

Foreign Funding – Instruments, Laws and Procedures

Lesson 16

KEY CONCEPTS

■ Euro Issue ■ American Depositary Receipts (ADR) ■ Global Depositary Receipts (GDR) ■ Foreign Currency Convertible Bonds (FCCBs) ■ Foreign Currency Exchangeable Bonds (FCEBs) ■ One Way Fungibility ■ Two Way Fungibility

Learning Objectives

To understand:

- Concept of foreign funding
- Different sources of fund from abroad available for Indian companies
- Different routes of issue
- Regulatory framework pertaining to various sources of International Fund in India
- Concept, Purpose and Process of issuance of ADR/GDR

Lesson Outline

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|--|---|
| ➤ Introduction | ➤ Foreign Currency Exchangeable Bonds Scheme, 2008 |
| ➤ Regulatory Framework in India | ➤ Checklist on Pre-issue and Post-issue formalities for GDRs/ADRs/FCCBs |
| ➤ Euro Issue | ➤ Lesson Round-Up |
| ➤ External Commercial Borrowings | ➤ Glossary |
| ➤ ECB Framework | ➤ Test Yourself |
| ➤ Depositary Receipts | ➤ List of Further Readings |
| ➤ Depositary Receipts Scheme, 2014 | |
| ➤ American Depositary Receipts (ADR) & Global Depositary Receipts (GDR) | |
| ➤ Procedure for Issuance of GDR/ADR | |
| ➤ Foreign Currency Convertible Bonds | |
| ➤ FCCB and Ordinary Shares (through Depositary Receipt Mechanism) Scheme, 1993 | |
| ➤ Foreign Currency Exchangeable Bonds (FCEBs) | |

INTRODUCTION

Globalisation has opened doors and opportunities that were never explored before. International Financing is also known as International Macroeconomics as it deals with finance on a global level. International finance helps organizations engage in cross-border transactions with foreign business partners, such as customers, investors, suppliers and lenders. Various international sources from where funds may be raised include the following:

The Government of India has taken various policies initiatives to allow India companies to raised funds from International Market. These policy initiatives have led to the introduction of International Instruments like American Depository Receipts (ADRs), Global Depository Receipts (GDRs), Foreign Currency Convertible Bonds (FCCBs) and Foreign Currency Exchangeable Bonds (FCEBs) etc.

- (i) Commercial Banks
- (ii) International Agencies and Development Banks
- (iii) International Capital Markets.

With economies and the operations of the business organizations going global, Indian companies have an access to funds in the global capital market.

Increased globalization and investor appetite for investing in India, offer unique opportunity to companies looking to tap a new investor base, awareness or raise capital.

Capital can be raised from international capital market in foreign currency by accessing foreign capital market. Funds raised through foreign currency are called as euro equity or debt.

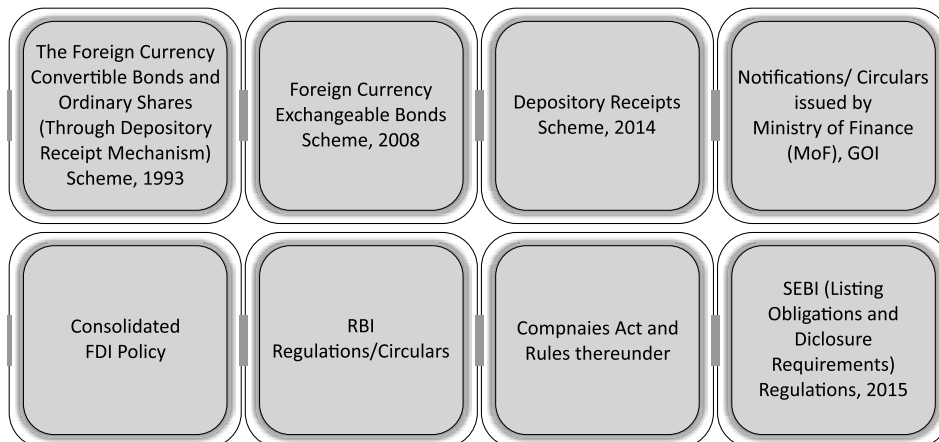
- **Euro Equity:** Euro equity represents shares denominated in dollar terms, issued by non-American and non-European companies to list their shares on American and European stock exchanges by complying the regulations of respective stock exchanges where the shares are intended to be listed. The euro equity issue can be made in different forms like American Depository Receipts and Global Depository Receipts.

Indian companies are allowed to raise capital in the international market through the issue of GDR/ADR/ FCCB/ FCEB and through External Commercial Borrowings.

- **Euro Debt:** Debts raised from international capital market by complying regulations of the respective country of which the capital market is accessed is called as euro debt. Euro debt can be issued in the form of ECB/FCCB/FCEB etc.

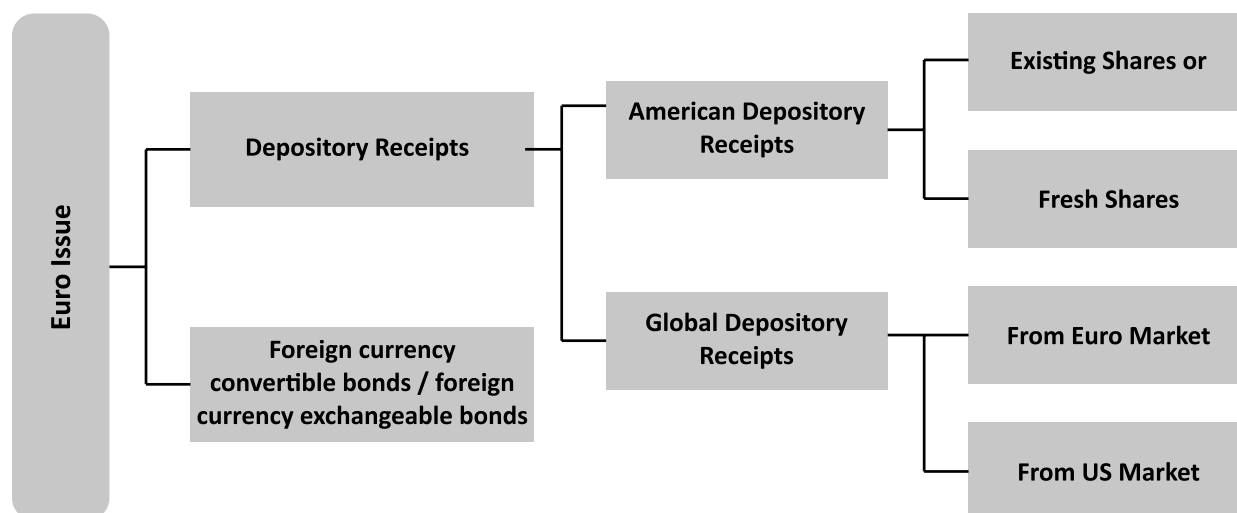
REGULATORY FRAMEWORK IN INDIA

Issue of ADR/GDR/FCCBs/FCEBs are regulated by the following regulations in India:



EURO ISSUE

Euro issue means modes of raising funds by an Indian company outside India in foreign currency. There are different modes of Euro issue which is as follows:



EXTERNAL COMMERCIAL BORROWING (ECB)

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis.

Merging of Tracks I and II as “Foreign Currency denominated ECB” and merging of Track III and Rupee Denominated Bonds framework as “Rupee Denominated ECB”.

ECB FRAMEWORK

The framework for raising loans through ECB comprises the following two options:

<i>Parameters</i>	<i>FCY denominated ECB</i>	<i>INR denominated ECB</i>
Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas (RDBs), which can be either placed privately or listed on exchanges as per host country regulations.

