

## PAPER 4: CORPORATE AND ECONOMIC LAWS

### PART – I: RELEVANT AMENDMENTS APPLICABLE FOR MAY 2020 EXAMINATION

#### Applicability of Relevant Amendments/ Circulars/ Notifications/ Regulations etc.

For May 2020 examinations for Paper 4: Corporate and Economic Laws, the significant amendments made in the respective subject for the period 1<sup>st</sup> May 2019 to 31<sup>st</sup> October, 2019 are relevant and applicable for said examinations.

Students are advised to refer study material of August 2019 edition with these applicable amendments.

**Relevant amendments:** Here are given relevant amendments arranged chapter wise.

### PART I: CORPORATE LAWS

#### SECTION A: COMPANY LAW

**Companies (Amendment) Act, 2019:** On July 31, 2019, the Ministry of Corporate Affairs introduced the Companies (Amendment) Act, 2019. The Amendment considers changes brought in by the Companies (Amendment) Ordinance, 2018, the Companies (Amendment) Ordinance Act, 2019 and the Companies (Amendment) Second Ordinance, 2019 to further amend the Companies Act, 2013.

The Amendment has reinforced the 2018 Ordinance and 2019 Ordinances, and all provisions are deemed to have come into force from November 2, 2018 except some sections which have come into force on August 15, 2019.

#### CHAPTER 1: APPOINTMENT AND QUALIFICATION OF DIRECTORS

##### **Enforcement of the Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2019 via G.S.R. 528(E) dated 25th July, 2019**

The Central Government makes the *Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2019* to amend *Companies (Appointment and Qualification of Directors) Rules, 2014*.

*In Companies (Appointment and Qualification of Directors) Rules, 2014, in rule 12A, -*

- (i) for the words “**who has been allotted**”, the words “**who holds**” shall be substituted;
- (ii) for the words, letters and figures “submit e-form DIR-3-KYC to the Central Government on or before 30th June of immediate next financial year”, the words, letters and figures “submit e-form DIR-3-KYC for the said financial year to the Central Government on or before 30th September of immediate next financial year” shall be substituted;
- (iii) after the proviso, the **following provisos** shall be inserted, namely:-

“Provided further that where an individual who has already submitted e-form DIR-3 KYC in relation to any previous financial year, submits web-form DIR-3 KYC-WEB through the web

service in relation to any subsequent financial year it shall be deemed to be compliance of the provisions of this rule for the said financial year:

Provided also that in case an individual desires to update his personal mobile number or the e-mail address, as the case may be, he shall update the same by submitting e-form DIR-3 KYC only.

Provided also that fee for filing e-form DIR-3 KYC or web-form DIR-3 KYC-WEB through the web service, as the case may be, shall be payable as provided in *Companies (Registration Offices and Fees) Rules, 2014.*”.

### CHAPTER 3: MEETING OF BOARD AND ITS POWERS

#### Enforcement of the *Companies (Meetings of Board and its Powers) Amendment Rules, 2019* dated 11th October, 2019

The Central Government makes the *Companies (Meetings of Board and its Powers) Amendment Rules, 2019* to amend the *Companies (Meetings of Board and its Powers) Rules, 2014*.

In the *Companies (Meetings of Board and its Powers) Rules, 2014*, in **rule 11**, in sub-rule (2), for the words "business of financing of companies", the words "business of financing industrial enterprises" shall be substituted.

### CHAPTER 4: INSPECTION, INQUIRY AND INVESTIGATION

#### Amendments through the *Companies (Amendment) Act, 2019*

| Relevant Section         | Amendment   | Date of Enforcement           |
|--------------------------|---|-------------------------------|
| Amendment of Section 212 | <p>(a) in <b>sub-section (8)</b>, for the words "If the Director, Additional Director or Assistant Director", the words "If any officer not below the rank of Assistant Director" shall be substituted;</p> <p>(b) in <b>sub-section (9)</b>, for the portion beginning with the words "The Director" and ending with the word, brackets and figure "sub-section (8)", the words, brackets and figure "The officer authorised under sub-section (8) shall, immediately after arrest of such person under such sub-section" shall be substituted;</p> <p>(c) in <b>sub-section (10)</b>,—</p> <p>(i) for the words "Judicial Magistrate", the words "Special Court or Judicial Magistrate" shall be substituted;</p> <p>(ii) in the proviso, for the words "Magistrate's court", the words "Special Court or Magistrate's court" shall be substituted;</p> | 15 <sup>th</sup> August, 2019 |

|  |   |  |
|--|---|--|
|  | <p>(d) after <b>sub-section (14)</b>, the following sub-section shall be inserted, namely:—</p> <p>“(14A) Where the report under sub-section (11) or sub-section (12) states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, key managerial personnel, other officer or any other person liable personally without any limitation of liability.”</p> |  |
|--|---|--|

## CHAPTER 5: COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

### Clarification under Section 232(6) of the Companies Act, 2013

A clarification has been issued by the MCA on 21<sup>st</sup> August, 2019 regarding section 232(6). According to the clarification,

- (a) The provision of section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme.
- (b) The 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control for the purpose of conforming to accounting standards (including Ind-AS 103 Business Combinations).
- (c) Where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/amalgamation in NCLT. However, if the 'appointed date' is significantly ante-dated beyond a year from the date of filing, the justification for the same would have to be specifically brought out in the scheme and it should not be against public interest.
- (d) The scheme may identify the 'appointed date' based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective. However, in case of such event based date being a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force.

## CHAPTER 6: PREVENTION OF OPPRESSION AND MISMANAGEMENT

## 1. Amendments through the Companies (Amendment) Act, 2019

| Relevant Section         | Amendment  | Date of Enforcement           |
|--------------------------|--|-------------------------------|
| Amendment of Section 241 | <p>(a) in sub-section (2), the following proviso shall be inserted, namely:—<br/>“Provided that the applications under this sub-section, in respect of such company or class of companies, as may be prescribed, shall be made before the Principal Bench of the Tribunal which shall be dealt with by such Bench.”;</p> <p>(b) after sub-section (2), the following sub-sections shall be inserted, namely:—<br/>“(3) Where in the opinion of the Central Government there exist circumstances suggesting that—</p> <p>(a) any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust;</p> <p>(b) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices;</p> <p>(c) a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or</p> <p>(d) the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest, the Central Government</p> | 15 <sup>th</sup> August, 2019 |

|                                 |   |                                     |
|---------------------------------|---|-------------------------------------|
|                                 | <p>may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.</p> <p>(4) The person against whom a case is referred to the Tribunal under sub-section (3), shall be joined as a respondent to the application.</p> <p>(5) Every application under sub-section (3)—</p> <p>(a) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and</p> <p>(b) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908, for the signature and verification of a plaint in a suit by the Central Government.”.</p> |                                     |
| <b>Amendment of Section 242</b> | <p>after <b>sub-section (4)</b>, the following sub-section shall be inserted, namely:—</p> <p>“(4A) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.”.</p>  | <b>15<sup>th</sup> August, 2019</b> |
| <b>Amendment of Section 243</b> | <p>(a) after <b>sub-section (1)</b>, the following sub-sections shall be inserted, namely:—</p> <p>“(1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:</p>   | <b>15<sup>th</sup> August, 2019</b> |

|  |  |  |
|--|--|--|
|  | <p>Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.</p> <p>(1B) Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office.”;</p> <p>(b) in <b>sub-section (2)</b>, after the word, brackets and figure “sub-section (1)”, the words, brackets, figure and letter “or sub-section (1A)” shall be inserted.</p> |  |
|--|--|--|

**2. Enforcement of the *National Company Law Tribunal (Second Amendment) Rules, 2019* vide Notification G.S.R. 351(E) dated 8th May, 2019**

The Central Government makes *the National Company Law Tribunal (Second Amendment) Rules, 2019* to amend the *National Company Law Tribunal Rules, 2016*.

In *National Company Law Tribunal Rules, 2016*,

in **rule 84**, after **sub-rule (2)**, the following sub-rules shall be inserted, namely: –

“(3) In case of a company having a share capital, the requisite number of member or members to file an application under sub-section (1) of section 245 shall be -

- (i) (a) at least five per cent. of the total number of members of the company; or
  - (b) one hundred members of the company,
- whichever is less; or

- (ii) (a) member or members holding not less than five per cent. of the issued share capital of the company, in case of an unlisted company;
- (b) member or members holding not less than two per cent. of the issued share capital of the company, in case of a listed company.

