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January 25, 2017
VOL. VIII, ISSUE 5

Insight

Analysis of Recent Developments in Indian Corporate Law

Foreword

Welcome to this issue of *Insight*.

In this issue of *Insight,* as the lead article we have considered the key regulatory developments that have been ushered in by the Central Government in 2016 in the foreign investment regime, SEBI and corporate laws and the tax regime with a view to ease doing business in India. This issue also covers the key aspects of the recently notified Insolvency and Bankruptcy Code.

Apart from the above, we have also captured developments relating to notifications issued by the Ministry of Corporate Affairs in relation to the Companies Act, 2013 as well as circulars and notifications issued by the Reserve Bank of India and the SEBI, in the last quarter as well as the recent SEBI proposal in relation to the regulatory framework governing schemes.

Any feedback and suggestions would be valuable in our pursuit to constantly improve *Insight* and ensure its continued success amongst readers. Please feel free to send any feedback, suggestions or comments to insight@cyrilshroff.com.

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100 YEARS OF VALUES

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2016 - YEAR IN REVIEW – KEY REGULATORY DEVELOPMENTS

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Introduction

2016 saw a series of significant policy and regulatory changes being ushered in by the Central Government with a view to enhance the ease of doing business in India. With changes ranging from cleaning up balance sheets of public sector banks to the Government's aggressive demonetisation measures to drive out the parallel economy and usher in cashless transactions, it has been an eventful year.

Through these changes, the Government has reiterated its commitment to reforms and its intention of bringing about a paradigm shift in the Indian economy. Accordingly, set out below is a snapshot of the key regulatory developments of 2016 which have an impact on transactions and deal structures.

Foreign Investment

The Government further liberalized and clarified certain aspects of the foreign direct investment ("**FDI**") regime and the key changes effected are set out below:

- **Introduction of Composite Caps for Different Investment Routes** - Foreign investments, direct and indirect, regardless of whether the foreign investments have been made under Schedule 1 (FDI), 2 (Foreign Institutional Investor), 2A (Foreign Portfolio Investment (FPI)), 3 (Non-Resident Indian), 6 (Foreign Venture Capital Investor (FVCI)), 9 (Limited Liability Partnerships), 10 (Depository Receipts) or 11 (Investment Vehicles) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA 20**") have been subsumed under a single composite cap in place of distinct investment caps for each investment route. Therefore, irrespective of the investment route (i.e. FDI, FPI, FVCI etc.) the composite cap would apply. However, composite caps continue to exclude foreign currency convertible bonds (FCCBs) and depository receipts (DRs) having underlying instruments, since these instruments are in the nature of debt.

- **Non Applicability of Sectoral Conditions for Portfolio Investments** - Investment by FIIs/ FPIs is permitted in the capital of an Indian company under the Portfolio Investment Scheme subject to a limit of 10% for individual holding, and an aggregate investment limit of 24%, or the applicable sectoral ceiling. Putting to rest certain controversies regarding whether portfolio investments are subject to sector specific conditionalities, it has been clarified that no approval or compliance with sector specific conditionalities shall be required in case of portfolio investment up to an aggregate foreign investment level of 49% or the sectoral cap, whichever is lower, if the same does not result in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities. Foreign direct investments, however, remain subject to the sectoral conditionalities and restrictions.

- **Deferred Consideration** - With a view to facilitate foreign investments and to bring Indian M&A transactions in line with global best practices, the Reserve Bank of India ("**RBI**") amended FEMA 20, to permit the payment of deferred consideration in case of share purchase transactions between a resident and a non-resident under the automatic route subject to the following conditions:

  - a maximum of 25% of the total consideration can be paid by the buyer on a deferred basis;

  - the deferred consideration is to be paid within 18 months from date of the transfer agreement; and

- the total consideration finally paid should be in line with the prevailing pricing norms.

The buyer and the seller may agree on structuring the deferred consideration by way of: (i) an escrow arrangement subject to the above conditions; or (ii) in cases where the total consideration is paid upfront by the buyer to the seller, an indemnity to be furnished by the Seller for an amount not exceeding 25% of the total consideration and for a period not exceeding 18 months from the date of payment of the full consideration. This move enables investors to structure tranche wise payments as well as earn out structures.

