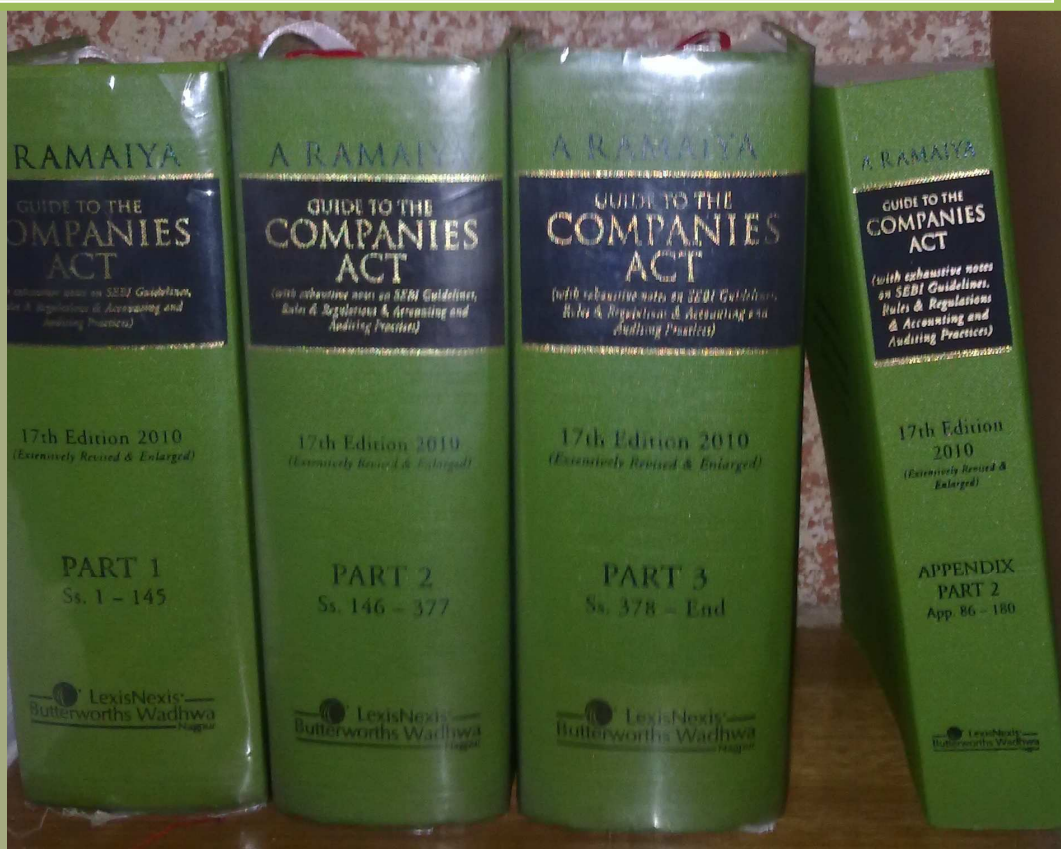


# SAMAGRATA

Providing you total updates on Corporate Laws



An initiative of Vinod Kothari & Company

SEPTEMBER, 2011

## *In this Issue*

1.	<b>Mergers and Corporate Restructuring: MCA Circular streamlines Central Government's role</b> - Team, Vinod Kothari & company	3
2.	<b>Recent developments in Company Law: MCA circulars and notifications January to Sept, 2011"</b> - Vinod Kothari	4
3.	<b>The most awaited Takeover code</b>	5-6
4.	<b>On the fast track for exit: MCA paves the way out for defunct companies</b> - Aditi Jhunjhunwala	7
5.	<b>Quick Note on Circulars issued by MCA in September, 2011</b>	8-9
6.	<b>Synopsis of the circulars issued by the RBI in September, 2011 to liberalise and rationalise ECB norms</b>	10-11
7.	<b>Students' Corner</b>	12

Join our mailing list. Register at:  
[www.vinodkothari.com/maillinglist.htm](http://www.vinodkothari.com/maillinglist.htm)

SEPTEMBER, 2011

## **Samagrata: Total updates on Corporate laws, latest events and amendments**



### **Editorial:**

It is a pleasure to present before you our second issue of **Samagrata** – a news letter on corporate law affairs and updates.

