

FEMA External Commercial Borrowings (ECB) Regulations

By

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FEMA Act – Introduction

- Rationale behind the Act
- Effective date of new Act
- Applicability of the Act
- Its size and nature
 - 49 Sections
 - 6 Rules
 - 26 Regulations
- Other related matters

Key Definitions (1/5)

- Authorized Person [2(c)]
- Capital Account Transaction [2(e)]
 - a transaction which alters
 - the assets or liabilities, including contingent liabilities, outside India of persons resident in India
 - or assets or liabilities in India of persons resident outside India,
 - includes transactions referred to in sub-section (3) of section 6
- Currency [2(h)]
 - includes
 - all currency notes, postal notes, postal orders, money orders,
 - cheques, drafts, travellers cheques,
 - letters of credit, bills of exchange and promissory notes,
 - credit cards or such other similar instruments, as may be notified by the Reserve Bank

Key Definitions (2/5)

- Current Account Transaction [2(j)]
 - transaction other than a capital account transaction, and includes
 - payments due in connection with
 - foreign trade,
 - other current business,
 - services, and
 - short-term banking and credit facilities in the ordinary course of business
 - payments due as interest on loans and as net income from investments,
 - remittances for living expenses of parents, spouse and children residing abroad, and
 - expenses in connection with foreign travel, education and medical care of parents, spouse and children

Key Definitions (3/5)

- Foreign Currency [2(m)]
- Foreign Exchange [2(n)]
 - Means foreign currency and includes
 - deposits, credits and balances payable in any foreign currency
 - drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency
 - drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency
- Foreign Security [2(o)]
 - Means any security
 - in the form of shares, stocks, bonds, debentures or
 - any other instrument denominated or expressed in foreign currency and
 - includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency

Key Definitions (4/5)

- FDI – reg 2(xvii) of FDI Regulations
 - ‘Foreign Direct Investment’ (FDI) means investment through capital instruments by a person resident outside India in an unlisted Indian company; or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company;
 - Note: In case an existing investment by a person resident outside India in capital instruments of a listed Indian company falls to a level below 10 percent of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI.
 - Explanation: Fully diluted basis means the total number of shares that would be outstanding if all possible sources of conversion are exercised

Key Definitions (5/5)

- Person[2(u)] – includes
 - individual,
 - HUF,
 - company,
 - firm,
 - AOP or a BOI, whether incorporated or not,
 - every artificial juridical person, and
 - any agency, office or branch owned or controlled by such person;
- Foreign Security [2(o)]
 - Means any security
 - in the form of shares, stocks, bonds, debentures or
 - any other instrument denominated or expressed in foreign currency and
 - includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency

FEMA Trigger Points

- Transaction between person resident in India and Resident outside India
- Transaction by Resident in Forex
- Transaction by Non Resident in Rupees
- Transaction by Resident outside India
- Transaction by Non Resident in India

Rules at glance

Sl. No.	O R No./ R R No. (if any)	Rule Title	Commonly referred as
1	379/2000	FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000	Encashment Rules
2	380/2000	FEM (Authentication of Documents) Rules, 2000	Authentication of Documents Rules
3	381/ 2000	FEM (Current Account Transactions) Rules, 2000	CAT Rules
4	382/2000	FEM (Adjudication Proceedings and Appeal) Rules, 2000	Adjudication and Appeal Rules
5	383/2000	FEM (Compounding Proceedings) Rules, 2000	Compounding Rules
6	677/2000	The Appellate Tribunal For Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000	ATFE Rules

Regulations at Glance (1/3)

Sl. No.	O R No./ R R No. (if any)	Regulation Title	Commonly referred as
1	1/2000	FEM (Permissible Capital Account Transactions) Regulations, 2000	Capital Account Transactions
2	2/2000	FEM (Issue of Security in India by a Branch, Office or Agency of a person resident outside India) Regulations, 2000	IDR Regulations
3	3/2000	FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000	ECB Regulations
4	4/2000	FEM (Borrowing or Lending in Rupees) Regulations, 2000	Rupee Borrowing Regulations
5	5/2000/ 5 (R) – 2016 (RB)	FEM (Deposit) Regulations, 2016 (Revised wef 01-04-2016)	Deposit Regulations
6	6/2000/ 6(R) – 2015 (RB)	FEM (Export and Import of Currency) Regulations, 2015 (Revised wef 29-12-2015)	Currency Regulations
7	7/2000/ 7-(R) – 2015 (RB)	FEM (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 (Revised wef 21-01-2016)	Foreign Assets Regulations
8	8/2000	FEM (Guarantees) Regulations, 2000	Guarantee Regulations
9	9/2000/ 9 (R) – 2015 (RB)	FEM (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 (revised wef 29-12-2015)	Forex Realization Regulations
10	10/2000/ 10 (R) – 2015 (RB)	FEM (Foreign Currency Accounts by a person Resident in India) Regulations, 2015 (Revised wef 21-01-2016)	Foreign Currency accounts Regulations
11	10A/2014	FEM (Crystallization of Inoperative Foreign Currency Deposits) Regulations, 2014	Foreign Deposits Regulations