- **Other Key Changes in the FDI Policy of 2016** – FDI is now permitted up to 100% in the following sectors:

  - Business to business (B2B) e-commerce, through the marketplace model (subject to the specified conditions, key amongst which are the conditions that (i) the e-commerce entity shall not exercise ownership over the inventory; and (ii) not more than 25% of the sales of the marketplace is effected by one vendor or their group companies);
  - Brownfield/ existing airport projects;
  - Animal Husbandry including breeding of dogs, Pisciculture, Aquaculture and Apiculture (without any controlled conditions);
  - Trading of Food Products manufactured in India, including through e-commerce;
  - Broadcasting Carriage Services (provided that for FDI beyond 49% in a company not seeking permission from sectoral Ministry, resulting in change in ownership pattern or transfer of stake from existing investor to new foreign investor will be under government route);
  - other financial services activities regulated by financial sector regulators including Securities and Exchange Board of india ("**SEBI**"), RBI, Insurance Regulatory änd Development Authority ("**IRDA**"), Pension Fund Regulatory and Development Authority ("**PFRDA**"), National Housing Bank ("**NHB**") (subject to prescribed conditions); and
  - Asset reconstruction companies (subject to prescribed conditions).

- **Investment by NRI's:** The RBI has clarified that investment by NRIs on a non-repatriation basis under Schedule 4 of FEMA 20 shall be deemed to be domestic investment and be treated at par with the investment made by residents.

Securities Law

With a view to enhance investments in the securities market as well as taking measures for the protection of stakeholders, SEBI introduced the following key regulatory changes in 2016:

- **Changes to the REITs and InvITs Regulations**

  With a view to increase investor confidence and to provide a much needed fillip to the real estate sector, the SEBI *vide* its board meeting held on September 23, 2016, sought to amend the Real Estate Investment Trusts ("**REITs**") and Infrastructure Investment

Trusts ("**InvITs**") Regulations, 2014 to facilitate the growth and ease the procedure for registration and regulation of such trusts.

The major changes introduced by SEBI to the regulations on REITs and InvITs have been dealt with separately in this issue of *Insight*.

- **Easing of Rules for Angel Funding in Start-ups**

  In order to develop the alternative investment industry and the start-up ecosystem in India, SEBI amended the SEBI (Alternative Investment Funds) Regulations, 2012, wherein the key changes made include the following:

  - Angel funds will now be allowed to invest in start-ups incorporated within 5 years (up from the earlier 3 years).
  - The upper limit for the number of angel investors in a scheme has increased from 49 to 200 and the lock-in requirements of investment made by angel funds in the venture capital undertaking has been reduced from 3 years to 1 year.
  - Further, the minimum investment amount requirement by an angel fund in any venture capital undertaking has been reduced from Rs. 50 lakh to Rs. 25 lakh.

- **Exit Offer for Dissenting Shareholders**

  Pursuant to a SEBI board meeting dated January 11, 2016, SEBI amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**") to include a new chapter VI-A regarding conditions and manner of providing an exit opportunity by the promoters or shareholders in control of a company to the dissenting shareholders, in case a company which has raised funds from the public through prospectus and still has any unutilized amounts out of the moneys so raised, proposes to vary its objects.

  Chapter VI-A of the ICDR Regulations prescribes the formula for determining the exit offer price, along with the manner of providing exit to dissenting shareholders and provides that only those dissenting shareholders of the issuer who are holding shares as on the relevant date are eligible to avail the exit offer. The exit offer is available in cases where the proposal for the change of objects is dissented to by at-least 10% of the shareholders and if the amount to be utilized for the objects for which the prospectus was issued is less than 75% of the amount raised. The said provisions are applicable on a prospective basis i.e. for issues which opened after the commencement of the provisions of the Companies Act, 2013 ("**2013 Act**") i.e. from April 1, 2014.

Corporate Laws

With a view to facilitate ease of doing business in India, the Ministry of Corporate Affairs ("**MCA**") implemented the following key changes:

- **Relaxation of Norms for Private Companies** – The following key amendments were effected to the 2013 Act and its corresponding rules to reduce the number of compliance requirements for private companies:

  - **Related Party Transactions** - The Act previously required private companies to obtain approval from disinterested directors and shareholders in case of related party transactions ("**RPTs**"). This was seen to be difficult in private companies owing to presence of fewer members, who were mostly related to one another. To overcome the same, the MCA has exempted private companies from complying with Section 188 of the Act in relation to RPTs.

