FEMA Seminar
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Topic 2

FEM(GUARANTEES) REGLNS. vs. ECB REGLNS.-- ***A CONTRADICTION***

Is this a case of RBI vs RBI ?

The question attracted attention in business & professional circles when ET reported on 14 Feb 2025 ‘RBI Moves to fine Co.s for Availing Foreign Guarantees’

Provisions in Guarantees & ECB Regulations

Now Let us look at the provisions in Guarantees Regulations & ECB Regulations.

Regulation 3A of FEM (Guarantees) Regulations 2000 prohibits Foreign Guarantees.

(Notification FEMA 8/2000-RB dated 03 May 2000)

Proviso

There is a proviso to Regln.3A, which permits such guarantees for domestic debt by way of bonds, debentures (but not loans)

3 A & FEM (B – L) Regulations, 2018

vide Notification FEMA 3 (R) / 2018 RB dated 17 Dec 2018

ECB

RBI FED MD No. 5/ 2018 -19 dated 26 -3-2019 which is based on & explains Notification FEMA 3 (R).: has 3 parts

ECB Contd....

Part I : ECB (External Commercial Borrowings)

Part II : TC (Trade Credits)

Part III: SO (Structured Obligations)

It is Part III that is of interest to us.

Structured obligations

- transactions between domestic entities, which are guaranteed by a foreign entity.

- There are **NO FEMA implications** until default.

Structured obligations....contd...

Then the foreign guarantor has to make a foreign inward remittance to the creditor in India.

In turn, the guarantor will have a claim against the principal debtor.

The latter has general permission to make a foreign outward remittance to reimburse the guarantor

Recent Developments

A] Guarantees

On 14 Aug 2025, RBI has published for Public Comment the draft of FEM (Guarantees) Regulations., 2025 vide proposed Notification FEMA (8R) / 2025 –RB.

This is meant to supersede FEM (Guarantees) Regulations 2000., vide Notification FEMA 8 /2000 -RB dated 03 MAY 2000.

Stated Intent of FEMA 8 (R)

A] To promote ease of doing business

B] To ensure that in general guarantees involving cross border transactions will be under Automatic Route .

C] To expand the universe of guarantees enabled under **Automatic Route.**

Stated Intent of FEMA 8 (R).....Contd....

The liberalisation measure which is germane to the present discussion is that Regulation 3A of FEMA 8 has been done away with.

Stated Intent of FEMA 8 (R).....Contd....

Regulation 6 (3) of draft FEMA 8 (R) places only a reporting obligation on the principal debtor in India in respect of foreign guarantees availed by him

Recent Developments. Contd....

ECB, TC, & SO

On 03 Oct. 2025, RBI has published for public comment, the draft of the FEM (Borrowing & Lending) (Fourth Amendment) Regulations,2025, to amend FEMA 3 (R)

Recent Developments. Contd....

The main thrust of the draft is to replace Schedule I to FEMA 3 (R), which brings in an amended ECB Framework.

Recent Developments. Contd....

Amendments include simplifying the definition of “ Eligible Borrower” , “Recognized Lender” & raising the borrowing limit from US $ 750 Mill. to US$ 1 Bill. or 300% of NW, whichever is higher.

Recent Developments. Contd....

No amendment has been made to Structured Obligations. So the old SO provisions continue to appear in the latest MD on ECB /TC/ SO.

The Question remains:

Was it fair to fine those Cos. for availing foreign guarantees ?

An Incidental Question:

As in the past, ECB Regulations continue to stipulate that, in the event of ECB default, the mortgaged property shall be sold only to **'a person resident in India" .**

In light of S.2 (v) of FEMA, this may result in Indian immovable properties passing into the hands of non-citizens.

Is that in tune with the regulator's intent?

(considering that even NRIs are not permitted to buy agricultural land or plantation or

farm house in India)?

Thank you