VIVRO
FINANCIAL SERVICES

FINTELLIGENCE

ISSUE 5 | MAY - JUNE 2016

FOREWORD

The Companies Act, 2013 brought about several changes in corporate regulations, several of them, emanating on account of aggressive interpretation of laws under the Companies Act 1956 Act by members of corporate India. The intention of any regulator is to ensure that the spirit of the law is adhered to and that measures are taken to ensure that investors and stakeholders are protected at all costs. There was no formal regulation governing Private Placement of Securities under the Companies Act 1956 and hence on the backdrop of the Sahara case, the government brought formal private placement regulations in the Companies Act 2013. By introducing a defined process, timelines for issue and allotment, use of a separate/escrow in bank account to maintain transparency and refund mechanisms with interest and strict penalties for violating regulations are some measures that will echo-well in the investor fraternity. In this issue of Fintelligence, we have articulated the regulations governing Private Placement of Securities under the Companies Act 2013 and other applicable industry specific regulations.

The Indian banking sector has evolved significantly over the years and in this evolution, the lending rates and policies to determine these lending rates have also progressed from the Benchmark Prime Lending Rate (BPLR) system from 2003 to 2010 to the Base Rate system from 2010 to 2016 and now to the Marginal Cost of funds Lending Rate (MCLR) system effective from 1st April 2016. The Reserve Bank of India has moved to the MCLR system with the ultimate objective of effective transmission of policy rate changes to borrowers in a timely and effective manner. This introduction will certainly bring in needed transparency in the system.

Keeping in mind the corporate governance principle of 'protection of minority shareholders' which is of more significance in a listed company, the Takeover Regulations have tried to strike a balance between the interests of the shareholders, acquirers and the Target Company and to ensure that the public shareholders of a listed company are treated fairly and equitably. Competing offers have a special feature of providing public shareholders an opportunity for accepting more favourable price as well as an opportunity to determine the controlling shareholders of the target company. At the same time, there is a need to ensure that competing offers are run in a fair, transparent and equitable manner, so as to ensure an orderly resolution of a competitive situation. In this issue we have written about the concept of Competing Offers under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and certain key case studies to address the practicalities of the concept.

On November 30th, 2015 the Reserve Bank of India (RBI) issued a circular detailing the revised framework of external commercial borrowings keeping in mind the pace of reforms and development of the regulatory and business environment. The revised framework aims to encourage long term ECBs denominated in foreign currency as well as in INR. Towards this measure, in order to rationalize the regulations, ECBs have been divided into three Tracks – Track I, Track II and Track III i.e. medium term ECB in foreign currency, long term ECB in foreign currency and ECBs denominated in Indian Currency respectively. The revised framework has brought in most ECBs under the automatic route and has also liberalized the end-use restrictions and expands the list of overseas lenders.

We are happy to release our May – June, 2016 issue of Fintelligence. We hope you enjoy this edition of Fintelligence. Please write back to us on fintelligence@vivro.net with your valuable feedback and comments.

Nilesh Vaishnav

Chairman

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PRIVATE PLACEMENT OF SECURITIES **AN OVERVIEW**

A Private Placement is any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter. Securities issued as private placements include debt, equity, and hybrid securities.

The regulations for private placement of securities are codified under sections 42 and 62 of the Companies Act, 2013. The companies act 2013 has formally introduced the concept of Private Placement, which earlier was operating through practice and experience with support of certain provisions scattered over various sections. These regulations are more specifically laid down to address various parameters on which a private placement can be undertaken.

The government brought formal Private Placement regulations to address the issues which were brought up on account of the Sahara case. In the said matter, two Sahara group companies namely Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) floated an issue of Optionally Fully Convertible Debentures (OFCDs) as a "Private Placement" and collected investments of over INR 24,000 crores from over 2 crore investors. When it came to the knowledge of SEBI that the OFCDs were issued to a large number of investors from the public, it issued a show cause notice to SIRECL and SHICL inter alia stating that the issuance of OFCD's are public issue and therefore liable to be listed u/s 73 of Act, 1956 and also directed to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, since they had violated various other clauses of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 and also various provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

It was urged by the Sahara Group that OFCDs were issued in the nature of "hybrid instruments" as defined u/s 2(19A) the Companies Act, 1956 and SEBI did not have jurisdiction to administer those securities since hybrid securities were not included in the definition of 'securities' under the Securities and Exchange Board of India Act, 1992 ("SEBI Act"), or the Securities Contract Regulation Act, 1956 ("SCRA"), but would be governed by the Central Government under section 55A(c) of the Companies Act, 1956. The Supreme Court held that OFCDs issued by Sahara Group were public issue of debentures, hence securities and once the number 49 is crossed, the proviso to Section 67(3) becomes effective and it is an issue to the public, which attracts Section 73(1) of the Companies Act, 1956 and application for listing becomes mandatory which falls under the administration of SEBI u/s 55A(1)(b) of the Act, 1956. The Court upheld the proceedings of the SEBI and Sahara Group was ordered to refund the amount to investors along with interest.

Conditions for Private Placement under the Companies Act, 2013

- **Maximum Number of Persons:** An offer for private placement can be made to not more than 200 people in a financial year. This limit excludes Qualified Institutional Buyers and Employees, as defined in the Issue of Capital and Disclosure Requirements, 2009, as amended from time to time and is calculated individually for each kind of security.

  In case of Non-Banking Financial Companies (NBFCs), in case of Private Placements of NCDs of maturity of more than 1 year, there are two separate categories – More than INR 1 crore per investor and less than INR 1 crore per investor. In case of NCDs issuances with less than INR 1 crore per investor there is a limit of 200 subscribers for each financial year and such subscriptions shall be fully secured. For issuances of INR 1 crore or more per subscriber, there is no limit on the number of subscribers. The option to create security in favour of the subscribers will be with the issuer. These provisions however do not apply to tax exempt bonds offered by NBFCs.

- **Minimum amount of offer for an individual:** The value of the Offer per person shall not be less than INR 20,000 of 'face value' of securities.

- **Persons to whom an offer can be made:** All offers shall be made only to those persons whose names are recorded by the company prior to the invitation to subscribe and allotments can be made only to such persons who have been addressed and the offer is made along with the Offer letter.
- **Mode of Payment:** All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.
- **No advertisement of offer:** No company offering securities under private placement shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an offer.
- **Bank Account:** The application money received from the private placement offer shall be deposited in a separate bank account in a scheduled bank.
- **Minimum gap between two offers:** A company can come with a new offer after completion of the earlier offer. However, no fresh offer or invitation shall be made unless the allotments with respect to any previous offer or invitation have been completed or been withdrawn or abandoned by the company.

