

External Commercial Borrowings

2018 MHA Legal



Principal Regulations - ECB

Foreign Exchange Management Act, 1999

Section 6 (3) (d) - Borrowing or Lending in Foreign Exchange

Power to regulate (Section 47)

Notifications

FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000

Master Direction on ECB

AP DIR Circulars

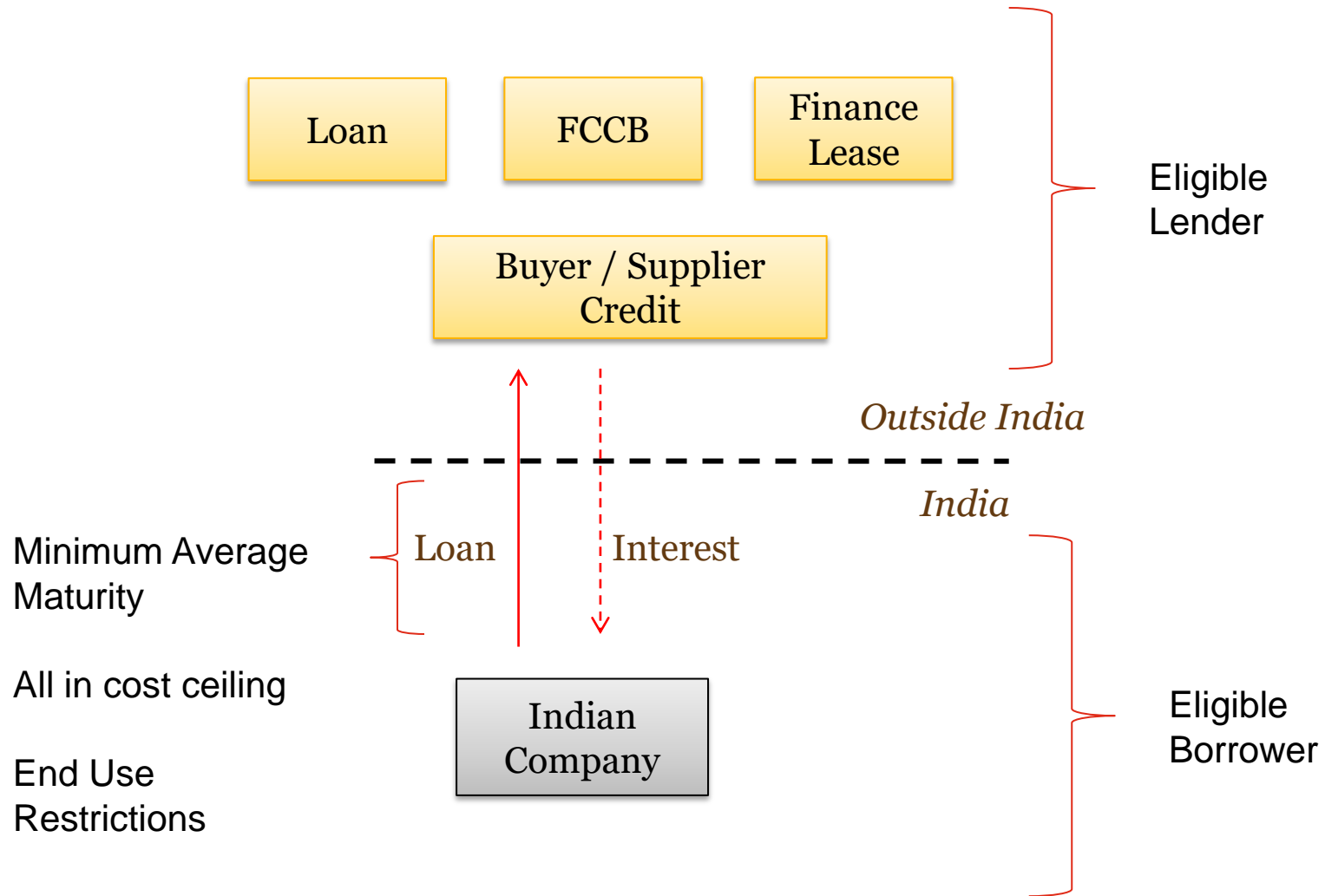
AP (DIR Series) Circulars issued by RBI from time to time