<i>Parameters</i>	<i>FCY denominated ECB</i>	<i>INR denominated ECB</i>												
Eligible borrowers	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: a) Port Trusts; b) Units in SEZ; c) SIDBI; and d) EXIM Bank.	a) All entities eligible to raise FCY ECB; and b) 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).												
	Question: Are LLPs eligible to raise ECBs? Answer: As LLPs are not eligible to receive FDI, they cannot raise ECBs.													
Recognised lenders	The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECBs. However, a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders; b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches/ subsidiaries of Indian banks, subject to applicable prudential norms, 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	Minimum average maturity period (MAMP) will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein: <table> <tr> <th><i>Sr. No.</i></th><th><i>Category</i></th><th><i>MAMP</i></th></tr> <tr> <td>(a)</td><td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td><td>1 year</td></tr> <tr> <td>(b)</td><td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans.</td><td>5 years</td></tr> <tr> <td>(c)</td><td>ECB raised for (i) working capital purposes or general corporate purposes. (ii) on-lending by NBFCs for working capital purposes or general corporate purposes. </td><td>10 years</td></tr> </table>		<i>Sr. No.</i>	<i>Category</i>	<i>MAMP</i>	(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
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Parameters	FCY denominated ECB	INR denominated ECB
	(d) ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure. (ii) on-lending by NBFCs for the same purpose. (e) ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure. (ii) on-lending by NBFCs for the same purpose.	7 years 10 years
	for the categories mentioned at (b) to (e) – (i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks. (ii) the prescribed MAMP will have to be strictly complied with under all circumstances.	
All-in-cost ceiling per annum	Benchmark Rate plus 550 bps spread: For existing ECBs linked to LIBOR whose benchmarks are changed to ARR. Benchmark rate plus 500 bps spread: For new ECBs.	Benchmark rate plus 450 bps spread.
	All-in-cost ceiling has been temporarily increased by 100 bps for ECBs raised till December 31, 2022. The enhanced all-in-cost ceiling shall be available only to eligible borrowers of investment grade rating from Indian Credit Rating Agencies (CRAs). Other eligible borrowers may raise ECB within the existing all-in-cost ceiling as hitherto.	
Other costs	Prepayment charge/ Penal interest, if any, for default or breach of covenants should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.	
End-uses (Negative list)	The negative list, for which the ECB proceeds cannot be utilised, would include the following: a) Real estate activities. b) Investment in capital market. c) Equity investment. d) Working capital purposes except in case of ECB mentioned in point (b) and (c) of Minimum Average Maturity Period above.	

<i>Parameters</i>	<i>FCY denominated ECB</i>	<i>INR denominated ECB</i>
	e) General corporate purposes except in case of ECB mentioned in point (b) and (c) of Minimum Average Maturity Period above. f) Repayment of Rupee loans except in case of ECB mentioned in point (d) and (e) of Minimum Average Maturity Period above. On-lending to entities for the above activities, in case of ECB raised by NBFCs as given in point (c), (d) and (e) of Minimum Average Maturity Period above.	
Exchange rate	Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement between the parties concerned for such change or at an exchange rate, which is less than the rate prevailing on the date of agreement, if consented to by the ECB lender.	For conversion to Rupee, exchange rate shall be the rate prevailing on the date of settlement.
Hedging provision	The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure. Infrastructure space companies shall have a board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case average maturity of ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of ECB and report the position to RBI through Form ECB 2 returns. The following operational aspects with respect to hedging should be ensured: (a) <i>Coverage</i>: The ECB borrower will be required to cover principal as well as coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day liability is created in the books of the borrower).	The overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India. The investors can also access the domestic market through branches/subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis.

Parameters	FCY denominated ECB	INR denominated ECB
	(b) <i>Tenor and rollover</i>: A minimum tenor of one year of financial hedge would be required with periodic rollover duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of ECB. (c) <i>Natural Hedge</i>: Natural hedge, in lieu of financial hedge, will be considered only to the extent of off projected cash flow/revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the off exposure has the maturity/ cash flow within the same accounting year. Any other arrangements/ structures, where revenues are indexed to foreign currency will not be considered as natural hedge.	
Change of currency of borrowing	Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.	Change of currency from INR to any freely convertible foreign currency is not permitted.
Note: The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors. Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.		

Limit and Leverage

Under the aforesaid framework, all eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under auto route. Further, in case of FCY denominated ECB raised from direct foreign equity holder ECB liability-equity ratio for ECBs raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if outstanding amount of all ECBs, including proposed one, is up to USD 5 million or equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio issued, if any, by the sectoral or prudential regulator concerned.

The automatic route limit stands increased from USD 750 million or equivalent to USD 1.5 billion or equivalent. This relaxation is available for ECBs to be raised till December 31, 2022.

Issuance of Guarantee by Indian Banks and Financial Institutions

Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.

Parking of ECB proceeds

ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

➤ **Parking of ECB proceeds abroad**

ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilization. Till utilisation, these funds 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 foreign branches/ subsidiaries of Indian banks abroad.

➤ **Parking of ECB proceeds domestically**

ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. 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.

Procedure of Raising ECB

All ECBs can be raised under the automatic route if they conform to the parameters prescribed under this framework. For approval route cases, the borrowers may approach the RBI with an application in Form ECB for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee. Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form ECB.

Reporting Requirements

Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

➤ **Loan Registration Number (LRN)**

Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Reserve Bank of India. Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

➤ **Changes in terms and conditions of ECB**

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 at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

➤ **Monthly Reporting of actual transactions**

The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

➤ **Late Submission Fee (LSF) for delay in reporting**

Any borrower, who is otherwise in compliance of ECB guidelines, can regularize the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of late submission fees in accordance with Master Direction- Reporting under FEMA, 1999.

➤ **Standard Operating Procedure (SOP) for Untraceable Entities**

The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECBs by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

Any borrower who has raised ECB 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 fulfills both of the following conditions:

- A. 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 authorised by the AD bank for the purpose;
- B. Entities have not submitted Statutory Auditor's Certificate for last two years or more.

Action

The following actions are to be undertaken in respect of 'untraceable entities':

- a. File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;
- b. No fresh ECB application by the entity should be examined/processed by the AD bank;
- c. Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- d. No inward remittance or debt servicing will be permitted under auto route.

Question: Whose responsibility is it to ensure compliance with ECB guidelines?

Answer: The primary responsibility for ensuring that the borrowing is in compliance with the applicable ECB guidelines is that of the borrower concerned. Structures which bypass/circumvent ECB guidelines in any manner and/or raising borrowings in any other manner which is not permitted/ disguising borrowing under the wrap of other kind of transactions and/ or contravening provisions of Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2018 would also invite penal action under FEMA.

Powers delegated to AD Category I banks to deal with ECB cases

The designated AD Category I banks can approve any requests from the borrowers for changes in respect of ECBs, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in name of borrower/lender, transfer of ECB and any other parameters, comply with extant ECB norms and are with the consent of lender(s).

The following changes can be undertaken under automatic route:

➤ **Change of the AD Category I bank**

AD Category I bank can be changed subject to obtaining no objection certificate from the existing AD Category I bank.

➤ **Cancellation of LRN**

The designated AD Category I banks may directly approach DSIM for cancellation of LRN for ECBs contracted, subject to ensuring that no draw down against the said LRN has taken place and the monthly ECB-2 returns till date in respect of the allotted LRN have been submitted to RBI.

Question: Can ECB raised under the earlier ECB framework be refinanced/ partially refinanced through an ECB raised under extant ECB framework?

Answer: Yes, provided that the borrower continues to be eligible to raise ECB under the extant ECB framework, all-in-cost is lower than the all-in-cost of existing ECB, residual maturity is not reduced and the new ECB is in compliance with the extant ECB framework as well.

➤ **Refinancing of existing ECB**

The designated AD Category I bank may allow refinancing of existing ECB by raising fresh ECB provided the outstanding maturity of the original borrowing (weighted outstanding maturity in case of multiple borrowings) is not reduced and all-in-cost of fresh ECB is lower than the all-in-cost (weighted average cost in case of multiple borrowings) of existing ECB. Further, refinancing of ECBs raised under the previous ECB framework may also be permitted, subject to additionally ensuring that the borrower is eligible to raise ECB under the extant framework. Raising of fresh ECB to part refinance the existing ECB is also permitted subject to same conditions. Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/Navratna public sector undertakings.

➤ **Conversion of ECB into equity**

Conversion of ECBs, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

- i. The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI policy;
- ii. The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under FDI policy;
- iii. Applicable pricing guidelines for shares are complied with;

- iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:
- a. For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to RBI in Form ECB 2 Return will be with suitable remarks, viz., “ECB partially converted to equity”.
 - b. For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to RBI in Form ECB 2 Return should be done with remarks “ECB fully converted to equity”. Subsequent filing of Form ECB 2 Return is not required.
 - c. For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.
 - v. If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;
 - vi. Consent of other lenders, if any, to the same borrower is available or at least information regarding conversions is exchanged with other lenders of the borrower;
 - vii. For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

Question: When ECB is partially converted into equity, should the remaining ECB amount comply with all the ECB guidelines?

Answer: Yes. The part conversion of ECB into equity will be freely permitted only when the part amount remaining as ECB complies with all the applicable ECB norms.

