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EXTERNAL COMMERCIAL BORROWINGS & FOREIGN INVESTMENTS IN INDIA

ECBs are Foreign Currency Denominated (including INR denominated) commercial borrowings raised by eligible resident entities from recognized lenders for medium and long term borrowings with a minimum average maturity period (MAMP) of 3 years and above.

The eligible resident Indian entities are also eligible to borrow for periods of less than 3 years, subject to the extant guidelines of the Reserve Bank of India.

ELIGIBLE BORROWERS

a) All entities eligible to receive FDI.
b) **STARTUPs recognized by the Central govt** as on date of raising ECB.
c) Port Trusts, Units in SEZ, SIDBI, EXIM Bank.
d) **Registered entities engaged in micro-finance activities** viz., registered Not for Profit Companies, registered societies/ trusts/ co-operatives and Non-Government Organizations are permitted only to raise INR ECBs.

END USE NEGATIVE LIST

a) Real estate activities
b) Investment in capital market & Equity investment
c) Working capital purposes except from foreign equity holder
d) **General corporate purposes** except from foreign equity holder
e) Repayment of Rupee loans except from foreign equity holder
f) On-lending to entities for the above activities.

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ECBS – RECOGNIZED LENDERS

- **Lender should be resident of FATF** compliant country or **IOSCO** (International Organization of Securities Commission) compliant.
- **Multilateral and Regional Financial Institutions** where India is a member country
- **Individual lenders can only be permitted if they are foreign equity holders** or for subscription to bonds /debentures listed abroad.
- **Foreign branches/ subsidiaries of Indian banks are permitted** as recognized lenders only for FCY ECBs.
- Foreign branches/ subsidiaries of Indian banks can participate as arrangers/ underwriters/ market-makers/ traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

MINIMUM AVERAGE MATURITY PERIOD – MAM

- MAMP will be 3 years, including borrowing by startups.
- **Manufacturing sector companies** may raise ECBs with MAMP of 1 year for ECB up to USD 50 million or its equivalent per FY.
- If the **ECB is raised from foreign equity holder** and utilized for working capital purposes or general corporate purposes or for repayment of rupee loans raised domestically for purposes other than capex, MAMP will be 5 years.
- **If the ECB is utilized for working capital purposes or general corporate purposes**, MAMP will be 10 years.

- **If the ECB is utilized for repayment of Rupee loans availed domestically for capex and non-capex,** MAMP will be 7 years and 10 years, respectively.

ALL-IN-COST CEILING

- **For new ECBs** - Benchmark rate plus 500 bps spread.
- **For existing ECBs linked to LIBOR whose benchmarks are changed to ARR** - Benchmark Rate plus 550 bps spread.
- **For INR denominated ECBs** - Benchmark rate plus 450 bps spread. **BENCHMARK RATE**: prevailing yield of the Government of India securities of corresponding maturity.
- **All-in-cost includes** rate of interest, other fees, expenses, charges, guarantee fees, ECA charges, whether paid in foreign currency or INR but will not include commitment fees and withholding tax payable in INR.
- **In the case of fixed rate loans, the swap cost plus spread should not be more than the floating rate plus the applicable spread.**
- for **FCCBs the issue related expenses** should not exceed 4% of issue size and **in case of private placement**, these expenses should not exceed 2% of the issue size, etc.

OTHER OPERATIONAL CONCEPTS

- **Change of currency of ECB** to any other freely convertible foreign currency as well as to INR is freely permitted.
- **ECB borrower to cover principal as well as coupon through financial hedges**.

- The financial hedge should start from the time of each such exposure (the day liability is created in the books of the borrower).
- **All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year** under Automatic Route.
- **STARTUPS recognized by the Central Government** can raise maximum of USD 3 million or equivalent per financial year.
- **FCY ECB raised from direct foreign equity holder**, **ECB liability-equity ratio** raised under the automatic route cannot exceed 7:1.
- **Issuance of any type of guarantee** by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted.
- ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilization.
- **Until utilization of ECB proceeds, funds can be invested in liquid assets**
  a) **deposits or CDs or other products offered by banks** rated not less than AA (-) by S&P/ Fitch IBCA or AA3 by Moody's
  b) **Treasury bills and other monetary instruments** of 1-year maturity having minimum rating as indicated above and
  c) deposits with foreign branches/ subsidiaries of Indian banks abroad.
- **ECB proceeds meant for Rupee expenditure** should be repatriated immediately.
- **ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I** banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.
- Any draw-down in respect of an ECB should take place only after obtaining the LRN from RBI on submission of Form ECB.

- **Borrowers to report actual ECB transactions in Form ECB 2 Return** to RBI through AD CAT 1 bank on monthly within 7 working days from the close of month to which it relates.
- **Changes in ECB parameters** in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, **should be reported to the RBI through revised Form ECB** not later than 7 days from the changes effected.