Definition

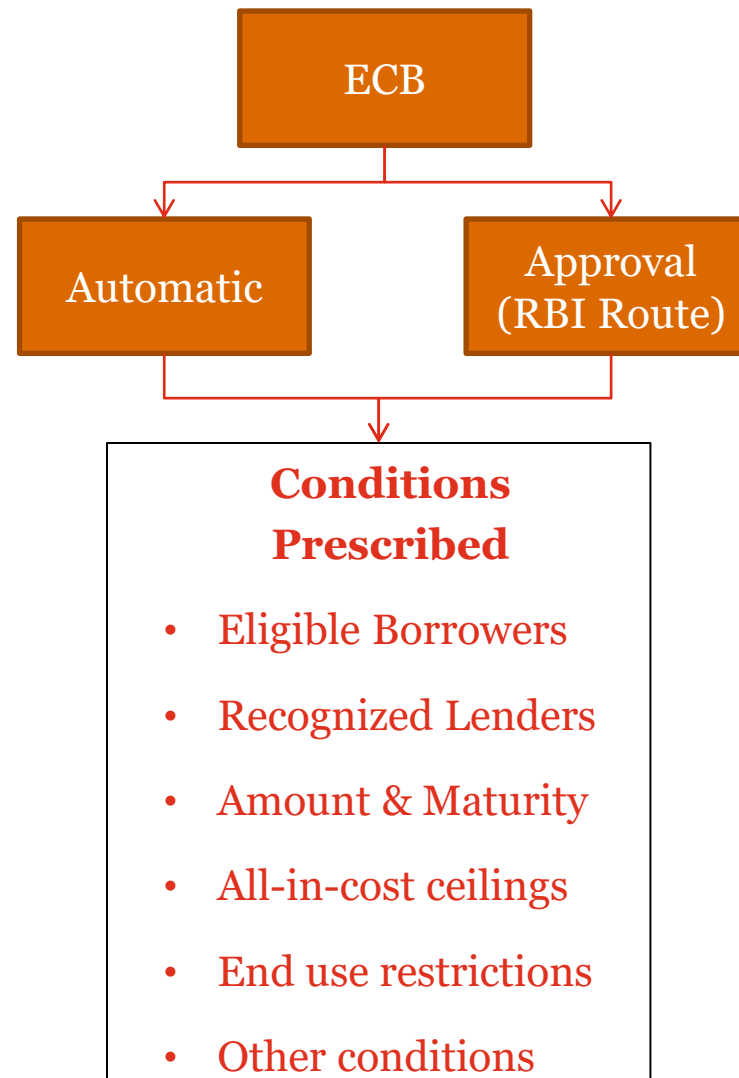
Commercial loans raised by eligible resident entities from recognised non-resident entities conforming to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.

Track 1	Track II	Track 3
Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.	Long term foreign currency denominated ECB with minimum average maturity of 10 years	Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

Concept



Permitted Route



Eligible Borrowers

Track 1

- Companies engaged in manufacturing, software development, shipping and airlines.
- SIDBI.
- Units in SEZs.
- Export Import Bank of India (Approval Route)
- Companies in Infrastructure Sector , NBFC – IFC, AFC, Holding Companies and CICs Also, Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908.

Track II

- All categories under Track I.
- Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI).

Track III

- All categories under Track II.
- All NBFC's coming under the regulatory purview of the Reserve Bank
- NBFCs, Not for Profit companies, Societies, trusts and cooperatives, NGOs engaged in micro finance activities.
- Companies engaged in miscellaneous services like R&D, training (other than educational institutes), supporting infrastructure, providing logistics services and companies engaged in maintenance, repair and overhaul and freight forwarding.
- SEZ / NMIZ Developers.

Recognized Lender

Track I

- International banks.
- International capital markets.
- Financial institutions – Multilateral, Regional, Government
- Export credit agencies.
- Suppliers of equipment.
- Foreign equity holders.
- Overseas long term investors such as Prudentially regulated financial entities; Pension funds; Insurance companies; Sovereign Wealth Funds; Financial institutions located in International Financial Services Centres in India
- Overseas branches / subsidiaries of Indian banks

Track II

- All entities listed under Track I but for overseas branches / subsidiaries of Indian banks.