- **Acceptance of Deposits** - The Companies (Acceptance of Deposits) Rules, 2014 will not be applicable to a private company which accepts from its members monies not exceeding 100% of the aggregate of paid-up share capital and free reserves.

- **Notification of Bankruptcy and Insolvency Code**

Under the erstwhile framework, corporate insolvency in India was dealt with under multiple laws and adjudicated by different forums. With a view to simplify the regulatory environment and remove regulatory overlaps, the MCA *vide* notification dated November 30, 2016 notified the provisions relating to corporate insolvency under the Insolvency and Bankruptcy Code, 2016 (the "**Code**"), which offers a comprehensive insolvency framework. The key features of the Code have been dealt with separately in this issue of *Insight*.

- **Establishment of the National Company Law Tribunal ("NCLT")**

Whilst the proposal for establishment of a national tribunal having the powers: (i) exercised by the Company Law Board under the Companies Act, 1956 ("**1956 Act**"); (ii) to consider rehabilitation and revival of companies; and (iii) relating to winding up of companies, had been hanging fire for over a decade, with a view to ease doing business in India the MCA finally notified the constitution of the NCLT and the National Company Law Appellate Tribunal on June 1, 2016.

Some of the important powers vested with the NCLT include – class action suits, deregistration of companies, oppression and mismanagement, refusal to transfer shares, tribunal ordered investigation, compounding of offences etc.

The establishment of the NCLT consolidates the corporate jurisdiction of the Company Law Board, Board for Industrial and Financial Reconstruction (BIFR), the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the jurisdiction and powers relating to winding up restructuring and other such provisions, which were earlier vested in the High Courts.

- **Notification of Provisions relating to Schemes**

The MCA also notified the provisions of the 2013 Act relating to amalgamation, compromise, arrangement, liquidation and winding up with effect from December 15, 2016. Since the NCLT, which is a specialized body, will now have jurisdiction over these matters (instead of the High Courts, as under the erstwhile framework), the MCA also notified the Companies (Transfer of Pending Proceedings) Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Amalgamation Rules**") (both with effect from December 15, 2016) paving the way for the transfer of pending legal proceedings relating to schemes and winding-up from High Courts to the relevant benches of NCLT. The key features of these recent notifications are covered separately in this issue of *Insight*.

Tax Reforms

In the year 2016, various initiatives were taken to make the tax regime more investor friendly and also prevent the base erosion and profit shifting. Some of the key changes are as follows:

- **Amendment to India-Mauritius DTAA**

India and Mauritius signed a protocol ("**India-Mauritius Protocol**") amending the Double Taxation Avoidance Agreement ("**DTAA**") entered into between India and Mauritius, as a step towards tightening the tax laws to enable more efficient collection of taxes from investments routed through Mauritius, which *inter alia*, made the following amendments[1]:

(i) Capital Gains

Under the prevalent DTAA, capital gains derived by a Mauritius tax resident from the sale of a capital asset were not chargeable to tax in India. The India - Mauritius Protocol has reversed the position and has now granted the right of taxation to India. Accordingly, capital gains arising from alienation of shares of an Indian company acquired on or after April 1, 2017 shall be subject to tax in India.

However, in order to facilitate smooth transition and to provide investors adequate advance notice, certain intermediate mechanisms have been proposed. Firstly, investments made till March 31, 2017 will be grandfathered, i.e. the amendment shall be applicable only in respect of shares acquired on or after April 1, 2017. Secondly, the India-Mauritius Protocol provides for a concessional tax regime (50% of the applicable domestic tax rate) in respect of capital gains earned by Mauritius entities during the period April 1, 2017 to March 31, 2019, subject to the satisfaction of certain conditions.

(ii) Interest

Prior to the execution of the India- Mauritius Protocol, the interest income was taxed as per the tax rates provided under the domestic tax laws of India (except for Mauritius banks, which were exempt from tax). The India-Mauritius Protocol provides that all Mauritius entities, including banks, earning interest income from Indian sources will be charged to tax at a rate of not more than 7.5% of the gross amount of interest, provided the Mauritius entities are the beneficial owners of such interest income.