REFINANCING OF EXISTING ECB

It is permitted, provided:

a) the **outstanding maturity** of the original borrowing is not reduced

b) **all-in-cost of fresh ECB** is lower than the all-in-cost of existing ECB.

Foreign branches of Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/ Navratna Public Sector Undertakings.

REPORTING REQUIREMENTS

- Loan Registration Number (LRN) – **Drawdown of ECBs should happen only after obtention of LRN from the RBI.**
- **borrowers are to submit Form ECB** through the AD Category I Bank to RBI, Department of Statistics and Information Management, External Commercial Borrowings Division for their perusal and issuance of LRN.
- The **borrowers are to report the actual ECB transactions through ECB 2 returns** through the AD Category I Bank on a monthly basis so as to reach within 7 days from the close of the relevant month.

- Changes, if any, in the ECB parameters, after obtention of the LRN should also be incorporated in the monthly returns.
- Any borrower (in compliance of the ECB guidelines) can regularize the delay in reporting by payment of Late Submission Fees (LSF) for the period of delay
- the delays may range from up to 30 days from the due date of submission to beyond 3 years from the due date of submission.
- The late submission may also range from Rs. 5,000 to Rs. 1,00,000 per year depending on the extant delayed submission.

CONVERSION OF ECB INTO EQUITY

- The activity of the borrowing company is covered under the automatic route of FDI.
- Conversion should be with the lender's consent and without additional cost & adhering to the sectoral cap as per the FDI Policy.
- Pricing guidelines to be adhered to.

If the borrower has availed any credit facilities from the Indian banking system, all prudential guidelines issued by the Department of Banking Regulation of RBI to be complied with, including consent of other lenders.

FOREIGN INVESTMENTS

Foreign Investments (FDI & FPI)

- different modes of Foreign Investments
- restrictions on Foreign Investments
- control and reporting

RELEVANT REGULATORS – NDI (NON-DEBT INSTRUMENTS) RULES

- Department of Economic Affairs, Finance Ministry notifies Non-Debt Instruments (NDI) rules.
- **RBI – Nodal authority** for Valuations & Reporting.
- **Various Government Ministries** – Cases requiring approvals (earlier FIPB – Foreign investment promotion board abolished in 2019)
- **DIPP (Deptt of Industrial policy & promotion) and Ministry of Commerce** – formulates FDI Policy Key changes.

KEY CHANGES

- **On-line reporting to RBI through AD Banks** – FIRMS Portal (Foreign Investment Reporting and Management System)
- **Late submission fee introduced.**
- **FEMA 20(R), Master directions., replaced with the NDI rules (33 Rules and 10 Schedules)**

KEY CONCEPTS

FOREIGN DIRECT INVESTMENT

- any **investment in Equity instruments**
- made by a Person Resident Outside India (PROI)
- on a repatriable basis
  a) In an unlisted Indian company
  b) **10% or more of the paid up equity capital**, on a fully diluted, [the total number of shares that would be outstanding if all possible sources of conversion are exercised] basis in a listed company.
  c) In an LLP towards capital contribution

ONCE AN FDI, ALWAYS AN FDI: In equity instruments of a listed Indian company falls to a level below 10% of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI.

FOREIGN PORTFOLIO INVESTMENT

- **Investment made by a PROI is less than 10% of the paid-up equity** capital, on a fully diluted basis of a listed company.

FOREIGN PORTFOLIO INVESTOR (FPI): a person registered in accordance under SEBI (FPI) Regulations 2019 wherein **FPIs can invest in securities in the primary and secondary markets** including shares, debentures and warrants of companies, listed or to be listed on a recognized stock exchange in India.

- The 10 percent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group.

DOWNSTREAM INVESTMENTS (INDIRECT FOREIGN INVESTMENTS)

- **Investments in the equity instruments of another Indian company by an Indian entity** (including LLP) which has received foreign investment and is owned or controlled by PROI

It also means Investment by an Investment Vehicle whose sponsor or manager of investment manager is not owned and not controlled by resident Indian citizens.

SECTORAL CAP is the ceiling limit up to which a PROI can subscribe to Paid-up capital of Indian Investee Company as prescribed under Sector-wise/ Activity-wise by Department of Industrial Policy & Promotion (DIPP)

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If the **foreign investment in the investing entity is 50% or more**, then the entire downstream investment will be regarded as indirect foreign investment.

FOREIGN VENTURE CAPITAL INVESTMENTS (FVCI) - FVCI is incorporated outside India and can invest in Domestic Venture Capital Fund or a Venture Capital undertaking (Domestic unlisted Company). They are SEBI registered Investment Vehicle.