Track III

- All entities listed under Track I but for overseas branches / subsidiaries of Indian banks. In case of NBFCs-MFIs, other eligible MFIs, not for profit companies and NGOs, ECB can also be availed from overseas organisations and individuals⁴

All in cost ceiling

Track I

- 450 basis points per annum over 6 month LIBOR or applicable bench mark.
- 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.

Track II

- 450 basis points per annum over 6 month LIBOR or applicable bench mark.
-
- Remaining conditions will be as given under Track I.

Track III

- The maximum spread will be 450 basis points per annum over the prevailing yield of the Government of India securities of corresponding maturity.
- Same as Track I
-

Negative End use – All Tracks

The negative list for all Tracks would include the following:

- a. Investment in real estate or purchase of land except when used for affordable housing as defined in Harmonised Master List of Infrastructure Sub-sectors notified by Government of India, construction and development of SEZ and industrial parks/integrated townships.
- b. Investment in capital market.
- c. Equity investment.

In addition to the above Additionally for Tracks I and III, the following negative end uses will also apply except when raised from Direct and Indirect equity holders or from a Group company, and provided the loan is for a minimum average maturity of five years:

- d. Working capital purposes.
- e. General corporate purposes.
- f. Repayment of Rupee loans.

For all Tracks, the following negative end use will also apply:

- g. On-lending to entities for the above activities from (a) to (f).

Limit to raise ECB

- Up to USD 750 million or equivalent for the companies in infrastructure and manufacturing sectors, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies;
- Up to USD 200 million or equivalent for companies in software development sector;
- Up to USD 100 million or equivalent for entities engaged in micro finance activities; and
- Up to 500 million or equivalent for remaining entities.
- ECB proposals beyond aforesaid limits will be considered under the approval route. For computation of individual limits under III, exchange rate prevailing on the date of agreement should be taken into account.
- In case the ECB is raised from direct equity holder, aforesaid individual ECB limits will also subject to ECB liability: equity ratio of 7:1. Ratio is not applicable if total of all ECBs raised by an entity is up to USD 5 million or equivalent.

Borrowing Currency

- ECB can be raised in any freely convertible foreign currency as well as in Indian Rupees.
- In case of Rupee denominated ECB, the non-resident lender, other than foreign equity holders, should mobilize Indian Rupees through swaps/outright sale undertaken through an AD Category I bank in India. .
- Change of currency of ECB from one convertible foreign currency to any other convertible foreign currency as well as to INR is freely permitted. Change of currency from INR to any foreign currency is, however, not permitted.
- Change of currency of ECB into INR 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.

Hedging requirements

- Borrowers eligible to raise ECB needs to have a board approved risk management policy and shall keep their ECB exposure hedged 100 per cent at all times.
- AD Category-I bank needs to verify that 100 per cent hedging requirement is complied with during the currency of ECB and report the position to RBI through ECB 2 returns.
- Entities raising ECB under track I and II are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure

Parking of ECB Proceeds

- ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilization. Till utilization, these funds can be invested in the following liquid assets
 - 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;
 - Treasury bills and other monetary instruments of one year maturity having minimum rating as indicated above and
 - Deposits with overseas branches/ subsidiaries of Indian banks abroad.

- 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. These term deposits should be kept in unencumbered position.

Minimum Average Maturity calculation

Date of Drawal/ Repayment	Drawdown (In USD)	Repayment (In USD)	Balance (In USD) (X)	No. of Days (Y)	Product (X x Y/ 360)
1-Jan-10	500,000	-	500,000	30	41,667
1-Feb-10	1,000,000	-	1,500,000	75	312,500
15-Apr-10	1,000,000	-	2,500,000	90	625,000
15-Jul-10	1,500,000	-	4,000,000	90	1,000,000
15-Oct-10	2,000,000	-	6,000,000	615	10,250,000
1-Jul-12	-	600,000	5,400,000	360	5,400,000
1-Jul-13	-	600,000	4,800,000	360	4,800,000
1-Jul-14	-	600,000	4,200,000	360	4,200,000
1-Jul-15	-	600,000	3,600,000	360	3,600,000
1-Jul-16	-	3,600,000	-		
			Cumulative Maturity Period (Z)		30,229,167
			Average maturity Period (Z/6000000)		5.04

