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# FEMA – Overview External Commercial Borrowings

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# ECB - Contents

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# Framework

## Act

Foreign Exchange Management Act, 1999 – Section 6 – Capital Account Definition

## Regulations

Permissible Capital Account Transaction Regulations 2000 [FEMA 1] and Borrowing and Lending Regulations 2000 [FEMA 3R]

Circulars (A.P. DIR Series Circulars) and Notifications amending the Regulations issued by RBI from time to time

External Commercial Borrowings (ECB) Policy – New ECB Framework dated 16 January 2019

## Master Direction

No. 11/2017-18 dated 26 March 2019 updated from time to time (last updated on 8 August 2019)

## FAQs

RBI issued FAQs on ECB dated 29 May 2019

Thumb Rule - ECB is a Capital Account Transaction – permissible only as stipulated - In case of doubt, always avail the Approval Route

*In view of complexities and voluminous content – Always refer, research, debate and then conclude...every time*

# Forms and Routes

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

FCY / INR

ECB Routes

*ECB routes does not apply to NCDs issued to RFPI which are covered under FEMA 20R*

## Automatic Route:

- No approval required
- Obtain LRN from RBI by filing Form ECB through AD Bank (earlier Form 83)
- Monthly filings with RBI through AD Bank in Form ECB-2
- Includes entities under Investigation under FEMA on without prejudice basis

## Approval Route:

- Prior application to the RBI through AD Bank (Form ECB)
- Recommendation of RBI Empowered Committee (Internal RBI & External Members) for application above certain threshold and final decision by RBI
- Factors: merits, macroeconomic situations and overall guidelines
- Post approval, obtain LRN, monthly filings as Automatic Route

Bank /  
Other Loans

Securitized  
instruments \*\*

FCCBs /  
FCEB

Finance  
Lease

Trade  
Credit >  
3years

All other forms of ECBs for  
instance, beyond individual  
limits

\*\* Securitized instruments (such as bonds, non-convertible, optionally convertible or partially convertible preference shares or debentures)

# Key parameters (cumulative)

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# • Eligible Borrowers and Recognised Lenders

## Eligible Borrowers

- All entities eligible to receive FDI
- Further, following entities are also eligible to raise ECB:
  - a) Port Trusts;
  - b) Units in SEZ;
  - c) SIDBI;
  - d) EXIM Bank and
  - e) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies / trusts / cooperatives and Non-Government Organizations (permitted only to raise INR ECB).

**LLPs not eligible borrower as not eligible to receive FDI**

## Recognised Lenders

- The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECBs.
- Additionally, following are also recognised lenders:
  - Multilateral and Regional Financial Institutions where India is a member country;
  - Individuals can only be permitted if they are foreign equity holders or for subscription to bonds / debentures listed abroad; and
  - Foreign branches / subsidiaries of Indian banks only for FCY ECB (except FCCBs and FCEBs)

## ● Minimum Average Maturity Period ('MAMP')

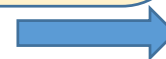
MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of MAMP. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

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

For 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.

Foreign equity holder means: a) Direct foreign equity holder of minimum 25% equity holding by the lender in the borrowing company; b) Indirect equity holder with minimum 51%; and c) Group company with common overseas parent.

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



## ● End-use (Negative List)

The negative list, for which the ECB proceeds cannot be utilized include:

- a) Real estate activities
- b) Investment in capital market
- c) Equity investment
- d) Working capital purposes\*
- e) General corporate purposes \*
- f) Repayment of Rupee loans\*
- g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as prescribed

**\* Except as prescribed under MAMP**

Other non-permissible utilization

- a. Contribution in an LLP
- b. Indirect Equity investment through Purchase of Goodwill
- c. Reimbursement of expenditure incurred in the past

*Investment in Overseas WOS / JV permissible*

**Real Estate Activities:** Any real estate activity involving own or leased property, for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate. However, this would not include, (i) construction / development of industrial parks / integrated townships/SEZ (ii) purchase / long term leasing of industrial land as part of new project / modernisation of expansion of existing units and (iii) any activity under 'infrastructure sector' definition



# ● All-in-Cost ceiling

- **Benchmark rate**
  - (6 months LIBOR or 6 months interbank interest rate applicable to currency of borrowing for eg., EURIBOR ) plus 450 bps spread
  - Benchmark rate in case of Rupee denominated ECB / TC will be prevailing yield of the Government of India securities of corresponding maturity.
- **All-in-cost Components –**
  - Rate of Interest, other fees, expenses, charges, guarantee fees, ECA charges whether in FCY or INR
- **Specific Exclusions :**
  - Commitment fees
  - Withholding Tax paid in Indian Rupees
- **Penal interest for default of any covenants: Not be more than 2% over the contracted rate of interest**

