

FEMA & INTERNATIONAL TAXATION FOR CA STUDENTS

Western India Regional Council of ICAI



EXTERNAL COMMERCIAL BORROWINGS [ECB]- FEMA REGULATION



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POPULAR FUNDING OPTIONS



END USE RESTRICTION

- External Commercial Borrowing [ECB].
- Non Convertible Debentures
- Partially/Optionally Convertible Preference Shares
- Partially/ Optionally Convertible Debentures.

- Equity Share Capital
- Fully convertible Preference Share capital
- Fully convertible Debentures

NO END USE RESTRICTION



REGULATORY OVERVIEW

**FAQs on
ECB - 29th
May 2019**

**Section 6 (2)
(Capital Account
Definition) of
FEMA, 1999
(Governing
Provisions)**

**A.P. DIR
Series
Circulars**

**FEMA
(Borrowing
or Lending)
Regulations,
2018**

**Master
Direction
No.5/2018-19
Updated on 1st
August, 2022**

**Notfn FEMA
3(R)/2018-RB
dtd. 17th
December
2018)**



Being a Capital Account Transaction, it is permissible only as stipulated. In case of doubt, always go for RBI approval

WHAT IS EXTERNAL COMMERCIAL BORROWING [ECB]?

- **Commercial loans**
- Raised by **eligible resident entities**
- From **recognized non-resident entities**
- Conforming to **parameters** such as
 - ✓ minimum maturity,
 - ✓ permitted end-uses,
 - ✓ non-permitted end-uses,
 - ✓ maximum all-in-cost ceiling, etc.