Regulations at Glance (2/3)

Sl. No.	O R No./ R R No. (if any)	Regulation Title	Commonly referred as
12	11/2000/ 11(R) – 2015 (RB)	FEM (Possession and Retention of Foreign Currency) Regulations, 2015 (Revised wef 29-12-2015)	Possession of Foreign Currency Regulations
13	12/2000/ 12(R) – 2015 (RB)	FEM (Insurance) Regulations, 2015 (Revised wef 29-12-2015)	Foreign Insurance Regulations
14	13/2000/ 13(R) – 2016 (RB)	FEM (Remittance of Assets) Regulations, 2016 (Revised wef 01-04-2016)	Remittance of Assets Regulations
15	14/2000/ 14(R) – 2016 (RB)	FEM (Manner of Receipt and Payment) Regulations, 2016 (Revised wef 02-05-2016)	Receipt and payment Regulations
16	20/2000/ 20(R) – 2017 (RB)	FEM (Transfer or issue of security by a person resident Outside India) Regulations, 2017 (Revised wef 07-11-2017)	FDI Regulations
17	21/2000	FEM (Acquisition and transfer of Immovable Property in India) Regulations, 2000	Acquisition of Immovable Properties In india
18	22/2000/ 22(R) – 2016 (RB)	FEM (Establishment in India of Branch or Office or other place of business) Regulations, 2016 (Revised wef 31-03-2016)	Branch Office Regulations
19	23/2000/ 23(R) – 2015 (RB)	FEM (Export of Goods and Services) Regulations, 2015 (Revised wef. 12-01-2016)	Exports Regulations
20	24/2000	FEM (Investment in Firms or Proprietary concern in India) Regulations, 2000	Investments into Firm or Proprietary concerns
21	25/2000	FEM (Foreign Exchange Derivatives Contracts) Regulations, 2000	Derivatives Regulations

Regulations at Glance (3/3)

Sl. No.	O R No./ R R No. (if any)	Regulation Title	Commonly referred as
21	71/2002	FEM (Off-shore Banking Units) Regulations, 2002	OBU Regulations
22	101/2003	FEM (Withdrawal of General Permission to Overseas Corporate Bodies) Regulations, 2003	OCB Regulations
23	120/2004	FEM (Transfer or Issue of Any Foreign Security) Regulations, 2004	ODI regulations
24	10A/2014	FEM (Crystallization Of Inoperative Foreign Currency Deposits) Regulations, 2014	Crystallization regulations
25	339/2015	FEM (International Financial Services Centre) Regulations, 2015	IFSC Regulations
26	348/2015	FEM (Regularization of Assets Held Abroad by a Person Resident in India) Regulations, 2015	Black Money Regulations

Definition of Resident in India (2 (v)) (1/2)

a person residing in India for more than 182 days during the course of the preceding financial year

India

But does not include

A person who has gone out of India or who stays outside India, in either case-

- (a) for or on taking up employment outside India, or
- (b) for carrying on outside India a business or vocation outside India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

A person who has come to or stays in India, in either case, **otherwise than-**

- (a) for or on taking up employment in India, or
- (b) for carrying on in India a business or vocation in India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Definition of Resident in India (2 (v)) (2/2)

- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India.

Definition of Non Resident Indian/ PIO

- a person resident outside India who is citizen of India;
- Person of Indian Origin (PIO) means a citizen of any country (**other than Bangladesh or Pakistan**) who had:
 - (a) at any time held Indian passport or
 - (b) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 or
 - (c) the person is a spouse of an Indian citizen or a person referred to in (a) or (b).