Just like the word **Samagrata**, that stands for aggregation – this newsletter is an aggregation of corporate law news and updates.

**This issue of Samagrata**, focuses on recent developments in corporate laws, measures taken by the Ministry, RBI and SEBI, their impact, regulatory aspects and others. We have made efforts to provide a 360-degree view of the developments in corporate law updates.

If you have an item to contribute for the next issue, however small or large, do not hesitate to contact at [abhijit@vinodkothari.com](mailto:abhijit@vinodkothari.com). We would be obliged for your feedback.

**Abhijit Nagee**  
Editor

Email: [abhijit@vinodkothari.com](mailto:abhijit@vinodkothari.com)  
Contact: 91-33-22817715/ 1276

## ARTICLE

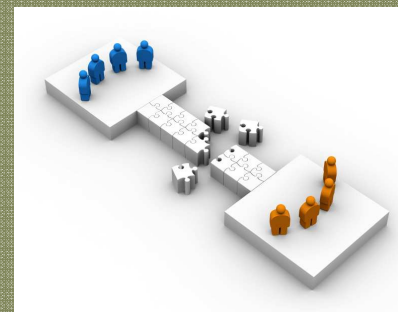
The Ministry of Corporate Affairs, in supersession of all earlier guidelines, has provided new guidelines vide General Circular 53/2011 dated 26th July, 2011 ([http://www.mca.gov.in/Ministry/pdf/Circular\\_53\\_2011\\_26july2011.pdf](http://www.mca.gov.in/Ministry/pdf/Circular_53_2011_26july2011.pdf)) for RDs and ROCs to streamline the procedure to be followed for cases u/s 391-394 and the process to be followed by the RD on receipt of notice from the court u/s 394A regarding the scheme. If the petition has already been filed with ROC in Form 61 in the system, the same can be monitored directly from the system.

Activity	Deadline provided
Mail to the concerned RoC by the RD for giving his report	Within 3 days of receipt of notice from the court
Furnishing of report by RoC	within 7 days from the receipt of Form 61 without waiting for RD's intimation
Letter to company / its Advocate to provide material of valuation report, Chairman's report regarding creditors / members meeting etc by RD	Within 5 days of receipt of notice from the court
Finalization and processing of matter	Within 7 days from receipt of information from the company/advocate
Letter to local branch of Law Ministry / Assistant Solicitor General appointed for the state by Law Ministry as the case may be (furnishing copy of the notices received u/s 394A) by the RD requesting for nomination of an advocate.	Within 7 days of receipt of notice from the court
Finalized affidavit to be sent to the designated Standing Counsel for the particular case for signature and then to Law Ministry (local branch) for identification	Within 5 days of getting required information from the company/advocate and preparation of the affidavit by the RD.

This article can be viewed at the following link:

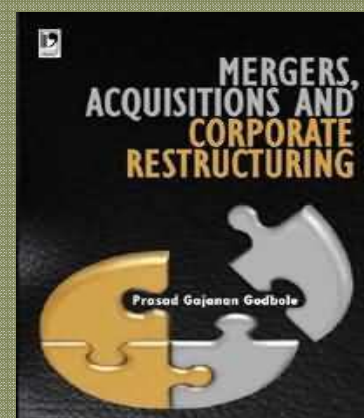
[http://www.india-financing.com/Note%20on%20guidelines%20provided%20to%20Rd%20and%20ROC%20by%20Ministry%20for%20mergers%20and%20arrangement%20schemes--in%20template%20\(2\).pdf](http://www.india-financing.com/Note%20on%20guidelines%20provided%20to%20Rd%20and%20ROC%20by%20Ministry%20for%20mergers%20and%20arrangement%20schemes--in%20template%20(2).pdf)

SEPTEMBER, 2011



### Mergers and Corporate Restructuring: MCA Circular streamlines Central Government's role

Team of Vinod Kothari & Company  
[team@vinodkothari.com](mailto:team@vinodkothari.com)



## Recent developments in Company Law: MCA circulars and notifications

*January to Sept, 2011*

Last updated 27 Sept 2011

Vinod Kothari  
Vinod Kothari & Company  
Company Secretaries in Practice  
E-mail: [vinod@vinodkothari.com](mailto:vinod@vinodkothari.com)  
Phone: 91-33-22817715/  
22813742/ 22811276

On the footsteps of RBI and SEBI, MCA has also initiated the practice of issuing master circulars and the most striking feature is the pace at which the circulars are being issued – some 38 circulars, 68 notifications and 5 amendments to Rules in the 9-month period from starting of January 2011 to September 2011 have been issued and interestingly most of them are towards speeding up things, relaxing unwanted controls, making approvals automatic, etc. MCA is using state-of-art methods – electronic mails, video-conferencing, remote location participation in general meetings, and so on to speed up things.