(4) The requisite number of depositor or depositors to file an application under sub-section (1) of section 245 shall be -

- (i) (a) at least five per cent. of the total number of depositors of the company; or
- (b) one hundred depositors of the company,

whichever is less; or

- (ii) depositor or depositors to whom the company owes five per cent. of total deposits of the company.”

## CHAPTER 7: WINDING UP

### Amendments through the Companies (Amendment) Act, 2019

| Relevant sections        | Amendment   | Date of Enforcement           |
|--------------------------|---|-------------------------------|
| Amendment of Section 272 | in sub-section (3), for the words, brackets and letter “or clause (e) of that sub-section”, the words “of that section” shall be substituted. | 15 <sup>th</sup> August, 2019 |

## CHAPTER 10: MISCELLANEOUS PROVISIONS

1. **Amendment in Section 406:** Section 406 has been substituted by the Companies (Amendment) Act, 2017, with effect from **15<sup>th</sup> August, 2019**

**Section 406:** (1) In this section, "Nidhi" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

- (2) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification—
- shall not apply to any Nidhi or Mutual Benefit Society; or
  - shall apply to any Nidhi or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification.
- (3) A copy of every notification proposed to be issued under sub-section (2), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.
- (4) In reckoning any such period of thirty days as is referred to in sub-section (3), no account shall be taken of any period during which the House referred to in sub-section (3) is prorogued or adjourned for more than four consecutive days.
- (5) The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament.

2. **Enforcement of the Nidhi (Amendment) Rules, 2019 via G.S.R. 467(E) dated 15<sup>th</sup> August, 2019**

The Central Government makes *the Nidhi (Amendment) Rules, 2019* to amend *Nidhi Rules, 2014*.

In the *Nidhi rules, 2014* (hereinafter referred to as “said rules”):

1. in **rule 2**, after clause (c), the following clause shall be inserted, namely:-
 

“(d) every company declared as Nidhi or Mutual Benefit Society under sub-section (1) of section 406 of the Act”.
2. in **rule 3**, after clause (d), the following clause shall be inserted, namely:-
 

‘(da) “*Nidhi*” means a company which has been incorporated as a *Nidhi* with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with the rules made by the Central Government for regulation of such class of companies.’.
3. In the said rules, **after rule 3**, the following rule shall be inserted, namely:-
 

“3A. Declaration of Nidhis.— The Central Government, on receipt of application (in Form NDH-4 along with fee thereon) of a public company for declaring it as Nidhi and on being satisfied that the company meets the requirements under these rules, shall notify the company as a Nidhi in the Official Gazette:

Provided that a Nidhi incorporated under the Act on or after the commencement of the Nidhi (Amendment) Rules, 2019 shall file Form NDH-4 within sixty days from the date of expiry of:-

  - (a) one year from the date of its incorporation; or
  - (b) the period up to which extension of time has been granted by the Regional Director under sub-rule (3) of rule 5:

Provided further that nothing in the first proviso shall prevent a Nidhi from filing Form NDH-4 before the period referred therein:

Provided also that that in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).”.
4. In the said rules, **in rule 4**, -
  - (i) in sub-rule (1), the words, “to be incorporated under the Act” shall be omitted;
  - (ii) in sub-rule (5), the words “Company incorporated as a” shall be omitted.
5. In the said rules, **in rule 5**, –
  - (i) in sub-rule (1), for the words “from the commencement of these rules”, the words “from the date of its incorporation” shall be substituted;
  - (ii) in sub-rule (3), before the Explanation, the following proviso shall be inserted, namely:-
 

“Provided that the Regional Director may extend the period upto one year from the date of receipt of application”.

- (iii) in sub-rule (4), after the words, brackets and figure “contained in sub-rule (1)”, the words, brackets and figures “and gets itself declared under sub-section (1) of section 406” shall be inserted.
6. In the said rules, in **rule 7**, in sub-rule (1), after the words “shall issue” the words “fully paid up” shall be inserted.
7. In the said rules, in **rule 12**,–
- (i) in sub-rule (1) after clause (b), the following clause shall be inserted namely: -  
“(ba) The date of declaration or notification as Nidhi”;
- (ii) in sub-rule (2), in clause (a), for the words “Registrar of Companies”, the words “Bench of the National Company Law Tribunal” shall be substituted.
8. In the said rules, in **rule 23**, in sub-rule (2), -
- (i) for the words “concerned Regional Director”, the words, “Central Government” shall be substituted;
- (ii) for the words “such Regional Director”, the words, “Central Government” shall be substituted;
- (iii) in the proviso, for the words “Regional Director”, the words, “Central Government” shall be substituted.
9. In the said rules, **after rule 23**, the following rules shall be inserted, namely: -

**23A. Compliance with rule 3A by certain Nidhis:-** Every company referred to in clause (b) of rule 2 and every Nidhi incorporated under the Act, before the commencement of *Nidhi (Amendment) Rules, 2019*, shall also get itself declared as such in accordance with rule 3A within a period of one year from the date of its incorporation or within a period of six months from the date of commencement of *Nidhi (Amendment) Rules, 2019*, whichever is later:

Provided that in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).

**23B. Companies declared as Nidhis under previous company law to file Form NDH-4:-** Every company referred in clause (a) of rule 2 shall file Form NDH-4 alongwith fees as per the *Companies (Registration Offices and Fees) Rules, 2014* for updating its status:

Provided that no fees shall be charged under this rule for filing Form NDH-4, in case it is filed within six month of the commencement of *Nidhi (Amendment) Rules, 2019*:

Provided further that, in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).

## PART II: ECONOMIC LAWS

## CHAPTER 1: THE FOREIGN EXCHANGE AND MANAGEMENT ACT, 1999

## I Amendment in Section 6 of the Foreign Exchange Management Act, 1999 vide Finance Act, 2015 w.e.f. 15.10.2019.

Amended section with the changes marked in bold, is as follows:

- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify—
  - (a) **any class or classes of capital account transactions, involving debt instruments, which are permissible;**
  - (b) **the limit up to which foreign exchange shall be admissible for such transactions;**
  - (c) **any conditions which may be placed on such transactions:**  
[Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.
- (2A) The Central Government may, in consultation with the Reserve Bank, prescribe—
  - (a) **any class or classes of capital account transactions, not involving debt instruments, which are permissible;**
  - (b) **the limit up to which foreign exchange shall be admissible for such transactions; and**
  - (c) **any conditions which may be placed on such transactions.**
- (3) [\*\*\*]
- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.
- (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or

other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

- (7) For the purposes of this section, the term "debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

## II. Amendments in External Commercial Borrowings

Vide FED Master Direction No.5/2018-19, amendments have been made in the Transactions on account of External Commercial Borrowings (ECB) . Here is the updated master direction –external commercial borrowings.

Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons under Section 11 of the Foreign Exchange Management Act (FEMA), 1999. These directions lay down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/constituents with a view to implementing the regulations framed.

### Index

| Para. No. | Particulars  |
|-----------|--|
|           | <b>External Commercial Borrowings Framework</b>                        |
| 2         | Introduction   |
| 2.1       | External Commercial Borrowings Framework                               |
| 2.2       | Limit and leverage   |
| 3         | Issuance of Guarantee, etc. by Indian banks and Financial Institutions |
| 4         | Parking of ECB proceeds  |
| 4.1       | Parking of ECB proceeds abroad   |
| 4.2       | Parking of ECB proceeds domestically                                   |
| 5         | Procedure of raising ECB   |
| 6         | Reporting Requirements   |
| 6.1       | Loan Registration Number   |
| 6.2       | Changes in terms and conditions of ECB                                 |
| 6.3       | Monthly reporting of actual transactions                               |
| 6.4       | Late Submission Fee for delay in reporting                             |
| 6.5       | Standard Operating Procedure for Untraceable Entities                  |

|     |   |
|-----|---|
| 7   | Powers delegated to AD Category I banks to deal with ECB cases                    |
| 7.1 | Change of the AD Category I bank  |
| 7.2 | Cancellation of LRN   |
| 7.3 | Refinancing of existing ECB   |
| 7.4 | Conversion of ECB into equity   |
| 7.5 | Security for raising ECB  |
| 7.6 | Additional Requirements   |
| 8   | Special Dispensations under the ECB framework                                     |
| 8.1 | ECB facility for Oil Marketing Companies  |
| 8.2 | ECB facility for Start-ups  |
| 9   | Borrowing by Entities under Investigation   |
| 10  | ECB by entities under restructuring/ ECB facility for refinancing stressed assets |
| 11  | Dissemination of information  |
| 12  | Compliance with the guidelines  |

**2. Introduction:** External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters given below apply in totality and not on a standalone basis.