Note: *Clause (c) above is excluded for the purpose of acquisition of immovable property*

EXTERNAL COMMERCIAL BORROWINGS (ECB)

What is ECB

- External Commercial Borrowings (ECBs) include
 - bank loans,
 - suppliers' and buyers' credits,
 - fixed and floating rate bonds (without convertibility)
 - Financial Lease
 - borrowings from private sector windows of multilateral Financial Institutions such as **IFC, ADB, CDC** etc..
 - Euro-issues include Euro-convertible bonds and GDRs.
- **Sec.6(3) Of FEMA Act,1999 read with Notification No. FEMA 3/ 2000-RB** viz. Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, dated May 3, 2000

Regulator And Importance of ECB

Regulator- **CG with the support of RBI**

Importance

- The ECB policy focuses on three aspects:
 - Eligibility criteria for accessing external markets.
 - The total volume of borrowings to be raised and their maturity structure.
 - End use of the funds raised.

External Commercial Borrowings

- Indian companies are allowed to access funds from abroad in the following methods:



ECB – New regime

Track – I	Track-II	Track-III
Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years (manufacturing companies borrowing up to USD 50 Mn with average maturity of 1 year)	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

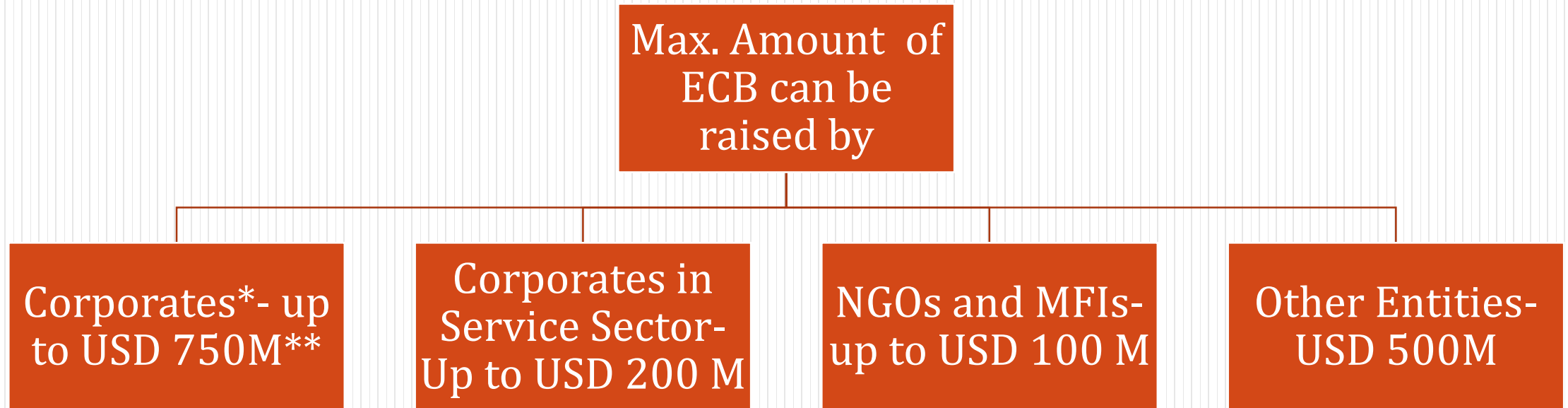
Eligible Borrowers

Track – I	Track-II	Track-III
Companies in Mfg and Software development	All entities listed under Track-I	All entities listed under Track-II
Shipping & Airline Companies	Companies in Infrastructure Sector	All NBFCs registered with RBI
SIDBI (Automatic Route) EXIM Bank(Approval Route)	REITs and INVITs	NBFC-MFI, NPOs engaged in MFI activity
Units in SEZ		Cos. engaged in R&D, Training (other than educational Inst.)
NBFC-IFC, NBFC-AFC		Cos. Supporting Infra and logistic services
Holding Companies and CIC		Developers of SEZ/NMIZs
HFC, regulated by the NHB		Companies engaged in the business of Maintenance, Repair and Overhaul and freight forwarding
Port Trusts		
EXIM Bank (Approval route)		