Click on the following link for an exhaustive presentation on the recent developments in Company Law by Mr. Kothari that covers all the circulars, notification and amendments along with their effects and advantages on the corporate structure, issued by the Ministry from January 2011 to September 2011 in the most comprehensive manner that gives a very clear understanding of all the changes brought by the Ministry during this period.

<http://www.india-financing.com/Recent%20Developments%20in%20Company%20Law%20-January%20-%2027th%20sep,%202011.pdf>

Master Circulars

## Recent developments in Company Law: MCA circulars and notifications *January to Sept, 2011*

Analysis of some major  
amendments



SEPTEMBER, 2011

# The most awaited Takeover Code

The Securities and Exchange Board of India on recommendations of TRAC introduced new SEBI (SAST) Regulations, 2011 vide notification no. SEBI/CFD/DCR/SAST/ 1/2011/09/23 dated 23rd September, 2011 ([http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1316782527325.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1316782527325.pdf)) notified to be effective from 22nd October, 2011, in order to ease out the acquisition by Indian Companies.

Here is a brief summary of the changes:

Particulars	Old Regulation	New Regulation
<b>Threshold for trigger of initial mandatory open offer</b>	15% of the of the voting capital of the target company (regulation 7)	25% of the voting capital of the target company (regulation 3)
<b>Minimum Offer size</b>	20 % of the total issued capital	26 % of the total issued capital
<b>Time for the open offer process</b>	95 calendar days	57 working days
<b>Completion of acquisition under open offer</b>	No specific time limit	not later than twenty-six weeks from the expiry of the offer period
<b>Creeping acquisition per financial year</b>	Creeping acquisition of 5% can be made per financial year by acquirers holding >15% <55% of voting capital of the Target Company	Creeping acquisition of 5% to be made per financial year by acquirers holding more than 25% of voting capital of the Target Company.
<b>Minimum public shareholding requirements</b>	Acquirer to take necessary steps to facilitate compliance with the relevant provisions of listing agreement if his shareholding pursuant to completion of open offer exceeds the maximum permissible non-public shareholding	Acquirer to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957 if his shareholding pursuant to completion of open offer exceeds the maximum permissible non-public shareholding
<b>Delisting pursuant to open offer</b>	Minimum public shareholding is to be maintained by the Acquirer post the open offer. Consequently, any delisting to be separately undertaken in compliance with Delisting Regulations, notified by SEBI.	Acquirer whose shareholding exceeds the maximum permissible non-public shareholding shall not be eligible to make voluntary delisting offer.
<b>Indirect acquisitions</b>	no express provision for compensating the public shareholders for the interim period between the primary transaction and public announcement, for treating the indirect acquisition as a direct	Indirect acquisition of shares, voting rights or control would trigger the open offer requirement regardless of the materiality of the Target Company.
<b>Payment of non-compete fees</b>	Any payment made to the persons other than the Target Company in respect to non compete fees to the extent of 25% of open offer price is not added to the open offer price.	The consideration paid for the shares in any form to the selling shareholders and their affiliates must be added to the negotiated price per share for the purpose of determining open offer pricing.

## SEBI UPDATES

Increase in corporate restructuring by Indian companies to adapt to the evolving competitive landscape demanded makeover of the existing takeover regulations. With discussions going on for quiet a long time SEBI finally came up with a new code.