Security for raising ECB

AD Category I banks are permitted to allow creation/cancellation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower, subject to satisfying themselves that:

- i. the underlying ECB is in compliance with the extant ECB guidelines,
- ii. there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
- iii. No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:

- i. **Creation of Charge on Immovable Assets:** The arrangement shall be subject to the following:
 - a. Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
 - b. The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.

- c. 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.
- ii. **Creation of Charge on Movable Assets:** In the event of enforcement/ invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may also be taken out of the country subject to getting 'No Objection Certificate' from domestic lender/s, if any.
- iii. **Creation of Charge over Financial Securities:** The arrangements may be permitted subject to the following:
 - a. Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
 - b. In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
 - c. In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.
- iv. **Issue of Corporate or Personal Guarantee:** The arrangement shall be subject to the following:
 - a. A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
 - b. Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
 - c. Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000, as amended from time to time.
 - d. ECB can be credit enhanced / guaranteed / insured by overseas party/ parties only if it/ they fulfil/s the criteria of recognised lender under extant ECB guidelines.

Additional Requirements

While exercising the delegated powers, the AD Category I banks should ensure that:

- i. The changes permitted are in conformity with the applicable ceilings / guidelines and the ECB continues to be in compliance with applicable guidelines. It should also be ensured that if the ECB borrower has availed of credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, any extension of tenure of ECB (whether matured or not) shall be subject to applicable prudential guidelines issued by Department of Banking Regulation of Reserve Bank including guidelines on restructuring.

- ii. The changes in the terms and conditions of ECB allowed by the ADs under the powers delegated and / or changes approved by the Reserve Bank should be reported to the DSIM as given at paragraph 6.2 above. Further, these changes should also get reflected in the Form ECB 2 returns appropriately.

Special Dispensations under the ECB Framework

ECB Facility for Oil Marketing Companies

Notwithstanding the provisions contained Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognized lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECBs shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECBs. All other provisions under the ECB framework will be applicable to such ECBs.

ECB Facility for Startups

AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- i. **Eligibility**

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

- ii. **Maturity**

Minimum average maturity period will be 3 years.

- iii. **Recognised lender**

Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognized lenders under this framework.

- iv. **Forms**

The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.

- v. **Currency**

The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/ outright sale undertaken through an AD Category-I bank in India.

- vi. **Amount**

The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.

- vii. **All-in-cost**

Shall be mutually agreed between the borrower and the lender.

- viii. **End uses**

For any expenditure in connection with the business of the borrower.

ix. Conversion into equity

Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.

x. Security

The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a non-resident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.

xi. Hedging

The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category - I banks in India. The lender can also access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

Note: Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECBs.

xii. Conversion rate

In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.

xiii. Other Provisions

Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable.

Further, the Start-ups as defined above as well as other start-ups which do not comply with the aforesaid definition but are eligible to receive FDI, can also raise ECB under the general ECB route/framework.

DEPOSITORY RECEIPTS

A Depository Receipt (DR) is a negotiable financial instrument issued by a company in a foreign jurisdiction. They represent certain securities like bonds, shares etc. DR is an important mechanism for raising funds by tapping foreign investors who otherwise may not be able to participate in the domestic market.

In India, any company, whether listed or unlisted are capable of issuing DRs. The issue of DRs is regulated by Ministry of Finance and by the Depository Receipts Scheme, 2014. Depending upon the location in which DRs are issued, they are called as American Depository Receipt ("ADR") or in general as Global Depository Receipts (GDRs).

Depository Receipts are generally classified as under:

Sponsored

A sponsored issue of depository receipts is based on a stock agreement, between the foreign depository and

the issuer of securities for the creation of the depository receipts. The sponsored depository receipts can be further classified as:

- a) **Capital Raising:** The Indian issuer deposits the freshly issued securities with the domestic custodian. On the basis of such deposit, the foreign depository then creates/issues depository receipts abroad for sale to global investors. This constitutes a capital raising exercise, as the proceeds of the sale of depository receipts eventually go to the Indian issuer.
- b) **Non-Capital Raising:** In a non-capital raising issue, no fresh underlying securities are issued. Rather, the issuer gets holders of its existing securities to deposit these securities with a domestic custodian, so that depository receipts can be issued abroad by the foreign depository. This is not a capital raising exercise for the Indian issuer, as the proceeds from the sale of the depository receipts go to the holders of underlying securities.

Un-sponsored

Where there is no stock agreement between the foreign depository and the Indian issuer, any person, without any involvement of the issuer, may deposit the securities with a domestic custodian in India. A foreign depository then issues depository receipts abroad on the back of such deposited underlying securities. The proceeds from the sale of such depository receipts go to the holders of the underlying securities. Based on whether a depository receipt is traded in an organised market or in the Over the Counter (“OTC”) market, the depository receipts can be classified as listed or unlisted.

- a) **Listed:** Listed depository receipts are traded on stock exchanges.
- b) **Unlisted:** The unlisted depository receipts are those which are inter-traded between parties and where such depository receipts are not listed on any stock exchanges.

DEPOSITORY RECEIPTS SCHEME, 2014

Depository Receipts Scheme 2014

The issuance of depository receipt is one of the mechanisms used by Indian companies to get an access to foreign investors. In simple terms, a depository receipt is a foreign currency denominated instrument which is issued by an overseas depository to non-residents against securities of the Indian company.

Hitherto, instruments issued by Indian companies to tap global capital markets, viz. American depository receipts (ADRs) or global depository receipts (GDRs) or convertible debt instruments in the form of foreign currency convertible bonds (FCCBs) were governed by the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) Scheme, 1993, which had been amended from time to time.

The DR Scheme is based on the recommendations of the Sahoo Committee, which under the chairmanship of Mr. M.S. Sahoo undertook a comprehensive review of the 1993 Scheme and proposed significant deregulation and rationalisation of the manner in which Indian companies could tap global capital markets.

On October 21, 2014, the Ministry of Finance (“MoF”) notified (“Notification”), the Depository Receipts Scheme, 2014 (“DR Scheme”) by virtue of which issuance of DRs has been taken out of the 1993 Scheme and is now regulated by the DR Scheme. The Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 stands repealed to the extent that it applies to Depository Receipts (“DRs”). It will, however, continue to apply to FCCBs. The DR Scheme came into effect from December 15, 2014.

DEFINITIONS

‘Permissible Jurisdiction’ as means a jurisdiction which is a member of the Financial Action Task Force on Money Laundering and the regulator of the securities market in that jurisdiction is a member of the International Organization of Securities Commission. Schedule I of the scheme provides the list of permissible jurisdictions.

The Ministry of Finance vide its notification dated October 7, 2019 amended the definition of ‘permissible jurisdiction’, inter alia, to include the International Financial Services Centre in India.

‘Permissible securities’ mean ‘securities’ as defined under section 2(h) of the Securities Contracts (Regulation) Act, 1956 and include similar instruments issued by private companies which:

- (i) may be acquired by a person resident outside India under the Foreign Exchange Management Act, 1999; and
- (ii) is in dematerialised form.

‘Right to issue voting instruction’ means the right of a depository receipt holder to direct the foreign depository to vote in a particular manner on its behalf in respect of permissible securities.

Eligibility for Issue of Depository Receipts

Clause 3 of the scheme describes the eligibility of issue of depository receipts.

1. The following persons are eligible to issue or transfer permissible transactions to a foreign depository for the issue of depository receipts:
 - Any Indian company, listed or unlisted, private or public;
 - Any other issuer of permissible securities;
 - Any person holding permissible securities;

which has not been specifically prohibited from accessing the capital market or dealing in securities.

2. Unsponsored depository receipts on the back of the listed permissible securities can be issued only if such depository receipts gave the holder the right to issue voting instruction and are listed on an international exchange.

Issue of Depository Receipts

- A foreign depository may issue depository receipts by way of a public offering or private placement or in any other manner prevalent in a permissible jurisdiction.
- An issuer may issue permissible securities to a foreign depository for the purpose of issue of depository receipts by any mode permissible for issue of such permissible securities to investors.
- The holders of permissible securities may transfer permissible securities to a foreign depository for the purpose of the issue of depository receipt, with or without the approval of issue of such permissible securities through transactions on a recognized stock exchange, bilateral transactions or by tendering through a public platform.

Limits

- The aggregate of permissible securities which may be issued or transferred to foreign depositories for issue of depository receipts, along with permissible securities already held by persons resident outside India shall not exceed the limit on foreign holding of such permissible securities under the FEMA, 1999.

Example: Foreign investment in a company is ordinarily permissible up to x%. However, it can be increased up to y% with the approval of the company in the general body meeting. If no such approval has been granted, the permissible securities on which depository receipts may be issued, whether sponsored or unsponsored, cannot exceed x%.