**2.1. ECB Framework:** The framework for raising loans through ECB (hereinafter referred to as the ECB Framework) comprises the following two options:

| Sr.No. | Parameters            | FCY denominated ECB  | INR denominated ECB  |
|--------|-----------------------|--|--|
| i      | Currency of borrowing | Any freely convertible Foreign Currency  | Indian Rupee (INR)   |
| ii     | Forms of ECB          | Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; <sup>1</sup> FCCBs; | Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade |

<sup>1</sup> FCCB – Foreign Currency Convertible Bond

|     |                    |  |   |
|-----|--------------------|--|---|
|     |                    | <sup>2</sup> FCEBs and Financial Lease.  | credits beyond 3 years; and<br>Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.                                     |
| iii | Eligible borrowers | All entities eligible to receive <sup>3</sup> FDI. Further, the following entities are also eligible to raise ECB:<br>i. Port Trusts;<br>ii. Units in SEZ;<br>iii. SIDBI; and iv. EXIM Bank of India.  | a) All entities eligible to raise <sup>4</sup> FCY ECB; and<br>Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organisations. |
| iv  | Recognised lenders | The lender should be resident of <sup>5</sup> FATF or <sup>6</sup> IOSCO compliant country, including on transfer of ECB. However,<br>a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;<br>b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and<br>c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). |   |

<sup>2</sup> FCEB – Foreign Currency Exchangeable Bond

<sup>3</sup> FDI – Foreign Direct Investment

<sup>4</sup> FCY – Foreign Currency

<sup>5</sup> FATF – Financial Action Task Force

<sup>6</sup> IOSCO – International Organization of Securities Commission

|                  |   | Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.  |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
|------------------|---|--|--------|----------|------|-----|--|--------|-----|--|---------|------------------|---|----------|-----|--|---------|-----|---|----------|
| V                | Minimum Average Maturity Period (MAMP)  | <p>MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:</p> <table border="1"> <thead> <tr> <th>Sr.No.</th> <th>Category</th> <th>MAMP</th> </tr> </thead> <tbody> <tr> <td>(a)</td> <td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td> <td>1 year</td> </tr> <tr> <td>(b)</td> <td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans</td> <td>5 years</td> </tr> <tr> <td><sup>7</sup>(c)</td> <td>ECB raised for<br/>(i) working capital purposes or general corporate purposes<br/>(ii) on-lending by NBFCs for working capital purposes or general corporate purposes</td> <td>10 years</td> </tr> <tr> <td>(d)</td> <td>ECB raised for<br/>(i) repayment of Rupee loans availed domestically for capital expenditure<br/>(ii) on-lending by NBFCs for the same purpose</td> <td>7 years</td> </tr> <tr> <td>(e)</td> <td>ECB raised for<br/>(i) repayment of Rupee loans availed domestically for</td> <td>10 years</td> </tr> </tbody> </table> | Sr.No. | Category | MAMP | (a) | ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year. | 1 year | (b) | ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans | 5 years | <sup>7</sup> (c) | ECB raised for<br>(i) working capital purposes or general corporate purposes<br>(ii) on-lending by NBFCs for working capital purposes or general corporate purposes | 10 years | (d) | ECB raised for<br>(i) repayment of Rupee loans availed domestically for capital expenditure<br>(ii) on-lending by NBFCs for the same purpose | 7 years | (e) | ECB raised for<br>(i) repayment of Rupee loans availed domestically for | 10 years |
| Sr.No.           | Category  | MAMP   |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
| (a)              | ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.  | 1 year   |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
| (b)              | ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans                                      | 5 years  |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
| <sup>7</sup> (c) | ECB raised for<br>(i) working capital purposes or general corporate purposes<br>(ii) on-lending by NBFCs for working capital purposes or general corporate purposes | 10 years   |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
| (d)              | ECB raised for<br>(i) repayment of Rupee loans availed domestically for capital expenditure<br>(ii) on-lending by NBFCs for the same purpose                        | 7 years  |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |
| (e)              | ECB raised for<br>(i) repayment of Rupee loans availed domestically for   | 10 years   |        |          |      |     |  |        |     |  |         |                  |   |          |     |  |         |     |   |          |

<sup>7</sup> Inserted vide [A.P.\(DIR Series\) Circular No. 04 dated July 30, 2019](#).

|      |                               |  |
|------|-------------------------------|--|
|      |                               | <p>purposes other than capital expenditure</p> <p>(ii) on-lending by NBFCs for the same purpose</p>  |
|      |                               | <p>for the categories mentioned at (b) to (e) –</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>   |
| vi   | All-in-cost ceiling per annum | Benchmark rate plus 450 bps spread.  |
| vii  | Other costs                   | Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the   |
|      |                               | contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.   |
| Viii | End-uses (Negative list)      | <p>The negative list, for which the ECB proceeds cannot be utilised, would include the following:</p> <p>a) Real estate activities.</p> <p>b) Investment in capital market.</p> <p>c) Equity investment.</p> <p>d) <sup>8</sup>Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above.</p> <p>e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above.</p> <p>f) Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above.</p> <p>g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.</p> |

<sup>8</sup> Substituted vide [A.P.\(DIR Series\) Circular No. 04 dated July 30, 2019](#). Prior to substitution it read as below:

- a) Working capital purposes except from foreign equity holder.
- b) General corporate purposes except from foreign equity holder.
- c) Repayment of Rupee loans except from foreign equity holder.
- d) On-lending to entities for the above activities.

|    |                   |  |   |
|----|-------------------|--|---|
| ix | Exchange rate     | Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.   | For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.  |
| x  | Hedging provision | <p>The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure.</p> <p>Infrastructure space companies shall have a Board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case the average maturity of the ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of the ECB and report the position to RBI through Form ECB 2. The following operational aspects with respect to hedging should be ensured:</p> | Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis. |

|  |  |   |  |
|--|--|---|--|
|  |  | <p><b>a. Coverage:</b> The ECB borrower will be required to cover the principal as well as the coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day the liability is created in the books of the borrower).</p> <p><b>b. Tenor and rollover:</b> A minimum tenor of one year for the financial hedge would be required with periodic rollover, duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of the ECB.</p> <p><b>c. Natural Hedge:</b> Natural hedge, in lieu of financial hedge, will be considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the offsetting exposure</p> |  |
|--|--|---|--|

|    |                                 |   |  |
|----|---------------------------------|---|--|
|    |                                 | has the maturity/cash flow within the same accounting any other arrangements/ structures, where revenues are indexed to foreign currency will not be considered as a natural hedge. |  |
| xi | Change of currency of borrowing | Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.                      | Change of currency from INR to any freely convertible foreign currency is not permitted. |

**Note:** The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors.  
<sup>9</sup>Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.

**2.2. Limit and leverage:** Under the aforesaid framework, all eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

**3. Issuance of Guarantee, etc. by Indian banks and Financial Institutions:** Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.

<sup>9</sup> Inserted vide [A.P. \(DIR Series\) Circular No. 17 dated January 16, 2019](#).

4. **Parking of ECB proceeds:** ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:
  - 4.1 **Parking of ECB proceeds abroad:** ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in the following liquid assets (a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's; (b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and (c) deposits with foreign branches/subsidiaries of Indian banks abroad.
  - 4.2 **Parking of ECB proceeds domestically:** ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.
5. **Procedure of raising ECB:** All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework. For approval route cases, the borrowers may approach the RBI with an application in prescribed format (Form ECB) for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee. Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form ECB.
6. **Reporting Requirements:** Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:
  - 6.1 **Loan Registration Number (LRN):** Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division, Bandra-Kurla Complex, Mumbai – 400 051 (Contact numbers 022-26572513 and 022-26573612). Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

**6.2 Changes in terms and conditions of ECB:** Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the <sup>10</sup>DSIM through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

**6.3 Monthly Reporting of actual transactions:** The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates.

Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

**6.4 Late Submission Fee (LSF) for delay in reporting:**

**6.4.1** Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining <sup>11</sup>LRN or delay in submission of Form ECB 2 returns, by payment of late submission fees as detailed in the following matrix:

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

**6.4.2** The borrower, through its AD bank, may pay the LSF by way of demand draft in favour of "Reserve Bank of India" or any other mode specified by the Reserve Bank. Such payment should be accompanied with the requisite return(s). Form ECB and Form ECB 2 returns reporting contraventions will be treated separately. Non-payment of LSF will be treated as contravention of reporting provision and shall be subject to compounding or adjudication as provided in FEMA 1999 or regulations/rules framed thereunder.