(iii) Fees for Technical Service ("**FTS**")

The India-Mauritius Protocol has introduced FTS clause, which seeks to tax FTS at the rate of 10%.

(iv) Other Income

The India-Mauritius Protocol provides that items of income, which are not expressly covered in the DTAA, could be now taxed in the source state.

- **Revised India-Cyprus DTAA**

India and Cyprus have entered into a revised DTAA along with its protocol, on November 18, 2016, which will replace the existing India-Cyprus DTAA. The revised DTAA has, *inter alia,* introduced the following amendments[2]:

1. *Refer to our Tax Alert (dated May 13, 2016) for further details .*
2. *Refer to our Tax Alert (dated December 16, 2016) for further details .*

(i) Capital Gains

The revised DTAA has introduced source based taxation of capital gains, i.e. capital gains arising to a Cyprus tax resident from alienation of shares of Indian company will be subject to tax in India. However, the revised DTAA provide for a grandfathering provision, as per which, the capital gains arising from the shares acquired prior to April 1, 2017 will continue to be not chargeable to tax in India.

(ii) Royalty and FTS

The revised DTAA provides that royalties and FTS would be taxed at the reduced rate of 10% (as against 15% provided under the prevalent DTAA) and the new FTS clause has done away with the 'make available' condition and seeks to expand the meaning of FTS to include within its purview the fees for managerial services.

- **Goods and Service Tax**

The introduction of Goods and Service Tax ("**GST**") will mark the consummation of 3rd generation fiscal reforms in India. GST would subsume the multiple indirect taxes currently levied, except the basic customs duty as well as remove the cascading effect of taxes. GST will be levied on intra-state supply of goods and services, concurrently by the Centre and the State as Central GST and State GST, respectively. Inter-state supplies would attract an Integrated GST. GST would be levied and collected at each stage of value addition.

As the Constitution of India, previously, did not vest an express power in the Centre to levy tax on sale of goods or in the States to levy service tax, an amendment to the Constitution of India was required to empower both the Centre and the States for levying tax on supply of goods and services. Accordingly, the Constitution (101^{st} Amendment) Act, 2016 ("**Constitutional Amendment Act**"), which was a precursor to the introduction of the GST in India, was granted assent to by the President of India on 8th September, 2016.

Pursuant to the Constitutional Amendment Act, the GST Council was constituted on September 12, 2016 for making recommendations to the Union and the States on important issues related to GST, *inter-alia,* including Model GST Laws, exemptions, GST rates including the floor rates with bands, special provisions for certain States, etc.

The GST Council, after taking into consideration the critical review of the draft Model GST released in June, 2016, has released a revised version of the draft Model GST Law ("**Revised Model GST**") on November 26, 2016 and is meeting periodically to finalize the basic structure of the proposed legislation.

By virtue of Section 19 of the Constitutional Amendment Act, if the GST does not come into force within a period of one year from the date of commencement of this Act i.e. by September 8, 2017, the current indirect taxes laws shall, also, cease to be in force. The Government of India is however, committed to introducing GST by April 2017.

The Government has taken various steps to improve the business climate in India as well as India's ranking in global indices such as the World Bank Report's 'Ease of Doing Business' by introducing significant reforms and changes in the regulatory regime. The Finance Minister recently stated that sustained efforts would continue to be made in this direction through 2017 targeted at promoting India as the preferred investment destination in an uncertain global economic climate.

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UPDATE ON INSOLVENCY AND BANKRUPTCY CODE, 2016

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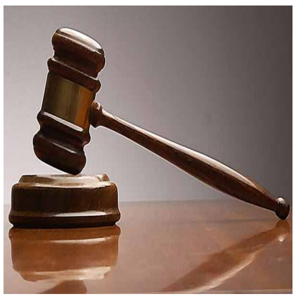
The MCA has vide notification dated November 30, 2016 notified the provisions relating to corporate insolvency resolution under the Code to be effective from December 01, 2016. Further, the Ministry of Finance had *vide* notification dated November 25, 2016 made effective the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**") with effect from December 01, 2016.