- The depository receipts may be converted to underlying permissible securities and vice versa subject to the limit mentioned above.

Pricing

The permissible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under the applicable laws.

Explanation

1. A company listed or proposed to be listed on a recognized stock exchange shall not issue equity shares on preferential allotment to a foreign depository for the purpose of issue of depository receipts at a price less than the price applicable to preferential allotment of equity shares of the same class to investors under the ICDR.
2. Likewise, where a listed company makes a qualified institutional placement of permissible securities to a foreign depository for the purpose of issue of depository receipts, the minimum pricing norms for such placement as applicable under the SEBI (ICDR) Regulations, 2018 shall be complied with.

Example: XYZ Limited, a listed company makes a Qualified Institution Placement of shares and the Floor price comes at Rs. 60 per share after complying with pricing norms of ICDR Regulations. NOW, if same class of shares is being issued to foreign depository for the purpose of issuing DRs, price cannot be less than Rs.60 and minimum price regulation of SEBI (ICDR) Regulations, 2018 shall be complied with.

Rights and Duties

The following are the rights and duties for the foreign depository:

1. The foreign depository shall be entitled to exercise voting rights, if any, associated with the permissible securities whether pursuant to voting instruction from the holder of depository receipts or otherwise;
2. The shares of a company underlying the depository receipts shall form part of the public shareholding of the company under Securities Contracts (Regulation) Rules, 1957, if:
 - a) the holder of such depository receipts has the right to issue voting instruction; and
 - b) such depository receipts are listed on an international exchange.
3. In the cases not covered under second point, shares of the company underlying depository receipts shall not be included in the total shareholding and in the public shareholding for the purpose of computing the public shareholding of the company;

4. A holder of depository receipts issued on the back of equity shares of a company shall have the same obligations as if it is the holder of the underlying equity shares, if it has the right to issue voting instruction.

Obligations

Clause 8 of the scheme imposes certain obligations on the domestic custodian as under:

- to ensure that the relevant provisions of the scheme related to the issue and cancellation of depository receipts is complied with;
- to maintain records in respect of, and report to, Indian depositories all transactions in the nature of issue and cancellation of depository receipts for the purpose of monitoring limits under the FEMA, 1999;
- to provide the information and data as may be called upon by SEBI, the RBI, Ministry of Finance; Ministry of Corporate Affairs and any other authority of law; and
- to file with SEBI a copy of the document by whatever name called, which sets the terms of issue of depository receipts issued on the back of securities, as defined under Section 2(h) of SCRA, 1956, in a permissible jurisdiction. (This is with respect to securities, and not permissible securities).

The following are the obligations imposed on the Indian Depositories that-

- they shall co-ordinate among themselves;
- they shall disseminate the outstanding permissible securities against which the depository receipts are outstanding; and
- they shall disseminate the limit up to which permissible securities can be converted to depository receipts.

A person issuing or transferring permissible securities to a foreign depository for the purpose of the issue of depository receipts shall comply with relevant provisions of the Indian law, including the scheme, related to the issue and cancellation of depository receipts.

Approval

Any approval necessary for issue or transfer of permissible securities to a person resident outside India shall apply to the issue or transfer of such permissible securities to a foreign depository for the purpose of issue of depository receipts. No approval is required if the issue of depository receipt is in accordance with the scheme.

Issue of FCCBs and Depository Receipts (DRs)

The inward remittance received by the Indian Company vide issuance of DRs and FCCBs are treated as FDI and counted towards FDI.

1. FCCBs/DRs may be issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and DR Scheme 2014 respectively, as per the guidelines issued by the Government of India thereunder from time to time.
2. DRs are foreign currency denominated instruments issued by a foreign Depository in a permissible jurisdiction against a pool of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.
3. In terms of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time, a person will be eligible to issue or transfer eligible securities to a foreign depository, for the

purpose of converting the securities so purchased into depository receipts in terms of Depository Receipts Scheme, 2014 and guidelines issued by the Government of India thereunder from time to time.

4. A person can issue DRs, if it is eligible to issue eligible instruments to person resident outside India under relevant Schedules under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time.
5. The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the relevant regulations framed under FEMA, 1999.
6. The pricing of eligible securities to be issued or transferred to a foreign depository for the purpose of issuing depository receipts should not be at a price less than the price applicable to a corresponding mode of issue or transfer of such securities to domestic investors under the relevant regulations framed under FEMA, 1999.
7. The issue of depository receipts as per DR Scheme 2014 shall be reported to the Reserve Bank of India by the domestic custodian as per the reporting guidelines for DR Scheme 2014.

AMERICAN DEPOSITORY RECEIPTS (ADR) & GLOBAL DEPOSITORY RECEIPTS (GDR)

Typically, companies in India issue securities in the form of depository receipts (DR) viz American Depository Receipts (ADR), Global Depository Receipts (GDR) or Foreign Currency Convertible Bonds (FCCB). While ADR and GDR are equity instruments, FCCB is a convertible debt instrument.

The DR Scheme 2014 is solely applicable to ADR and GDR. The Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 continues to govern FCCB.

Regulation 2(c) of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 defines ADR as under:

“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.”

Regulation 2(i) of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004, defines GDR as under:

“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.

Difference between American Depository Receipts (ADR) and Global Depository Receipts (GDR)

- ADR are US \$ denominated and traded only in US.
- GDRs are traded in various places such as New York Stock Exchange, London Stock Exchange, etc.

Sponsored ADR/GDR Issue

An Indian company can also sponsor an issue of ADR / GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs / GDRs can be issued abroad. The proceeds of the ADR / GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs / GDRs.

Two-Way Fungibility Scheme

A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs / GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of ADRs / GDRs would be permitted to the extent of ADRs / GDRs which have been redeemed into underlying shares and sold in the Indian market.

CONCEPTS ONE SHOULD KNOW

One way fungibility - Here investors could cancel their depository receipt and recover the proceeds by selling the underlying shares in the Indian market; DRs once redeemed could not be converted into shares.

Two way fungibility - It means that the shares so released can be reconverted by the company into DRs for purchase by the overseas investors. It implies that the re-issuance of DRs would be permitted to the extent of DRs that have been redeemed and underlying shares are sold in domestic market.

Sponsor - It is a process of disinvestment by the Indian shareholders of their holding in overseas market.

Provisions under the Companies Act, 2013

The Companies Act, 2013 has laid down provisions for issue of GDRs under Section 41 and prescribed the Companies (Issue of Global Depository Receipts) Rules, 2014.

According to Section 2(44) of Companies Act, 2013, “Global Depository Receipt” means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

Section 41 provides that a company may, after passing a special resolution in its general meeting, issue depository receipts in any foreign country in such manner, and subject to such conditions, as may be prescribed.

Companies (Issue of Global Depository Receipts) Rules, 2014

Eligibility to issue depository receipts

Rule 3 lays down that a company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations.

Conditions for issue of depository receipts

Rule 4 lays down the following conditions to be fulfilled by a company for issue of depository receipts:

- The Board of Directors of the company intending to issue depository receipts shall pass a resolution authorising the company to do so.
- The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting. However, a special resolution passed under section 62 of Companies Act, 2013 for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for the purpose of section 41 of Companies Act, 2013 as well.
- The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.
- The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts.

- The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a **practising company secretary** to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or practising chartered accountant or practising cost accountant or **practising company secretary**, as the case may be, shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorised by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts.

However, that the committee of the Board of directors referred to above shall have at least one independent director in case the company is required to have independent directors.

Manner and form of depository receipts

Rule 5 deals with the manner and form of issue of depository receipts.

- The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent in the concerned jurisdiction and may be listed or traded on the listing platform in the concerned jurisdiction.
- The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Central Government or Reserve Bank of India may prescribe or specify from time to time.
- The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank.

Voting rights

Rule 6 provides the provisions for voting rights of depository receipts holder.

- A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares after following the procedure provided in the Scheme and the provisions of this Act.
- Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard.

Proceeds of Issue

Rule 7 provides that the proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank account of the shareholders.

However, the proceeds of issue of depository receipts may be remitted in an International Financial Services Centre Banking Unit (IBU) and utilized in accordance with the instructions issued by Reserve Bank of India from time to time.

Non-applicability of certain provisions of the Act

- (1) The provisions of the Act and any rules issued thereunder insofar as they relate to public issue of shares or debentures shall not apply to issue of depository receipts.