Recognized Lenders

Track – I	Track-II	Track-III
Multilateral financial institutions (such as IFC, ADB, CDC, etc.) / regional FIs and Govt. owned FIs	All entities listed under Track-I (except OB and Sub of Indian Banks)	All entities listed under Track-I (except OB and Subsidiaries of Indian Banks)
International capital markets		In case of MFIs and NPOs engaged in MFIs, Overseas Organizations and Individuals can lend (subject to the conditions)
International banks		
Export credit agencies		
Suppliers of equipment		
Foreign collaborators and Foreign equity holders [other than OCBs]		
Overseas Long Term Investors		
Overseas Branches/ Subsidiaries of Indian Banks		

Amount and Maturity Under Automatic Route



* Corporates include – Infra and Mfg, IFC, AFC, Holding Cos and CIC

** Public Sector Oil Marketing Companies-limit up to USD 10 Bn

All in cost ceiling

Average Maturity Period	Track-I	Track-II	Track-III
3-5 years	6 Months LIBOR+ 450 Basis Points	6 Months LIBOR+ 450 Basis Points	450 basis points over the prevailing yield of the GOI securities of corresponding maturity
More than 5 years			
More than 10 Years	NA		

Penal Interest - $\leq 2\%$

All in cost includes:

- Rate of Interest
- other fees and expenses in foreign currency
- except commitment fees
- Prepayment fees
- Fees payable in Indian Rupees

Parking of ECB Proceeds

- ECB raised abroad **meant for Rupee expenditure** in India, should be **brought immediately for credit to their Rupee accounts** with AD Category I banks in India.
- ECB proceeds meant only for **foreign currency expenditure** can be **retained abroad** pending utilization.

End Use of Proceeds

- By Corporates in Real, Infrastructure and service sectors
 - Capital Goods (Import and Local Sourcing)
 - New Project/ Modernisation
 - ODI in JV/ WOS
 - Acquisition of shares in Disinvestment process
 - Refinancing of existing TC for import of CG
 - Payment of CG already imported but unpaid
 - General Corporate Purpose (including WC) - MAM \geq 5 Years.
 - Shipping & Airline Companies - Import of Vessels & Aircrafts, respectively

End Use of Proceeds – Not Permitted

- Borrowings under Track I to III
 - Onward lending
 - Investment in Capital Markets
 - Equity Investment domestically
 - Investment in real estate sector or acquisition of land, except for affordable housing projects, SEZs and Industrial Parks & Integrated Townships
- Borrowings under Track I and II
 - Working Capital Purpose*
 - General Corporate Purpose
 - Repayment of Rupee Loans

*Exemption - Borrowings from direct and indirect equity holders with MAM > 5 years and Public Sector Oil Marketing Companies

Security

- The choice of security to be provided to the lender/supplier is left to the borrower.
- However, creation of charge over immovable assets and financial securities in favour of the overseas lender is subject to compliance of specified regulations.

Granting of NOC by AD (1/2)

- 'No objection' for Creation of charge on Immovable assets shall be granted only to a resident ECB borrower.
- The period of such charge on immovable assets has to be **co-terminus** with the maturity of the underlying ECB.
- Such 'no objection' **should not** be construed as a permission to **acquire immovable asset (property) in India**, by the overseas lender/ security trustee.
- In the event of enforcement / invocation of the charge, the immovable asset (property) will have to be **sold only to a person resident in India** and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

Granting of NOC by AD (2/2)

- No objection' for pledge of shares shall be granted only to a resident ECB borrower.
- The pledge of shares of the borrowing company **as well as domestic associate companies held by promoters** of the borrowing company to secure the ECB subject to the following conditions:
 - (i) The period of such pledge shall be co-terminus with the maturity of the underlying ECB.
 - (ii) In case of invocation of pledge, transfer shall be in accordance with the extant FDI policy.
 - (iii) A certificate from the Statutory Auditor of the company that the ECB proceeds have been / will be utilized for the permitted end-use/s.

Other Points

- Prepayment of ECB **up to USD 500 million** may be allowed by AD banks **without prior approval** of Reserve Bank subject to compliance with the stipulated minimum average maturity period as applicable to the loan.
- The existing ECB may be **refinanced** by raising a fresh ECB subject to the condition that the fresh ECB is raised at a lower all-in-cost and the outstanding maturity of the original ECB is maintained.

Application for Prior Approval

- Applicants are required to submit an application in form ECB through designated AD bank along with necessary documents.

The Chief General Manager-in-Charge,
Foreign Exchange Department,
Central Office,
ECB Division,
Reserve Bank of India,
Mumbai – 400 001.