FORMS OF ECB

Bank/
Other Loans

Securitized
instruments

Trade
Credits >
3 Y

FCCBs/
FCEB

Financial
Lease

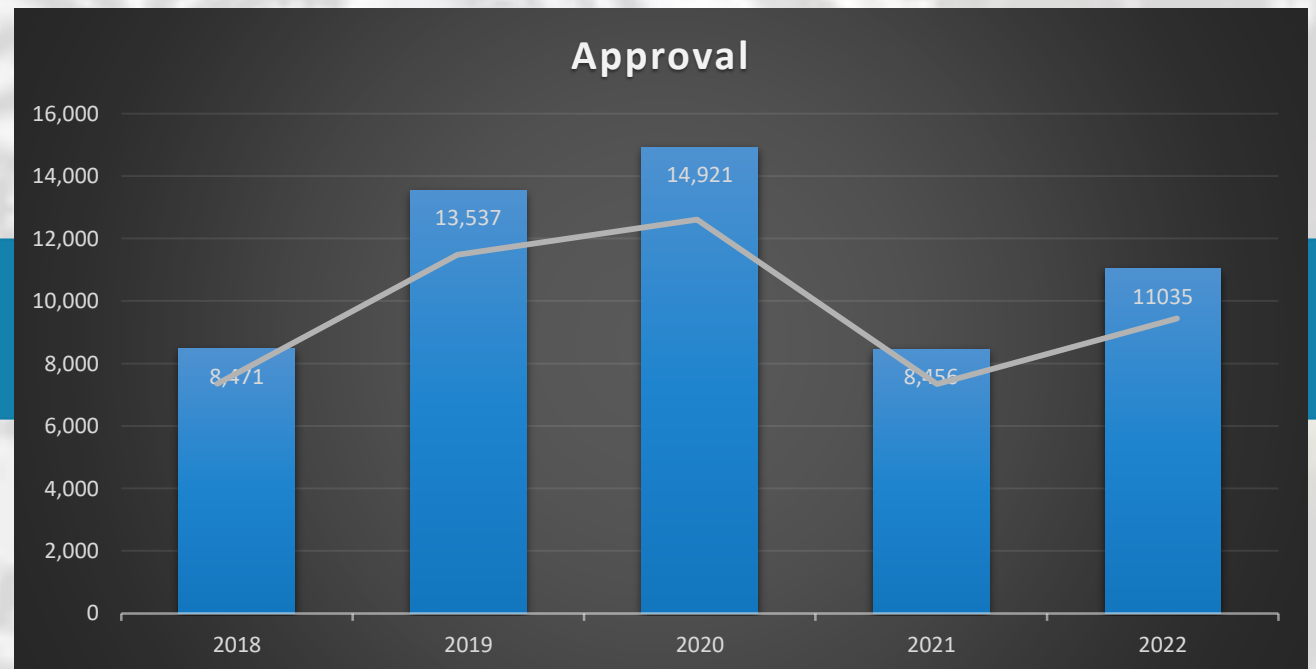
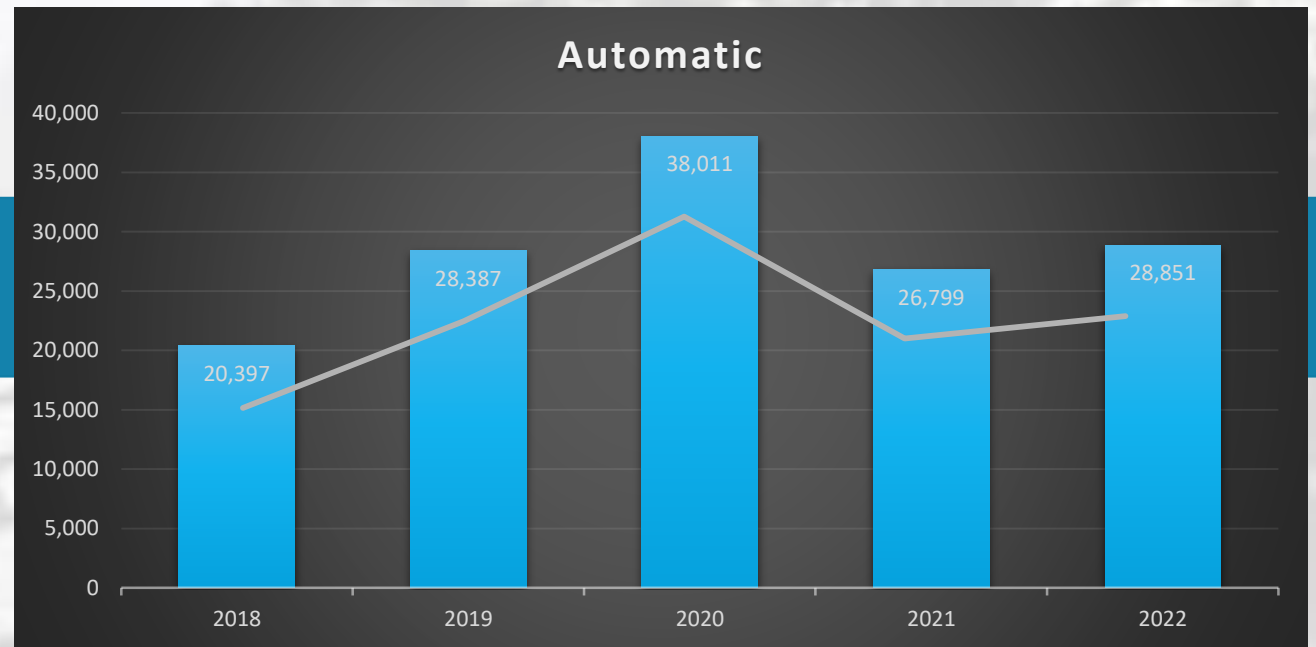
AUTOMATIC ROUTE