*(All-in-cost should be within the applicable ceiling at all times, for eg., giving interest breaching the ceiling in first year and much lower in second year so as to comply on an average, is not permitted)*

# ● Limits & Currency

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- **Individual limit of borrowing**
  - ECB up to USD 750 million or equivalent per financial year irrespective of the category of borrower under automatic route
- **Currency:** ECB can be raised in any freely convertible foreign currency as well as in Indian Rupees as stipulated
- **Change of currency of ECB**
  - ECB from one convertible foreign currency to any other convertible foreign currency as well as to INR is freely permitted (at an exchange rate prevailing on the date of agreement or less than that rate with consent of ECB Lender).
  - Change of currency from INR to any foreign currency is, however, not permitted.

# ECB Liability : Equity Ratio & Parking ECB proceeds

## ECB Liability : Equity Ratio

- In case of FCY ECB from direct foreign equity holder - Ratio not to exceed 7:1 .
- Not applicable if outstanding ECB (including proposed ECB) is upto USD 5 million
- Borrowing entities to be governed by guidelines on debt equity ratio issued, if any, by the sectoral or prudential regulator concerned
- Proposed ECB to be added to all the outstanding ECB for ECB Liability : Equity ratio – except ECB raised for refinancing
- Equity includes - paid-up capital plus free reserves (incl. proportionate share premium received in FC) as per latest audited balance sheet.

*Non-convertible Preference Shares not to be included in Equity*

## Parking ECB proceeds

### Abroad

- ECB for foreign currency expenditure can be parked abroad pending utilization;
- Till utilisation, can be invested in liquid assets (certificate of deposits, Treasury bills, deposits with foreign branches / subsidiaries of Indian banks abroad)

### Domestically

- ECB for Rupee expenditure to be immediately repatriated to India;
- Can be invested in term deposits for maximum period of 12 months

*(It cannot be extended beyond this period. Funds have to be shifted to non-interest bearing account or returned back to the lender beyond 12 months)*

# Refinancing & Conversion

## Refinancing existing ECB

- Refinancing of existing ECB by raising fresh ECB is permitted provided:
  - No reduction in outstanding maturity of the original borrowing;
  - all-in-cost of fresh ECB to be lower than all-in-cost of existing ECB
- Refinancing of ECBs raised under the previous ECB framework – permitted
- Fresh ECB is not availed from overseas branches / Subsidiaries of Indian banks except for highly rated corporates (AAA) and Maharatna / Navratna public sector undertakings

Refinancing of INR ECB with FCY ECB is not permitted.

## Conversion of ECB into equity: Permitted subject to following:

- Activity of borrowing company covered under automatic route or required approval is obtained for FDI;
- Conversion not to breach applicable sectoral cap under FDI policy;
- Compliance with pricing guidelines (FV on date of conversion);
- Consent of other lenders; and
- Conversion at exchange rate on the date of agreement or any lesser rate with mutual Consent

ECB interest also permitted to be converted into equity subject to applicable conditions

# Hedging Requirements

## Hedging Framework:

### Foreign Currency Denominated:

- To follow guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator
- For Infrastructure space companies
  - Requires board approved risk management policy
  - Mandatory hedge of 70% of ECB exposure if average maturity < 5 years

### Operational aspects of Hedging:

- **Coverage:** Hedge required to cover principal and interest from the day liability created in books of borrower
- **Tenor and rollover:** Minimum tenor of 1 year of financial hedge required with periodic rollover to ensure ECB exposure is not unhedged at any point
- **Natural Hedge:** Natural hedge, in lieu of financial hedge, to be considered to the extent of offsetting projected cash flows / revenues in matching currency net off projected outflows within same accounting year

### INR Denominated

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



# Security / Creation of charge

## Security for Raising ECB

AD Banks are permitted to allow creation of charge on i) immovable assets, ii) movable assets, iii) financial securities, and iv) issue of corporate and/or personal guarantees in favor of overseas lender / security trustee, to secure the ECB to be raised / raised by the borrower. The creation of security to be co-terminus with underlying ECB subject to security clause in Loan Agreement and NOC from Indian Lenders