With the SICA repeal coming into effect concurrently from December 01, 2016 with effectiveness of the Code, all proceedings pending under SICA shall stand abated (other than approved schemes) and the company is allowed to make a reference to the NCLT under the Code within 180 days from the commencement of the Code (being December 01, 2016). The manner of administration of approved schemes is yet to be specified. The winding up proceedings currently pending under the 1956 Act will get transferred to the NCLT in the manner to be specified by the Government. The rules and regulations in relation to setting up of the insolvency professional agencies ("**IPAs**"), registration of insolvency professionals, corporate insolvency resolution process and liquidation of corporate persons have also been notified.



Corporate Insolvency Resolution Process ("**CIRP**")

CIRP can be initiated by a financial/ operational creditor or the corporate debtor upon occurrence of a default (a minimum of Rs. 1,00,000) by filing an application before the NCLT. The NCLT will, within 14 days of receipt of CIRP application, admit the application after ascertaining existence of default. The application for CIRP by the financial creditor will, *inter alia*, propose the name of an interim resolution professional ("**IRP**") who will manage affairs of the corporate debtor on a going concern basis till the resolution professional ("**RP**") is appointed. The CIRP application should be submitted along with *inter alia* the particulars of security held, default record with the information utility/ credit information company, order of the court adjudicating default, relevant contracts and entries in banker's book. The CIRP application can be withdrawn before admission.

The CIRP shall start from the date of admission of CIRP application by NCLT and from that day, a moratorium for a period of 180 days will be declared on, *inter alia*, proceedings against the corporate debtor, disposing of assets of the corporate debtor and foreclosure/ enforcement of any security. A period of 180 days has been prescribed for the purpose of completion of the entire CIRP with a further extension of 90 days in exceptional cases. The list of registered insolvency professionals is available on the website of the Insolvency and Bankruptcy Board of India ("**Board**").

For the purpose of inviting claims against the corporate debtor (formats have been prescribed), a public announcement will be made by the IRP within 3 days of his appointment. Financial contracts, records of the information utilities, contracts, invoices, court orders, invoices, financial statements/ accounts and employment contracts can be submitted as proof of claims of the creditors till the approval of resolution plan ("**Plan**") by the committee of creditors ("**CC**", comprising of all financial creditors except related party creditors).

The IRP will verify these claims, make a detailed list of creditors and constitute the CC within 30 days of the date of his appointment. In cases where there are no financial creditors or only related party financial creditors, the CC shall comprise of maximum of 18 largest operational creditors by value, and one elected representative of workmen and employees each.

The first meeting of CC will be held within 7 days of the constitution of CC and a RP will be appointed. The approval of CC (75% by value) will be, *inter alia*, required for raising any interim finance, creating security interest, changing ownership interest/ capital structure/ management of company and modifying contracts.

The RP shall prepare an information memorandum ("**IM**") which shall contain relevant information on the corporate debtor for the purpose of formulation of the Plan. The IM will be made available to potential resolution applicants, subject to maintenance of confidentially of information in addition to the CC. The RP is also empowered to sell unencumbered assets of the corporate debtor, not exceeding10% of total claims admitted, outside the ordinary course of business for realizing better value, subject to approval by the CC. Further, the liquidation value of the corporate debtor will be estimated by 2 registered valuers (appointed by the IRP) on the basis of internationally accepted valuation standards and an average of these estimates will be taken as the liquidation value.

A Plan can be submitted by any person to the RP and shall mandatorily provide for: (i) specific sources of funds to be used for payment of insolvency resolution process costs, liquidation value to operational creditors (to be paid in priority to financial creditors within 30 days of approval of the Plan) and liquidation value to dissenting financial creditors (payment to be made before other financial creditors make recoveries); (ii) term and implementation schedule of the Plan; (iii) management and control of the corporate debtor; and (iv) means of supervising implementation of the Plan.

Among others, the Plan may provide for transfer/ sale of assets of company, substantial acquisition of shares/ merger/ consolidation of the company, satisfaction/ modification of security interest, curing/ waiving of breach/ extension of maturity date/ change in interest rate or other terms of debts due from the company, reduction in dues payable to creditors, amendments to company's constitutional documents, issuing securities of the company for cash/ property/ in exchange of claims and obtaining requisite approvals from the government or other authorities.