**6.5 Standard Operating Procedure (SOP) for Untraceable Entities:** The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions

<sup>10</sup> DISM – Department of Statistics and Information Management

<sup>11</sup> LRN – Loan Registration Number

for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

- i. **Definition:** Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:
  - a) Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
  - b) Entities have not submitted Statutory Auditor's Certificate for last two years or more;
- ii. **Action:** The followings actions are to be undertaken in respect of 'untraceable entities':
  - a) File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;
  - b) No fresh ECB application by the entity should be examined/processed by the AD bank;
  - c) Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
  - d) No inward remittance or debt servicing will be permitted under auto route.

7. **Powers delegated to AD Category I banks to deal with ECB cases:** The designated AD Category I banks can approve any requests from the borrowers for changes in respect of ECB, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in name of borrower/lender, transfer of ECB and any other parameters, comply with extant ECB norms and are with the consent of lender(s). Further, the following can also be undertaken under the automatic route:

7.1 **Change of the AD Category I bank:** AD Category I bank can be changed subject to obtaining no objection certificate from the existing AD Category I bank.

7.2 **Cancellation of LRN:** The designated AD Category I banks may directly approach DSIM for cancellation of LRN for ECB contracted, subject to ensuring that no draw down against the said LRN has taken place and the monthly ECB-2 returns till date in respect of the allotted LRN have been submitted to DSIM.

- 7.3 Refinancing of existing ECB:** Refinancing of existing ECB by fresh ECB provided the outstanding maturity of the original borrowing (weighted outstanding maturity in case of multiple borrowings) is not reduced and all-in-cost of fresh ECB is lower than the all-in-cost (weighted average cost in case of multiple borrowings) of existing ECB. Further, refinancing of ECB raised under the previous ECB frameworks may also be permitted, subject to additionally ensuring that the borrower is eligible to raise ECB under the extant framework. Raising of fresh ECB to part refinance the existing ECB is also permitted subject to same conditions. Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/ Navratna public sector undertakings.
- 7.4 Conversion of ECB into equity:** Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:
- (i) The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI policy.
  - (ii) The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under FDI policy;
  - (iii) Applicable pricing guidelines for shares are complied with; iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:
    - (a) For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
    - (b) For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
    - (c) For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.
  - (iv) If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;

- (v) Consent of other lenders, if any, to the same borrower is available or atleast information regarding conversions is exchanged with other lenders of the borrower.
- (vi) For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

**7.5. Security for raising ECB:** AD Category I banks are permitted to allow creation/cancellation of charge 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 ECB to be raised/ raised by the borrower, subject to satisfying themselves that:

- (i) the underlying ECB is in compliance with the extant ECB guidelines,
- (ii) there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
- (iii) No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:

- (i) **Creation of Charge on Immovable Assets:** The arrangement shall be subject to the following:
  - (a) Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
  - (b) The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.
  - (c) 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.
- (ii) **Creation of Charge on Movable Assets:** In the event of enforcement/ invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim

against the ECB. Encumbered movable assets may also be taken out of the country subject to getting 'No Objection Certificate' from domestic lender/s, if any.

**(iii) Creation of Charge over Financial Securities:** The arrangements may be permitted subject to the following:

- (a) Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
- (b) In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
- (c) In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.

**(iv) Issue of Corporate or Personal Guarantee:** The arrangement shall be subject to the following:

- (a) A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
- (b) Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
- (c) Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000, as amended from time to time.
- (d) ECB can be credit enhanced / guaranteed / insured by overseas party/ parties only if it/ they fulfil/s the criteria of recognised lender under extant ECB guidelines.

**7.6. Additional Requirements:** While exercising the delegated powers, the AD Category I banks should ensure that:

- i. The changes permitted are in conformity with the applicable ceilings / guidelines and the ECB continues to be in compliance with applicable guidelines. It should also be ensured that if the ECB borrower has availed of credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, any extension of tenure of ECB (whether matured or not) shall be subject to applicable prudential guidelines issued by Department of Banking Regulation of Reserve Bank including guidelines on restructuring.
- ii. The changes in the terms and conditions of ECB allowed by the ADs under the powers delegated and / or changes approved by the Reserve Bank should be reported to the DSIM as given at paragraph 6.2 above. Further, these changes should also get reflected in the Form ECB 2 returns appropriately.

#### **8. Special Dispensations under the ECB framework:**

**8.1 ECB facility for Oil Marketing Companies:** Notwithstanding the provisions contained in paragraph 2.1 (viii), 2.1 (x) and 2.2 above, Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

**8.2 ECB facility for Startups:** AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- (i) **Eligibility:** An entity recognised as a Startup by the Central Government as on date of raising ECB.
- (ii) **Maturity:** Minimum average maturity period will be 3 years.
- (iii) **Recognised lender:** Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognised lenders under this framework.
- (iv) **Forms:** The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
- (v) **Currency:** The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the nonresident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.

- (vi) **Amount:** The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
- (vii) **All-in-cost:** Shall be mutually agreed between the borrower and the lender.
- (viii) **End uses:** For any expenditure in connection with the business of the borrower.
- (ix) **Conversion into equity:** Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
- (x) **Security:** The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a nonresident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.
- (xi) **Hedging:** The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks in India. The lender can also access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

**Note:** Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.
- (xii) **Conversion rate:** In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.
- (xiii) **Other Provisions:** Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable. Further, the Start-ups as defined above [8.2. (i)] as well as other start-ups which do not comply with the aforesaid definition but are eligible to receive FDI, can also raise ECB under the general ECB route/framework.

9. **Borrowing by Entities under Investigation:** All entities against which investigation / adjudication / appeal by the law enforcing agencies for violation of any of the

provisions of the Regulations under FEMA pending, may raise ECB as per the applicable norms, if they are otherwise eligible, notwithstanding the pending investigations / adjudications / appeals, without prejudice to the outcome of such investigations / adjudications / appeals. The borrowing entity shall inform about pendency of such investigation / adjudication / appeal to the AD Category-I bank / RBI as the case may be. Accordingly, in case of all applications where the borrowing entity has indicated about the pending investigations / adjudications / appeals, the AD Category I Banks / Reserve Bank while approving the proposal shall intimate the agencies concerned by endorsing a copy of the approval letter.

**10. ECB by entities under restructuring/ ECB facility for refinancing stressed assets:**

**10.1** An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan.

**10.2** <sup>12</sup>Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.

**10.3** Eligible borrowers under the ECB framework, who are participating in the Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 as resolution applicants, can raise ECB from all recognised lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee term loans of the target company. Such ECB will be considered under the approval route, procedure of which is given at paragraph No. 5 above.

**11. Dissemination of information:** For providing greater transparency, information with regard to the name of the borrower, amount, purpose and maturity of ECB under both Automatic and Approval routes are put on the RBI's website, on a monthly basis, with a lag of one month to which it relates.

**12. Compliance with the guidelines:** The primary responsibility for ensuring that the borrowing is in compliance with the applicable guidelines is that of the borrower concerned. Any contravention of the applicable provisions of ECB guidelines will invite penal action under the FEMA. The designated AD Category I bank is also expected to ensure compliance with applicable ECB guidelines by their constituents.

---

<sup>12</sup> Inserted vide [A.P.\(DIR Series\) Circular No. 04 dated July 30, 2019](#).

**CHAPTER 3: PREVENTION OF MONEY LAUNDERING ACT, 2002****I Amendment in section 8 vide Finance Act, 2019, w.r.e.f. 20-3-2019.**

**Sub-section (3)** dealing with the computation of period of attachment/ retention of property / record seized / frozen during investigation, is amended as follows:

(3) Where the Adjudicating Authority decides that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under section 5(1) or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

- (a) continue during investigation for a period not **exceeding three hundred and sixty-five days** or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court.

Explanation.—For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

**II Insertion of section 11A vide the Aadhaar and Other Laws (Amendment) Act, 2019, w.e.f. 25-7-2019****Verification of identity by reporting entity.**

11A.(1) Every reporting entity shall verify the identity of its clients and the beneficial owner, by—

- (a) authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) if the reporting entity is a banking company; or
- (b) offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or
- (c) use of passport issued under section 4 of the Passports Act, 1967 (15 of 1967); or
- (d) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf:

Provided that the Central Government may, if satisfied that a reporting entity other than banking company, complies with such standards of privacy and security under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and

Services) Act, 2016 (18 of 2016), and it is necessary and expedient to do so, by notification, permit such entity to perform authentication under clause (a):

Provided further that no notification under the first proviso shall be issued without consultation with the Unique Identification Authority of India established under sub-section (1) of section 11 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) and the appropriate regulator.