### Here are some quick reactions to the new takeover code:

1. The increase in the initial threshold for trigger of open offer from 15% to 25%. This will provide ample opportunity for existing shareholders or new investors to raise their shareholding up to 25%, without making any open offer. It will also benefit companies as they will be able to attract investors in a less tedious manner, as such investors will not have any obligation to make an open offer up to the higher threshold of 25%.
2. Due to the increase in Offer size from 20% to 26% of the total issued capital, acquirers shall have the ability to obtain legitimate control of the company, with an initial 25% acquisition coupled with 26% in the open offer.
3. With regard to provision for non-compete fees, all shareholders shall be given exit at the same price.



### A Tug of War Over 'Control'

Definition of control over the years has been subject of various litigations and different outcomes

Sebi's definition includes the right to control management or policy decisions by virtue of a person or persons' shareholding or management rights or shareholders agreements or voting agreements

The takeover committee says the 'ability' to control management or

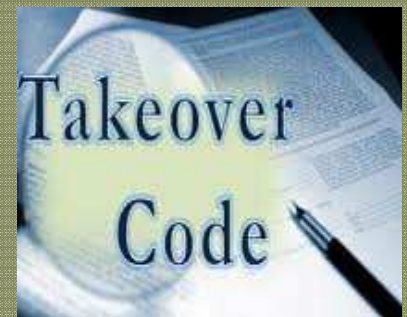
policy decisions should also be included

Sebi board has refused to accept the takeover committee's suggestion on definition, saying it is a subjective matter and interpretation can vary

The definition opens the door to the concept of negative control that is often exercised by veto rights common in most investor agreements



*"The new Takeover Code is throwing up new surprises. Regulation 3 (3) of the new law, which deals with open offer obligations of persons acting in concert (PAC), has increased the liabilities of promoter group shareholders beyond what was conceived by the Achuthan committee"*



# ARTICLE



It is quite common for entities to form companies that were formed for a once-conceived business, but that never took off and therefore, the company remains unused. Or it may be that the business ceased quite some time back and the company is lying like a shell entity over the years. Defunct companies may either be taken into winding up or may be written off as defunct by the Registrar u/s 560 of the Companies Act, 1956. Ministry has come up with various schemes for such inoperative companies. It had lately come up with an Easy Exit Scheme for the first time in the year 2010.

Click on the following link to read an elaborate article on defunct companies, MCA's initiative to bring down the level of these non-operative companies to reduce the burden of the dormant names lying in the country's list of companies and all about fast track exit (FTE) mode.

<http://www.india-financing.com/Article-Fast%20track%20exit-MCA%20smoothing%20ways.pdf>

**Register of Companies.**

**Effective date**  
The scheme is effective from 3<sup>rd</sup> July, 2011. There is no time limit for the scheme - from which it appears that the scheme may be continuing.

**Procedure**

1. Make an application in the form FTE available on MCA portal, along with a filing fee of Rs. 5000/-.
2. Form to be either digitally signed by Manager or secretary or manually by the Director authorized by BoD. Form to be mandatorily certified by PCA, PCL, PCWA.
3. If case for appointment of MCA 22 (DIR 2) is filed then the applicant will get a certificate from PCA/PCL/PCWA to the effect that the applicant(s) are the present directors of the company. No form 32/DIR 3 to be filed.
4. Company to intimate pending litigation involving the company, if any. In case pending proceedings u/s 159, 220 then company to go for compounding and get the same disposed off before processing of the application.
5. Form FTE to be accompanied by each of the directors and an indemnity bond duly notarized.
6. Company to also file a statement of accounts duly certified by the auditor or a CA in whole time practice.

DIFFERENCES BETWEEN THE FAST TRACK EXIT AND THE EASY EXIT SCHEMES. BELOW IS A SYNOPSIS:

Particulars	Fast Track Exit (FTE)	Easy Exit Scheme (EES)	
		2011	2010
<b>Eligibility</b>	Being inoperative since incorporation or is not carrying any business activity since last one year prior to application under FTE	Being inoperative or not carrying any business since 1 <sup>st</sup> April, 2008	Being inoperative or not carrying any business for atleast 2years
<b>Asset-Liability</b>	Nil assets, nil liabilities	No requirement of nil asset, nil liability	Statement of accounts depicting that companies with assets and liabilities may apply under the scheme
<b>Filing Fee</b>	Rs. 5000/-	Rs. 3000/-	No Fees
<b>Signing Application</b>	Application to be digitally signed by a director or manager or secretary; in case of manual application to be signed by a director authorised by BoD	Application to be digitally signed by one director; in case of manual application to be signed by one director	Application to be digitally signed by one director; in case of manual application to be signed by one director