## Creation of Charge on Immovable Property

- Security shall be subject to FEMA (Acquisition and Transfer of Immovable Property in India) Regulation 2000;
- Permission should not be construed as permission to acquire immovable property by overseas lender / security trustee;
- In case of enforcement / invocation, property should be sold to person resident in India and proceeds shall be repatriated to liquidate the outstanding ECB

## Creation of Charge on Movable Assets

In case of enforcement / invocation of charge, the claim of the lender will be restricted to outstanding claim against ECB. (NOC from Indian lenders for moving encumbered movable assets outside India)

## Creation of Charges over Financial securities:

Below arrangements are permitted:

- Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower
- Pledge on other financial securities, viz. bonds and debentures, mutual funds etc. in the name of ECB borrower / promoter
- Security interest over all current and future loan assets and all current assets of the borrower
- In case of invocation of pledge, transfer as per extant FDI / RFPI Policy / FEMA 20R

Issue of Corporate and Personal Guarantee - Possible subject to below conditions / documents:	Issuance of Guarantee, etc. by Indian Banks and Financial Institutions
<ul style="list-style-type: none"> <li>• A copy of Board Resolution with details specified.</li> <li>• Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.</li> <li>• Compliance with the Foreign Exchange Management (Guarantees) Regulations, 2000.</li> <li>• ECB can be credit enhanced / guaranteed / insured by overseas party if it is recognised lender under extant ECB guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• Issuance of Guarantee, Letter of credit, letter of undertaking or letter of comfort by Indian banks, All India Financial Institutions and NBFCs (financial intermediaries) relating to ECB is not permitted.</li> <li>• Indian financial intermediaries (Banks, NBFCs or All India Financial Institutions) cannot invest in FCCBs / FCEBs in any manner.</li> </ul>

## **Non-resident guarantee for domestic fund based and non-fund based facilities:**

- The non-resident guarantor may discharge the liability by: i) payment out of rupee balance held in India or ii) by remitting the funds to India or iii) by debit to FCNR(B) / NRE account
- Non-resident guarantor may enforce his claim against resident borrower to recover the amount and on recovery amount can be repatriated subject to certain conditions
- General permission to resident to make payment to non-resident who has met the liability under a guarantee

# Reporting Requirements

**Form ECB:** Borrower is required to submit Form ECB in duplicate with AD Bank. AD Bank will forward one copy to the Director, Balance of payments statistics division, Department of Statistics and Information Management, RBI.

**Loan Registration Number:** Any draw-down in respect of ECB as well as payment of any fee / charges for ECB should happen only after obtaining LRN from RBI.

**Changes in terms and conditions of ECB:** – revised Form ECB should be submitted with DSIM within 7 days of such changes

**Monthly filings:** Borrower to submit Form ECB-2 on monthly basis with AD Bank so as to reach to DSIM within 7 days from the close of the month. All filings up to date for past ECB / FCCB before new ECB / FCCB, etc. It requires compliance certificate from CS / CA apart from that of AD-Bank.

## **Reporting on Conversion of ECB into equity :**

- Partial Conversion – Converted portion to be reported in Form FC-GPR and appropriately reported in monthly Form ECB2 – “ECB Partially converted into Equity”
- Full Conversion – Entire portion to be reported in Form FC-GPR and appropriately reported in monthly Form ECB2 – “ECB fully converted into Equity”
- For conversion of ECB into equity in phases, reporting through ECB 2 Return will also be in phases.



# Late submission fees (LSF)

Delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns can be regularized by payment of LSF as under:

Sr. No.	Type of Return / Form	Period of delay	Applicable LSF
1	Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
2	Form ECB 2 / Form ECB	Up to three years from due date of submission / date of drawdown	INR 50,000 per year
3	Form ECB 2 / Form ECB	Beyond three years from due date of submission / date of drawdown	INR 100,000 per year

- With this change, borrowers who are otherwise in compliance can regularize their reporting delays without having to go to the RBI for compounding contraventions
- Non-payment of LSF will be treated as a contravention of reporting provision and shall be subject to compounding or adjudication as provided in FEMA
- Form ECB and Form ECB 2 reporting contraventions will be treated separately.