Foreign investment in Investment Vehicle means it is an entity registered under SEBI., eg.,

START-UP COMPANY - Start-up Company means a Private Company incorporated under the Companies Act, 2013 or a Registered Partnership Firm or an LLP, recognised as such by the DIPP, Ministry of Commerce and Industry, Government of India and complying with following conditions:

a) **recognition will be restricted to 7 years** from the incorporation

b) For bio-technology sector, start-up recognition is up to 10 years.

c) **Turnover for any FY** since incorporation does not exceed INR 100 cr.

d) The **entity is working towards innovation, development or improvement of product or processes or services**, or operating on a scalable business model with high potential for employment generation/ wealth creation.

ELIGIBLE FOREIGN INVESTORS

- **PROI** - Non resident entities, NRIs, OCIs, Foreign Nationals
- **NRIs resident in Nepal and Bhutan** subject to the inward remittances received in free foreign exchange
- **Erstwhile OCBs** who are not under the RBI caution list
- Foreign Portfolio Investors
- Foreign Venture Capital Investors

ELIGIBLE INVESTEE ENTITIES

- **Indian companies** as defined under the Companies Act 2013
- **Trusts** being Venture Capital Funds regulated by SEBI
- **LLPs**
- **Special Investment Vehicles**
- **Start-up companies**

ELIGIBLE INVESTMENT INSTRUMENTS

a) **Fully paid Equity shares.**

b) **Partly paid Equity shares,** provided 25% of total consideration is received upfront and balance within 12 months.

c) Fully, Compulsorily and mandatorily convertible debentures/ Preference shares.

d) **Share warrants** provided at least 25% of consideration is received upfront and balance within 18 months of issuance.

e) **Convertible notes issued by Startup entities**, repayable at the option of the holder or converted into equity within a period not exceeding 5 years from the date of issue of the CN.

f) Bonus Shares/ Rights Shares/ ESOPs.
g) **Swap of equity instruments** (FDI & ODI structure) - NRI owned companies.
h) Import of capital goods/ machinery.
i) Conversion of ECB into equity shares.

PROHIBITED SECTORS

- **Lottery business** including Government, Private and On-line
- **Gambling** and betting including Casinos
- Chit Funds
- Nidhi Business
- Trading in Transferable Development Rights
- Real Estate Business, Construction of Farm Houses, etc.
- Manufacturing of Tobacco, Cigarettes & tobacco substitutes
- Sectors not open to Private investments, eg., Atomic Energy, Railways

RULES GOVERNING PLEDGE OF SHARES

Any person resident outside India **holding equity instruments in an Indian Company may pledge in favour of a Bank in India**

a) **to secure credit facilities** being extended to such Indian company.,
b) for genuine business purposes.,
c) **Submission of a declaration/ annual certificate from the statutory auditor** of the investee company that the loan proceeds will be utilized for the said purpose.

Also investor may pledge in favour of Overseas Bank

a) **to secure credit facilities** being extended to PROI who is the promoter of such Indian company or the overseas group company.,

b) Loan is availed only in an Overseas bank.,

c) Loan is utilized for genuine business purposes and not for investments.

d) Loan proceeds should not result in any capital inflow in to India.,

e) Submission of a declaration/ annual certificate from the statutory auditor of the investee company that the loan proceeds will be utilized for the said purpose.

TRANSFER OF NON-DEBT INSTRUMENTS

NATURE	MODE	RULE	PRICING	REPORTING
NR to NR (excl NRI/ OCI/ OCB	Sale/ gift	AR (if FDI allowed under AR)	NA	NA
NR to R	Sale/ gift	AR	Yes	FCTRS
R to NR	Sale	AR should comply with FDI Guidelines	Yes	FCTRS
R to NR	Gift (relatives)	RBI Approval shall not exceed 5% of paid up cap or max $50000	NA	FCTRS
R to NR Lender	Pledge	Under ECB (AD NOC)	NA	NA
NR to R (Bank, lender, NBFC)	Pledge	Automatic	NA	NA
NR to NR (overseas lending bank)	Pledge	Automatic	NA	NA

AR=Automatic Route, FCTFS = Foreign currency transfer of shares

PROCESS OF REPORTING USING VARIOUS REPORTING FORMS

FORM	PURPOSE	RESPONSIBILITY OF FILING	TIMEFRAME
Foreign Currency - Gross Provisional Return (FCGPR)	• Reporting of **capital instrument issued to a PROI** and where such issue reckoned as FDI. • *conversion of ECB into Equity.*	Investee Entity	**Within 30 days** from the date of issue of capital instruments
Annual Return of Foreign Liabilities and Assets (FLA)	**Annual reporting by Indian company which has received FDI or LLP** which has received capital contribution in the previous year(s) including the current year.	Investee Entity	**On or before the 15th of July**
Foreign Currency-Transfer of Shares (FC-TRS)	Transfer between resident to NR Sale of shares on SE*	Resident transferor/ transferee or PROI *Responsibility of the NR	**Within 60 days of transfer** of capital instruments of receipt/remittance of funds whichever is earlier. **In case of deferred payment transfer,** reporting be done on receipt of every tranche of payment.