It has also been laid that if a company makes an offer or accepts monies in contravention to the regulations under the Companies Act, the company, its promoters and directors shall be liable for a penalty up to the amount involved in the offer or invitation or Rs. 2 crore, whichever is higher, and the company will be liable to refund all monies to subscribers within a period of 30 days of the order imposing the penalty.

Procedure for Private Placement

The procedure for private placement has been laid down under section (1) (c) and is read with section 42 of Companies Act, 2013.

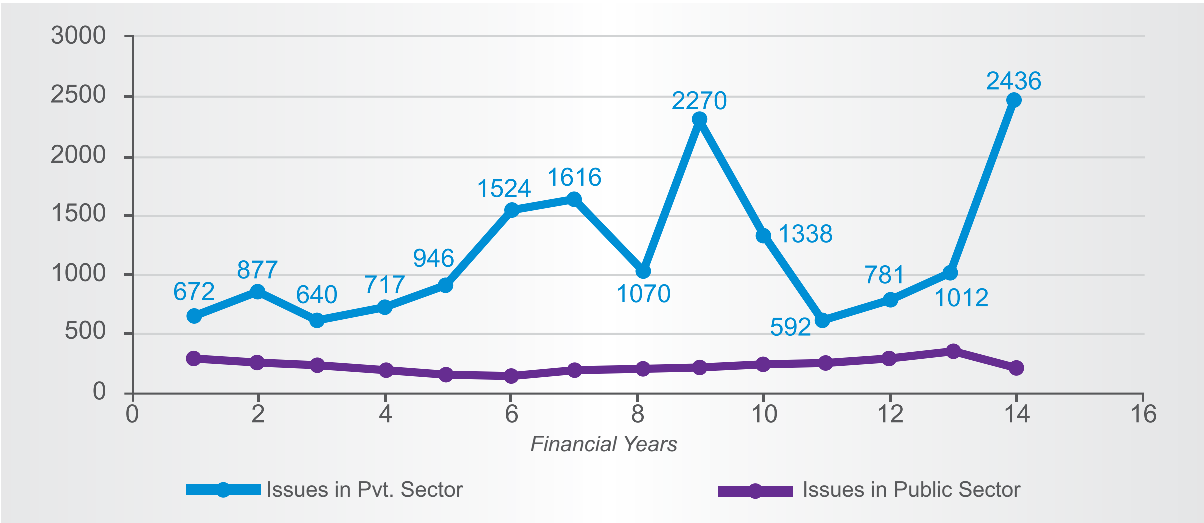
A company must ensure that its articles of association authorize increase of share capital by private placement. If not, appropriate approvals from Board and the shareholders to be sought and resolutions to be passed.

- **Identification of Persons to whom the offer/invitation shall be made:** All Private Placement offers shall be made to only those persons whose names are recorded by the company prior to the invitation to subscribe and such persons shall receive the offer by name.
- **Preparation of the Private Placement Letter of Offer:** For every private placement an Offer Letter is to be prepared as per form PAS 4. The Letter of Offer shall contain such details including – General information about the company, management perception of risk factors, disclosures on the directors, litigations on the company as well as on the directors etc., It shall contain the complete particulars of the offer containing all terms and conditions as well as objects for making the private placement, amount to be raised, time schedule, details of any security etc. It shall also contain the Financial Position of the Company, Capital Structure, Profits, Dividends, Summary of financial position for past three years, Audited cash flow statement, any change in accounting policies, etc.
- **Special Resolution:** Prior approval of shareholders shall be taken by way of a Special Resolution for each offer/ invitation for private placement. The explanatory statement attached to the notice to the general meeting shall include the justification of the price at which the offer is being made. In the case of non-convertible debentures, prior approval of shareholders by a Special Resolution is required only once a year for all the offers of such debentures during the year.
- **Circulation of the Offer Letter:** The offer letter along with the application form addressed specifically to the proposed allottees shall be sent either in writing or electronic form within 30 days of recording the names of such persons as specified above. Only the person to whom the application form is addressed shall be permitted to subscribe using that particular application form.
- **Prepare and Maintain a Record of Private Placement offers:** The Company shall maintain a complete record under Form PAS 5 of the offer made under Private Placement. The details shall include name of the person, father's name, complete address, contact details, signature of the officer designated to maintain the records etc..

- **ROC Filing – PAS 4 and PAS 5:** The Company shall file PAS 4 and PAS 5 within a period of 30 days with the Registrar of Companies in such manner as prescribed under the Act and Rules. The Company shall also file these forms with SEBI if the company is listed.
- **Board Meeting and Allotment of Securities:** The Company shall call a Board meeting to consider the allotment of Privately Placed securities and make an allotment of securities under Private Placement within 60 days from the date of receipt of application money for such securities. If the company is unable to allot such securities within that period of time, it shall repay the application money to subscribers within 15 days from the date of completion of 60 days. If however the company fails to repay the allotment money within the 15 days period stated hereinabove, it shall be liable to repay that money with an interest rate of 12% p.a. from the expiry of the 60 day period mentioned hereinabove.
- **ROC Filing PAS 3:** The Company is required to file with the ROC a return of allotment under form PAS 3 giving complete particulars of the list of allottees – full name, address, PAN, email address, class of security, date of becoming a security holder, number of securities, nominal value of securities, amount paid up and consideration received. The form shall also contain the requisite Board resolutions and valuation reports, if any.
- **Issue Share Certificates:** Once the above mentioned process is completed, the Company shall issue share certificates to the respective allottees.

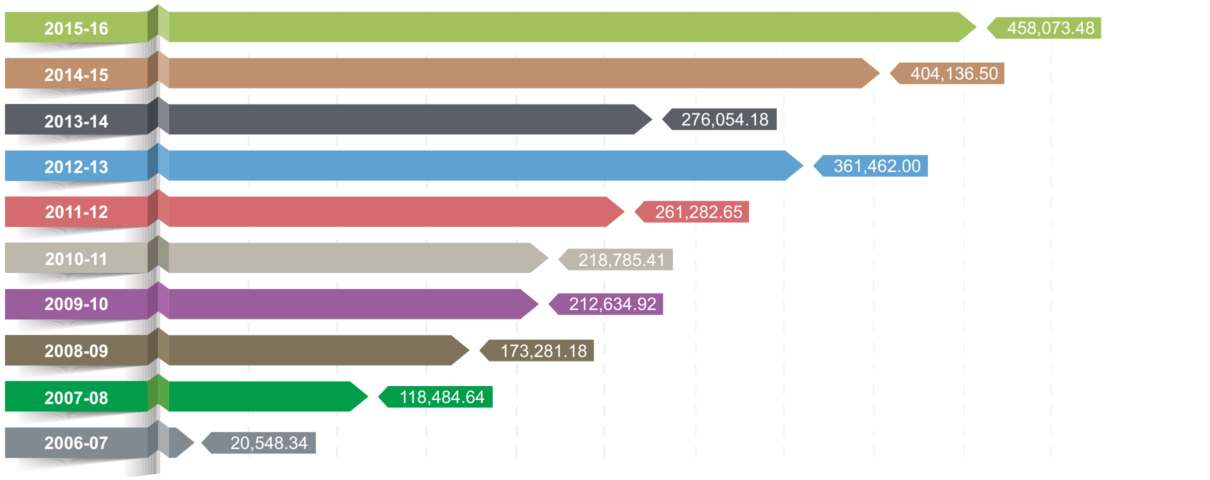
Private Placement Market

Private Placement has evolved to be a preferred route for raising resources by both private and public sector companies. In India, the route has gained importance during the last few years, in lieu of the prolonged subdued conditions in the new issues market. In terms of instruments, equity portion is more often prescribed through preference shares while the debt portion is instrumented through bonds and debentures.