- (2) If any reporting entity performs authentication under clause (a) of sub-section (1), to verify the identity of its client or the beneficial owner it shall make the other modes of identification under clauses (b), (c) and (d) of sub-section (1) also available to such client or the beneficial owner.
- (3) The use of modes of identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or beneficial owner shall be denied services for not having an Aadhaar number.
- (4) If, for identification of a client or beneficial owner, authentication or offline verification under clause (a) or clause (b) of sub-section (1) is used, neither his core biometric information nor his Aadhaar number shall be stored.
- (5) Nothing in this section shall prevent the Central Government from notifying additional safeguards on any reporting entity in respect of verification of the identity of its client or beneficial owner.

Explanation.—The expressions "Aadhaar number" and "core biometric information" shall have the same meanings as are respectively assigned to them in clauses (a) and (j) of section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016).]

### III Amendment in section 12 vide Aadhaar and Other Laws (Amendment) Act, 2019, w.e.f. 25-7-2019

Clause (c) & (d) of section 12(1) have been omitted by the Aadhaar and Other Laws (Amendment) Act, 2019, w.e.f. 25-7-2019.

Prior to their omission, clauses (c) and (d) read as under:

"(c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;

(d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;"

## CHAPTER 4: FOREIGN CONTRIBUTION REGULATION ACT, 2010

### Foreign Contribution (Regulation) (Second Amendment) Rules, 2019

Vide notification no. **G.S.R. 659(E)**, dated 16th September, 2019, Central Government hereby enacts the *Foreign Contribution (Regulation) (Second Amendment) Rules, 2019*, further to amend the *Foreign Contribution (Regulation) Rules, 2011*.

In the Foreign Contribution (Regulation) Rules, 2011, —

- (i) **in rule 6A**, for the words “rupees twenty-five thousand”, the words “one lakh rupees” shall be substituted;
- (ii) **in rule 7**, in sub-rule (4), for the words “sixty days”, the words “one month” shall be substituted;
- (iii) **in rule 12**, in sub-rule (2), after the prescribed form (i.e., FC- 3C) the words and letters “with an affidavit executed by each office bearer and key functionary and member in Performa ‘AA’ appended to these rules” shall be inserted;

#### **CHAPTER 5: ARBITRATION AND CONCILIATION ACT, 1996**

In section 1 which deals with the Short title, extent and commencement, proviso is omitted by the Jammu and Kashmir Reorganisation Act, 2019, dated 9-8-2019, w.e.f. **31-10-2019**, Prior to its omission read as under:

"Provided that Parts I, III and IV shall extent to the State of Jammu and Kashmir only insofar as they relate to international Commercial arbitration or, as the case may be, international Commercial Conciliation."

#### **CHAPTER 6: INSOLVENCY AND BANKRUPTCY CODE, 2016**

##### **The Insolvency and Bankruptcy Code (Amendment) Act, 2019**

Ministry of Corporate Affairs vide Notification S.O. 2953(E) dated 16th August, 2019, in exercise of the powers conferred by sub-section (2) of section 1 of **the Insolvency and Bankruptcy Code (Amendment) Act, 2019**, the Central Government hereby appoints the date of publication of this notification in the Official Gazette as the date on which the provisions of the said Act shall come into force.

Following are the relevant amendments:

- (i) In **section 5(26)** pertaining to the definition “resolution plan”, following explanation is added.  
 “Explanation.—For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;”
- (ii) **In section 7(4)** of the Code, following proviso shall be inserted:  
 “Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.”
- (iii) **In section 12** which deals with the Time-limit for completion of insolvency resolution process. – Following provisos have been added after the proviso to section 3:  
 “Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency

commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019”.

(iv) In **section 25A** after sub-section 3, following sub-section shall be added:

“(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent, of the voting share of the financial creditors he represents, who have cast their vote:

**Provided** that for a vote to be cast in respect of an application under section 12 A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3).”

(v) In **section 30(2)(b)**, the following shall be substituted :

- (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—
- (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
  - (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (7) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

- (i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;
  - (ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or
  - (iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;”
- (vi) In **section 31(1)** of the Code, after the words “members, creditors,” the following words shall be inserted:
- “including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,”
- (vii) In **section 33(2)**, following explanation shall be added:
- “Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (7) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.”

## PART – II : QUESTIONS AND ANSWERS

### QUESTIONS

#### Integrated Case Scenario/ Multiple Choice Questions

1. Lagus Transport Services Limited (LTSL) is operating in logistics and public transport domain. The company has pan-India presence. As per its Articles of Association, the company can appoint a maximum of 15 directors and all of them shall be rotational directors. Presently, the company has a strength of 14 directors, of which 9 are executive directors and the remaining 5 are non-executive directors. As on 31<sup>st</sup> March, 2018, its paid-up share capital was ₹ 8.42 crore; the turnover was ₹ 84 crore; and it had, in the aggregate, outstanding loans, debentures and deposits to the tune of ₹ 42 crore.
- In the Annual General Meeting (AGM), held on 20<sup>th</sup> August, 2018, Anil, Badal, Chanchal and Damodar were appointed as directors in place of Mohan, Navin, Om and Prasad by passing a single resolution with simple majority. It is to be noted that earlier, a motion authorising the appointment of Anil, Badal, Chanchal and Damodar by a single resolution was passed in the meeting and not a single vote was cast against such motion.
- As on 31<sup>st</sup> March, 2019, the turnover of the company increased to ₹ 120.52 crore but the aggregate of outstanding loans, debentures and deposits reduced to ₹ 40 crore. The paid-

up share capital was the same as earlier. Due to the increased turnover there arose the requirement of appointing two independent directors.

Since the company was required to appoint two independent directors, the total strength of the Board with such appointments would go up to 16 directors from the present 14 whereas according to the Articles, the company can have a maximum of 15 directors. Accordingly, the Articles were altered and the total strength was increased to 20 directors.

After altering the Articles, the company proceeded to appoint four independent directors instead of the mandatorily required two since it was felt that such step would strengthen the corporate governance to the maximum extent. The independent directors were - Mrs. Eekam, who is considered 'influencer' on supply chain management and has a lot of expertise in the logistics field; Mrs. Prajna who is a marketing expert; Mrs. Ruchita, who is MBA (Finance and Accounting) from IIM, Ahmedabad; and Mr. Amit, who is skilled in developing customised software. Subsequent to the above developments, the time to hold Annual General Meeting (AGM) approached and it was held on 12<sup>th</sup> August, 2019, at the registered office of the company at Mumbai.

#### Multiple Choice Questions (MCQs)

1. In this case scenario, Anil, Badal, Chanchal and Damodar were appointed as directors by passing a single resolution at the AGM. Is such appointment valid?
  - (a) The appointment of Anil, Badal, Chanchal and Damodar by a single resolution is valid because beforehand, a motion authorising their appointment by a single resolution was passed in the meeting and not a single vote was cast against such motion.
  - (b) The appointment of Anil, Badal, Chanchal and Damodar by a single resolution is not valid because passing of resolution by simple majority indicates that it was not passed unanimously.
  - (c) The appointment of Anil, Badal, Chanchal and Damodar by a single resolution with simple majority is not valid because such resolution is required to be passed as a special resolution.
  - (d) The appointment of Anil, Badal, Chanchal and Damodar by a single resolution is not valid because in no case more than one director can be appointed by passing a single resolution.
2. In the given case scenario, according to the Articles all the directors are rotational. Had this been not the case, how many directors were required to retire at the AGM which was held on 20<sup>th</sup> August, 2018?
  - (a) Five directors
  - (b) Four directors
  - (c) Three directors

- (d) Two directors
3. In the given case scenario, if it is presumed that as on 31<sup>st</sup> March, 2019, the turnover of the company is ₹ 87.00 crore and the paid-up share capital is ₹ 12.00 crore, would the company be still mandatorily required to appoint two independent directors?
- (a) There is no need to appoint two independent directors since the aggregate of turnover and paid-up share capital has not crossed the threshold of ₹ 100 crore.
- (b) Instead of appointing two independent directors, the company is required to appoint only one independent director since the aggregate of turnover and paid-up share capital is above ₹ 90 crore but less than ₹ 100 crore.
- (c) The company is required to appoint minimum two independent directors since the paid-up share capital is ₹ 12 crore.
- (d) The company is required to appoint only one independent director since the paid-up share capital is below ₹ 15 crore.
4. According to the case scenario, the company altered its Articles of Association so as to increase the total strength of directors up to 20 from the present 15 directors. Which of the following options is applicable in such a case of alteration:
- (a) The articles were altered by passing an ordinary resolution.
- (b) The articles were altered by passing an ordinary resolution followed by approval sought from the jurisdictional Registrar of Companies.
- (c) The articles were altered by passing a Board Resolution with more than seventy-five percent majority.
- (d) The articles were altered by passing a special resolution.
5. As on 12<sup>th</sup> August, 2019, when the AGM of LTSL was held, the total strength of directors reached to 18 due to the appointment of four independent directors. When all the directors are rotational, how many directors shall get retired at this AGM?
- (a) Six directors
- (b) Five directors
- (c) Four directors
- (d) Two directors
2. Ali Baba Limited is a listed company incorporated under the provisions of Company Law having its registered office at Andhra Pradesh. Mrs. Smart is a Managing Director of Ali Baba Limited since its incorporation. She was first director and one of the promoters of the company. She has vast experience of managing the company in very efficient manner.
- Ali Baba Ltd. is a holding company of PM Limited with a Fira Private Limited as a subsidiary to PM Limited.