STATISTICAL REPRESENTATION OF ECB REGISTRATIONS

APPROVAL ROUTE

Total Values as at August 18, 2022

As available on RBI website



Amount in US\$ Million

ECB RAISING OPTIONS

INR/ FCY ECB

AUTOMATIC ROUTE

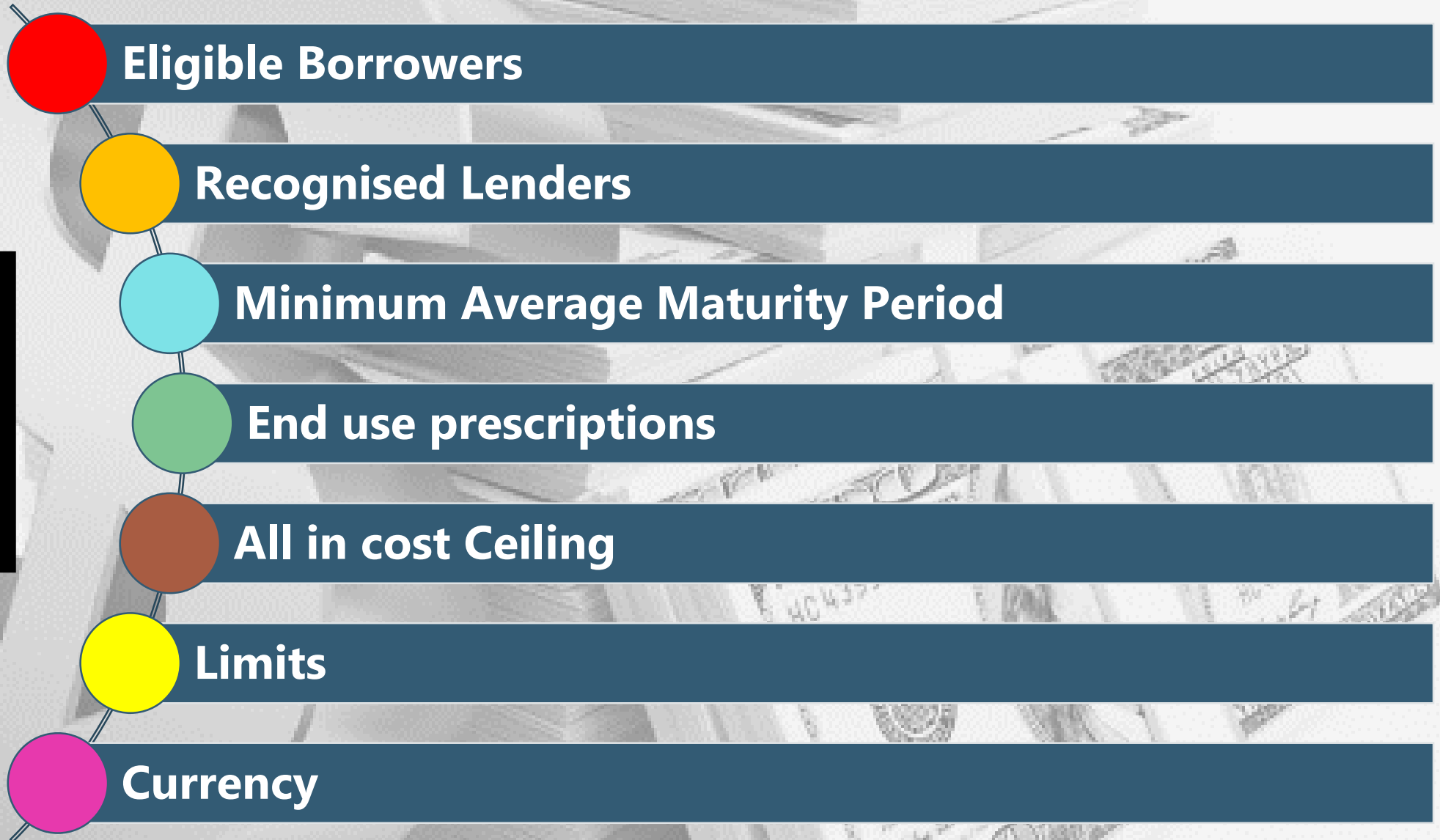
- Up to USD 750 million★ or equivalent per FY from a borrower.
- FCY ECB from foreign equity holder :- Debt equity ratio not to exceed 7:1 if o/s amount of all ECB (including proposed) is > USD 5 million.
- Conforming to all parameters prescribed under this ECB framework.

APPROVAL ROUTE

- Entities not conforming to parameters laid down.
- To make an application to RBI through their AD Bank
- RBI Empowered Committee to consider application
- Final decision by RBI

★ Stands increased from USD 750 million or equivalent to USD 1.5 billion or equivalent for ECBs to be raised till December 31, 2022

KEY PARAMETERS (CUMULATIVE)



Recognised Lenders



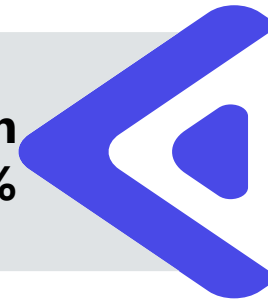
Entities resident of FATF or IOSCO compliant country

Multilateral and Regional Financial Institutions (India member country)



Foreign branches / subsidiaries of Indian banks - only for FCY ECB

Individuals can be lender only if "foreign equity holder" having a minimum of 25% direct equity holding



(Foreign Equity Holding condition to be fulfilled throughout the tenure of the ECB wherever applicable.)