- (2) The offer document, by whatever name called and if prepared for the issue of depository receipts, shall not be treated as a prospectus or an offer document within the meaning of this Act and all the provisions as applicable to a prospectus or an offer document shall not apply to a depository receipts offer document.
- (3) Notwithstanding anything contained under section 88 of the Companies Act, 2013, until the redemption of depository receipts, the name of the overseas depository bank shall be entered in the Register of Members of the Company.

Reporting of FCCB/ADR/GDR Issues

The Indian company issuing ADRs / GDRs has to furnish to the Reserve Bank, full details of such issue in the Form- DR (Return to be filed by an Indian Company who has arranged issue of GDR/ADR), within 30 days from the date of closing of the issue. The company should also furnish a quarterly return in the Form DR - Quarterly, to the Reserve Bank within 15 days of the close of the calendar quarter. The quarterly return has to be submitted till the entire amount raised through ADR/GDR mechanism is either repatriated to India or utilized abroad as per the extant Reserve Bank guidelines.

PROCEDURE FOR ISSUANCE OF ADRs/GDRs

A. Approvals Required

The issue of ADRs/GDRs requires the approval of a Board of Directors, shareholders, “In principle and Final” approval of Ministry of Finance, approval of Reserve Bank of India, In-principle consent of Stock Exchange for listing of underlying shares and In-principle consent of Financial institutions.

Approval of Board of Directors

A meeting of Board of Directors is required to be held for approving the proposal to raise money from Euro Capital market. A board resolution is to be passed to approve the raising of finance by issue of GDRs/FCCBs. The resolution should indicate therein specific purposes for which funds are required, quantum of the issue, country in which issue is to be launched, time of the issue etc. A director/Sub- Committee of Board of Directors is also to be authorised for seeking Government approval in connection with Euro issue and signing agreements with depository, organising road shows for fixation of price of GDRs. The Board meeting shall also decide and approve the notice of Extraordinary general meeting of shareholders at which special resolution is to be considered.

Approval of Shareholders

Proposal for making Euro issue, as proposed by Board of Directors require approval of shareholders. A special resolution under Section 62 of the Companies Act, 2013 is required to be passed at a duly convened general meeting of the shareholders of the company.

Approval of Ministry of Finance - “In Principle and Final”

With respect to ADR/GDR, guidelines issued on the subject dated 19-1-2000 brought ADR/GDR under the automatic route and therefore the requirement of obtaining approval of Ministry of Finance, Department of Economic Affairs has been dispensed with.

Further, private placement of ADR/GDR will also not require prior approval provided the issue is managed by investment banker.

In-Principle Consent of Stock Exchanges for Listing of Underlying Shares

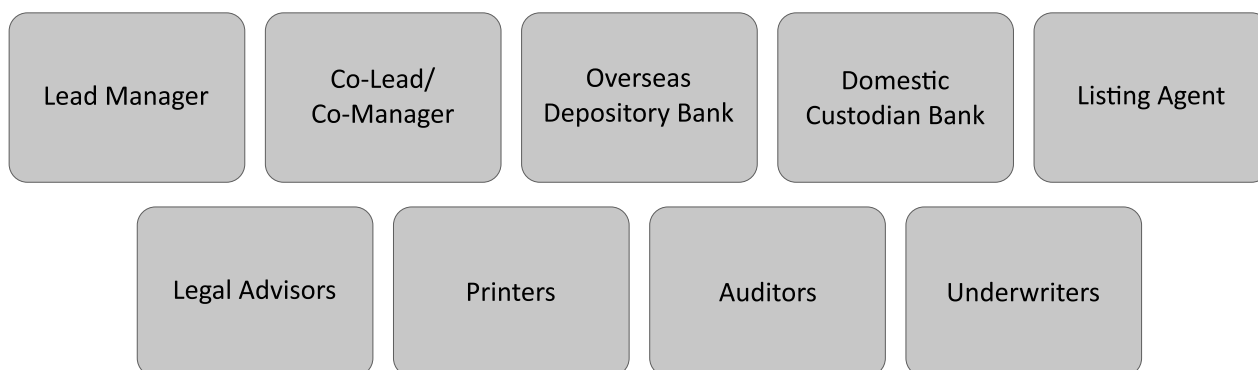
The issuing company has to make a request to the domestic stock exchange for in-principle consent for listing of underlying shares which shall be lying in the custody of domestic custodian. These shares, when released by the custodian after cancellation of GDR, are traded on Indian stock exchanges like any other equity shares.

In-Principle Consent of Financial Institutions

Where term loans have been obtained by the company from the financial institutions, the agreement relating to the loan contains a stipulation that the consent of the financial institution has to be obtained. The company must obtain in-principle consent on the broad terms of the proposed issue.

B. Appointment of Intermediaries

The following agencies are normally involved in the Euro issue:



➤ **Lead Manager**

The company has to choose a competent lead manager to structure the issue and arrange for the marketing. Lead managers usually charge a fee as a percent of the issue. The issues related to public or private placement, nature of investment, coupon rate on bonds and conversion price are to be decided in consultation with the lead manager.

➤ **Co-Lead/Co-Manager**

In consultation with the lead manager, the company has to appoint co-lead/co-manager to coordinate with the issuing company/lead manager to make the smooth launching of the Euro issue.

➤ **Overseas Depository Bank**

It is the bank which is authorised by the issuing company to issue Depository Receipts against issue of ordinary shares or Foreign Currency Convertible Bonds of issuing company.

➤ **Domestic Custodian Bank**

A banking company which acts as custodian for the ordinary shares or Foreign Currency Convertible Bonds of an Indian company, which are issued by it. The function of the domestic custodian bank is to co-ordinate with the depository bank. When the shares are issued by a company the same are registered in the name of depository and physical possession is handed over to the custodian. The beneficial interest in respect of such shares, however, rests with the investors.

➤ **Listing Agent**

One of the conditions of Euro-issue is that it should be listed at one or more Overseas Stock Exchanges. The appointment of listing agent is necessary to coordinate with issuing company for listing the securities on Overseas Stock Exchanges.

➤ **Legal Advisors**

The issuing company should appoint legal advisors who will guide the company and the lead manager to prepare offer document, depository agreement, indemnity agreement and subscription agreement.

➤ **Printers**

The issuing company should appoint printers of international repute for printing Offer Circular.

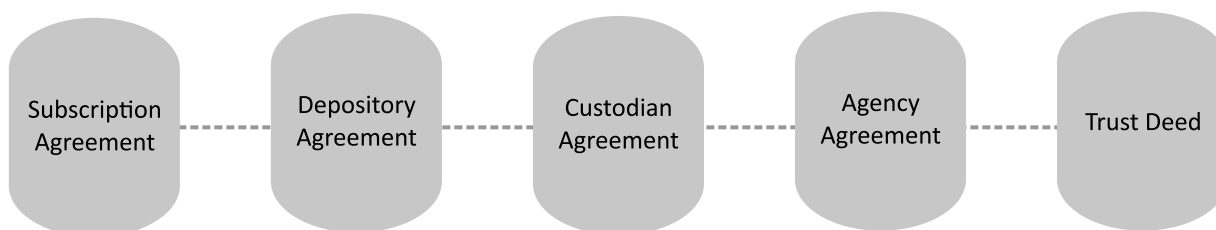
➤ **Auditors**

The role of issuer company's auditors is to prepare the auditors report for inclusion in the offer document, provide requisite comfort letters and reconciliation of the issuer company's accounts between Indian GAAP/UK GAAP/US- GAAP and significant differences between Indian GAAP/UK GAAP/US-GAAP.

➤ **Underwriters**

It is desirable to get the Euro issue underwritten by banks and syndicates. Usually, the underwriters subscribe for a portion of the issue with arrangements for tie-up for the balance with their clients. In addition, they will interact with the influential investors and assist the lead manager to complete the issue successfully.

C. Principal Documentation



i. Subscription Agreement

Subscription Agreement provides that Lead Managers and other managers agree, severally and not jointly, with the company, subject to the satisfaction of certain conditions, to subscribe for GDRs at the offering price set forth. It may provide that obligations of managers are subject to certain conditions precedent.

Subscription agreement may also provide that for certain period from the date of the issuance of GDR the issuing company will not (a) authorise the issuance of, or otherwise issue or publicly announce any intention to issue; (b) issue offer, accept subscription for, sell, contract to sell or otherwise dispose off, whether within or outside India; or (c) deposit into any depository receipt facility, any securities of the company of the same class as the GDRs or the shares or any securities in the company convertible or exchangeable for securities in the company of the same class as the GDRs or the shares or other instruments representing interests in securities in the company of the same class as the GDRs or the shares.