Process and compliances

- Execute a Loan Agreement with the overseas lender along with Draw down and repayment schedule
- Prepare and file form in duplicate, certified by the Company Secretary or Chartered Accountant to the Authorized Dealer.
- AD will process the application and forward the one copy to Department of statistics and information system, RBI for generating Loan Registration Number (LRN).
First draw down should be only after obtaining LRN.

In the event of Approval route, please obtain prior approval from RBI in form ECB before following the above steps.

On-going compliance

- ECB-2 Return certified by the designated AD bank needs to be submitted on monthly basis - to reach RBI within seven working days from the close of month to which it relates.

Conversion of ECB into Equity

Conditions:

- Activities to be under Automatic Route / FIPB approval obtained
- Sectoral Cap not breached
- Pricing guidelines followed (listed / unlisted company)

Reporting structure

- Full conversion of outstanding ECB into equity – Form FC-GPR to AD & Form ECB-2 to DSIM within 7 working days from the close of the month
- Partial conversion of outstanding ECB into equity – Form FC-GPR for converted portion & Form ECB-2 to DSIM mentioning converted and unconverted portion

Powers with AD Bank

AD Banks have been delegated with the powers to approve the following aspects in relation to ECB's:

- Changes/modifications in the drawdown/repayment schedule - with or without change in the average maturity period or all-in-cost;
- Changes in the currency of borrowing;
- Change of the AD bank;
- Changes in the name of the Borrower Company;
- Transfer of ECB;
- Change in the recognized lender;
- Change in the name of Lender;
- Cancellation of LRN;
- Change in the end-use of ECB proceeds;
- Reduction in amount of ECB;
- Change in all-in-cost of ECB
- Extension of matured but unpaid ECB

Trade Credits

- Trade Credits (“TC”) refer to credits extended for imports directly by the overseas supplier, bank and financial institution for maturity of less than 5 years.
- TC can be obtained up to a maximum of USD 20 million per import transaction under automatic route. Beyond USD 20 million require prior approval of RBI.
- Maturity period and amount
 - Normal Import transactions – USD 20 million – 1 year
 - Import of Capital goods - USD 20 million – upto 5 years
 - Rollover / extension not permitted
- All in cost ceiling* – 6 month LIBOR plus 350 basis points
- Guarantee – AD banks are permitted to issue LoC/guarantee/LoU etc. in favor of overseas supplier / bank / FI upto USD 20 M per transaction
 - 1 year – import of non-capital goods permissible under FTP
 - 3 years – import of capital goods

ECB for Startups

Criteria	Requirement
Eligibility	An entity recognised as a Startup by the Central Government as on date of raising ECB.
Maturity	Minimum average maturity period will be 3 years.
Recognized Lender	Resident of a FATF (member or regional) compliant country. Overseas branches/subsidiaries of Indian banks and overseas wholly owned subsidiary / joint venture of an Indian company will not be considered as recognized lenders
Form of Borrowing	Borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
Currency	Any freely convertible currency or in INR or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilize INR through swaps/outright sale undertaken through an AD bank.
Amount	USD 3 million or equivalent per financial year
All in cost ceiling	Mutually agreed between the borrower and the lender