Fast Track Exit would pave a way for the companies for easy dissolution rather than



**On the fast track for exit:**  
MCA paves the way out for defunct companies  
-By Aditi Jhunjhunwala  
[aditi@vinodkothari.com](mailto:aditi@vinodkothari.com)

## Article

**On the fast track for exit:**  
MCA paves the way out for defunct companies

CS Aditi Jhunjhunwala  
[aditi@vinodkothari.com](mailto:aditi@vinodkothari.com)  
Vinod Kothari & Company

## MCA's Clarification on earlier circulars

- Complied by Abhijit Nagee

### Online incorporation of companies within 24 hours

In order to give ease to the corporate world to carry business in India, the Ministry of Corporate Affairs had passed General Circular No. 49/2011 dated 23rd July modifying the incorporation procedures to enable promoters to get their companies incorporated online within 24 hours.

Further the matter has been re-examined in the Ministry and it has been decided vide **General Circular No. 61/2011** dated 5<sup>th</sup> September<sup>1</sup> that since now companies are being incorporated within 24-48 hours, on-line approval of incorporation forms i.e. STP mode of approval of e-forms 1, 18 and 32 on the basis of certification and declarations given by the practicing professional is not going to be implemented yet.

### Ministry's Clarification on notification no. S.O. 447 (E) on Revised Schedule VI (to be effective from 01.04.2011)

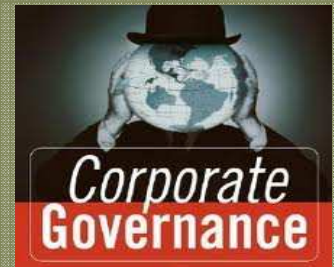
With reference to Ministry's notification no. S.O. 447 (E) dated 28.02.2011<sup>1</sup> regarding revised schedule VI of the companies Act, 1956 the ministry vide **General Circular No. 62/2011** dated 5<sup>th</sup> September, 2011<sup>1</sup> further clarified that the presentation of financial statements for the limited purpose of IPO/FPO during the FY 2011-12 may be made in the format of the pre-revised schedule VI under the Companies Act, 1956. However, for period beyond 31<sup>st</sup> March, 2012, the financial statements would be prepared only in the new format as prescribed by the present Schedule VI of the companies Act, 1956. Also the Companies must ensure that they prepare and file Annual Accounts for the financial year 2011-12 as per revised Schedule VI of the Companies Act, 1956.

### Compliance of the provisions of Companies Act, 1956 and Rules made thereunder

In order to ensure Corporate Governance and proper compliances of provisions of Companies Act, 1956, it was decided vide General Circular No. 33/2011 dated 01.06.2011, that no request (whether oral or in writing or through e-forms) for recording any event based information shall be accepted by the Registrar of Companies from defaulting Companies unless they file their updated Balance Sheet and Profit and loss Account and Annual Return with the Registrar of Companies.



## Quick Note on Circulars issued by MCA in September, 2011



INCOME STATEMENT	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
Administrative Salary	1,100.0	1,200.0	1,300.0	1,400.0	1,500.0	1,600.0
Professional Salary	1,200.0	1,300.0	1,400.0	1,500.0	1,600.0	1,700.0
Other Salary	1,300.0	1,400.0	1,500.0	1,600.0	1,700.0	1,800.0
Cost of sales	1,500.0	1,600.0	1,700.0	1,800.0	1,900.0	2,000.0
Cost of sales including depreciation	1,600.0	1,700.0	1,800.0	1,900.0	2,000.0	2,100.0
Depreciation cost of sales	100.0	100.0	100.0	100.0	100.0	100.0
Cost of sales	1,500.0	1,600.0	1,700.0	1,800.0	1,900.0	2,000.0
Other expenses	1,400.0	1,500.0	1,600.0	1,700.0	1,800.0	1,900.0
Operating expenses	1,500.0	1,600.0	1,700.0	1,800.0	1,900.0	2,000.0
Staffing, general and administrative (incl. amort)	1,000.0	1,100.0	1,200.0	1,300.0	1,400.0	1,500.0
Amortisation of software	50.0	50.0	50.0	50.0	50.0	50.0
Amortisation of patents, goodwill and other	20.0	20.0	20.0	20.0	20.0	20.0
Research, development, and related	100.0	100.0	100.0	100.0	100.0	100.0
Other expenses (incl. amort)	830.0	830.0	830.0	830.0	830.0	830.0
Total operating expenses	1,500.0	1,600.0	1,700.0	1,800.0	1,900.0	2,000.0
Operating income	1,000.0	1,100.0	1,200.0	1,300.0	1,400.0	1,500.0
Interest expense	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)
Interest on other income	50.0	50.0	50.0	50.0	50.0	50.0
Income before taxes	950.0	950.0	950.0	950.0	950.0	950.0
Provision for income taxes	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)
Income before extraordinary items	850.0	850.0	850.0	850.0	850.0	850.0
Minority interest (loss)	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
Continuing share of accounting changes	0.0	0.0	0.0	0.0	0.0	0.0
Net income	800.0	800.0	800.0	800.0	800.0	800.0

