |
| | 03 | Rights | | | | | | |
| | 04 | Bonus | | | | | | |
| | 05 | Conversion of ECB | | | | | | |
| | 06 | Conversion of royalty (including lump sum payments) | | | | | | |
| | 07 | Conversion against import of capital goods by units in SEZ | | | | | | |
| | 08 | ESOPs | | | | | | |
| | 09 | Share Swap | | | | | | |
| | 10 | Others (please specify) | | | | | | |
| | Total | | | | | | | |
| (b) | Type of security issued | | | | | | | |
| | No. | Nature of security | Number | Maturity | Face value | Premium | Issue Price per share | Amount of inflow* |
| | 01 | Equity | | | | | | |
| | 02 | Compulsorily Convertible Debentures | | | | | | |
| | 03 | Compulsorily Convertible Preference shares | | | | | | |
| | 04 | Others (please specify) | | | | | | |
| | Total | | | | | | | |

i) In case the issue price is greater than the face value please give break up of the premium received.
 ii) * In case the issue is against conversion of ECB or royalty or against import of capital goods by units in SEZ, a Chartered Accountant's Certificate certifying the amount outstanding on the date of conversion

| | | |
|-----|----------------------------|---------------|
| (c) | Break up of premium | Amount |
| | Control Premium | |
| | Non competition fee | |
| | Others [®] | |
| | Total | |

[®] please specify the nature

| | | |
|-----|---|--|
| (d) | Total inflow (in Rupees) on account of issue of shares / convertible debentures to non-residents (including premium, if any) | |
|-----|---|--|

| | | |
|-----|--|--|
| | vide (i) Remittance through AD: (ii) Debit to NRE/FCNR A/c with Bank _____ (iii) Others (please specify) Date of reporting of (i) and (ii) above to RBI under Para 9 (1) A of Schedule I to Notification No. FEMA 20 /2000-RB dated May 3, 2000, as amended from time to time. | |
| (e) | Disclosure of fair value of shares issued** | |
| | We are a listed company and the market value of a share as on date of the issue is* | |
| | We are an un-listed company and the fair value of a share is* | |

** before issue of shares

*(Please indicate as applicable)

| 5. Post issue pattern of shareholding | | Equity | | | Compulsorily convertible Preference Shares/ Debentures | | |
|---------------------------------------|--------------------------------------|---------------|-------------------------|---|--|-------------------------|---|
| Investor category | | No. of shares | Amount (Face Value) Rs. | % | No. of shares | Amount (Face Value) Rs. | % |
| a) | Non-Resident | | | | | | |
| | 01 Individuals | | | | | | |
| | 02 Companies | | | | | | |
| | 03 FIs | | | | | | |
| | 04 FVCIs | | | | | | |
| | 05 Foreign Trusts | | | | | | |
| | 06 Private Equity Funds | | | | | | |
| | 07 Pension/ Provident Funds | | | | | | |
| | 08 Sovereign Wealth Funds | | | | | | |
| | 09 Partnership/ Proprietorship Firms | | | | | | |
| | 10 Financial Institutions | | | | | | |
| | 11 NRIs/PIO | | | | | | |
| | 12 Others (please specify) | | | | | | |
| | Sub Total | | | | | | |
| b) | Resident | | | | | | |
| | Total | | | | | | |

**DECLARATION TO BE FILED BY THE AUTHORISED REPRESENTATIVE OF THE
INDIAN COMPANY:** *(Delete whichever is not applicable and authenticate)*

We hereby declare that:

1. We comply with the procedure for issue of shares / convertible debentures as laid down under the FDI scheme as indicated in Notification No. FEMA 20/2000-RB dated 3rd May 2000, as amended from time to time.

2. The investment is within the sectoral cap / statutory ceiling permissible under the Automatic Route of RBI and we fulfill all the conditions laid down for investments under the Automatic Route namely (strike off whichever is not applicable).

a) Foreign entity/entities—(other than individuals), to whom we have issued shares have existing joint venture or technology transfer or trade mark agreement in India in the same field and Conditions stipulated at Para 4.2 of Consolidated FDI policy Circular of Government of India have been complied with.

