



## **Regulatory Alert** Delivering Clarity

### **RBI notifies FEMA (Borrowing and Lending) Regulations, 2018 and announces New External Commercial Borrowings (ECB) Framework**

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## Background

In order to simplify the provisions dealing with borrowing and lending in foreign exchange and Indian Rupees, the Reserve Bank of India (RBI) had notified consolidated Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 (the Borrowing and Lending Regulation) on 17 December 2018. The consolidation of regulations were proposed by RBI in its Bi-monthly Monetary Policy statement of 5 December 2018.

The Borrowing and Lending Regulation supersedes:

- Foreign Exchange Management (Borrowing and Lending in Indian Rupee) Regulations, 2000; and
- Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000.

In furtherance to the above and to rationalise and provide operational framework for ECB and Rupee denominated bonds, on 16 January 2019 RBI, announced the New External Commercial Borrowing Framework (New ECB Framework).

This alert has been divided into two parts:

Part I: Highlights of the Borrowing and Lending Regulation

Part II: Highlights of the New ECB Framework

## Part I - Highlights of the Borrowing and Lending Regulation

- **Insertion of following new definitions:**
  - **External Commercial Borrowing (ECB)** means borrowing by an eligible resident entity from outside India in accordance with the framework decided by RBI
  - **External Commercial Lending (ECL)** means lending by a person resident in India to a borrower outside India in accordance with the framework decided by RBI
  - **Real Estate Activity** means any activity involving own or leased property for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate. However, this would not include development of integrated township, purchase/ long term leasing of industrial land as part of new project/modernization or expansion of existing units or any activity under 'infrastructure subsectors' as given in the Harmonized Master List of infrastructure sub-sectors approved by the Government of India (GOI)
  - **Trade Credit** refers to the credits extended by the overseas supplier, bank /financial institution for imports into India in accordance with the Trade Credit framework decided by the RBI in consultation with the GOI;  
**Explanation:** Depending on the source of finance, such trade credits include both suppliers' credit and buyers' credit. Suppliers' credit relates to the 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

overseas bank or financial institution. Imports should be as permissible under the extant Foreign Trade Policy of the Director General of Foreign Trade (DGFT).

- **Amendment to below definition:**

- **Indian Entity** is amended to include Limited Liability Partnership formed and registered in India under the Limited Liability Partnership Act, 2008 (LLP). The term has now excluded a Partnership Firm formed under the Partnership Act, 1932. This change will make Indian LLPs eligible to raise ECBs.

- **Borrowing from Outside India in Foreign Exchange (FE) by a Person Resident in India (RI) - ECB:**

**Changes in provisions relating to borrowing made by persons other than Authorised Dealer (AD)**

- Financial Institution formed under an Act of the Indian Parliament will have to obtain prior approval of GOI to raise FE for onward lending. Further, if such borrowing is in the nature of ECB, it shall be subject to ECB provisions
- To study abroad, an Indian Resident may now raise loan outside India up to US\$ 2,50,000 subject to specified terms and conditions
- Eligible resident entities may raise ECB from outside India in freely convertible foreign currency or Indian Rupee (INR). Highlights of the conditions dealing with ECB is as under:
  - Forms of ECB - Certain hybrid instruments, such as optionally convertible debentures, which are presently covered under ECB, would now be governed by specific hybrid instruments regulations to be announced
  - For conditions relating to eligible borrowers, lenders, end-uses and limits for individual borrowings, please refer to Part II of the alert

- **Borrowing in Indian Rupee (INR) by a RI other than AD:**

- RI may borrow in INR from an NRI/Relative who are OCI cardholders outside India subject to specified terms and conditions
- Borrowing in Rupees by Indian company from NRI/PIO through issuance of Non-Convertible Debentures other than through public offer is now permitted subject to compliance of New ECB Framework
- Financial Institution formed under an Act of the Indian Parliament will have to obtain prior approval of GOI to raise borrowing in INR for onward lending. Further, if such borrowing is in the nature of ECB, it shall be subject to ECB provisions
- Registered Housing Financial Institution or a registered Non-banking Financial Company in India or any other financial institution as and when specified by RBI, may now provide housing loan or vehicle loan to an NRI/OCI subject to specified terms and conditions

- **Continuation of loan in the event of change in the residential status of lender/borrower:**

- In case a loan was granted by a resident individual to another resident individual and lender subsequently becomes a non-resident, then repayment by the resident borrower shall be made by credit to the NRO account.
- In case loan was granted by NRI/OCI cardholder to an RI and the lender subsequently becomes resident then repayment of loan may be made to the designated account of the lender maintained in India
- Resident Individual is now permitted to service loan taken overseas as person resident outside India, subject to specified terms and conditions