# MCA UPDATES

Now, on the requests received from various quarters of the corporates & professionals, the Ministry vide **General Circular No. 63/2011** dated 06.09.2011, states that the following forms will also be accepted by the Registrar:

Filing by Directors of defaulting Companies in the following three categories:

in respect of defaulting companies	in respect of Companies having the status of Dormant Companies	in respect of Companies having the status as active in progress companies
Form 2, Form 3, Form 5, Form 23, Form 61	Form 61, Form DIN-3, Form 32, Form 21 Form FTE	Form 32, Form 2, Form 3, Form 5, Form 21, Form 23, Form 61, Form 23AC, Form 23ACA, Form 20B, Form 21A, Form 66, Form 23B, Form FTE

Effective date of the Circular - 18<sup>th</sup> September, 2011.

**Further clarification on circular 63/2011 vide circular 64/2011 dated 20<sup>th</sup> September, 2011<sup>1</sup>**

The effective date of circular 63/2011 to be implemented has been changed to 25<sup>th</sup> September, 2011.

Click on the following link to read in details regarding all the circulars issued by the Ministry since starting of January, 2011 to September, 2011.

<http://www.india-financing.com/Consolidated Note on the Circulars of Ministry issued since January 2 011 till 25th September, 2011--By VK & Co.pdf>



Please fill out the following form. You can save data typed into this form.

### FORM 32

Particulars of appointment of Managing Director, directors, manager and secretary and the changes among them or consent of candidate to act as a Managing Director or director or manager or secretary of a company and/or undertaking to take and pay for qualification shares

(Pursuant to sections 302(C), 244(C) or 246(1)(a) and 246(1)(b)(ii) of the Companies Act, 1956)

Form Language:  English  हिन्दी

Note - All fields marked in \* are to be mandatorily filled.

- \* This form is for:  New company  Existing company
- (a) \* Form 1A reference number (Service request number (SRN) of Form 1A) or corporate identity number (CIN) of company
- (b) Global location number (GLN) of company
- (a) Name of the company
- (b) Address of the registered office of the company
- (c) e-mail ID of the company

4. Number of Managing Director, director(s) for which the form is being filed

5. Details of the Managing Director, directors of the company

Please fill out the following form. You can save data typed into this form.

### FORM NO. 61

Form for filing an application with Registrar of Companies

(Pursuant to section 166, 216, 204, 606, 621A of the Companies Act, 1956)

Form Language:  English  हिन्दी

Note - All fields marked in \* are to be mandatorily filled.

- \* Category of applicant
- \* Name of office of the Registrar of Companies (ROC) to which application is being made
- (a) Corporate identity number (CIN) or foreign company registration number (FCRN) of the company or Form 1A reference number (Service request number (SRN) of Form 1A)
- (b) Global location number (GLN) of company
- (a) Name of the company
- (b) Address of the registered office or of the principal place of business in India of the company
- (c) e-mail ID of the company