Subscription agreement also provides, an option to be exercisable within certain period after the date of offer circular, to the lead manager and other managers to purchase upto a certain prescribed number of additional GDRs solely to cover over-allotments, if any.

ii. Depository Agreement

Depository Agreement lays down the detailed arrangements entered into by the company with the Depository, the forms and terms of the depository receipts which are represented by the deposited shares. It also sets forth the rights and duties of the depository in respect of the deposited shares and all other securities, cash and other property received subsequently in respect of such deposited shares. Holders of GDRs are not parties to deposit agreement and thus have no contractual rights against or obligations to the company.

The depository is under no duty to enforce any of the provisions of the deposit agreement on behalf of any holder or any other person. Holder means the person or persons registered in the books of the depository maintained for such purpose as holders. They are deemed to have notice of, be bound by and hold their rights subject to all of the provisions of the deposit agreement applicable to them. They may be required to file from time to time with depository or its nominee proof of citizenship, residence, exchange control approval, payment of all applicable taxes or other governmental charges, compliance with all applicable laws and regulations and terms of deposit agreement, or legal or beneficial ownership and nature of such interest and such other information as the depository may deem necessary or proper to enable it to perform its obligations under Deposit Agreement.

The company may agree in the deposit agreement to indemnify the depository, the custodian and certain of their respective affiliates against any loss, liability, tax or expense of any kind which may arise out of or in connection with any offer, issuance, sale, resale, transfer, deposit or withdrawal of GDRs, or any offering document. Copies of deposit agreement are to be kept at the principal office of Depository and the Depository is required to make available for inspection during its normal business hours, the copies of deposit agreement and any notices, reports or communications received from the company.

iii. **Custodian Agreement**

Custodian works in co-ordination with the depository and has to observe all obligations imposed on it including those mentioned in the depository agreement. The custodian is responsible solely to the depository. In the case of the depository and the custodian being same legal entity, references to them separately in the depository agreement or otherwise may be made for convenience and the legal entity will be responsible for discharging both functions directly to the holders and the company. Whenever the depository in its discretion determines that it is in the best interests of the holders to do so, it may, after prior consultation with the company terminate, the appointment of the custodian and in such an event the depository shall promptly appoint a successor custodian, which shall, upon acceptance of such appointment, become the custodian under the depository agreement. The depository shall notify holders of such change promptly. Any successor custodian so appointed shall agree to observe all the obligations imposed on him.

iv. **Agency Agreement**

In case of FCCBs, the company has to enter into an agency agreement with certain persons known as conversion agents. In terms of this agreement, these agents are required to make the principal and interest payments to the holders of FCCBs from the funds provided by the company. They will also liaise with the company at the time of conversion/redemption option to be exercised by the investor at maturity.

v. **Trust Deed**

In respect of FCCBs the company enters into a Covenant (known as Trust Deed) with the Trustee for the holders of FCCBs, guaranteeing payment of principal and interest amount on such FCCBs and to comply with the obligations in respect of such FCCBs.

D. Pre and Post Launch – Additional Key Actions

Apart from obtaining necessary approvals, appointment of various agencies and proper documentation, the following additional key actions are necessary for making the Euro-issue a success.

(i) Constitution of a Board Sub-Committee; (ii) Selection of Syndicate Members; (iii) Constitution of a task force for due diligence; (iv) Listing; (v) Offering Circular; (vi) Research papers; (vii) Pre-marketing; (viii) Timing, pricing

and size of the issue; (ix) Roadshows; (x) Book building and pricing of the issue; (xi) Closing of the issue; (xii) Allotment; (xiii) Investor Relation Programme; and (xiv) Quarterly Statement.

a. Constitution of a Board Sub-Committee

To launch a Euro-issue, the issuing company has to take a large number of decisions in time. These decisions normally fall within the power of Board of Directors. It is usually difficult to call Board Meetings frequently and to ensure presence of adequate Board Members. Thus, it is normally advisable to constitute a sub-committee of the Board with full delegation of powers with regard to Euro-issue. The delegation of powers to the Board sub- committee should normally include the following:

- Appointment of agencies;
- Authority to make applications for seeking various approvals;
- Authority to finalise and execute documents and agreements;
- Decisions about the timing, size and pricing of the issue; and
- Allotment of shares.

b. Selection of Syndicate Members

The success of any Euro-issue depends upon the well planned and coordinated efforts of the syndicate members and the company. The selection of the Syndicate members should be made depending upon the strength and capabilities of each member in different areas of specialisation such as marketing, financial research, distribution etc. The lead manager may be entrusted with the work of selection of syndicate members. The lead manager while selecting the above members, in addition to their strength and capability, should also evaluate their standing, image, reputation, infrastructure, past experience in handling Indian Euro-issue, etc.

c. Constitution of a task force for due diligence

The due diligence is a process in which a team consisting of legal, technical and financial experts of the lead manager meets top executives of the company and visits the sites of the company in order to understand the strengths, weaknesses, problems and opportunities of the company. The team also studies and analyses the balance sheet of the company and its subsidiaries, its financial arrangement with the group, investment pattern and also the future prospects of the company. It also scrutinize the minutes of the company, various arrangements entered into by the company with regard to marketing, purchase, technology, ancillary units, employment, etc. and analyse the impact of litigations on the profitability of the company.

The purpose of above exercise is to draft the offering circular (prospectus) and work out marketing strategies for the Euro-issue.

d. Listing

One of the conditions of Euro-issues is that the securities are to be listed on one or more Overseas Stock Exchanges. The issuing company has to fulfill all the requirements particularly disclosure and documentation as prescribed by the Overseas Stock Exchanges. The company shall take the help of the listing agent in getting its Euro-issue instruments listed on the Overseas Stock Exchanges.

The issuing company shall prepare the requisite documents as prescribed by the Overseas Stock exchange authorities and submit the same along with application to it after scrutinizing the application and obtain the formal listing approval shall be issued by the Overseas Stock Exchange.

The underlying shares against GDRs are to be listed on one or more Indian Stock Exchange(s) on which the company's existing shares are already listed. For this purpose, the company has to apply to the stock exchange authorities to get the shares represented by GDRs listed on the Indian Stock Exchanges. Trading of such shares on Indian Stock Exchange(s) will not commence until the period specified in the guidelines after the date of issue of the GDRs.

E. Offering Circular

Offering Circular is a mirror through which the prospective investors can access vital information regarding the company in order to form their investment strategies.

It is to be prepared very carefully giving true and complete information regarding the financial strength of the company, its past performance, past and envisaged research and business promotion activities, track record of promoters and the company, ability to trade the securities on Euro capital market.

The Offering Circular should be very comprehensive to take care of overall interests of the prospective investor. The Offering Circular for Euro-issue offering should typically cover the following contents:

- Background of the company and its promoters including date of incorporation and objects, past performance, production, sales and distribution network, future plans, etc.
- Capital structure of the company-existing, proposed and consolidated.
- Deployment of issue proceeds.
- Financial data indicating track record of consistent profitability of the company.
- Group investments and their performance including subsidiaries, joint venture in India and abroad.
- Investment considerations.
- Description of shares.
- Terms and conditions of global depository receipt and any other instrument issued along with it.
- Economic and regulatory policies of the Government of India.
- Details of Indian securities market indicating stock exchange, listing requirements, foreign investments in Indian securities.
- Market price of securities.
- Dividend and capitalisation.
- Securities regulations and exchange control.
- Tax aspects indicating analysis of tax consequences under Indian law of acquisition, membership and sale of shares, treatment of capital gains tax, etc.
- Status of approvals required to be obtained from Government of India.
- Summary of significant differences in Indian GAAP, UK GAAP and US GAAP and expert's opinion.
- Report of statutory auditor.
- Subscription and sale.
- Transfer restrictions in respect of instruments.

- Legal matters etc.
- Other general information not forming part of any of the above.

A copy of the Offering Circular is required to be sent to the Registrar of Companies, SEBI and the Indian Stock Exchanges for record purposes.

F. Research Papers

Research analysts team of lead manager/co-lead manager prepares research papers on the company before the issue. These papers are very important marketing tools as the international investors normally depend a lot on the information provided by the research analysts for making investment decisions.