Source: RBI

While the equity markets recover from economic and political concerns in the economy and gain buoyancy, private placement in bonds and debentures have caught attention of companies.



Source: RBI

Conclusion

Companies Act, 2013 has brought about several changes with respect to Private Placements which are especially welcome from the point of view of investors. By introducing a defined process, timelines for issue and allotment, use of a separate/ escrow in bank account to maintain transparency and refund mechanisms with interest and strict penalties for violating regulations are some measures that will echo-well in the investor fraternity. Ofcourse, while measures have been taken to protect investors it shall certainly involve stiffer compliance and greater care on the part of companies.

Nevertheless, Private Placements as a means of raising capital shall continue to be used by companies. The Indian economy is certainly seen as a bright spot amidst the global economy and companies shall witness an investment interest from global as well as Indian investors. Private Placements are expected to run bullish in years to come owing to the future business foray and the high leveraged financing structure of several sectors, compelling them to look for alternate capital raising options. Private Placement will not only allow such companies to remain private and raise fund in lesser time and costs but also choose their own set of investors with like goals and enable them to make a return over a longer period of time.

MCLR
THE NEW BENCHMARK FOR INTEREST RATES

Introduction

The Indian banking sector has evolved significantly over the years and in this evolution, the lending rates and policies to determine these lending rates have also progressed from the Benchmark Prime Lending Rate (BPLR) system from 2003 to 2010 to the Base Rate system from 2010 to 2016 and now to the Marginal Cost of funds Lending Rate (MCLR) system effective from 1st April 2016.

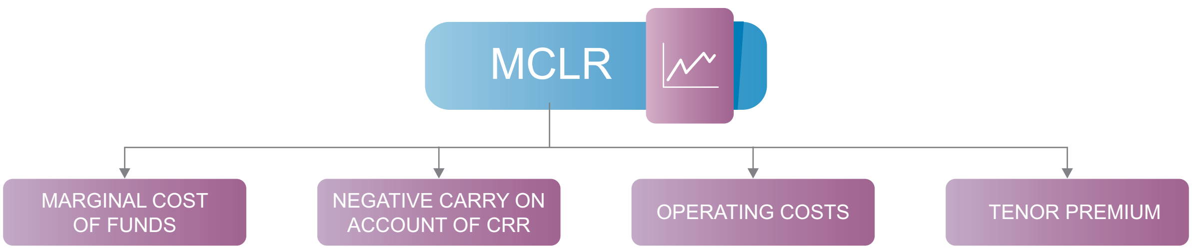
The Reserve Bank of India (RBI), being the regulator of banks and financial institutions in India has developed these systems based on changing macro and micro economic environments in India and factors abroad which have a bearing on interest rates in India. The BPLR system was flawed in the sense that it acted as a benchmark and not a firm floor rate. Hence banks often charged lower interest rates to the BPLR to esteemed corporate customers and higher rates to retail borrowers, which defeated the purpose of the system. It also resulted in another problem – bank interest rates ceased to respond to monetary policy changes that the RBI introduced. In 2010 the RBI moved to the Base Rate system, under which the RBI provided an 'illustrative' formula to compute the Base Rate. However, banks were free to use a system it deemed fit based on its business operations to determine a base rate (floor rate). On top of this rate banks added the tenor premium, risk premium and product premium to arrive at the final lending rate for borrowers – corporate/wholesale and retail. Under this system, banks were free to determine a base rate and publish the same once a year, the impact of change in repo rates etc. did not translate back to the end customer.

Effective 1st April 2016, the RBI has moved to the MCLR system with the ultimate objective of effective transmission of policy rate changes to borrowers in a timely and effective manner. Through the introduction of MCLR, the RBI seeks to ensure that the lending costs are in line with the marginal cost of funds (fresh incremental borrowings). For example, if the bank cuts deposit rates it will automatically have to transmit the cut in deposit rates to its lending rates. The bottom line the RBI seeks to communicate is – If you can borrow at lower rates, you may as well lend at lower rates!

Marginal Cost of Funds Lending Rate (MCLR)

MCLR is a tenor linked internal benchmark of a bank which is the minimum lending rate of a particular maturity for all loans linked to that benchmark. The Interest Rate charged by banks on advances shall be a combination of the MCLR and Spread charged by the banks considering their business strategy and credit risk premium. The banks have the authority to change the spread charged on MCLR linked loans – however it is not so easy. The spread charged to a customer can be increased only in case of deterioration of credit risk profile of the borrower. Such decision must be supported by complete risk profile review of the borrower. Hence, increasing the spread may become operationally difficult for the banks.

There are 4 major components of the MCLR



I. Marginal Cost of funds:

Marginal cost of funds = 92% x Marginal Cost of Borrowings + 8% x Return on Net Worth

Marginal Cost of Borrowing:

It takes into consideration two major sources of funds for Banks – Deposits and Borrowings

Deposits	
Current Deposits	The core portion of current deposits identified based on the guidelines on Asset Liability Management is to be considered for arriving at the balance outstanding.
Savings Deposits	The core portion of savings deposits identified based on the guidelines on Asset Liability Management issued vide circular dated October 24, 2007 should be reckoned for arriving at the balance outstanding.
Term Deposits (Fixed Rate)	Term deposits of various maturities including those on which differential interest rates are payable should be included.
Term Deposits (Floating Rate)	The rate should be arrived at based on the prevailing external benchmark rate on the date of review.
Foreign Currency Deposits	Foreign currency deposits, to the extent deployed for lending in rupees, should be included in computing marginal cost of funds. The swap cost and hedge cost of such deposits should be reckoned for computing marginal cost.