Eligible Borrowers

FCY ECB

All entities which are eligible to receive FDI

Port Trusts

SIDBI

Units in SEZ

EXIM Bank of India

INR ECB

All entities eligible for FCY denominated ECB

Registered entities engaged in micro finance activities

Registered NPOs

Registered Societies/ Trust/ Cooperatives

Non Governmental Organisation

MINIMUM AVERAGE MATURITY PERIOD (MAMP)

Minimum Average maturity period : Should be **3 years**.

However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

No.	Specific Category	MAMP
(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(b)*	ECB raised from foreign equity holder (#) for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years
(c)*	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
(d)*	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years
(e)*	ECB raised for (i) repayment of Rupee loans availed domestically (other than capital expenditure) (ii) on-lending by NBFCs for the same purpose	10 years

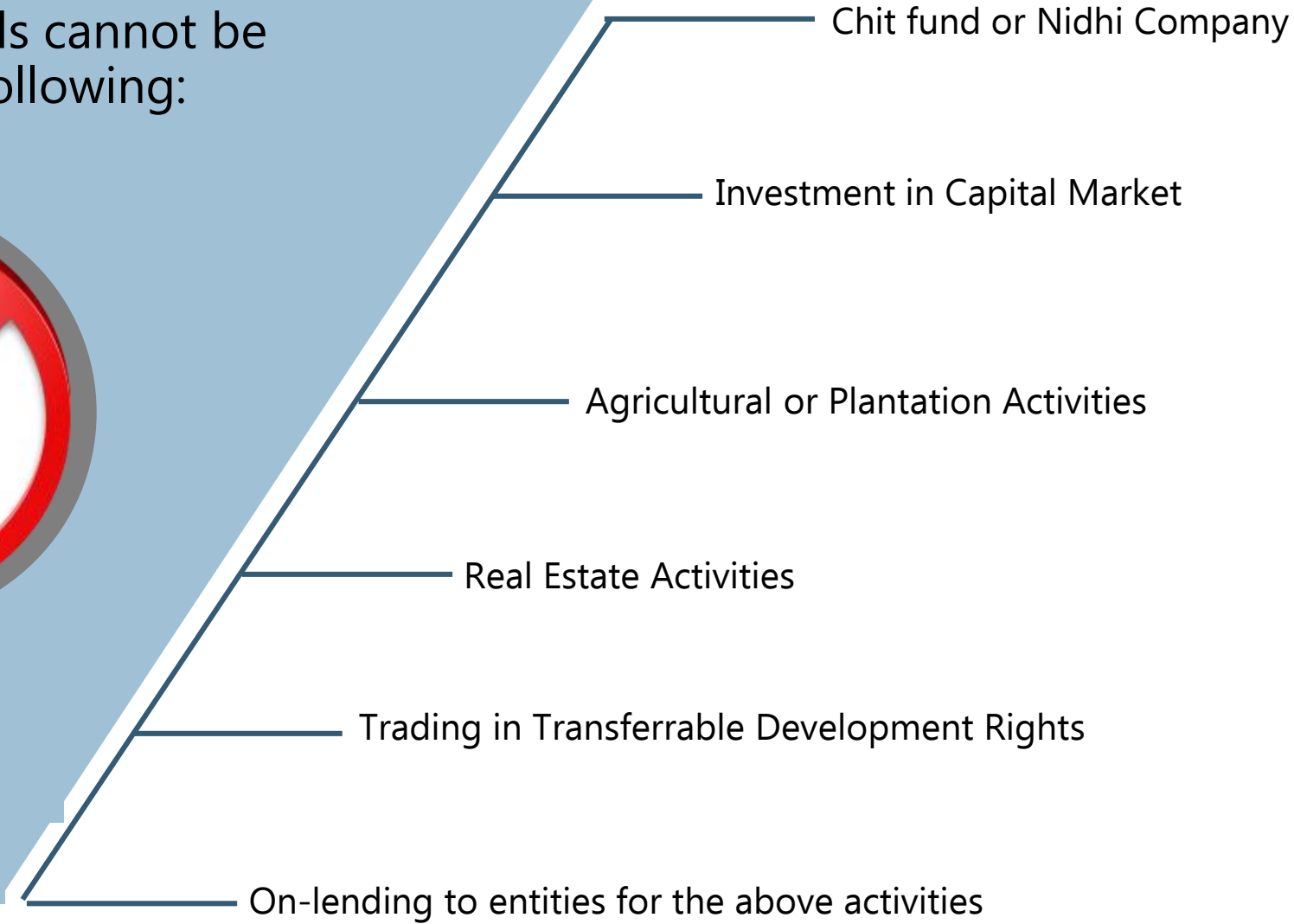
(#) Foreign Equity Holder :