- **Trade Credit for Imports:**

Importers may raise trade credit from outside India in freely convertible foreign currency or Indian Rupee (INR). Highlights of the conditions dealing with trade credit are as under:

- **Borrowing limit** - Increased to US\$ 50 million equivalent per import transaction for import of capital or non-capital goods
  - **Maturity period** - For import of capital goods maturity period is 3 years, for non-capital goods it is maximum of 1 year and it is linked with operating cycle
  - **Lender** - Overseas suppliers, banks and financial institutions, foreign equity holders and financial institutions in International Financial Services Centres (IFSC's) in India are recognised as eligible lenders for trade credit.
- **Any borrowings made under the erstwhile regulations will continue as permitted up to the date of repayment.**

## Part II - Highlights of New ECB Framework

- **Merger of Tracks:** The New ECB Framework has merged earlier Tracks I and II ECB as "Foreign Currency denominated ECB" (FCY ECB) and merged Track III and Rupee Denominated Bonds (RDBs) framework as "Rupee Denominated ECB" (INR ECB).
- **Benchmark rates:** Benchmark rate in case of FCY ECB / Trade Credit (TC) refers to 6-month London Interbank Offered Rate (LIBOR) of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for e.g., Euro Interbank Offered Rate (EURIBOR). Benchmark rate in case of INR ECB will be prevailing yield of the GOI security of corresponding maturity. All in cost ceiling per annum is Benchmark rate plus 450 basis points spread.
- **Eligible borrowers:** As a major step towards liberalisation and rationalisation, all entities eligible to receive FDI are eligible borrowers.  
Further, the following entities are also eligible to raise ECB:
  - Port Trusts;
  - Units in SEZ;
  - SIDBI;
  - EXIM Bank; and
  - Registered entities engaged in micro-finance activities, viz., registered not-for-profit companies, registered societies/ trusts/ cooperatives and non-government organisations (permitted only to raise INR ECB)
- **Recognised Lenders (including transfer of ECBs) :**  
The recognised lender should now be :
  - Resident of FATF or IOSCO-compliant country
  - Multilateral and Regional Financial Institutions where India is a member country
  - Individuals who are foreign equity holders or for subscription to bonds/debentures listed abroad
  - Foreign branches / subsidiaries of Indian banks only for FCY ECB (except FCCBs and FCEBs).
- **Minimum Average Maturity Period (MAMP):** Earlier regulation had different MAMP prescribed for different tracks, sectors, amounts etc. The New ECB Framework states that MAMP will be 3 years. However,
  - for manufacturing sector companies MAMP of 1 year, for ECB up to US\$ 50 million or its equivalent per financial year; and
  - for ECB raised from foreign equity holder and utilised for working capital purposes, general corporate purposes or repayment of rupee loans - MAMP of 5 years is permitted.

- **End-uses:** The negative list for which the ECB proceeds cannot be utilised, would include the following:
  - Real estate activities (as defined)
  - Investment in capital market
  - Equity investment
  - Working capital purposes except from foreign equity holder
  - General corporate purposes except from foreign equity holder
  - Repayment of rupee loans except from foreign equity holder
  - On-lending to entities for the above activities
 Considering that the concept of tracks I, II and III have been done away with, the negative list applies to all ECBs.

- **Limit:** As per the New ECB Framework, all eligible borrowers can raise ECB up to US\$ 750 million or equivalent per financial year under automatic route.

- **Reporting requirements:** The monthly reporting under Form ECB - 2 continues under new ECB Framework.

- **Late Submission Fee (LSF) for delay in reporting:** The New ECB Framework has introduced the concept of LSF whereby any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of specified late fees. This is a welcome move especially in cases where delay is unintentional and inadvertent. The late payment should be accompanied with the requisite return(s).

- **Untraceable entity:** As per the New ECB Framework borrower (an entity) will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters, with documented communication/reminders numbering 6 or more and it fulfils both of the following conditions:
  - Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorized by the AD bank for the purpose;
  - Entities have not submitted Statutory Auditor's Certificate for last two years or more;

The New ECB Framework prescribes action to be taken against untraceable entities.

## Conclusion

The Consolidated Regulation and New ECB Framework provides clarity as well as simplifies borrowing and lending in foreign exchange and Indian Rupee and provides relief to corporates as well as individuals by providing avenues to raise money.

Now even LLPs, entities engaged in construction activities, trading and service sector will be eligible to raise ECB. Further, restriction on related party to subscribe/invest in RDBs has been done away with.

These changes will improve ease of doing business in India.

**Source:** Notification No. FEMA 3(R)/2018-RB dated 17 December 2018 and A.P. (DIR Series) Circular No. 17 issued by RBI dated 16 January 2019.

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