Following are the details pertaining to the incorporation of the related entities and its capital structure:

| S. No. | Particulars                | Ali Baba Limited  | PM Limited       | Fira Private Limited |
|--------|----------------------------|-------------------|------------------|----------------------|
| 1.     | Date of Incorporation      | 17/09/1985        | 06/09/1988       | 28/09/1989           |
| 2.     | Place of Registered Office | Andhra Pradesh    | Delhi            | Hyderabad            |
| 3.     | Authorised Share Capital   | ₹ 100,00,00,000/- | ₹ 20,00,00,000/- | ₹10,00, 00,000/-     |
| 4.     | Paid Up Share Capital      | ₹ 99,00,00,000/-  | ₹ 10,00,00,000/- | ₹ 10,00,00,000/-     |

Under the guidance of Mrs. Smart, Ali Baba Limited acquired shareholding in PM Limited and thus resulting it into a subsidiary company of Ali Baba Limited. Now the Board of Directors of Ali Baba Limited wishes to nominate Mrs. Smart for the position of Managing Director in PM Limited and also to appoint her as Whole Time Director(WTO) in Fira Private Limited, which is a wholly owned subsidiary (WOS) of PM Limited.

Therefore, the Board of Directors of PM Limited passed a Board Resolution through resolution by circulation to appoint Mrs. Smart as Managing Director of the company. Subsequently, the Board of Directors of Fira Private Limited passed the Board Resolution at Board Meeting, wherein all directors present in the meeting approved the resolution for appointing her as Whole Time Director of the company and then subsequent to unanimous Board approval, Fira Private Limited also conducted the general meeting for getting approval of shareholders and passed the ordinary resolution to appoint her as Whole Time Director in the company.

Further, for appointment of Mrs. Smart, PM Limited and Fira Private Limited had complied with Schedule V of the Companies Act, 2013 as a result respective companies did not take any approval from Central Government for her appointment as Managing Director and Whole Time Director respectively.

Based on the above provided information and in the light of applicable provisions of the Companies Act, 2013, read with Schedule V of the Act, you are asked to advice on the following Multiple Choice Questions:

1. State on the validity of the appointment of Mrs. Smart as Managing Director in PM Limited in terms of the provisions of the Companies Act, 2013?
  - (a) Invalid, as no such appointment was made or approved by resolution passed at the board meeting with the consent of all the directors present at the meeting and supported by general meeting's ordinary resolution under section 196.
  - (b) Valid as whole time KMP shall hold office in its subsidiary at the same time.
  - (c) Valid with further approval of the Central Government
  - (d) Invalid because a person cannot hold more than one office as Managing Director

2. Whether Mrs. Smart appointment as Whole Time Director in Fira Private Limited is valid as per provisions of the Companies Act, 2013?
  - (a) No, because being Fira Private Limited is private company so rule 8 & 8A of Companies (Appointment & Remuneration of Managerial Personnel) Rules, 2014, not applicable
  - (b) Yes, as per section 2(71) it is deemed as public Co.
  - (c) Yes, on further approval of Central Government
  - (d) No, because of restriction under section 203(3) on appointment in more than one company.
3. What will be legal position as to the appointment of Mrs. Smart as Managing Director in PM Limited, if Ali Baba Limited is a Government Company?
  - (a) Invalid due to non-compliance of section 203
  - (b) Valid in light of the provisions 203(4A)
  - (c) Valid with approval of central government
  - (d) Invalid because a person cannot hold office of Managing Director in more than 1 company.
4. What is the status of Fira Private Limited for the purpose of the applicability of the Companies Act, 2013, if Ali Baba Limited is a Government Company?
  - (a) Private Company
  - (b) Public Company
  - (c) Government Company
  - (d) Associate Company
5. Whether appointment of Mrs. Smart as Whole Time Director in Fira Private Limited is legally acceptable, if Ali Baba Limited is a Government Company?
  - (a) No, because being Fira Private Limited is private company so rule 8 & 8A of Companies (Appointment & Remuneration of Managerial Personnel) Rules, 2014, not applicable
  - (b) Yes, because section 203 is not applicable on Government Companies
  - (c) Yes, with further approval Central Government
  - (d) No, because of restriction under section 203(3)
3. In case of Topica Sugar Mills Limited, necessary arrangements are in place for conducting of Board Meetings through the means of video conferencing, a facility which Vaibhav and Yukta, the two directors out of six intend to utilize by participating in such meetings through

- it. During which part of the year they should intimate the company about their participation in Board Meetings through video conferencing?
- (a) At the beginning of the Financial Year
  - (b) At the beginning of the Calendar Year
  - (c) On 1st day of any month falling in the Financial Year
  - (d) Before the Board Meeting.
4. Blue Rose Agri-Products Limited, which is *inter-alia* listed on National Stock Exchange, has called an extra-ordinary general meeting (EGM) of the shareholders on 29<sup>th</sup> January, 2019 at its Head Office in New Delhi to seek approval in respect of certain matters. It so happened that the company received a notice on 25<sup>th</sup> January, 2019 from the requisite number of small shareholders who proposed appointment of Shivank as their director but it refused to entertain the notice as the same was served quite late. Advise the latest date by which the small shareholders must have given the notice for the appointment of Shivank so that it was not refused by the company.
- (a) The notice should have been served latest by 24<sup>th</sup> January, 2019.
  - (b) The notice should have been served latest by 15<sup>th</sup> January, 2019.
  - (c) The notice should have been served latest by 22<sup>nd</sup> January, 2019.
  - (d) The notice should have been served latest by 19<sup>th</sup> January, 2019.
5. The IRP appointed for M Ltd. is seeking your views on the constitution of the Committee of creditors of M Ltd. M Ltd. does not have any financial debt other than loan obtained from Mr. A, son of Mr. B, the managing director of M Ltd. Considering the above, identify the appropriate constitution of the committee of creditors out of the following:
- (a) Mr. A, 18 largest operational creditors, 1 representative of all workmen
  - (b) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees.
  - (c) Only Mr. A since he is the only financial creditor
  - (d) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees and the resolution professional.
6. Which of the following terms are not included within arrangements entered into by the Central Government with another country, in relation to reciprocal arrangements under PMLA, 2002?
- (a) Enforcement of the provisions of PMLA, 2002
  - (b) Prevention of offence in India under the corresponding PMLA law in force in the other country
  - (c) Exchange the history of person if it is wilful offender under the PMLA on annual basis.

- (d) Exchange information to prevent any offence under PMLA, 2002.
7. Mr. V, brother of Mr. R, is a resident of Singapore and he owns an immovable property in Chennai which he inherited from his father, who was a resident of India, Can Mr. V continue to hold the property?
- (a) No, he cannot hold transfer or invest in India, since he is resident outside India.
- (b) Yes, he can continue to hold in India, since he is person of India Origin and the property is located in India
- (c) Yes, he can continue to hold the property, since this was inherited from a person who was resident in India.
- (d) Yes, he can continue to hold the property, since his brother (Mr. R) uses the property whenever he travels to Chennai.
8. Which among the following is legally acceptable permissible source for funding overseas direct investment :
- (a) Proceeds of External Commercial Borrowings
- (b) Proceeds of Real estate business
- (c) Proceeds of Banking business
- (d) Proceeds of foreign currency funds raised through other than ADR / GDR issues

### Descriptive Questions

9. Aster limited (a listed company) deals in business of trading of raw materials to the manufacturer of the garments. The company was running in losses for past two years. The Board of the company appointed Mr. C with good experience in cost management to overcome the said situation, as whole time director. He was of 70 years on the date of his appointment i.e. 18.12.2019.