- Direct foreign equity holder – min 25% direct equity holding
- Indirect equity holder - min indirect equity holding of 51%
- Group Company with common overseas parent

****ECB cannot be raised from foreign branches/subsidiaries of Indian banks for working capital, general corporate purposes and repayment of rupee loans.***

NEGATIVE LIST / RESTRICTED END USE

The ECB proceeds cannot be utilized for the following:



(*) : Except if conditions are met as mentioned in MAM

ALL IN COST CEILING

INCLUSIONS

- Rate of Interest
- Other Fees
- Expenses
- Charges
- Guarantee Fees
- ECA Charges whether in FCY or INR



EXCLUSIONS

- Commitment Fees
- Withholding Tax payable in INR

All in cost ceiling p.a - Benchmark Rate

FCY ECB

- Widely accepted interbank rate or Alternate Reference Rate ARR (*) of 6-month tenor, applicable to the currency of borrowing
- **Existing ECB** (LIBOR linked)- 550 basis points (upto 31.12.2022) over the benchmark rate.
- **New ECB** - 500 basis points over the benchmark rate (ARR).[From 08.12.2021]

(*) A.P. (DIR) Cir No. 19 dtd. 8.12.2021, all banks changed their benchmark from LIBOR to any widely accepted alternative reference rate (ARR) for eg. SECURED OVERNIGHT FINANCING RATE