ECB for Startups

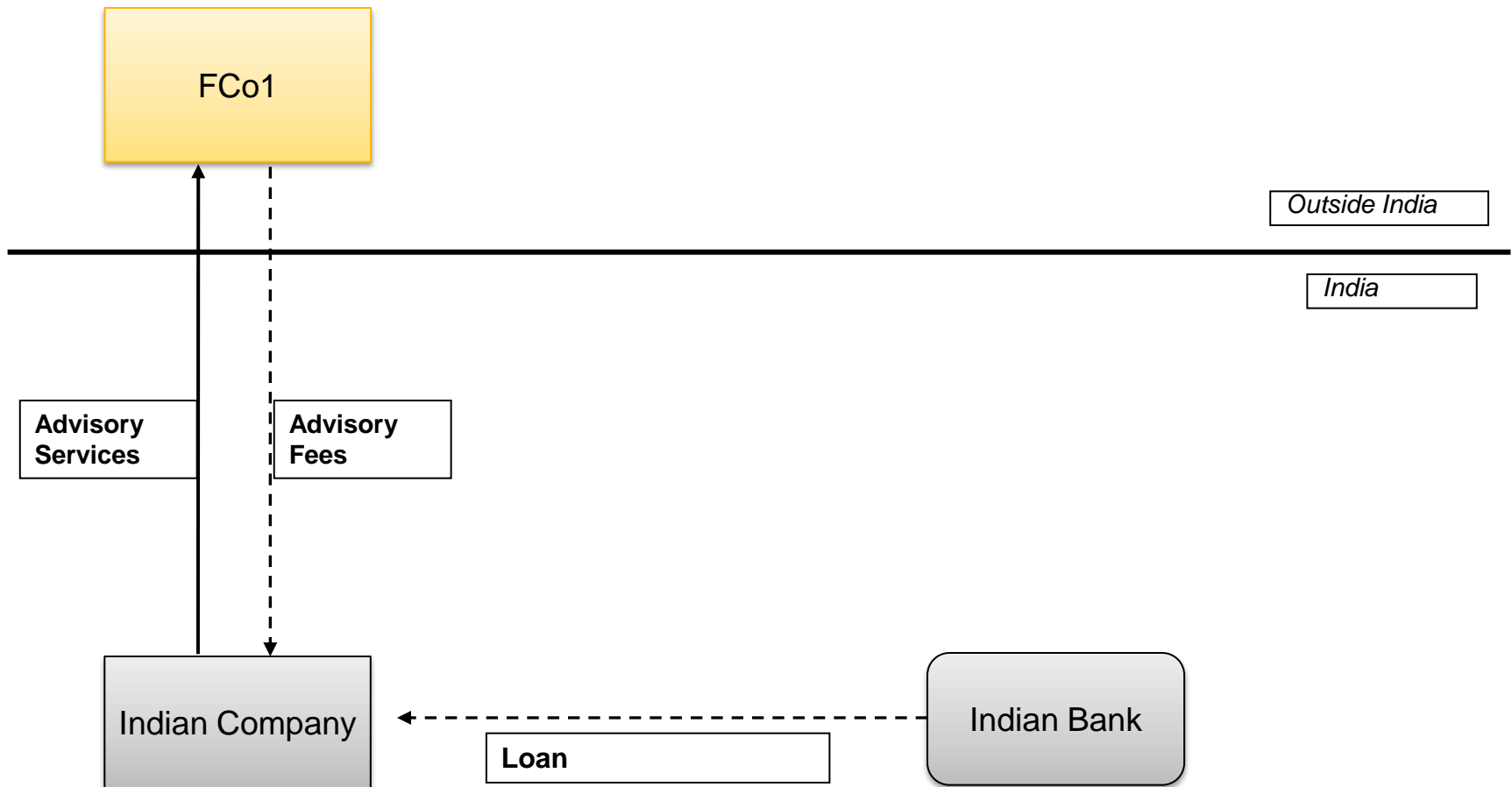
Criteria	Requirement
End use	For any expenditure in connection with the business of the borrower.
Conversion into equity	freely permitted subject to Regulations applicable for foreign investment in Startups
Security	Choice of security to be provided to the lender is left to the borrowing entity.
Guarantee	Issuance of corporate or personal guarantee is allowed. Guarantee issued by a non-resident is allowed only if such parties qualify as lender
Hedging	The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD 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.
Conversion Rate	Conversion will be at the market rate as on the date of agreement.
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 applicable as per policy. ECB liability : equity ratio will not be applicable