Following were the relevant extracts from latest audited financial statements (as on 31<sup>st</sup> March, 2019);

- (a) Authorised Share capital is ₹ 390 crore, out of which paid up share capital was ₹ 215 crore; company was in process of FPO, hence had balance of ₹ 15 crore in share application money account.
- (b) Balance of reserve and surplus was ₹ 170 crore, out of which ₹ 150 crore was general reserve and ₹ 20 crore was on accounts of revaluation reserve.
- (c) Outstanding amount for long term loans was ₹ 200 crore
- (d) Company had investment of ₹ 40 crore at book value; due to economic slowdown same is not liquid investment
- (e) Accumulated losses were of ₹ 10 crore.

In the light of the given facts and figures, evaluate the given situations in terms of the relevant provisions of the Companies Act, 2013-

- (i) Validity of appointment of Mr. C, as managerial person in office of whole time director in Aster Limited.
  - (ii) Compute the Effective Capital of Aster Limited for payment of Managerial Remuneration.
  - (iii) Since Aster Ltd. was running in losses, state the maximum amount of remuneration to be paid on yearly basis to each Managerial Person.
10. Fame Ltd. filed an application to the registrar for removal of the name of company from the register of companies after passing special resolution. On the complaint of certain members, Registrar came to know that already an application is pending before the Tribunal for the sanctioning of a compromise or arrangement proposal. The application was filed by the Fame Ltd. two months before the filing of this application to the Registrar. Determine the given situations in the lights of the given facts as per the Companies Act, 2013:
- (i) Legality of filing an application by Fame Ltd. Before the Registrar.
  - (ii) Consequences if Fame Ltd. files an application in the above given situation.
  - (iii) In case Registrar notifies Fame Ltd as dissolved under section 248 in compliances to the required provisions, what remedy will be available to the aggrieved party?
11. Draft a Board Resolution of disclosure of interest by Mr. J, director of ABC Ltd. in a proposed contract to be entered into with M/s APL & Co. in which, such director is a partner.
12. Enumerate the given situations in the light of the term defined as Current Account Transaction under FEMA.
- (a) An Indian resident imports machinery from a vendor in UK for installing in his factory.
  - (b) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.
  - (c) An Indian resident transfers US\$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.
13. Mr. X was found to be guilty of offence of money-laundering by being involved in an activity connected with proceeds of crime. Adjudicating Authority(AA) as per findings confirmed the attachment of the property and ordered for the investigation. The investigation was initiated by the AA on 1<sup>st</sup> February, 2019. The attachment of the property of Mr. X was still to be continued by 31<sup>st</sup> January 2020. Enumerate in the given situation the validity of the attachment period.

14. ABZ Ltd. an unlisted company with total assets of ₹ one crore as per financial statement as on 31<sup>st</sup> March, 2018, defaulted in the payment of the financial debt against the financial creditor Mr. X. Mr. X filed an application for initiation of insolvency process against ABZ Ltd. under the fast track corporate insolvency resolution process on 31<sup>st</sup> May 2019. Discuss the relevancy for disposal through the mechanism of the fast track corporate insolvency resolution process and the legal position of holding of fast track corporate insolvency resolution process by Mr. X in the term of the IBC, 2016. Compute the time period for completion of fast track process in the said situation.
15. Bhrat Ltd. is a subsidiary of Global Ltd., which is a MNC registered in Hongkong. The Bhrat Ltd. had obtained the permission to receive foreign contribution in a designated account in the SBI. Later it was discovered that the obtained foreign contribution were deposited in other account for its functioning. Advise on the given situation as to depositing of the amount of foreign contribution from designated account to any other account. And state the duty of the bank on the said transactions made?
16. SEBI on a complaint of Mr. KG enquires that Mr. Mehta, a Chief Executive Officer of the X Company, on the basis of unpublished price sensitive information, has been indulged in the trading of the securities of that company. Examine, on the basis of the said finding, what action SEBI can take against Mr. Mehta under the Securities and Exchange Board of India Act, 1992.
17. Mr. R, the respondent had placed an order of purchase of various quantities of phosphoric acid from the Mr. P, the petitioner. The purchase order noted that the terms and conditions were to be as per the Fertilizer Association of India (FAI). Terms and Conditions for Sale and Purchase of Phosphoric Acid were as per Clause 15 of the FAI which also provided terms for settlement of disputes by arbitration. Enumerate in the light of the given circumstances as to existence of a valid arbitration agreement between the parties as per the Arbitration and Conciliation Act, 1996.
18. PQR Ltd. is holding 30% of the paid up equity capital of Cochin Stock Exchange. The company appoints MNL Ltd. as its proxy who is not a member of the Cochin Stock Exchange, to attend and vote at the meeting of the stock exchange. Examine whether the Cochin Stock Exchange can restrict the appointment of MNL Ltd. as proxy for PQR Ltd. and further restrict, the voting rights of PQR Ltd. in the Cochin Stock Exchange.
19. Mr. Mediator was proposed to be appointed as a resolution professional for the corporate insolvency resolution process initiated against BMR Ltd. Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. Mediator is partner. In the light of the given facts, examine the nature of the proposal of the appointment of Mr. Mediator for the conduct of the CIRP as per the Insolvency and Bankruptcy Code, 2016.
20. In the annual general meeting of XYZ Ltd., while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud and financial irregularities were marked against him by some members. This resulted into chaos in the meeting. The situation was normal only after the Chairman declared about initiating an inquiry against

the director Mr. X, however, could not be re-appointed in the meeting. The matter was published in the newspapers next day. On the basis of such news, whether the court can take cognizance of the matter and take action against the director on its own? Justify your answer with reference to the provisions of the Companies Act, 2013.

### SUGGESTED ANSWER

#### (1) Integrated case scenario 1

1. Answer – (a)
2. Answer - (c)
3. Answer - (c)
4. Answer- (d)
5. Answer - (b)

#### (2) Integrated case scenario 2

1. Answer: (a)
2. Answer: (b)
3. Answer: (b)
4. Answer: (c)
5. Answer: (b)

#### Multiple choice questions

3. Answer (b)
4. Answer (b)
5. Answer (b)
6. Answer (c)
7. Answer (c)
8. Answer (a)

#### Descriptive Questions

9. (i) As per section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of twenty-one years or has attained the age of seventy years, unless that appointment of a person who has attained the age of seventy years may be made by passing a special resolution(SR) with explanatory statement annexed to the notice for such an appointment of person.

Where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

Therefore, appointment of Mr. C as whole time director in the Aster Ltd. being of 70 years, is valid in compliance to above legal provisions.

- (ii) As per section II of Part II of Schedule V to the Companies Act 2013, "effective capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

According to the particulars given:

| Particulars  | Amounts (in Crore) |
|--|--------------------|
| Paid up share capital (Excluding share application money) (215-15) | ₹ 200              |
| General Reserve (Excluding Revaluation Reserve) (170-20)           | ₹ 150              |
| Long term loans  | ₹ 200              |
| Less; Investments (40) and Accumulated losses (10)                 | ₹ 50               |
| Effective Capital  | ₹ 500              |

- (iii) As per Section II of Part II of Schedule V to the Companies Act 2013, in case of no or inadequate profits, if effective capital of company is ₹ 250 crore or more then, yearly remuneration per person payable shall not exceed by ₹ 120 lakh plus 0.01% of the effective capital in excess of ₹ 250 crore.

The maximum remuneration that may be paid to each managerial person will be [120 lakh + (0.01% x 250 cr)] = 122.5 lakh.

Provided that the remuneration in excess of above limits may be paid if the resolution passed by the shareholders is a special resolution.

10. According to the Section 248(2) of the Companies Act, 2013, a company may, after extinguishing all its liabilities, by a special resolution, or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all

or any of the grounds specified in section 248(1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner.

Further Section 249 provides restrictions on making application under section 248 .

An application under section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company—

- (a) has changed its name or shifted its registered office from one State to another;
- (b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;
- (c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;
- (d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
- (e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

**Violation of above conditions on filing of application:** If a company files an application in violation of restriction given above, it shall be punishable with fine which may extend to one lakh rupees.