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Employees' Stock Option (ESOP)	Stock option to PROI	Issuing Indian Company	**Within 30 days** from the date of issue

FORM	PURPOSE	RESPONSIBILITY FOR FILING	TIMEFRAME
LLP (I)	LLP receiving amount of consideration for capital contribution and acquisition of profit shares	Investee Indian LLP	**Within 30 days** from the date of receipt the amount of consideration
LLP (II)	Disinvestment/ transfer of capital contribution profit share between a resident and non resident (or vice versa)	Investee Indian LLP	**Within 60 days** from the date of receipt funds
Depository Receipt Return (DRR)	Reporting of issue/ transfer of depository receipt issued in accordance with the Depository Receipt Scheme, 2014 by the Domestic Custodian	Domestic Custodian	**Within 30 days** of close of the issue/program
Downstream Investment (Form DI)	An Indian company making downstream investment in another Indian company which is considered indirect foreign investment for the investee company	Indian Entity or Investment Vehicle making DI	**Within 30 days** of such investment

Form InVi	An investment vehicle which has issued its unit person resident outside India	Indian Investment Vehicle	**Within 30 days** of issuance of units in Investment Vehicle
Form Convertible Notes (CN)	Issuance & Transfer of CNs by Indian startup company	Issuing company/ Transferor/ Transferee	Within 30 days of issuance/ transfer

LATE SUBMISSION FEE (LSF)

AMT IN REPORTING	LSF (% OF AMT)	MAX LSF
Up to Rs 1 cr	0.05%	Rs 10 Lac or 300% of amt involved (lower)
> Rs 1 cr	0.15%	Rs 1 crore or 300% of amt involved (lower)

- % of LSF **doubled for every 12 months of delay**
- Includes Sundays/ Holidays
- The period shall begin from day after due date till preceding day of reporting

NON-DEBT INSTRUMENTS (NDI) RULES

Rules 1 & 2 – Short title, definitions, etc.

Rule 3 – Restrictions on investments in India by PROI

Rule 4 – Restrictions on receiving investments

Rule 5 – Permission for making investment by a PROI

Rule 6 – investment by person resident outside India – Sch. I, VI, VIII, IX

Rule 8 – Issue of ESOPs & SWEAT Equity shares

Rule 9 – Transfer of equity instruments of an Indian company by or to a person resident outside India.

Rule 10 – Investments by SEBI registered FPIs Sch. II & X

Rule 12 – Investments by NRI or OCI – Sch. III, IV, X Rule 16 – Investments by FVCI -Sch. VII

Rule 20 – Reporting requirements

Rule 21 – Pricing guidelines

Rule 23 – Downstream investments

Rules 24 to 33 – Acquisition & transfer of immovable property in India by NRIs/ OCIs/ purpose of acquiring property, etc., including miscellaneous provisions.

LIST OF DOCUMENTS FOR OBTENTION OF FOREIGN INVESTMENTS

- **Application (for Inward) along with FEMA declaration** signed by Investee Company.
- Brief **profile of Investee Company** providing main business activities of the entity **with 5-digit NIC (National Industrial classification) code as per NIC 2008 list**.
- Copy of **MOA of Indian Investee** Company.
- Copy of MOU/ share purchase agreement or declaration that there is no such agreement.
- **6 Point KYC SWIFT of the remitter**/ investor as per RBI format.
- ***NOC from joint account holder*** *if shares are issued on single name* (applicable for remittances received from joint accounts only).
- **Declaration stating Capital instruments against this remittance would be issued within 60 days** in accordance with the provisions.

- **Scan email acknowledgement** received by the investee company from FIRMS helpdesk w.r.t to Entity master.
- **Undertaking from customer** confirming FCGPR & related documents will be reported in FIRMS portal within 30 days from date of allotment of shares.

LIST OF DOCUMENTS FOR REFUND OF FOREIGN INVESTMENTS

- **Application (FCTRS Outward) + Form A2** signed by Investee Company.
- **FIRC in original obtained and endorsed** and retained along with the records.
- **Copy of UIN letter/ FIRMS FCGPR reporting Ref Number.**
- Letter from the Company mentioning reason for return of funds.
- *Board resolution from the company confirming excess funds have been received as share application money* and the excess funds are being repatriated back to the investor.
- Letter **confirmation that no interest element involved in refund** of excess share application funds.
- **Branch has to intimate to RBI about refund**, once refund transaction is processed.