Structured Obligations

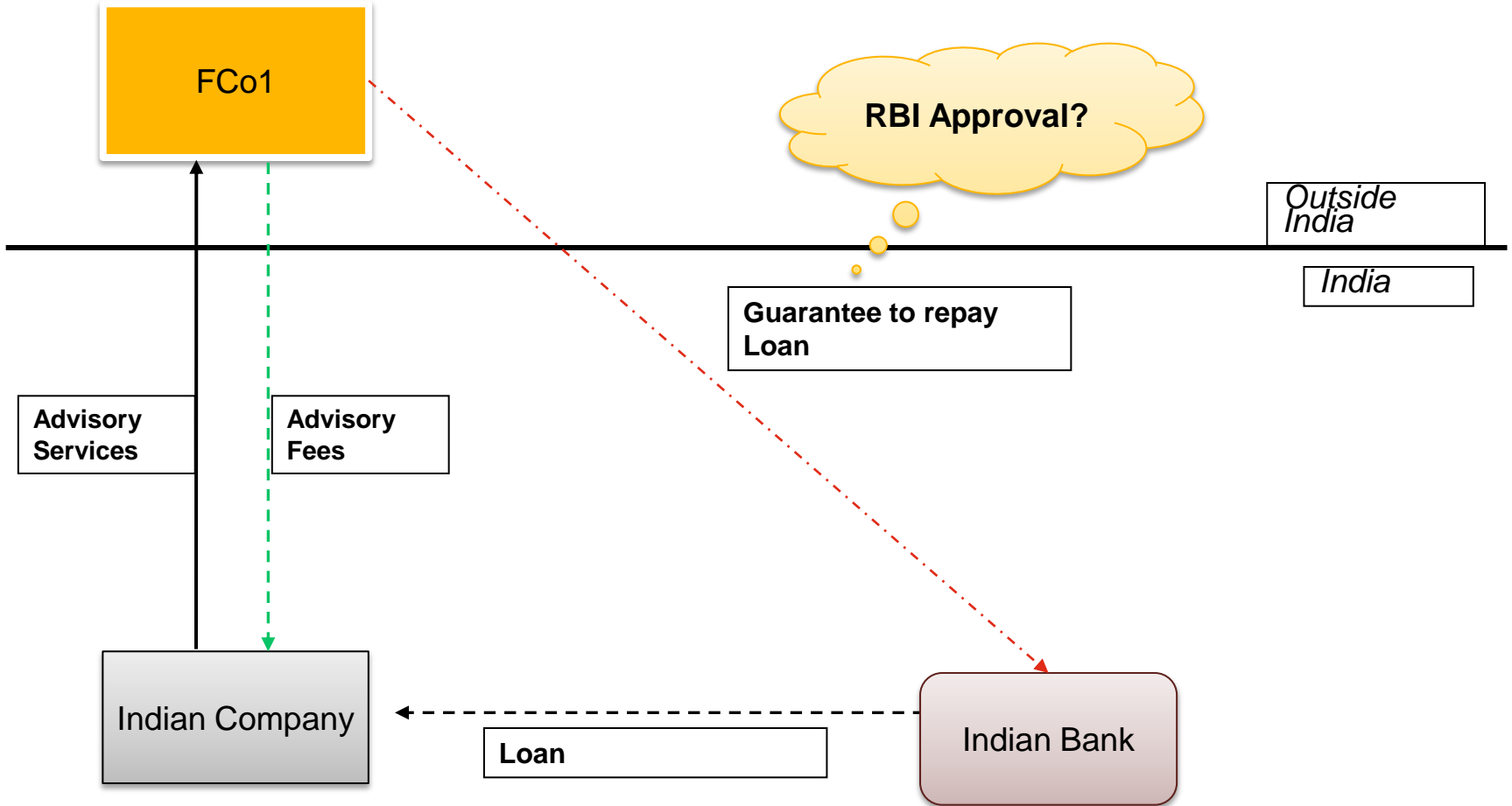
Structured Obligations



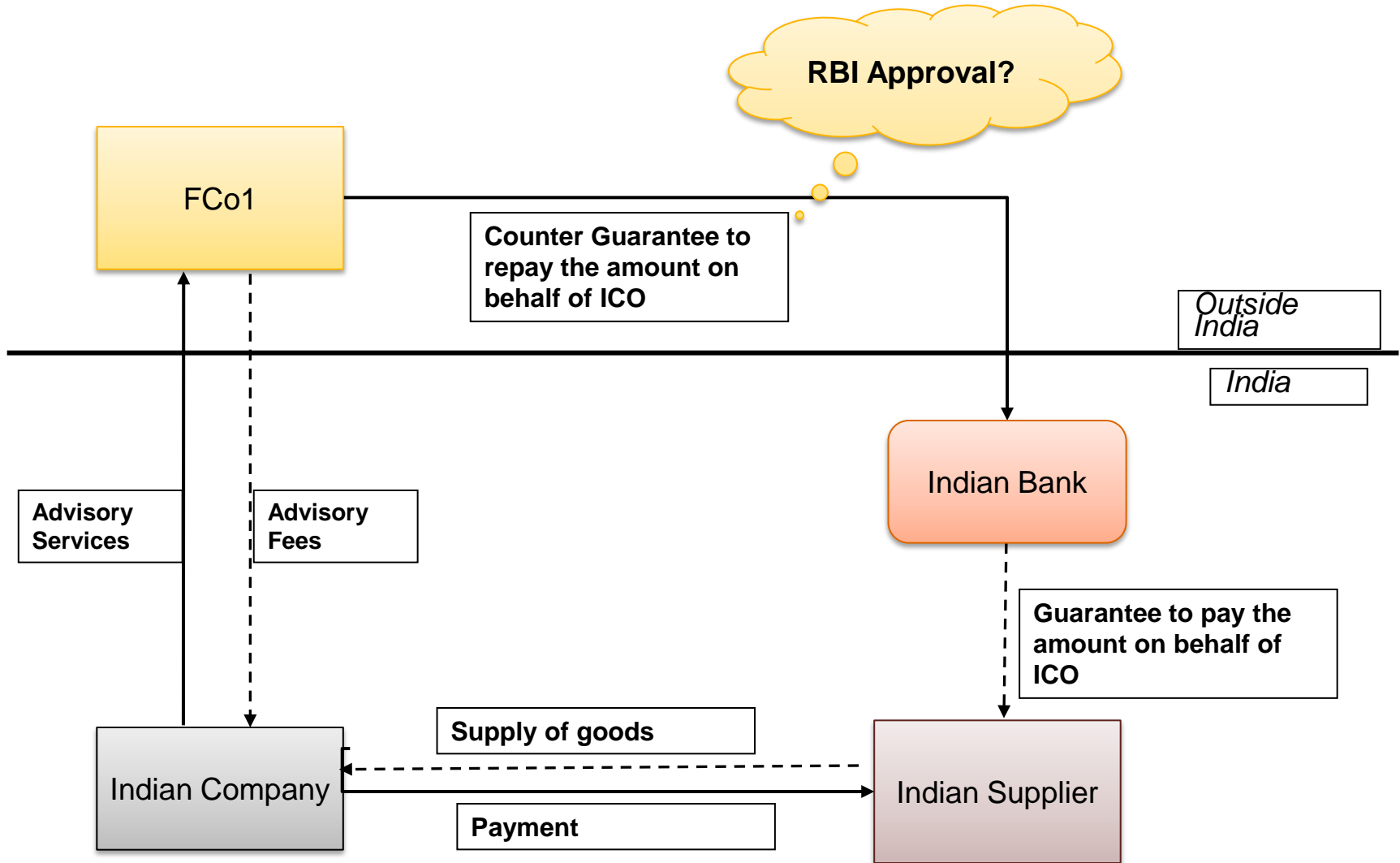
Structured Obligations



Structured Obligations



Structured Obligations



Practical Aspects

- Treatment of certain securities - Non convertible, optionally convertible or partially convertible preference shares.
- Concept of Deemed ECB.
- Maturity period – Can I consider calendar years?
- RBI has not granted the LRN even after 2 months – Can I drawdown the first tranche.
- Can I convert ECB into equity including Interest – what about interest on Interest.
- ECB for Trading sector.
- Does software sector include –IT/ITeS non STPI units.
- Can I use MIBOR for INR denominated ECBs?
- In case of confusion on whether a sector qualifies under automatic route, can I still follow automatic route.

A photograph of a desk setup. On the left, a small green plant in a glass jar sits on a dark surface. A white lamp with a conical shade is lit, casting a warm glow. In the background, a laptop is open, and a pen lies on the desk. The overall scene is a professional workspace.