**Rights of registrar on non-compliance of conditions by the company:** An application filed under above circumstances, shall be withdrawn by the company or rejected by the Registrar as soon as conditions are brought to his notice.

**Aggrieved person to file an appeal against the order of registrar:** As per section 252(1), any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies. However a reasonable opportunity is given to the company and all the persons concerned.

According to the above provisions, following are the answers:

- (i) As per the restrictions marked in the Section 249(d) stating that an application under section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded.

As per the facts application to the registrar for removal of the name of company from the register of companies, was filed by the Fame Ltd. within three months to the filing of an application to the Tribunal for approval of compromise or arrangement proposal. Therefore filing of such an application by Fame Ltd is not valid.

- (ii) If a company files an application in above situation, it shall be punishable with fine which may extend to one lakh rupees. An application so filed, shall be withdrawn by the company or rejected by the Registrar as soon as conditions are brought to his notice.
- (iii) According to the provision given in section 252(1), a person aggrieved by an order of the Registrar, notifying Fame Ltd. as dissolved under section 248, may:
  - ◆ file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar, and
  - ◆ if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the Fame Ltd. in the register of companies.
  - ◆ A reasonable opportunity is given to the Fame Ltd. and all the persons concerned.

#### 11. Board Resolution of disclosure of Interest U/s 184

Resolved that pursuant to section 184(1) of the Companies Act, 2013 read with Rule 9(1) of the *Companies (Meetings of Board and its powers) Rules, 2014*, and other applicable provisions of the Companies Act, 2013, the general notice of disclosure of interest or concern in Form MBP-1 received from Mr. J, Director of the company, as placed before the meeting, be and hereby noted and taken on record by the Board.

Resolved further that Mr. J, Director of the company, and Mr. -----Company Secretary of the company be and hereby severally authorised to make necessary entries in the register maintained for the purpose.

Further resolved that Mr. ----- Company secretary and Mr. J director of the company, be and are severally authorised to affix his/ her DSC and file e-form MGT-14 with the Registrar of Companies.

#### 12. (1) An Indian resident imports machinery from a vendor in UK for installing in his factory.

**Answer:** As per accounts and income-tax law, machinery is a "capital expenditure". However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence, the said transaction, is a Current Account Transaction.

- (2) **An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.**

**Answer:** As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], "short-term banking and credit facilities in the ordinary course of business" are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

- (3) **An Indian resident transfers US\$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.**

**Answer:** Under accounts and income-tax law, gift is a "capital receipt". However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

13. **Order for attachment/retention of property etc.:** As per section 8 of the PMLA, 2002, where the Adjudicating Authority decides that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect.

**Period for attachment, retention, or freezing of the seized or frozen property or record:** Whereupon such attachment, retention, or freezing of the seized or frozen property or record, AA shall—

- (a) continue during investigation, for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- (b) become final after an order of confiscation is passed under section 8(7) or section 8(5) or section 58B or section 60(2A) by the Special Court .

For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

Accordingly, the attachment of the property of Mr. X to be continued by 31<sup>st</sup> January 2020 is valid as it is within 365 days from the date of order of the investigation by the Adjudicating Authority.

14. **Relevancy :** Fast track corporate insolvency resolution process is a speedy process for corporate insolvency resolution for small corporates.

As per section 55 of the IBC, 2016, it is applicable to following corporate debtors - (a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or (b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or (c) such other category of corporate persons as may be notified by the Central Government.

**Applicability of the provisions** - The provisions are applicable to - (a) small company under section 2(85) of Companies Act (b) a start-up (other than partnership firm)[as defined by Ministry of Commerce and Industry notification No. GSR 501(E) dated 23-5-2017] (c) an unlisted company with total assets not exceeding ₹ one crore as per financial statement immediately preceding the financial year [SO 1911(E) dated 14-6-2017].

**Time period for completion of fast track process**

The fast track corporate insolvency resolution process shall be completed within a period of 90 days from the insolvency commencement date. It can be extended by Adjudicating Authority by further 45 days, if resolution passed at a meeting of the committee of creditors and supported by a vote of seventy five per cent of the voting shares [section 56(3) of Insolvency Code, 2016].

According to the provisions, fast track corporate insolvency resolution process shall be completed by 29<sup>th</sup> of August 2019. On further extension upto by 13<sup>th</sup> of October, 2019 in compliance with above provision.

15. Every person who has been granted a certificate or given prior permission shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate. However, person may open one or more accounts in one or more banks for utilising the foreign contribution received by him. No funds other than foreign contribution shall be received or deposited in such account or accounts.

Every bank or authorised person in foreign exchange shall report to such authority as may be specified —

- (a) prescribed amount of foreign remittance;
- (b) the source and manner in which the foreign remittance was received; and
- (c) other particulars, in such form and manner as may be prescribed.

As per the above stated provisions, Foreign contributions should be received only in the branch of Bank as specified in the application for grant of registration certificate. If permission is obtained to receive foreign contribution in a designated account, and depositing the same in other account, is an offence. However, for utilisation of the funds, one or more banks are permissible [proviso to section 17(1) of FCRA, 2010].

**Obligations of Bank receiving foreign contribution of its customer**

According to *Rule 16 of FCR, Rule 2011*, the bank shall report to the Central Government within forty-eight hours any transaction in respect of receipt or utilisation of any foreign contribution by any person whether or not such person is registered or granted prior permission under the Act.

16. Section 15G of the Securities and Exchange Board of India (SEBI) Act, 1992 deals with penalty for Insider Trading. According to this, if any insider
- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate on any stock exchange on the basis of any unpublished price sensitive information; or
  - (ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law, or
  - (iii) counsels or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information,

shall be liable to a penalty of minimum ₹ 10 lacs which may extend upto twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher. As such SEBI can, after following the prescribed procedure, impose a penalty on Mr. Mehta. The maximum penalty that SEBI can impose is Rupees twenty-five crores or three times the amount of profits made out of insider trading, whichever is higher.

17. **Arbitration agreement through reference:** The Arbitration and Conciliation Act, 1996 envisages a possibility of an arbitration agreement coming into being through incorporation. In other words, parties to an agreement could agree to arbitrate by referring to another contract containing an arbitration agreement. The requirement is that the reference must leave no doubt in the mind of the reader that the parties indeed wanted to incorporate the arbitration agreement into the agreement between them.[Section 7(5)]

Accordingly, as per the said provision, yes this a valid reference for an arbitration agreement to come into existence. It was held by the Supreme Court of India in *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn Ltd 2006 (2) ArbLR 435 (SC)* that for a reference to constitute an arbitration agreement the contract should be in writing and reference should be such as to make that arbitration clause a part of the contract. Both the conditions were held to be fulfilled in the present instance.

18. Section 7(A) of the Securities (Contracts) Regulation Act, 1956 provides that a recognised stock exchange is empowered to amend rules to provide for all or any of the following matters:
- (a) Restriction of voting right to members only.
  - (b) Regulation of voting rights by specifying that each member is entitled to one vote only irrespective of number of shares held.

- (c) Restriction on right of members to appoint proxy.
- (d) such incidental, consequential and supplementary matters as may be necessary to give effect to any of the matters specified in clauses (a), (b) and (c).

As such Cochin Stock Exchange can restrict the appointment of MNL Ltd., as proxy, if rules of the exchange so provide. If it is not so provided, rules may be amended and after getting approval of the Central Government regarding amendment, it can restrict appointment of proxies.

Cochin Stock Exchange can also restrict the voting rights of PQR Ltd. if rules of the exchange so provide. If it is not so provided, rules maybe amended and after getting approval of Central Government regarding amendment, it can restrict the voting rights of PQR Ltd. on appointment of proxies.

19. As per Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation– A person shall be considered independent of the corporate debtor, if he :

- (a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;
- (b) is not a related party of the corporate debtor; or
- (c) is not an employee or proprietor or a partner:
  - (i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor in the last three financial years.
  - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

As per the given facts, Mr. Mediator was proposed to be appointed as a resolution professional for the insolvency resolution process initiated against BMR Ltd. Whereas, Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. Mediator is partner.

Since, Mr. R is the partner in Insolvency Professional Entity in which Mr. Mediator is also a partner, so, Mr. Mediator is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor, because Mr. R is relative of Director of BMR Ltd. (Corporate Debtors).

20. Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:
1. Every offence under this Act except the offences referred to in sub section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.
  2. No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder, member of the company, or of a person authorized by the Central Government in that behalf.

Thus, in the given situation, the court shall not initiate any suo moto action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or of a person authorized by the Central Government in this behalf.