Borrowings	
Short Term Rupee Borrowings	Average rates at which such short term borrowings were raised in the last one month to be considered. For eg. Interest on borrowings from RBI under LAF will be the average interest rate at which a bank has borrowed from RBI under LAF during the last one month.
Long Term Rupee Borrowings	Option 1: Average rates at which such long term borrowings were raised to be considered. Option2: Proxy Rate - Appropriate benchmark yield for bank bonds published by FIMMDA for valuation purposes.
Foreign Currency Borrowings including HO Borrowings by Foreign Banks	Foreign currency borrowings, to the extent deployed for lending in rupees, should be included in computing marginal cost of funds. The all-in-cost of raising foreign currency borrowings including swap cost and hedge cost would be reckoned for computing marginal cost of funds.

$$\textbf{The Marginal Cost of Borrowings for each component} = \frac{\textbf{Rates offered on deposits on the date of review}}{\textbf{rates at which funds are raised to the Balance}} \times \textbf{Balance outstanding as on the previous day of review as a percentage of total funds (other than equity)}$$

Return on Net Worth:

The Marginal Cost of Funds shall include the amount of common Equity Tier 1 capital required to be maintained for Risk Weighted Assets as per extant capital adequacy norms.

Since currently, the common equity Tier 1 capital is (5.5% +2.5%) 8% of RWA, the weightage given for this component in the marginal cost of funds will be 8%. The cost of equity will be the minimum desired rate of return on equity computed as a mark-up over the risk free rate. Banks could follow any pricing model such as Capital Asset Pricing Model (CAPM) to arrive at the cost of capital subject to annual review.

In case of newly set up banks (either domestic or foreign banks operating as branches in India) where lending operations are mainly financed by capital, the weightage for this component may be higher i.e. in proportion to the extent of capital deployed for lending. This dispensation will be available for a period of three years from the date of commencing operations.

Accordingly as the Return on Net Worth carries an 8% weight, the balance weightage of 92% will be given to the Marginal Cost of Borrowings to arrive at the Marginal Cost of Funds.

II. Negative Carry on account of CRR:

Banks have to keep a certain level (4% as on April 5, 2016) of their deposits with the Reserve Bank. This ratio is the Cash Reserve Ratio (CRR). Banks don't earn any interest on such amounts. Hence, negative carry on CRR could also be referred to as the opportunity cost of CRR. It is computed as under:

Required CRR x (Marginal Cost) / (1- CRR)

III. Operating Costs:

Includes all operating costs associated with providing the loan product including cost of raising funds. Costs of providing services are to be recovered by way of service charges and will not form part of this component.

IV. Tenor Premium:

Tenor premium is uniform for all types of loans for a given residual tenor

Hence,

MCLR = Marginal Cost of funds + Negative Carry on account of CRR + Operating Costs + Corresponding Tenor Premium.

The exhibit below shows the MCLR rates of select banks:

Sr No.	Bank	Base Rate (%)	MCLR (%)				
			Overnight	1 Month	3 Month	6 Month	1 Year
1	State Bank of India	9.30	8.95	9.05	9.10	9.15	9.20
2	Punjab National Bank	9.60	9.15	9.20	9.30	9.35	9.40
3	Bank of Baroda	9.65	9.00	9.00	9.05	9.10	9.30
4	Bank of India	9.70	9.15	9.20	9.25	9.30	9.40
5	Union Bank of India	9.65	9.25	9.30	9.35	9.45	9.50
6	Canara Bank	9.65	9.00	9.25	9.35	9.40	9.45

Source: Official website of Banks

It can be noticed that the difference between the Base Rate and 1 Year MCLR varies from 10 bps to 30 bps across select six nationalized banks. The short tenor MCLR for bigger banks would be around 90-100 bps lower than the base rate, making it comparable to commercial paper (CP) rates with similar tenor. On the longer end (one-year rate), considering the 70-75 bps of tenor premium in the market, the difference from the base rate could be around 25-30 bps. Banks with a higher share of stable current and savings accounts will see less impact. Those with a relatively higher mix of domestic borrowing (in the form of longer tenor senior or subordinated debt) will be better positioned (in the current decreasing interest rate scenario).

Review of MCLR

Banks shall review and publish their MCLR of different maturities (Overnight, One month, Three Month, Six Month & 1 year) every month on a pre-announced date with the approval of the Board or any other committee to which powers have been delegated.

Spread

Borrowers shall be charged an interest rate which shall be equal to the applicable MCLR plus the spread charged by the bank. Banks are advised to determine their spread taking into consideration their business strategy and credit risk premium of the borrower based on the credit risk rating/scoring model adopted by banks or based on external credit rating. To existing borrowers the spread may be changed subject to a full-fledged risk profile review of the customer. However this stipulation shall not be applicable to loans under consortium / multiple banking arrangements.

Reset of Interest Rates

- Banks may specify interest reset dates on their floating rate loans. Banks will have the option to offer loans with reset dates linked either to the date of sanction of the loan/credit limits or to the date of review of MCLR.
- The MCLR prevailing on the day the loan is sanctioned will be applicable till the next reset date, irrespective of the changes in the benchmark during the interim.
- The periodicity of reset shall be one year or lower. The exact periodicity of reset shall form part of the terms of the loan contract.

Exemptions

The following shall be exempt from complying with the MCLR mechanism:

- Loans covered under Specially Formulated Government Schemes
- Working Capital Term Loan (WCTL), Funded Interest Term Loan (FITL), etc. granted as part of the rectification/ restructuring package.
- Loans granted under various refinance schemes formulated by Government of India or any Government Undertakings. Interest rate charged on the part not covered under refinance should adhere to the MCLR guidelines.

The following categories of loans can be priced without being linked to MCLR as the benchmark for determining interest rate:

- Advances to banks' depositors against their own deposits;
- Advances to banks' own employees including retired employees;
- Advances granted to the Chief Executive Officer / Whole Time Directors;
- Loans linked to a market determined external benchmark;
- Fixed rate loans granted by banks. However, in case of hybrid loans where the interest rates are partly fixed and partly floating, interest rate on the floating portion should adhere to the MCLR guidelines.

Transitional Provisions for Existing Borrowers

Existing loans and credit limits linked to the Base Rate may continue till repayment or renewal, as the case may be and banks will continue to review and publish Base Rate as hitherto. Existing borrowers will also have the option to move to the MCLR linked loan at mutually acceptable terms.

Effects of MCLR to Borrowers

At the outset, it appears that interest rate policy transmission should be much quicker in the MCLR regime as compared to the earlier regime. If the RBI cuts repo rates and cost of borrowing in the system goes down, you can expect reduction in your EMI much sooner. The only draw-back is that a borrower will have to wait till the next interest reset date as agreed upon and mentioned in the loan contract / sanction letter for any rate cut to actually materialise to their account.

Banks are required to publish their MCLR every month and hence they shall be unable to hide their cost of borrowing from borrowers in order to avoid a transmission of rate cuts. This shall create sufficient transparency in the system.

It needs to be mentioned though that MCLR is a double edged sword. Just as one can expect a reduction in interest rates with efficiency and transparency, an increase in interest rates will also percolate to the borrowers just as efficiently and transparently.