G. Pre-marketing

Pre-marketing exercise is a tool through which the syndicate members evaluate the prospects of the issue. This is normally done closer to the issue. The research analysts along with the sales force of the syndicate members meet the prospective investors during pre-marketing roadshows. This enables the syndicate members to understand the market and the probable response from the prospective investors. The pre-marketing exercise helps in assessing the depth of investors' interest in the proposed issue, their view about the valuation of the share and the geographical locations of the investors who are interested in the issue. The response received during pre-marketing provides vital information for taking important decisions relating to timing, pricing and size of the issue. This would also help the syndicate members in evolving strategies for marketing the issue.

H. Timing, pricing and size of the Issue

After pre-marketing exercise, the important decisions of timing, pricing and size of the issue are taken. The proper time of launching the issue is when the fundamentals of the company and the industry are strong and the market price of the shares are performing well at Indian Stock Exchanges. The timing should also not clash with some other major issues of the Indian as well as other country companies. The decision regarding the size of issue is inversely linked with the pricing i.e. larger the size, the comparatively lower the price or vice-versa.

I. Roadshows

Roadshows represent meetings of issuers, analysts and potential investors. Details about the company are presented

in the roadshows and such details usually include the following information about the company making the issue:

- History
- Organisational structure
- Principal objects
- Business lines
- Position of the company in Indian and international market
- Past performance of the company

During road shows, the investors give indication of their willingness to buy a particular quantity at particular terms. Their willingness is booked as orders by the marketing force of lead manager and co-lead manager. This process is known as book building.

- Future plans of the company
- Competition - domestic as well as foreign
- Financial results and operating performance
- Valuation of shares
- Review of Indian stock market and economic situations.

Thus at road shows, series of information presentations are organised in selected cities around the world with analysts and potential institutional investors. It is, in fact, a conference by the issuer with the prospective investors.

Road show is arranged by the lead manager by sending invitation to all prospective investors.

J. Book building and pricing of the Issue

Price is a very critical element in the market mix of any product or service. This is more so in case of financial assets like stocks and bonds and specially in case of Euro issues. The market price abroad has a strong correlation to the near future earnings potential, fundamentals governing industry and the basic economic state of the country. Several other factors like prevalent practices, investor sentiment, behaviour towards issues of a particular country, domestic market process etc., are also considered in determination of issue price. Other factors such as the credit rating of the country, interest rate and the availability of an exit route are important.

K. Closing of the Issue and Allotment

Closing is essentially an activity confirming completion of all legal documentation and formalities based on which the company issues the share certificate to the depository and deposits the same with the domestic custodian. Once the issue is closed and all legal formalities are over, the allotment is finalised. Thereafter, the company issues shares in favour of the Overseas Depository Bank and deposits the same with the domestic custodian for custody. The particulars of the Overseas Depository Bank are required to be entered into the Register of Members of the company.

L. Investor Relation Programme

The international investors expect that the issuing company maintains contact with them after the issue. These investors always like to be informed by the company about the latest developments, the performance of the company, the factors affecting performance and the company's plans. It is, therefore, essential for the GDR issuing company to set up an investor relation programme. Good investor relation ensures goodwill towards the company and it would help the company in future fund raising efforts.

FOREIGN CURRENCY CONVERTIBLE BONDS (FCCB)

Foreign Currency Convertible Bonds (FCCBs) are optionally convertible bonds issued in a currency other than Indian Rupees. A convertible bond is a mix between a debt and equity instruments. It acts like a bond by making regular coupon and principal payments, but these bonds also give the bondholders the option to convert the bond into shares at the expiry the term of the Bond.

The FCCBs are unsecured, carry a fixed rate of interest and an option for conversion into a fixed number of equity shares of the issuer company. Interest and redemption price (if conversion option is not exercised) is payable in dollars. FCCBs shall be denominated in any freely convertible Foreign Currency. However, it must be kept in mind that FCCB issue proceeds need to conform to ECB end use requirements.

Apart from the policy of ECB, issue of FCCB is also required to adhere to FEMA Regulations and in accordance with the scheme viz., “Issue of Foreign Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

Foreign investors also prefer FCCBs because of the dollar denominated servicing, the conversion option and, the arbitrage opportunities presented by conversion of the FCCBs into equity at a discount on prevailing Indian market price.

In addition, 25% of the FCCB proceeds can be used for general corporate restructuring.

The major drawbacks of FCCBs are that the issuing company cannot plan its capital structure as it is not assured of conversion of FCCBs. Moreover, the projections for cash outflow at the time of maturity cannot be made.

Difference between Foreign Currency Convertible Bonds (FCCBs) and Global Depository Receipts (GDR)

- FCCB is a type of Eurobond which can be exchanged for equity shares at some later date after issue of the Bond.
- GDR is a negotiable instrument in the form of depository receipts or certificate created by the overseas depository bank outside India and issued to non-resident investor against the issue of ordinary shares of Foreign currency convertible bonds of the issuing company.

Benefits to the Issuer Company

- Being Hybrid instrument, the coupon rate on FCCB is particularly lower than pure debt instrument there by reducing the debt financing cost.
- FCCBs are book value accretive on conversion. It saves risks of immediate equity dilution as in the case of public shares. Unlike debt, FCCB does not require any rating nor any covenant like securities, cover etc.
- It can be raised within a month while pure debt takes a longer period to raise. Because the coupon is low and usually payable at the time of redeeming the instrument, the cost of withholding tax is also lower for FCCBs compared with other ECB instruments.

Benefits to the Investor

- It has advantage of both equity and debt.
- It gives the investor much of the upside of investment in equity, and the debt portion protects the downside.
- Assured return on bond in the form of fixed coupon rate payments.
- Ability to take advantage of price appreciation in the stock by means of warrants attached to the bonds, which are activated when price of a stock reaches a certain point.
- Significant Yield to maturity (YTM) is guaranteed at maturity.
- Lower tax liability as compared to pure debt instruments due to lower coupon rate.

FCCB AND ORDINARY SHARES (THROUGH DEPOSITORY RECEIPT MECHANISM) SCHEME, 1993

FCCBs are governed by the ‘Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993’ as amended from time to time and Notification FEMA No.120/RB-2004 dated July 7, 2004.

The issuance of FCCBs was brought under the ECB guidelines in August 2005. In addition to the requirements of:

- (i) having the maturity of the FCCB not less than 5 years,

- (ii) the call & put option, if any, shall not be exercisable prior to 5 years,
- (iii) issuance of FCCBs only without any warrants attached,
- (iv) the issue related expenses not exceeding 4% of issue size and in case of private placement, shall not exceed 2% of the issue size, etc.

as required in terms of Notification FEMA No. 120/RB-2004 dated July 7, 2004, FCCBs are also subject to all the regulations which are applicable to ECBs.

Important Definitions under the Scheme, 1993	
Domestic Custodian Bank	It 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.
Foreign Currency Convertible Bonds	It 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.
Issuing Company	It means an Indian Company permitted to issue Foreign Currency Convertible Bonds or ordinary shares of that company against Global Depository Receipts.
Overseas Depository Bank	It means a bank authorised by the issuing company to issue Global Depository Receipts against issue of Foreign Currency Convertible Bonds or ordinary shares of the issuing company.
Redemption and Restructuring of FCCBs	
Redemption of FCCBs	Keeping in view the need to provide a window to facilitate refinancing of FCCBs by the Indian companies which may be facing difficulty in meeting the redemption obligations, Designated AD Category - I banks have been permitted to allow Indian companies to refinance the outstanding FCCBs, under the automatic route, subject to compliance with the terms and conditions set out hereunder: ➤ Fresh ECBs/ FCCBs shall be raised with the stipulated average maturity period and applicable all-in- cost being as per the extant ECB guidelines; ➤ The amount of fresh ECB/FCCB shall not exceed the outstanding redemption value at maturity of the outstanding FCCBs; ➤ The fresh ECB/FCCB shall not be raised six months prior to the maturity date of the outstanding FCCBs ; ➤ The purpose of ECB/FCCB shall be clearly mentioned as 'Redemption of outstanding FCCBs' in Form 83 at the time of obtaining Loan Registration Number from the Reserve Bank; ➤ The designated AD - Category I bank should monitor the end-use of funds; ➤ ECB / FCCB beyond USD 500 million for the purpose of redemption of the existing FCCB will be considered under the approval route; and ➤ ECB / FCCB availed of for the purpose of refinancing the existing outstanding FCCB will be reckoned as part of the limit of USD 750 million available under the automatic route as per the extant norms.