OR

Foreign entity/entities—(other than individuals), to whom we have issued shares do not have any existing joint venture or technology transfer or trade mark agreement in India in the same field.

For the purpose of the 'same' field, 4 digit NIC 1987 code would be relevant.

b) We are not an Industrial Undertaking manufacturing items reserved for small sector.

OR

We are an Industrial Undertaking manufacturing items reserved for small sector and the investment limit of 24 % of paid-up capital has been observed/ requisite approvals have been obtained.

c) Shares issued on rights basis to non-residents are in conformity with Regulation 6 of the RBI Notification No FEMA 20/2000-RB dated 3rd May 2000, as amended from time to time.

OR

Shares issued are bonus.

OR

Shares have been issued under a scheme of merger and amalgamation of two or more Indian companies or reconstruction by way of de-merger or otherwise of an Indian company, duly approved by a court in India.

OR

Shares are issued under ESOP and the conditions regarding this issue have been satisfied

Key to Abbreviations

| S.No. | Abbreviation | Expansion |
|-------|--------------|--|
| 1 | AD | Authorised Dealer |
| 2 | ADB | Asian Development Bank |
| 3 | AMP | Average Maturity Period |
| 4 | CDC | Council for the Development of Cambodia |
| 5 | DGCA | Directorate General of Civil Aviation |
| 6 | DGFT | Directorate General of Foreign Trade |
| 7 | DIPP | Department of Industrial Policy and Promotion |
| 8 | DNBS | Department of Non Banking Supervision, Reserve Bank of India |
| 9 | DSIM | Department of Statistics and Information Management |
| 10 | ECA | Export Credit Agency |
| 11 | ECB | External Commercial Borrowings |
| 12 | EXIM | Export Import |
| 13 | FATF | Financial Action Task Force |
| 14 | FCCB | Foreign Currency Convertible Bonds |
| 15 | FCEB | Foreign Currency Exchangeable Bonds |
| 16 | FDI | Foreign Direct Investment |
| 17 | FEMA | Foreign Exchange Management Act |
| 18 | FERA | Foreign Exchange Regulation Act |
| 19 | FI | Financial Institution |
| 20 | HFC | Housing Finance Company |
| 21 | IFC | Infrastructure Finance Company |
| 22 | IP | Industrial Park |
| 23 | LC | Letter of Credit |
| 24 | LG | Letter of Guarantee |
| 25 | LIBOR | London Inter Bank Offered Rate |
| 26 | LoC | Letter of Comfort |
| 27 | LoU | Letter of Undertaking |
| 28 | LRN | Loan Registration Number |
| 29 | MAMP | Minimum Average Maturity Period |

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| S.No. | Abbreviation | Expansion |
|-------|--------------|--|
| 30 | NBFC | Non Banking Finance Company |
| 31 | NGO | Non Governmental Organisation |
| 32 | NMIZ | National Manufacturing Investment Zone |
| 33 | NOC | No objection Certificate |
| 34 | NRE | Non Resident External |
| 35 | NRO | Non Resident Ordinary |
| 36 | OCB | Overseas Corporate Bodies |
| 37 | PSU | Public Sector Undertaking |
| 38 | RBI | Reserve Bank of India |
| 39 | SEBI | Securities and Exchange Board of India |
| 40 | SEZ | Special Economic Zone |
| 41 | SME | Small and Medium Enterprise |
| 42 | TC | Trade Credit |

Feedback Page

This is the first edition of the guide by the Committee, and, obviously, therefore there is scope for improvement. We intend to make it as useful as possible in its present format. The committee, therefore, hopes to keep updating this guide on a regular basis in order to make it more functional.

We solicit comments and suggestions from practitioners and others to improve the usefulness of the guide. In particular, we will welcome practitioners, and further areas for inclusion.

Your valuable inputs may be sent to ccbcaf@icai.org.

We are thankful to CA. P. Venkatesan for preparing the draft of this book on External Commercial Borrowings: A Practitioner's Guide.

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