Conclusion

In the erstwhile system, banks have generally refused to lower interest rates even though their cost of borrowing has gone down on account of the various monetary policy measures taken by the RBI. Under the MCLR system, it does not seem that banks will not be able to restrict transmissions of rate cuts that easily – on account of the regularity of publishing interest rates, bucketing of interest rates based on tenor and a documented need to justify a change in spread on the basis of a credit risk scoring model. The short term market is primarily governed by commercial papers. If the short term rates from banks are beneficial, there could be an increase in short term lending by banks. In time it is expected that banks with large spreads will have to fall in line with competition by lowering the spread and maintaining rates in line with the overall market.

COMPETING OFFERS UNDER SEBI (SAST) REGULATIONS, 2011

An Acquirer seeking to acquire a strategic stake in an Indian listed company (Target Company) faces certain unique challenges. On the one hand, the proposed acquisition may trigger an obligation for the Acquirer to make an open offer to acquire at least 26% of the publicly held shareholding in the Target Company, under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "Takeover Regulations"), while on the other hand, the Acquirer would also need to take into account the possibility of competing offers being launched.

The last few years have seen some high profile competing open offer battles in India. This article briefly analyses the regulatory aspects applicable to competing open offers in India, under the Takeover Regulations with the help of recent competing offers that took place in India.

What is a Competing Offer

The term 'Competing Offer' refers to an offer given by any other person (Competing Acquirer) after an offer has already been given by an Acquirer to the public shareholders of the Target Company to acquire the shares held by them. Regulation 20 of SEBI (SAST) Regulations, 2011 governs and deals with the concept of Competing Offer. For example if 'A' (Acquirer) has already given an open offer to the shareholders of X Ltd. (Target Company) and subsequently during the relevant period, B (any other Acquirer) also gives another offer to the shareholders of the Target Company, then offer given by B shall be termed as Competing Offer in terms of the Takeover Regulations.

The Takeover Regulations aims to protect the interests of the public shareholders by providing an exit opportunity at the best possible terms. Accordingly, the Takeover Regulations permits, a third person to make a Competing Offer to acquire the shares of the Target Company when the Acquirer's open offer is subsisting. At the same time it is of prime importance to achieve orderly competition between Acquirers (Competing Acquirer) vying for the same Target Company. Therefore, the Takeover Regulations regulates Competing Offers as provided herein below:

a. Size of Competing Offers

- The minimum number of shares for a competing offer shall be determined as under:

Existing Holding of Competing Acquirer along with PACs
+
Number of Shares to be acquired through the Competing Offer

Should be at least equal to

Existing Holding of First Acquirer
+
Number of Shares proposed to be acquired under the Offer
+
Underlying Agreement for the acquisition of shares

- In case of a competing offer, the subsisting mandatory offer's size can be increased up to 3 working days prior to the commencement of the tendering period.[1]
- In case of a competing offer, the subsisting voluntary offer's size can be increased within a period of fifteen working days from the public announcement of a competing offer.

b. Timing of the Competing Offer:

- A Competing offer has to be made within fifteen working days from the public announcement of the original open offer.
- After fifteen working days from the date of public announcement of the open offer under the Takeover Regulations (voluntary or mandatory) till the expiry of the offer period for such open offer, no person can make a public announcement of an open offer for acquiring shares, or enter into any transaction that would trigger the Takeover Regulations requiring a mandatory open offer.

c. Offer Price

- The offer price for each of the competing offers will be determined in accordance with the parameters prescribed under Regulation 8 of the Takeover Regulations.
- In case of competing offers, upward revisions of the offer price is permitted at any time up to 3 working days prior to the commencement of the tendering period.

Pre-requisites for Making a Competing Offer

- There has to be a subsisting public announcement of an open offer by an acquirer under the Takeovers Regulations.
- Any person other than the original acquirer who has made the subsisting open offer can make the competing offer.
- Interestingly, the Takeover Regulations permits all persons other than the original acquirer to make a competing offer and does not restrict even the PACs of the acquirer from making a competing offer. This omission could be an oversight by the regulators but even if the PAC of an acquirer makes a competing offer, the offers of the acquirer and the PAC shall be consolidated as a single offer for the purposes of the Takeover Regulations.
- The Takeover Regulations does not impose any restriction on the number of competing offers, provided all the offers are made within the timeframe prescribed.
- Competing offer can be conditional as to the minimum level of acceptances only if the original open offer is conditional as to the minimum level of acceptances.
- Though a competing offer under the Takeover Regulations is made by the acquirer voluntarily, a competing offer shall not constitute voluntary offer under the Takeover Regulations. Therefore, the conditions applicable to a voluntary offer under the Takeover Regulations (viz. Prior holding of at least 25% or more shares, no acquisition during the preceding 52 weeks, No further acquisition of shares for a period of six months) shall not be applicable to a competing offer and therefore all the provisions of offer size, would also apply in case of Competing Offer.
- The schedule of activities and the tendering period for all competing offers shall be identical and the last date for tendering shares in acceptance of the every competing offer shall stand revised to the last date for tendering shares in acceptance of the competing offer last made.
- No induction of any new director to the board of directors of the target company during the pendency of competing offers, provided that in the event of death or incapacitation of any director, the vacancy arising therefrom may be filled by any person subject to approval of such appointment by shareholders of the target company by way of a postal ballot.
- Acquirers who have made the first public announcement, as well as competing acquirers, shall be allowed to revise the terms of their offers as long as these revisions are favorable to the target shareholders.

1. 2(za) "Tendering period" means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares.

Prohibitions on Competing Offers in Certain Cases

In view of Regulation 20 (7), making a following competing offer, or entering into a transaction which would trigger an obligation to make a following competing offer is not permitted, until after the expiry of the offer period, in the following cases:

I. where the original open offer is for the acquisition of shares pursuant to a disinvestment in terms of Regulation 13(2)(d) (the term "disinvestment" is defined to mean the sale by the Central Government or any State Government or a government company of shares or voting rights in, or control over, a public sector undertaking); or

II. where the open offer is pursuant to a relaxation granted by the SEBI pursuant to Regulation 11(2) from strict compliance with the various open offer obligations set out in Chapters III and IV under Regulation 11(2), SEBI may grant such a relaxation where the Central Government or a State Government or any regulatory authority has superseded and replaced the board of the target company or where it is otherwise satisfied that such a relaxation will be in the interests of the public, investors and the securities market.

Case studies on Competing Offers

- Battle for Mangalore Chemicals & Fertilizers Limited (MCFL) (TC):

Background:

SCM Soilfert Limited ("Acquirer") was promoted by (PAC) Deepak Fertilizers and Petrochemicals Corporation Limited (DFPCL) and owned 25.30% shares in MCFL.