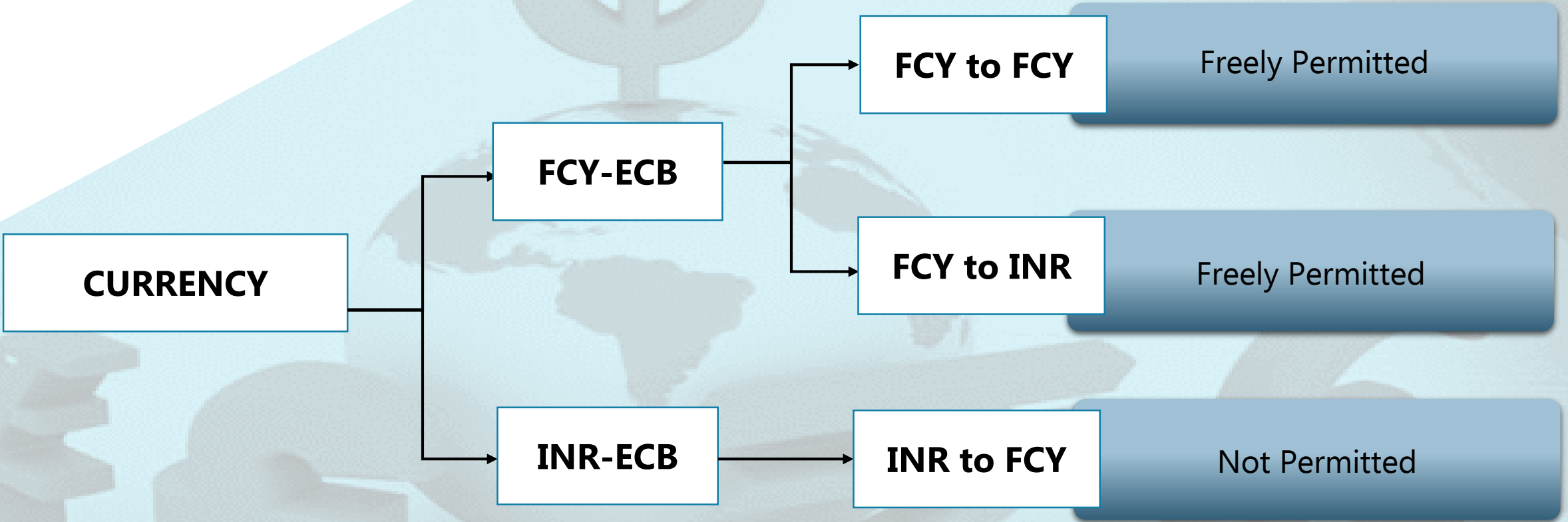
INR ECB

- Prevailing yield of the Govt. Sec. of corresponding maturity.
- 450 basis points over the benchmark rate (Govt. Securities) *[As at 16.09.22 rate @ 6.18% for 6 months tenure]*

All-in-cost ceiling has been temporarily increased by 100 bps for ECBs raised till December 31, 2022, only to eligible borrowers of investment grade rating from CRAs.

Change of Currency of Borrowings

CHANGE IN CURRENCY



HEDGING

FCY-ECB

- Guidelines issued by the concerned sectoral or prudential regulator to be followed for hedging,
- For Infrastructure space companies
 - ✓ Requires board approved risk management policy
 - ✓ Mandatory hedge of 70% of ECB exposure if average maturity < 5 years

INR-ECB

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

OPERATIONAL ASPECTS WITH RESPECT TO HEDGING

1

Coverage

Required to cover the principal as well as the coupon through financial hedges from date of liability created in the books.

2

Tenor & Rollover

Minimum 1 year periodic rollover to ensure nothing is left out unhedged.

3

Natural Hedge

To be considered to the extent of offsetting projected cash flows / revenues in matching currency net off projected outflows within same accounting year



ECB LIABILITY-EQUITY RATIO

- In case of FCY ECB's raised from foreign equity holder - must **not exceed 7:1** [Applicable, if outstanding amount of ECB > USD 5 million]
- Ratio shall be considered with respect to the concerned foreign equity holder
- Borrowing entities to be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.



- ECB Liability : All outstanding amount of all ECB (other than INR denominated) + the proposed ECB
- Equity : Paid up capital + Free reserves (proportionate share premium received in Foreign currency)

#All figures to be taken as per latest audited Balance Sheet

ABROAD



ECB proceeds meant only for foreign currency expenditure can be parked abroad for utilisation

Until utilisation, these funds can be invested in the following:

Deposits or CD or other products offered by banks rated not less than AA (-) by S&P/ Fitch IBCA or Aa3 by Moody's

Treasury bills and other monetary instruments of one-year maturity having minimum rating as mentioned.

Deposits with foreign branches/subsidiaries of Indian banks abroad

DOMESTICALLY



ECB proceeds meant for Rupee expenditure

Repatriated immediately for credit to their Rupee accounts with AD Cat I banks in India

In term deposits with AD Cat I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.

REFINANCING EXISTING ECB

Permitted by raising fresh ECB, provided:

- O/s maturity of the original borrowing (weighted O/s maturity in case of multiple borrowings) is NOT REDUCED.
- all-in-cost of fresh ECB (weighted average cost in case of multiple borrowings) to be LOWER than all-in-cost of existing ECB



Refinancing of ECBs raised under the previous ECB framework (wholly and in part) – permitted subject to adherence to eligibility criteria of existing provisions

Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/Navratna public sector undertakings.

Refinancing of INR ECB with FCY ECB is not permitted.