Draw Down/LRN

- For allotment of Loan Registration Number (**LRN**), borrowers are required to submit **Form 83**, in **duplicate**, certified by a CS or CA to the designated AD bank.
- The borrower can draw-down the loan only after obtaining the LRN from DSIM, Reserve Bank.

Recurring Compliances

- Borrowers are required to submit **ECB-2 Return** certified by the designated AD bank on monthly basis so as to reach DSIM, Reserve Bank **within seven working days** from the close of month to which it relates.

Change of Terms and Other Conditions

- Earlier for cancellation of LRN and change in the end use of ECB Proceeds- approval of DSIM is required
- It has been simplified by delegating power to AD Category-I banks for
 1. Cancellation of LRN (Automatic & Approval Route)
 2. Change in the end use of ECB proceeds(Automatic route) Subject to certain conditions.However, **change in the end-use of ECBs** availed under the **approval route** will continue to be referred to the Foreign Exchange Department, Central Office, Reserve Bank of India

Conversion of ECB Into Equity- Conditions

- The activity of the company- Automatic Route for FDI

OR

- Government approval for foreign equity participation has been obtained by the company, wherever applicable.
- The foreign equity holding after such conversion of debt into equity is **within the sectoral cap**, if any,
- **Pricing of shares** is as per the pricing guidelines issued under FEMA, 1999 in the case of listed/unlisted companies.

Conversion of ECB Into Equity- Reporting

Full Conversion

- File Form **FC-GPR**
- Form **ECB-2** with in 7 working days
- "ECB wholly converted to equity" -on top of the ECB-2
- Subsequent months Filing is not necessary

Partial Conversion

- File Form **FC-GPR**
- Form **ECB-2** with in 7 working days
- "ECB Partially converted to equity" -on top of the ECB-2
- Subsequent months Filing is necessary for remaining portion of O/s ECB

Trade Credits

- Suppliers Credit – Where the overseas supplier give credit for certain period
- Buyer’s Credit – Where the overseas supplier facilitates the credit from a foreign bank / financial institution
- Maturity period
 - Capital Goods - > 1 year and < 5 years from the date of shipment
 - Others - < 1 year
- Amount – USD 20 Million per shipment
- No roll over or extension is permitted
- All in cost ceiling

Maturity Period	All-in-cost ceilings over 6 months LIBOR*
Up to one year	350 basis points
> 1 year but < 5 years	
* for the respective currency of credit or applicable benchmark	

LOANS FROM NRI

Loans from NRI / PIO

- Borrowing in FC by Individual resident Indian in India
 - The lender is a close relative (ref Sec 2(77) of Companies Act, 2013)
 - The maximum loan amount is USD 250,000 or its equivalent INR
 - The loan amount shall be received by CFE/NRE/FCNR funds
 - Minimum maturity period of the loan is 1 year
 - The loan is free of Interest
- Restriction on end use of Funds
 - The borrower shall not engage in Agricultural/ Plantation/ real estate business/ trading in TDR/ does not act as Nidhi or Chit Fund company;
 - also the funds shall not be used for investment in capital or otherwise, in any company or partnership firm or proprietorship concern or any entity, whether incorporated or not or for re-lending

Loans from NRI / PIO

- Borrowing in INR by persons other than Companies in India
 - The loan amount shall be received by CFE/NRE/NRO/FCNR funds
 - The loan period shall not exceed 3 years
 - The Rate of Interest shall not exceed 2% over prevailing bank rate
 - The loan amount is not eligible for repatriation (but eligible under USD 1 Million)

- Restriction on end use of Funds
Same as in previous slide

Loans from NRI / PIO

- **Borrowing in INR by Companies in India**
 - The amount shall be received by way issue of NCDs
 - The issue of NCDs is made by public offer
 - The loan period shall not be less than 3 years
 - The Rate of Interest shall not exceed 3% over prevailing bank rate
 - The company shall file report to RBI within 30 days of receipt
- **Additional conditions for repatriation**
 - The % of investment by NRI shall be within the limits specified under FDI
 - The amount has to come by CFE/NRE/FCNR account
- **Restriction on end use of Funds**
 - The borrower shall not engage in Agricultural/ Plantation/ real estate business/ trading in TDR/ does not act as Nidhi or Chit Fund company;
 - also the funds shall not be used for investment in capital or otherwise, in any company or partnership firm or proprietorship concern or any entity, whether incorporated or not or for re-lending

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Our Presence in

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Thank you!!!

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