Inter- relation between competing Acquirer and PACs with it:

Competing Acquirer and PACs belonged to two groups i.e. Adventz Group controlled by Mr. Saroj Kumar Poddar and UB Group controlled by Dr. Vijay Mallya (VM)

- Competing Acquirer i.e. (Zuari Fertilizers and Chemicals Ltd.), a wholly owned subsidiary of Zuari Agro Chemicals Pvt. Ltd., which held 16.47 % shares in MCFL, ,
- United Breweries (Holdings) Ltd., (UBHL) a flagship holding company of UB Group, controlled by V M. UBHL held 15.05% shares in MCFL;
- Kingfisher Finvest India Ltd., (KFL), a wholly owned subsidiary of UBHL, was part of UB Group, KFH held 2.01 % shares in MCFL;
- McDowell Holdings Ltd.,(MHL), part of the UB group and promoted by UBHL, KFIL, Mallya Private Ltd. and V M , MHL held 4.92% shares in MCFL (Together referred to as UB group and promoters of MCFL)

First Open Offer:

On April 23, 2014, SCM Soilfert Limited ("Acquirer") along with (PAC) made an open offer to acquire up to 26.00% of the voting share capital of the Target Company at a price of Rs. 63.00 per share. The open offer triggered as the Acquirer's shareholding increased from 24.5% to 26.2%, and open offer was made under Regulation 3(1) of the SEBI (SAST) Regulations, 2011. The Offer Price was revised to Rs. 93.60 per share. 5.94% shares were accepted under the open offer. The post offer shareholding of Acquirer and PACs increased to 31.25% of the equity share capital of the Target Company. This was also considered as a hostile bid for Mangalore Chemicals & Fertilizers Limited against the promoters of the company.

Competing Offer:

The corporate battle took a decisive turn on May 13, 2014 when Adventz Group along with UB Group made a competing offer for acquisition of 26% of the share capital of MCFL against the original offer. The UB Group was not in a position to finance the competing offer, Adventz Group was willing to finance the competing offer and participate in the management of the TC. Accordingly Adventz Group along with UB Group made a competing offer to acquire 26% shares of MCFL at a price of Rs. 68.55, the offer price was revised to Rs. 81.60. The Adventz group acquired 0.04% shares in the open offer. Post open offer shareholding of the Competing Acquirer and PACs increased to 38.44%.

The competing offer was successful as post offer shareholding of the Acquirers increased to 38.44 which was higher than the post offer shareholding of the Acquirers of the First Offer. Presently the promoters of MCFL are KFL, MHL, UBH and ZFCL and their aggregate shareholding is 75% of the total paid and voting capital of the Target Company.

- Fame India Limited Competing Offer under SEBI (SAST) Regulations, 1997

There was a fierce tussle between two prominent multiplex brands, viz. Inox Leisure Limited ("Inox") and Reliance Media works Limited ("RML") to acquire a third one, Fame India Limited ("Target Company" / "Fame"). This case study is quite fascinating and interesting as it involves making a competitor open offer to acquire a company even when the earlier acquirer had already acquired a controlling stake in it.

Inox purchased a 43.2% stake in Fame from the Shroff family, the promoters of the company, for Rs. 44/- a share and subsequently bought another 7.2% for Rs 50.75 before launching the mandatory 20% open offer at a price of Rs. 51/- per equity share ("Inox Offer Price") payable in cash which triggered the open offer and made the first public announcement of its offer on February 6, 2010. Reliance Group in terms of provision of Regulation 25 of the Takeover Regulations 1997 made the public announcement of its counter-offer on February 21, 2010, which was well within the stipulated time.

Reliance group through open market purchases acquired 6.12% of the Fame Equity, thereby increasing its existing stake of 6.02% to 12.14%. The offer ("Reliance Open Offer"), a voluntary offer, was made by the Reliance Group to the equity shareholders of Fame as a competitive bid to acquire up to 62.36% of the voting capital of Fame (to meet with the condition that the competing offer should be at least equal to the holding of the first bidder including the number of shares for which the offer by the first bidder has been made), at a price of Rs. 83.40 for each equity share of Fame ("Reliance Offer Price") payable in cash. The Reliance Offer Price was at premium of 63.5% over the Inox Offer Price.

Despite the efforts of the Reliance Group of offering a higher price and an offer to acquire higher number of shares from the public shareholders of Fame India Limited, they could not succeed in acquiring control over the Target Company.

- Great Offshore Limited (GOL/ Target Company /TC) Competing Offer under SEBI (SAST) Regulations, 1997

First Offer:

Voluntary open offer was made by Natural Power Ventures Private Limited (NPVPL), the Acquirer along with Bharti Shipyard Limited (BSL) and Dhanshree Properties Private Limited (DPPL), being persons acting in concert with the Acquirer to acquire 20% of the emerging Voting capital of the Great Offshore Limited at an offer price of Rs. 344/- per equity share on June 3, 2009.

The Acquirer and the PACs were holding 23.19% of the total paid-up equity share capital of the TC as on the date of the Letter of Offer. The Offer Price of Rs. 344/- per Equity Share, as offered earlier was revised to Rs. 405/- per Equity Share, which was further revised to Rs. 560/- per Equity Share vide the first corrigendum.

The Acquirers acquired 21.02% equity shares under the open offer and their total shareholding post open offer was 44.26%.

Competing Offer:

Eleventh Land Developers Private Limited along with ABG Shipyard Limited made competitive bid on June 23, 2009 to acquire 1,25,71,072 Equity Shares representing 32.12% of the Target Company at an offer price of Rs. 375/- per equity share.

Subsequent to the Public Announcement the Acquirer/ PAC acquired 6.16% additional Shares of the TC Company at a maximum price of Rs.450/- and 519.94 through open market purchases. Consequent to the Open Market Purchases, Offer Price was revised to Rs.450/- per Share and was further revised to Rs. 520/- per Share of the Target Company through corrigendum.

The Competing Acquirers along with PAC were holding 8.28% of the total paid up equity share capital of the TC as on the date of Letter of Offer.

The Competing Acquirers acquired 15.23% in the open offer aggregating their shareholding to 23.51%. Post open Offer the shareholding of the Competing Acquirers was 15.23% as they sold around 8.28% by way of market sales.

In the end competing offer failed and the original open offer was successful in acquiring control over Great Offshore Limited as the post open offer shareholding of the First Acquirers was more than the Acquirers who made the competing offer.