Restructuring of FCCBs	Restructuring of FCCBs involving change in the existing conversion price is not permissible. Proposals for restructuring of FCCBs not involving change in conversion price will, however, be considered under the approval route depending on the merits of the proposal.
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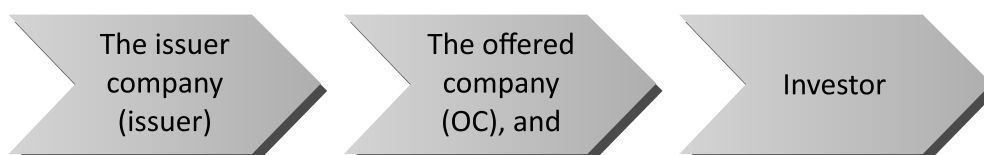
FOREIGN CURRENCY EXCHANGEABLE BONDS

Indian promoters can now raise money abroad by issuing foreign currency bonds against the value of their investments in shares of listed group company, termed as Foreign Currency Exchangeable Bonds (FCEB). The issue of these bonds helps the promoter to meet the financing requirements within the group. Issue of Foreign Currency Exchangeable Bonds (FCEB) are governed by Foreign Currency Exchangeable Bonds Scheme, 2008 issued by Ministry of Finance, Department of Economic Affairs.

What is FCEB?

According to the “Issue of Foreign Currency Exchangeable Bonds (FCEBs) Scheme, 2018, FCEB means a bond expressed in foreign currency, the principal and the interest in respect of which is payable in foreign currency, issued by an issuing company and subscribed to by a person resident outside India, exchangeable into equity shares of another company, being 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.

Parties of FCEB



Under this option, an issuer company may issue FCEBs in foreign currency, and these FCEBs are convertible into shares of another company (offered company) that forms part of the same promoter group as the issuer company.

Example- Company ABC Ltd. issues FCEBs, then the FCEBs will be convertible into shares of company XYZ Ltd. that are held by company ABC Ltd. and where companies ABC Ltd. and XYZ Ltd. form part of the same promoter group. Unlike FCCBs that convert into shares of issuer itself, FCEBs are exchangeable into shares of OC. Also, relatively, FCEB has an inherent advantage that it does not result in dilution of shareholding at the OC level.

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.
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.

FOREIGN CURRENCY EXCHANGEABLE BONDS SCHEME, 2008

Issuer Company	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 (FDI) 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.
Eligible subscriber	Entities complying with the FDI 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 (FIPB), wherever required under the FDI 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 the FCEB may be invested in promoter group companies. ii. The proceeds of FCEB can be invested 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. Promoter Group Companies Promoter Group Companies receiving investments out of the FCEB proceeds may utilise 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.
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 extant 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 shall be retained and/or deployed overseas by the issuing/promoter group companies in accordance with the policy for the ECB. 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 Authorised Dealer bank.

CHECKLIST ON PRE ISSUE AND POST-ISSUE FORMALITIES FOR GDRs/ADRs/FCCBs

Pre-Issue Formalities

Documents required for granting approval under Regulation 28(1) of the SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015, for companies proposing to come out with issue of GDRs/ADRs/FCCBs:

1. Certified true copy of the resolution passed by the Board of Directors of the Company approving the issue of the GDRs/ADRs/FCCBs.
2. Copy of the notice sent to the shareholders of the company.
3. Certified true copy of the resolution passed by the shareholders of the Company in the general body meeting approving the issue of the GDRs/ADRs/FCCBs.
4. Draft offering circular for issue of the GDRs/ADRs/FCCBs.

5. Confirmation by the Managing Director and/or Company Secretary as per prescribed format by Exchange.
6. Processing fee.

Note: All pages of the documents/details provided should be serially numbered, stamped and certified by the authorized signatory of the company.

Post-Issue Formalities

Documents required for listing approval for equity shares underlying GDRs/ ADRs/ or equity shares allotted upon conversion of FCCBs issued by the Companies:

1. Letter of Application (i.e. by Listed companies applying for listing of further issue) duly completed. (In case of conversion of FCCBs only post allotment distribution schedule is required to be submitted).
2. Brief particulars of the new securities issued as per prescribed format.
3. Certified true copy of the Board resolution in which the equity shares were allotted.
4. List of allottees and the number of equity shares allotted.
In case of GDRs/ADRs, the list of GDR/ADR holders and the number of GDRs/ADRs allotted.
5. Shareholding Pattern as per the format prescribed under Regulation 31 of the SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 giving details pre and post allotment.
6. Processing Fee [**Processing fee is not payable on the first conversion, where the company has paid the same at the time of obtaining prior approval under Regulation 28(1) of the SEBI (LODR), Regulations, 2015. In case prior approval obtained after 01/04/2017, the aforesaid Processing Fees is not applicable**].
7. Additional Annual Listing Fee, if applicable, on enhanced capital.
8. Confirmation by the Managing Director/ Company Secretary as per enclosed format by Exchange.
9. Certified true copy of letter issued by the overseas Stock Exchange granting listing/ trading permission to the GDRs/ADRs/FCCBs.
10. Certified true copy of the resolution in which the Board of the company or the Committee of Directors of the company decided to open the proposed issue of GDRs/ADRs/FCCBs.
11. Auditor's Certificate confirming the floor price for the proposed issue and receipt of funds against the said issue.
12. A copy of the final offering circular (printed copy as well as pdf file on CD), duly certified by the Managing Director/ Company Secretary.
13. Detailed valuation report with related workings/calculations on the basis of which company proposes to acquire the foreign company.

Note: Documents at Sr. Nos. 9 to 13 are required to be submitted only at the time of filing the first application in respect of any offer document.

All pages of the documents/details provided should be serially numbered, stamped and certified by the authorized signatory of the company.

LESSON ROUND-UP

- Capital can be raised from international capital market in foreign currency by accessing foreign capital market. Funds raised through foreign currency are called as euro equity or debt.
- Indian companies are allowed to raise equity capital in the international market through the issue of GDR/ ADR/FCCB/FCEB.
- ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.
- The issue of GDRs/FCCBs requires the approval of a Board of Directors, shareholders, “In principle and Final” approval of Ministry of Finance, Approval of Reserve Bank of India, In-principle consent of Stock Exchange for listing of underlying shares and In-principle consent of Financial institutions.
- FCCBs/DRs may be issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and Depository Receipts Scheme, 2014 respectively, as per the guidelines issued by the Government of India thereunder from time to time.
- The FCCBs are unsecured, carry a fixed rate of interest and an option for conversion into a fixed number of equity shares of the issuer company.

GLOSSARY

Bond: A negotiable certificate evidencing indebtedness a debt security or IOU, issued by a company, municipality or government agency. A bond investor lends money to the issuer and, in exchange, the issuer promises to repay the loan amount on a specified maturity date. The issuer usually pays the bondholder periodic interest payments over the life of the loan.

Eurobond: Eurobonds are issued in a specific currency outside the currency’s domicile. They are not subject to withholding tax and fall outside the jurisdiction of any one country. The Eurobond market is based in London. Not to be confused with euro-denominated bonds.

CEDEL: One of the two major organizations in the Eurobond market which clears or handles the physical exchange of, securities and stores securities. Based in Luxembourg, the company is owned by several shareholding banks and operates through a network of agents.

Coupon: The interest paid on a bond expressed as a percentage of the face value. If a bond carries a fixed coupon, the interest is paid on an annual or semi-annual basis. The term also describes the detachable certificate entitling the bearer to payment of the interest.

Foreign Currency Convertible Bonds: It 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.

Overseas Depository Bank: It means a bank authorised by the issuing company to issue Global Depository Receipts against issue of Foreign Currency Convertible Bonds or ordinary shares of the issuing company.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation.)

1. What do you mean by External Commercial Borrowings (ECBs)? Describe the various forms of ECB as per RBI Guidelines.
2. State the procedure laid out for issuance of ADRs/GDRs.
3. Briefly explain the condition required to be fulfilled by a company for issue of depository receipts under the Companies (Issue and Global Depository Receipts) Rules, 2014.
4. What do you mean by Foreign Currency Exchangeable Bond (FCEB)? Explain the Pricing norms for issuing of FCEB under the Foreign Currency Exchangeable Bonds Scheme, 2008.
5. Mention the Regulatory Framework in India for issue of ADR/GDR/FCCBs/FCEBs.
6. Write short notes on :
 - (a) Sponsored ADR/GDR issue
 - (b) Two Way Fungibility Scheme.

LIST OF FURTHER READINGS

- FAQs on External Commercial Borrowings available at <https://m.rbi.org.in/Scripts/FAQView.aspx?Id=120>
- Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations https://m.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11510
- FAQs on Funding Option available at <https://www.investindia.gov.in/faq-pdf/27/en>