Conversion of ECB to Equity

**Permitted :
Subject To:**



Activity of borrowing company covered under automatic route or required Gov. approval is obtained for FDI

Conversion at exchange rate on the date of agreement or any lesser rate with mutual Consent

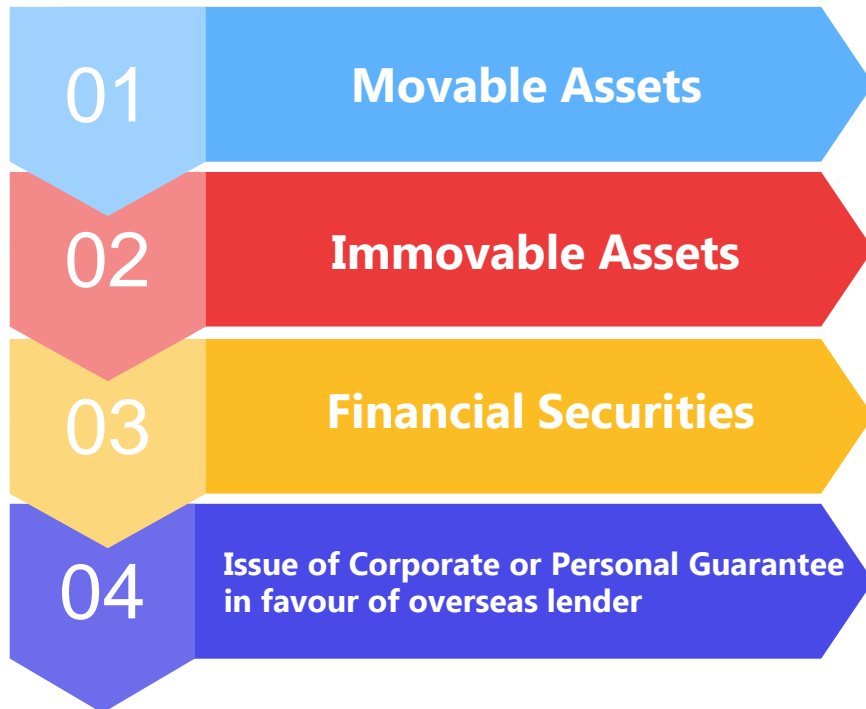
Consent of lenders

Compliance with pricing guidelines are complied with

Conversion not to breach applicable sectoral cap under FDI policy

SECURITY/ CREATION OF CHARGE

Security



Creation of Charge

Movable Property

In case of enforcement/ invocation of charge, the claim of the lender will be restricted to outstanding claim against ECB.

Financial securities

Pledge of shares of the borrowing company held by the promoters as well as domestic companies of the borrower is permitted.

Pledge on other financial securities, viz. bonds and debentures, Government securities, Government Saving Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds

Immovable Property

Security shall be subject to (Acquisition and Transfer of Immovable Property in India) Regulation 2017;

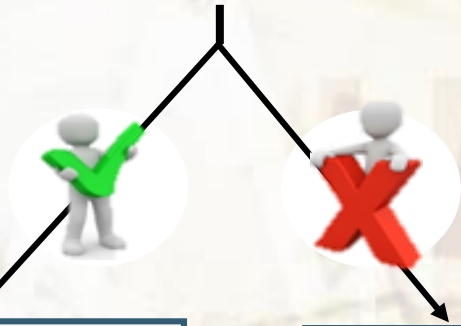
Permission should not be construed as permission to acquire immovable property by overseas lender/security trustee;

In case of enforcement / invocation, property should be sold to Person Resident in India and proceeds shall be repatriated to liquidate the outstanding ECB

DEEMED ECB



TIME LIMIT FOR IMPORT PAYMENT



Payment made within 6months (approved extension upto 3years)

DEEMED ECB (TC outstanding > 3years)

DEEMED ECB

- Shall be considered as contraventions
- Non compliance to ECB parameters such as:
 - ✓ eligibility criteria,
 - ✓ Drawdown without obtaining LRN,
 - ✓ Non-adherence to reporting requirements etc.
- Shall be regularized by making an application for compounding to RBI.