Conclusion

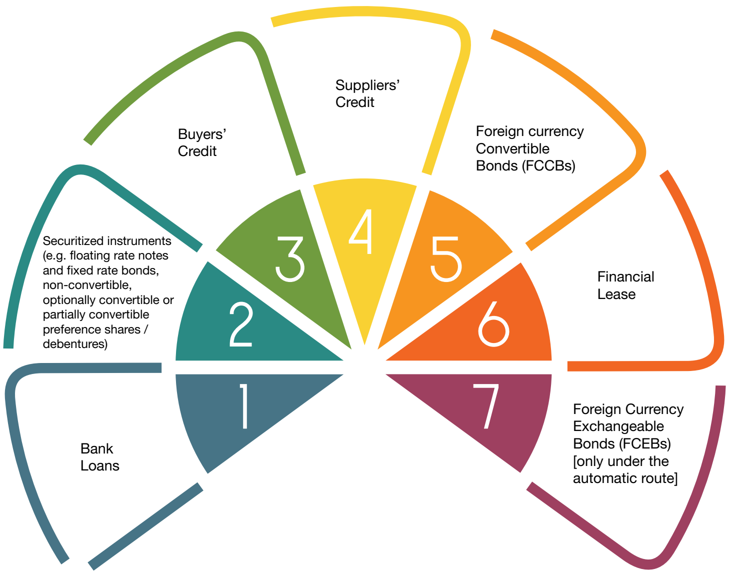
Keeping in mind the corporate governance principle of 'protection of minority shareholders' which is of more significance in a listed company, the Takeover Regulations have tried to strike a balance between the interests of the shareholders, acquirers and the Target Company and to ensure that the public shareholders of a listed company are treated fairly and equitably. The Takeover Regulations do not regulate or impose any restrictions on the target company from soliciting competitive bids from other potential bidders. The Regulations have been designed in such a manner which provides equal opportunity to all the shareholders to choose either to remain with the new promoter or to exit. Competing offers have a special feature of providing public shareholders an opportunity for accepting more favourable price as well as an opportunity to determine the controlling shareholders of the target company. At the same time, there is a need to ensure that competing offers are run in a fair, transparent and equitable manner, so as to ensure an orderly resolution of a competitive situation.

EXTERNAL COMMERCIAL BORROWING

On November 30th, 2015 the Reserve Bank of India (RBI) issued a circular detailing the revised framework of external commercial borrowings keeping in mind the pace of reforms and development of the regulatory and business environment. The revised framework aims to encourage long term ECBs denominated in foreign currency as well as in INR. Towards this measure, in order to rationalize the regulations, ECBs have been divided into three Tracks – Track I, Track II and Track III i.e. medium term ECB in foreign currency, long term ECB in foreign currency and ECBs denominated in Indian Currency respectively. The revised framework has brought in most ECBs under the automatic route and has also liberalized the end-use restrictions and expands the list of overseas lenders.

Forms of ECB:

Borrowings raised under the ECB framework may be in the following forms



Key highlights of the ECB policy:

1. Minimum Average Maturity

Track 1 (Medium Term ECB)	Track 2 (Long Term ECB)	Track 3 (INR denominated ECB)
	Minimum Average Maturity	
• Up to USD 50 mn or its equivalent: 3 years • Beyond USD 50 mn or its equivalent: 5 years	10 years, irrespective of the amount	Same as Track I

2. Eligible Borrowers

Track 1 (Medium Term ECB)	Track 2 (Long Term ECB)	Track 3 (INR denominated ECB)
• Companies in following sectors: – Manufacturing sector – Software development – Shipping and airlines • Units in SEZs • SIDBI • Exim Bank (approval route)	• All entities under Track I • Companies in infrastructure sector • Core investment companies • REITs and INVITs registered with SEBI	• All entities under Track II • All NBFCs • Entities engaged in micro finance activities • Companies in Miscellaneous Services, viz. – R&D – Training(excluding educational institutes) – Companies supporting infrastructure – Logistic services • SEZs/NMIZs Developers

Remarks:

- Logistic services companies are now eligible to avail ECB;
- Infrastructure companies and CIC/holding companies to now need to comply with 10 years MAM, unless ECB is denominated in INR;
- REITs/INVITs are now permitted to raise long term ECB under Track II and III which would assist the construction sector in raising the much needed cash;
- SEZ/NMIZ developers are now covered under the automatic route under Track III;
- All NBFCs are now eligible to raise ECB under Track III, subject to end-use restrictions;
- LLPs are still not included in the list of eligible borrowers.

3. Recognized Lenders/Investors:

Track 1 (Medium Term ECB)	Track 2 (Long Term ECB)	Track 3 (INR denominated ECB)
• International Banks; • International Capital Markets; • Multilateral / Regional / Government Owned Financial Institutions; • 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 at International Financial Services Centers in India • Overseas branches / subsidiaries of Indian Banks	• All entities listed under Track I but for overseas branches / subsidiaries of Indian Banks.	• All entities listed under Track I but for overseas branches / subsidiaries of Indian Banks. • In case of NBFCs – MFI, other eligible MFIs, not for profit companies and NGOs, ECB can also be availed from overseas organisations and individuals satisfying prescribed conditions.

4. All-in-Cost Ceiling (AIC)

Track 1 (Medium Term ECB)	Track 2 (Long Term ECB)	Track 3 (INR denominated ECB)
• Average maturity of 3-5 years: 300 bps over the 6-month LIBOR • Average maturity of above 5 years: 450 bps over the 6-month LIBOR • Penal interest: Maximum 2% over and above contracted interest rate	Maximum spread of 500 bps p.a. over the benchmark. Remaining conditions will be the same, as given under Track 1.	To be in line with the market conditions

All-in-cost includes rate of interest, other fees, expenses, charges and guarantee fees whether paid in foreign currency or INR but will not include commitment fees, pre-payment fees / charges, withholding tax payable in INR.

5. Permitted End-Uses: A small negative list of end use restriction is specified as below.

Track 1 (Medium Term ECB)	Track 2 (Long Term ECB)	Track 3 (INR denominated ECB)
• Capital expenditure in the form of: – Import of capital goods – Local sourcing of capital goods – New projects – Modernization/ expansion of existing units – Overseas Direct Investments – Acquisition of shares of PSUs under the disinvestment programme of Government of India – Refinancing of existing trade credit raised for import of capital goods – Payment of capital goods already shipped/ imported but unpaid – Refinancing of existing ECB, provided residual maturity is not reduced. • SIDBI - only for the purpose of on-lending to borrowers in the MSME sector. • Units of SEZs - only for their own requirements. • Shipping and Airlines companies - only for import of vessels and aircrafts respectively. • For General Corporate Purpose (including working capital), provided the ECB is raised from direct/ indirect equity holder, or group company, for a minimum average maturity of 5 years. • Approval route: – Import of second-hand goods as per DGFT guidelines – On-lending by Exim Bank	• Any end-use other than the following: – Real estate activities – Investing in capital market – Using proceeds for equity investment domestically – On-lending to other entities with any of the above objectives – Purchase of land • Holding companies can also use ECB proceed to provide loans to their infrastructure SPVs.	• Any end-use other than the following: – Real estate activities – Investing in capital market – Using the proceeds for equity investment domestically – On-lending to other entities with any of the above objectives – Purchase of land • SEZs/ NMIZs Developers - Only for providing infrastructure facilities within SEZ/ NMIZ. • NBFCs can use ECB proceeds for: – On-lending to infrastructure sector – Providing hypothecated loans to domestic entities for acquisition of capital goods/equipment – Providing capital goods/ equipment to domestic entities by way of lease / hire-purchase • Entities in micro-finance sector - Only for on-lending to self-help groups or for microcredit or for bona fide microfinance activity including capacity building.