Thank you

In the event you need any further information or clarification. Please feel free to contact:

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About MHA Legal

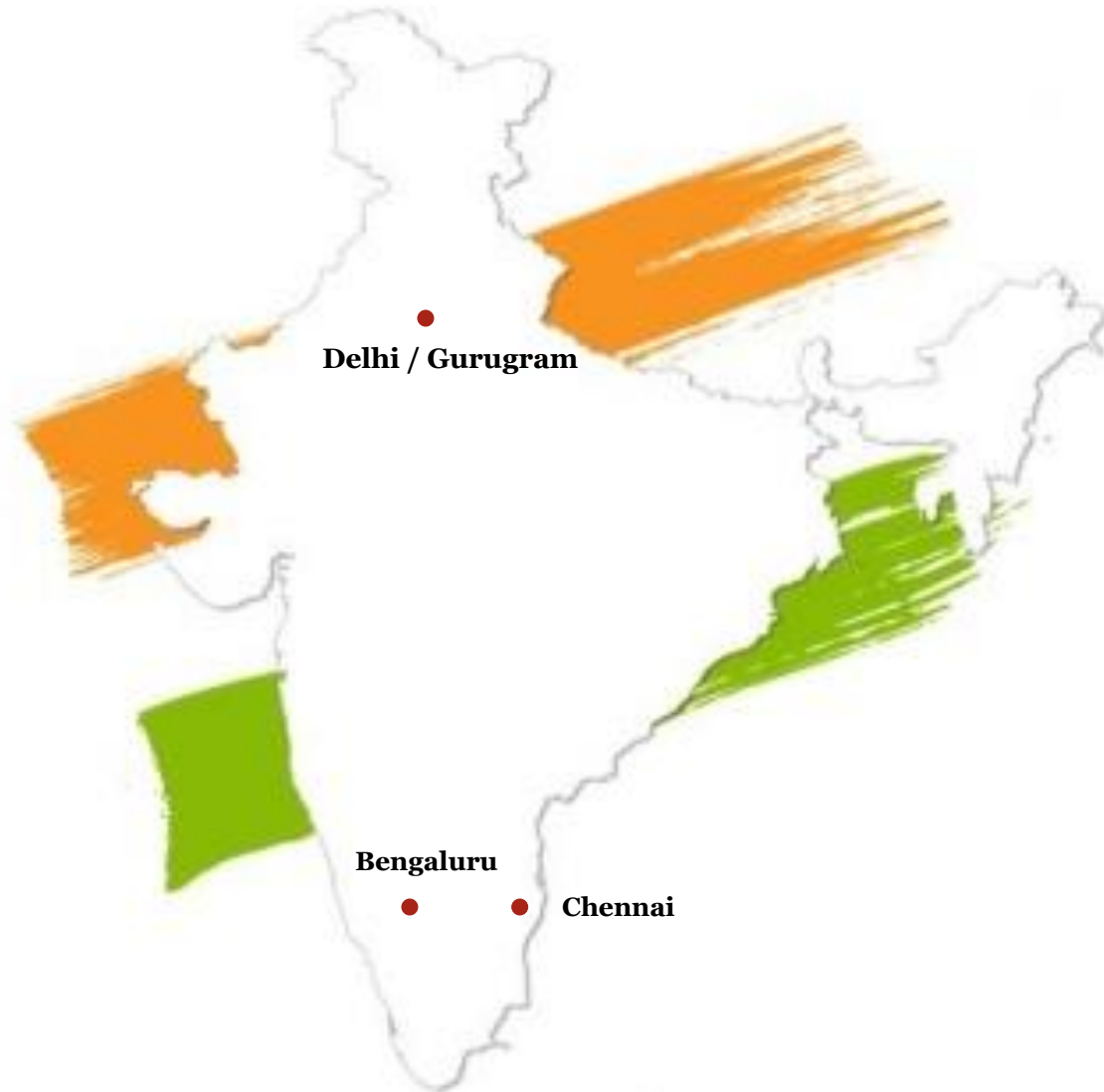
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Office Locations



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Passion, Integrity, Excellence**

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