# Powers delegated to AD Banks *(not for FCCB / FCEB)*

- |   |  |
|---|--|
| i. Change / Modification in Drawdown / Repayment Schedule   | vii. Change in name of Lender  |
| ii. Change in Currency of Borrowing   | viii. Prepayment of ECB (provided MAMP is maintained)  |
| iii. Change in AD Bank (subject to no objection certificate from earlier AD Bank)                       | ix. Cancellation of LRN (only if no draw-down)   |
| iv. Change in name of borrower Company  | x. Reduction in amount of ECB  |
| v. Transfer of ECB (on re-organization at the borrower level – merger/demerger/ acquisition as per law) | xi. Refinancing of existing ECB (provided the fresh ECB is raised at a lower all-in-cost and residual maturity is not reduced) |
| vi. Change in Recognised Lender   |  |

While permitting changes, AD Bank should ensure –

- Revised average maturity / all-in-cost are in conformity with applicable guidelines
- RBI DBR Prudential guidelines complied for credit facilities from Indian Banks or their Overseas Branches / Subs
- ECB continues to be in compliance with applicable guidelines
- Changes to be communicated in Form ECB / ECB-2 within 7 days of the changes being effected.

# Start Ups - Special dispensation under ECB

<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• An entity recognised as a Startup by the Central Government as on date of raising ECB</li> </ul>
<b>Amount, Average Maturity &amp; All-in-costs</b>	<ul style="list-style-type: none"> <li>• Amount - The limit of startup remains constant at USD three million or equivalent per financial year either in INR or any other convertible foreign currency or a combination of both</li> <li>• Ratio - Leverage ratio and ECB Liability – Equity Ratio is not applicable.</li> <li>• Maturity - Minimum average maturity period of 3 years</li> <li>• All-in-cost - Mutually agreed between the borrower and lender</li> </ul>
<b>Recognised Lender</b>	<ul style="list-style-type: none"> <li>• Lender / investor to be a resident of FATF compliant country</li> <li>• Not permissible - Overseas branches / subsidiaries of Indian banks and overseas WOS / JV of an Indian company</li> </ul>
<b>Form and End-use</b>	<ul style="list-style-type: none"> <li>• Form - Loans or non-convertible or optionally convertible or partially convertible preference shares.</li> <li>• End Use - For any expenditure in connection with the business of borrower</li> </ul>
<b>Currency and conversion</b>	<ul style="list-style-type: none"> <li>• Denominated in any freely convertible currency or in INR or a combination thereof (Hedging recommended but not mandatory)</li> <li>• Conversion of ECB into equity is freely permitted – rate as per date of agreement</li> </ul>
<b>Security and Guarantee</b>	<ul style="list-style-type: none"> <li>• Security = movable, immovable, intangible assets (including patents, IPRs), financial securities, etc.</li> <li>• Issuance of corporate or personal guarantee is allowed. NR guarantee only if Eligible Lender as above. Banks / FIs / NBFCs cannot issue any guarantee, LoC, etc.</li> </ul>

# Standard Operating Procedure (SOP) for Untraceable Entities

- New concept
- Action plan to be undertaken by the AD Banks and RBI against untraceable entities in contravention of reporting provisions under the New ECB Framework, for eight quarters or more
- Stricter compliance requirements in relation to ineligibility for untraceable entities

**Untraceable Entities:** Any borrower who has raised ECB will be treated as 'untraceable entity', if:

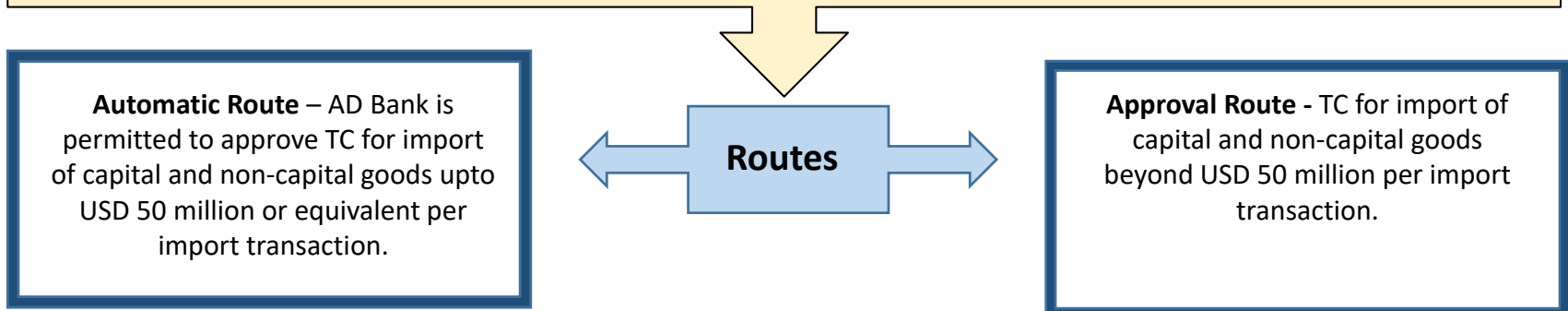
- Entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/reply in negative for a period of not less than two quarters with documented communication/reminders numbering 6 or more; and it fulfills both the following conditions:
  - a) Entity not found to be operative at the registered office during the visits by the officials; and
  - b) Entities have not submitted Statutory Auditor's Certificate for last two years or more