REPORTING REQUIREMENTS

ECB

FORM ECB - DOCUMENTS REQUIRED

- ✓ **Loan Agreement covering amount, purpose, interest, drawdown & repayment schedule**
- ✓ **Working of Minimum Average Maturity Period (MAMP) as prescribed by the regulation**
- ✓ **Brief Profile of the Borrower and Lender & Declaration from Borrower and Lender**
- ✓ **CA Certification of Form ECB**
- ✓ **Form ECB duly filled**



Submit **Form ECB** and other required documents to AD Bank

Form ECB should be certified by the **CS/CA**

AD Category I bank to forward one copy to the **DSIM**

DSIM will allot **LRN** to the borrower

DSIM – Department of Statistics and Information Management
LRN – Loan Registration Number

CONSIDERATIONS WHILE AVAILING ECB



IMPORTANT POINTS

Verify that Borrower is eligible

Confirm that Lender is recognized

Permitted End Use as per RBI guidelines

Adhere to Minimum Maturity Period

Comply with All in one Ceiling

Obtain LRN

Drawdown with LRN

* SUBJECT TO CERTAIN TERMS AND CONDITIONS

CHANGES IN ECB PARAMETERS

REPORTING REQUIREMENTS

CHANGE IN TERMS OF

Name of the Borrower Company

Recognised Lender

Drawdown/repayment schedule

End use of ECB proceeds.

Currency of Borrowings

Cancellation of LRN.

AD Bank

- Revised Form ECB*** for changes in parameters in consonance with ECB Norms should be reported to the **DSIM through AD Bank** not later than **7 days** from the changes effected.
- While submitting the **revised Form ECB**, the changes should be specifically mentioned.
- The above should be with the **consent of the Lender(s)**.

*Subject to certain terms & conditions

MONTHLY RETURN ECB - 2



**Form ECB- 2 Return
(Certified by CA/CS)**

To be submitted within 7 working days from the close of month to which it relates

**Through Designated AD Bank to
DSIM, RBI**

CHECKLIST OF DOCUMENTS:

- **Copy of Form ECB filed (Original/Revised)**
- **Copy of LRN issued by RBI**
- **Bank statement for the month.**
- **Drawdown or utilization details from client**
- **Underlying supporting for verification of above.**

NIL return – To be filed even if there is no transaction

CONVERSION OF ECB INTO EQUITY

REPORTING COMPLIANCES

- Form FC- GPR - Online on FIRMS portal
- Form ECB-2 - "ECB Wholly Converted to Equity" should be indicated on top of the ECB- 2 form. *

*Once reported, filing of ECB-2 in the subsequent months is not necessary.

- Form FC- GPR - conversion of shares - Online on FIRMS portal
- Form ECB 2 - remaining portion of ECB - "ECB Partially Converted to Equity" should be clearly indicated on top of the ECB- 2 form

Within 7 working days from the close of month to which it relates

Delay in reporting compliances to be regularised by payment of “ Late Submission Fee”

TYPE OF RETURN/FORM	PERIOD OF DELAY	APPLICABLE LSF
Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
Form ECB 2/Form ECB	Up to three years from due date of submission/date of drawdown	INR 50,000 per year
Form ECB 2/Form ECB	Beyond three years from due date of submission/date of drawdown	INR 100,000 per year

- ★ Regularisation of contravention by payment of LSF is ONLY for reporting delays.
- ★ Any other contravention under ECB shall have to be regularised by making an application to RBI for compounding the said contravention

ECB FOR START UPS

Eligibility

An entity recognized as a Startup by the Central Government as on date of raising ECB

Amount

USD 3 million or equivalent per financial year either in INR or any other convertible foreign currency or a combination of both

MAMP

Minimum average maturity period of 3 years

All-in-costs

Mutually agreed between the borrower and lender

Recognized Lender

Lender / investor to be a resident of FATF compliant country
Overseas branches/subsidiaries of Indian banks & overseas WOS/JV of an Indian company - Not permissible

Form and End-use

Form -Loans or non-convertible or optionally convertible or partially convertible preference shares.
End Use -For any expenditure in connection with the business of borrower

Currency Conversion

Denominated in any freely convertible currency or in INR or a combination thereof
Conversion of ECB into equity is freely permitted –rate as per date of agreement

GENERALLY COMMITTED CONTRAVENTIONS IN ECB

**Drawdown of ECB
before obtaining LRN**

**Not a permissible end
use**

**Not an eligible
borrower/ Availment
from non recognised
lender**

**Non-adherence to the
MAMP of the loan**

**Non adherence to
reporting requirements**

Breach of All in cost

**Delay in payment of
Trade credits > 3 years**