SEPTEMBER, 2011

### External Commercial Borrowings (ECB) for the Infrastructure Sector- Liberalisation

Considering the specific needs of the infrastructure sector, RBI vide **Circular No. 25** dated 23rd September, 2011, (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6731&Mode=0>) has now allowed Indian companies which are in the infrastructure sector, to utilise 25 per cent (25%) of the fresh ECB raised by the corporate towards refinancing of the Rupee loan/s availed by them from the domestic banking system, **under the approval route (with prior RBI approval)**, subject to the following conditions:-

- (i) at least 75 per cent of the fresh ECB proposed to be raised should be utilised for capital expenditure towards a 'new infrastructure' project(s),
- (ii) in respect of remaining 25 per cent, the refinance shall only be utilized for repayment of the Rupee loan availed of for 'capital expenditure' of earlier completed infrastructure project(s); and
- (iii) the refinance shall be utilized only for the Rupee loans which are outstanding in the books of the financing bank concerned.

### External Commercial Borrowings (ECB) – Bridge Finance for Infrastructure Sector

RBI vide **Circular No. 26** dated 23rd September, 2011 (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6732&Mode=0>), has now permitted Indian infrastructure companies, to import capital goods by availing short term credit (including buyers'/ suppliers' credit) in the nature of 'bridge finance', **under the approval route**, subject to the following conditions:-

- (i) the bridge finance shall be replaced with a long term ECB;
- (ii) the long term ECB shall comply with all the extant ECB norms; and
- (iii) prior approval shall be sought from the Reserve Bank for replacing the bridge finance with a long term ECB.

### External Commercial Borrowings (ECB) – Rationalisation and Liberalisation

RBI has decided to further rationalise and liberalize the ECB guidelines as under with a view to increase domestic lending rates and it has issued **Circular No. 27** dated 23rd September, 2011 (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6733&Mode=0>), in this regard:

#### **I. Enhancement of ECB limit under the automatic route**

- a) Under the existing ECB policy, eligible borrowers in the real sector, industrial sector and the infrastructure sector could avail ECBs of up to USD 500 million (or its equivalent) per financial year under the automatic route. The RBI has now **enhanced this limit to USD 750 million** thereby allowing eligible borrowers to borrow an additional USD 250 million under automatic route.
- b) For corporates in specified service sectors such as hotels, hospitals and softwares, the ECB limit **has been doubled** from USD 100 million to USD 200 million (or its equivalent) per financial year.

#### **II. ECBs designated in INR**

- a) Eligible borrowers can now avail ECB designated in Indian Rupees (INR) from foreign equity holders under the automatic / approval route, as the case may be.
- b) Non-Governmental organisations engaged in micro-finance activities are now permitted to avail ECBs designated in INR **under the automatic route** from overseas organizations and individuals as per the existing ECB guidelines.

#### **III. ECB for Interest During Construction (IDC)**

- a) Indian companies in the infrastructure sector may now utilise ECB proceeds for IDC, **under the automatic / approval route**, as the case may be, subject to the conditions that the IDC is capitalised and also is part of the project cost.



### ECB Policy - Structured Obligations for infrastructure sector

RBI has liberalised the policy relating to credit enhancement vide **Circular No. 28** dated 26th September,

2011 (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6735&Mode=0>), and **now permits direct and indirect foreign equity holders to provide credit enhancement** to Indian companies engaged exclusively in the development of infrastructure under **automatic route**.

Direct foreign equity holders need to hold at least 25% of the paid-up capital of the borrower and indirect foreign equity holders are required to hold at least 51% of the paid-up capital of the borrower to provide credit enhancement to Indian companies engaged exclusively in the development of infrastructure.

### External Commercial Borrowings (ECB) from the foreign equity holders

According to the existing ECB policy, a foreign equity holder, in order to be eligible as a 'recognised lender' for ECBs exceeding USD 5 million under the automatic route, must have a minimum paid-up equity of 25% held directly by the lender and the debt-equity ratio should not exceed 4:1.

RBI with a view to further rationalize the policy issued **Circular No. 29** dated 26th September, 2011 (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6736&Mode=0>), with the following clarifications:

- (a) The term 'debt' in the debt-equity ratio has now been replaced with '**ECB liability**' and the ratio will henceforth be known as the '**ECB liability-equity ratio**'. This change clarifies the position that other borrowings / debt (other than ECBs) will not be considered while determining 'debt' for calculating the 'ECB liability - equity' ratio.
- (b) For calculating the 'equity' component of the foreign equity holder for ECBs exceeding USD 5 million, apart from paid up capital contributed by foreign equity holders, free reserves (including the share premium received in foreign currency) as per the last audited balance sheet must be taken into account.
  - (i) For multiple foreign equity holders in the borrowing company, the portion of the share premium in foreign currency brought in by the relevant lenders need to be taken into account for calculating the 'ECB liability - equity' ratio.