**Action:** The followings actions are to be undertaken in respect of 'untraceable entities':

- 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;
- No fresh ECB application by the entity should be examined/processed by the AD bank;
- Directorate of Enforcement to be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- No inward remittance or debt servicing will be permitted under auto route.

# Trade Credits

Trade credits refer to credits extended directly by the overseas supplier, bank and financial institution for a maturity period up to 3 years for imports into India. Trade credit includes Suppliers credit (Overseas Supplier himself) & Buyers credit (By Overseas Banks & Financial Institutions)



## Maturity Prescription (with no roll / extension beyond the permitted period)

- **Import of non-capital goods** - Up to 1 year from the date of shipment or operating cycle whichever is less.
- **Import of capital goods** - Up to 3 years from date of shipment.

**Reporting**- Monthly reporting in Form TC by AD Category 1 Banks (not later than 10<sup>th</sup> of the following month) / Quarterly reporting – Issuance of Bank Guarantees.

## Other points

- All in costs: up to 250 basis points + 6 months LIBOR. Includes rate of interest, other fee, expense, charges, guarantee fee whether in FCY or INR
- AD Banks permitted to issue Guarantee in favor of overseas supplier, bank or financial institution not exceeding the amount of TC and the period cannot exceed the maximum permissible period for TC.

## **RBI Guidelines on Funds raised overseas by overseas holding / association / subsidiary / group companies**

- Indian companies or their AD banks are not allowed to issue direct or indirect guarantee or create any contingent liability or offer any security for borrowings by overseas holding / association / subsidiary / group companies except for purposes explicitly permitted in the relevant regulations
- Funds raised overseas by above entities with support from Indian companies and AD Banks cannot be used in India (except general or special permission outside India).
- Strict penal action for violation

## **Items of Compounding**

- End-use not complied
- Eligible lender conditions not complied
- Loans from un-recognised borrowers
- MAMP not complied
- ECB compliances not undertaken
- Undue gain even if interest free loan (except when converted)
- Deemed ECB
  - Overdue imports payables
  - Overdue current account payables
  - On-behalf payments by overseas entities
  - Exports Advance without underlying

# Minimum Average Maturity Period ('MAMP')

Illustration for calculating Minimum Average Maturity as available in the RBI circular

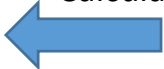
## Calculation of Average Maturity- An Illustration

ABC LTD.                      Loan Amount = USD 2 million

Date of drawal / repayment (MM/DD/YYYY)	Drawal	Repayment	Balance	No. of Days** balance with the borrower	Product= (Col.4 * Col. 5)/ (Loan amount * 360)
Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
05/11/2007	0.75		0.75	24	0.0250
06/05/2007	0.50		1.25	85	0.1476
08/31/2007	0.75		2.00	477	1.3250
12/27/2008		0.20	1.80	180	0.4500
06/27/2009		0.25	1.55	180	0.3875
12/27/2009		0.25	1.30	180	0.3250
06/27/2010		0.30	1.00	180	0.2500
12/27/2010		0.25	0.75	180	0.1875
06/27/2011		0.25	0.50	180	0.1250
12/27/2011		0.25	0.25	180	0.0625
06/27/2012		0.25	0.00		

**Average Maturity= 3.2851 years**

\*\* Calculated by = DAYS360 (firstdate, seconddate, 360)



# Infrastructure Space Companies

## **Definition:**

- Companies in the infrastructure sector\*;
- NBFC undertaking infrastructure financing;
- Holding Companies / Core Investment Companies undertaking infrastructure financing;
- Housing Financing Companies regulated by National Housing Bank; and
- Port Trusts (constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908)

*\* Infrastructure Sector: It has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors, approved by Government of India vide Notification No. 13/06/2009-INF, as amended / updated from time to time. For ECB, “Exploration, Mining and Refinery” sectors will be deemed as in the infrastructure sector.*







**Questions**

**&**



**Answers**

**THANK YOU ALL FOR YOUR ATTENTION !**

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