6. Individual Limits under Automatic Route:

Sector	Route	
	Automatic	Approval
Infrastructure and Manufacturing	Upto USD 750 million	USD 750 million and above
Software Development Activities	Upto USD 200 million	USD 200 million and above
Micro Finance Activities	Upto USD 100 million	USD 100 million and above
Others	Upto USD 500 million	USD 500 million and above

The above limits are separate from the limits allowed under the framework for issuance of Rupee denominated bonds overseas. For computation of individual limits under Track III, exchange rate prevailing on the date of the agreement should be taken into account.

Currency of Borrowing

ECB can be raised in any freely convertible currency as well as in INR. For INR-denominated ECB, lenders (other than foreign equity holders) are required to mobilise INR through swaps/outright sale undertaken through an AD Cat I bank in India.

Change of currency from one convertible foreign currency to another convertible foreign currency/INR is freely permitted. Rate for conversion into INR shall be the rate prevailing on the date of agreement for such change or any exchange rate lower than the rate prevailing on the date of agreement. However, change of currency from INR to foreign currency is not permitted.

Part Refinancing of Existing ECBs

Part refinancing of ECBs by raising fresh ECBs is permitted provided that - there is no reduction in residual maturity of the ECB and fresh ECB has lower all-in-cost.

Parking of Proceeds

While the conditions concerning parking of ECB proceeds are similar to the existing framework, the new framework permits ECB borrowers to park ECB proceeds in term deposits with AD banks up to 12 months (previously 6 months). The deposits should be unencumbered.

Prepayment of ECBs and Conversion to Equity

Pre-payment is permitted without any restriction on amount subject to compliance with stipulated minimum average maturity.

Conversion of ECB to equity shall be permitted subject to FDI Policy guidelines and as per the extant ECB guidelines.

Security for raising ECBs

Security for ECBs may in the form of charge created 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 ECBs to be raised/ raised by the borrower subject to the fact that underlying ESB is in compliance with extant ECB guidelines, a security clause exists in the loan agreement and there is no objection from existing domestic lenders, as applicable.

Guarantees by Indian Banks and Financial Institutions

Indian Banks, All India Financial Institutions and NBFCs shall not be permitted to issue guarantees, SBLC, Letter of undertaking or comfort letters relating to ECBs. No financial intermediary shall be permitted to invest in FCCBs.

Conclusion

ECBs have developed into a significant instrument for inviting investments into Indian Companies which has further gained significant momentum after the government's proactive approach to attract foreign capital as well as the various Make in India initiatives. ECBs could be availed under the older regime up to March 31, 2016, provided the loan agreement was executed prior to the enforcement of the Revised Framework i.e. December 02, 2015, except for, (i) ECB facility for working capital by airlines companies; (ii) ECB facility for consistent foreign exchange earners under the USD 10 billion scheme; and (iii) ECB facility for low cost affordable housing projects (as defined in the extant foreign direct investment policy) where agreements can be executed and loan registration number can be obtained by March 31, 2016 irrespective of enforcement of the Revised Framework.

Through the revised framework RBI has promoted long term foreign currency borrowings to make repayments more sustainable and minimizing roll-over risks for borrowers. A major change is brought in by allowing Indian Companies to raise ECBs through INR denominated Bonds where the currency is borne by the lender.

About Vivro

Vivro is a Financial Services Group engaged in the business of providing Investment Banking, Corporate Finance, Corporate & Financial Advisory and Asset Resolution Services. Vivro Financial Services Private Limited is a Merchant Banker registered with the Securities Exchange Board of India (SEBI) and Vivro Capital Advisors Private Limited is a Company that provides Asset Resolution Services to Banks and Financial Institutions.

Our Team

Vivro is founded by experienced professionals who have been engaged in Capital Market and Corporate Finance services for the last three decades. Our company is supported by a team of more than 90 enthusiastic and motivated people from different backgrounds with varied educational accomplishments and expertise. The talent pool of our company comprises of Chartered Accountants, Company Secretaries, MBAs, Lawyers as well as Ex-Bankers who have held senior positions at various banks and financial institutions. This mix of people infuses elements of creativity and professionalism in our workplace, which adds tremendous value to the services that we offer. With a strong team in place, Vivro is able to deliver value added solutions, tailor-made to suit the requirements of our clients.

Our Value Proposition

Vivro has emerged as a knowledgeable and reliable partner for businesses both in India and Abroad. Vivro has catered to several companies over the years and it enjoys tremendous confidence from clients, investors, lenders, brokers and financial institutions. Our advisory services and our ability to access the right capital for the right investment opportunity have resulted in significant stakeholder value creation. Vivro has a disciplined and demonstrated process specifically tailored for each client and transaction to maximize value.

Capital Market Services

Our Capital Markets team assists private companies to raise capital from capital markets through

- Initial Public Offers of Equity & Debt, Placements, while they assist public limited companies in a host of capital market transactions ranging from Rights Issue,
- Qualified Institutional Placements,
- Institutional Placement Program, and various other Merchant Banking compliances relating to Takeover, Open Offers, Buybacks, Delisting, etc.

Corporate Finance

Vivro syndicates and structures debt finance through several instruments such as:

- Term Loans/ Project Loans
- Working Capital Finance/ Corporate Loans/Letter of Credits/Bank Guarantees/External Commercial Borrowings
- Factoring/Commercial Paper
- Inter Corporate Deposits, Structured Finance, Infrastructure Financing, etc.

Corporate Advisory

Our corporate advisory services:

- Private Equity and Venture Capital placement and advisory
- Mergers and Acquisitions: Buy/ Sell advisory as well as schemes of arrangement for corporate reorganization
- Valuation Services and Fairness Opinions
- ESOP Structuring and Valuation

Business Consulting

Our Business Consulting Services:

- Business and Expansion Plans and Strategies
- Corporate Governance and Reporting
- Corporate Organization
- Succession Planning
- Entry into India Services

Asset Resolution

Vivro is empaneled with over 30 banks and carries out effective strategies for recovery of NPA accounts, enforcement of assets under law, arranging for sale of assets or eventual settlement to affect Final Recovery of advances on behalf of these banks and financial institutions.

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