- c) For calculating 'ECB liability', outstanding ECBs from the same foreign equity holder need to be considered in such calculation, together with the proposed ECB.
- d) Foreign equity holders (direct / indirect) can now provide ECBs under the approval route to service sector units (in addition to those in hotels, hospitals and software). This change will benefit borrowings by training institutions, research and development and miscellaneous service companies. Indirect foreign equity holders, proposing to provide ECBs, however, have to ensure at least 51% holding in the borrower.
  - (i) Group companies are permitted to provide ECBs subject to the condition that both the borrower and the group company providing the ECB must be subsidiaries of the same parent.
- (e) The foreign equity holders submitting these ECB proposals to the RBI for approval need to ensure that the total outstanding stock of ECBs (including the proposed ECBs) does not exceed 7 times the equity holding (directly or indirectly) of the lender.
  - (i) Group companies submitting these ECB proposals to the RBI for approval should ensure that the total outstanding stock of ECBs (including proposed ECBs) does not exceed 7 times the equity holdings by the common parent in the Borrower.

### External Commercial Borrowings (ECB) in Renminbi (RMB)

RBI by issuing **Circular No. 30** dated 27th September, 2011 (<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=6737&Mode=0>), has permitted Indian Infrastructure companies to avail ECBs in RMB **under the approval route**, subject to following:

- (a) ECB in RMB can be availed **up to the equivalent of USD 1 billion** annually.
- (b) The RBI approval in this regard will be valid for a period of 3 months from the date of issue of the approval letter and the loan agreement must be executed within this 3 month period.
- (c) The borrower must obtain the Loan Registration Number from the RBI within the above 3 month time period for the RBI approval to remain valid.



# STUDENTS' CORNER

## Share Capital of a Company

**Share capital:** This is the ownership capital of companies. Shareholders own the company. Shareholders subscribe to the capital of the company and thereby take the risk of losing all their capital. What do they get in return? As long as the company runs, the shareholders are entitled to distribution of earnings of the company, called **dividends**. When the company is wound up, all the surplus assets of the company belongs to the shareholders. Hence, the shareholders are entitled to all the residual profits of the company. There may be some investors who want certainty of return on their capital, and in return, they are prepared to forego the residual profits of the company. Hence, capital of companies may be classified into two:

- (i) **Preference shares** are shares that rank in priority over ordinary shares, in the matter of **dividends**, as also repayment of capital upon winding up. Since they carry a preference, they are entitled only to a fixed rate of dividends. For example, if a preference share is entitled to 10% dividend, and the company earns profits of 25% of capital, it will pay only 10% to preference shares, and the balance profits shall be available for distribution to ordinary shares.
- (ii) **Equity shares**, that is, shares that do not have the preference mentioned above.

Though both equity share and preference share represents share capital for a company but both are different on various grounds, here are some of the differences between the two –

Preference shares	Equity shares
As regard dividend and refund of capital in case of winding up preference share holders get paid before the equity share holders	Do not have these preferences that preference shares have
Since they carry a preference, they are entitled only to a fixed rate of dividend	Dividend on the basis of performance of company, sometimes when company makes loss then they are not paid any dividend.
Can be converted in to equity shares after some years, if terms of issue provide so	Cannot be converted in to preference shares
No right to participate in the management of the company. They do not carry voting rights as such, except in case of matters concerning their interests.	Have voting rights and also the right to participate in the management of the company
Preference shares, however, may have a stated redemption period.	Equity shares are permanent capital – there is no provision in law for redemption or repayment of equity shares except in exceptional cases like reduction of capital, or buyback of shares

Click on the following link to see other articles and presentations on corporate laws:

[http://www.india-financing.com/staffpublications\\_corplaw.htm](http://www.india-financing.com/staffpublications_corplaw.htm)

SEPTEMBER, 2011

