

Security creation requirements relaxed under ECB Guidelines

The Reserve Bank of India, vide its circular dated January 1, 2015 has liberalized the External Commercial Borrowing (“**ECB**”) by expanding the options of securities which can be provided to a foreign lender and consolidating the provisions relating to the same at one place. The circular provides the general and specific conditions for creation of security in favour of a foreign lender.

Previously, the choice of security to be provided to the overseas lender / supplier for securing ECB was left to the borrower.

General Conditions: The general conditions for creation of security in all cases are as follows:

- (i) the underlying ECB is in compliance with the extant ECB guidelines;
- (ii) The Loan Agreement consist of the security clause requiring the ECB borrower to create charge on immovable assets / movable assets /financial securities / issuance of corporate and / or personal guarantee in favour of overseas lender / security trustee;
- (iii) No objection certificate has been obtained from the existing lenders in India, if necessary.

Specific Conditions: The specific conditions for creation of charge on assets are as follows:

(i) Creation of Charge on Immovable Assets:

- Such security shall be in accordance with Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.
- The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender / security trustee.
- In the event of the enforcement of the charge, the charged 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 of the charge, the claim of the lender will be restricted to the outstanding claim against the ECB, whether the lender takes over the movable asset or otherwise, and the encumbered movable assets may be taken out of the country.

(iii) Creation of Charge over Financial Securities

- 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.
- In addition, security interest over all current and future loan assets and all current assets, Rupee accounts of the borrower with AD Category-I banks in India including accounts in form of escrow arrangement or debt service reserve account, standing in the name of the borrower, can be used as security for ECB.
- In case of enforcement of pledge, transfer of financial securities must be within sectoral cap and in accordance with the FDI/FII policy and FEMA Regulations.

(iv) Issue of Corporate or Personal Guarantee

- A Board Resolution for the issue of corporate guarantee for the company issuing such guarantee and specifying name of the officials authorized to execute such guarantees on behalf of the company or in individual capacity should be obtained.
- Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
- Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000.

The Circular provides that once the general and specific conditions have been met, the Authorized Dealer Bank may permit creation of charge which shall co-terminus with underlying ECB.

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