The Plans submitted by resolution applicants will be examined by the RP for compliance with the Code and will be submitted to the CC for its approval. The CC can make modifications to the Plan. The Plan will then be submitted for NCLT's approval. Upon approval by the NCLT after checking compliance with the Code, the Plan will be binding on corporate debtors, employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The Plan will be effective notwithstanding any consent requirements under shareholders' agreement or joint venture agreement. Application to the NCLT can also be made for seeking assistance of the district administration for implementation of the terms of the Plan. Approval of a Plan can be appealed against on limited grounds of contravention of law, material irregularity in exercise of powers by the RP or non-compliance with the Board's requirements (which includes providing for liquidation value for operational creditors and insolvency resolution process costs).

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COMPANY LAW UPDATE

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MCA amends the Companies (Incorporation) Fourth Amendment Rules, 2016

The MCA has amended the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**"), which, *inter alia,* includes the following:

- Amendment to Rule 33 provides that a copy of the order of the NCLT approving the alteration of Article of Association ("**AoA**") for conversion of a public company into a private company shall be filed with the Registrar of Companies ("**RoC**") within 15 days of receipt of the same in Form No. INC-27 with fee. The same shall be accompanied with a printed copy of the altered AoA of the Company.

- Rule 38 has been added in the Incorporation Rules. This provides for Simplified Proforma for Incorporating Company Electronically.
- Rule 39 has been added in the Incorporation Rules. This allows for the conversion of a company limited by guarantee into a company limited by shares. The company seeking such conversion must have share capital equivalent to the guarantee amount. An application for the conversion must be filed in INC-27 with the RoC along with altered the Memorandum of Association and AoA. Rule 39 has been inserted with effect from November 1, 2016

(MCA Notification No G.S.R. 936(E) published in the Gazette on October 1, 2016)

MCA amends Schedule II of the 2013 Act

In para 3 of Part A of Schedule II, Indian Accounting Standards ("**Ind AS**") have been made applicable for calculating depreciation for intangible assets. For a company which is not required to apply Ind AS, relevant Accounting Standards under Companies (Accounting Standards) Rules, 2006 shall continue to apply. This notification is made applicable for the accounting period on or after April 1, 2016.

(MCA Notification No G.S.R. 1075(E) published in the Gazette on November 17, 2016)

MCA publishes the Companies (Removal of Difficulties) Fourth Order, 2016

- The MCA has published the Companies (Removal of Difficulties) Fourth Order, 2016 ("**Fourth Order**") pursuant to clause (c) of sub-section (1) of section 434 of the 2013 Act in light of difficulties having arisen with respect to the continuation of proceedings under the provisions of the 1956 Act with regards to: (a) proceedings other than cases of winding-up that are reserved for orders; (b) winding-up proceedings commenced under the 2013 Act or the Code which are being proceeded in High Courts and ; (c) proceedings other than cases of winding-up wherein hearings have been completed and only the pronouncement of an order is pending.
- After the proviso to Section 434(1)(c) a new *proviso* has been added which provides that only proceedings other than winding-up wherein an order has not been reserved by the High Court shall be transferred to the NCLT. All proceedings under the 1956 Act, other than cases of winding-up, that are reserved for orders and all cases of winding-up which are pending before the High Courts wherein petitions have not been served under Rule 26 of the Companies (Court) Rules, 1959 ("**Court Rules**") shall be dealt with in accordance with provisions of the 1956 Act and the Companies Court Rules.
- Further, the Bombay High Court in *West Hills Realty Private Limited* v. *Neelkamal Realtors Tower Private Limited* (Company Petition No. 331 of 2016) has held that service of petitions under Rule 26 (*Service of Petition*) of the Court Rules does not include providing a notice of admission of the petition as well.

(MCA Notification No S.O. 3676(E) published in the Gazette on December 7, 2016, with effect from December 15, 2016)

MCA notifies the Companies (Transfer of Pending Proceedings) Rules, 2016

The MCA in exercise of its power conferred to it under Section 434 of the 2013 Act read with Section 239 of the Code has made the following rules:

- All proceedings under the 2013 Act including proceedings relating to arbitration, compromise, arrangements and reconstruction, other than proceedings relating to winding up on the date of coming into force of these rules shall stand transferred to the benches of the NCLT exercising respective territorial jurisdiction. All those proceedings which are reserved for orders for allowing or otherwise of such proceedings shall not be transferred.
- All applications and petitions relating to voluntary winding up of companies pending before a High Court on the date of commencement of this rule, shall continue with and be dealt with by the High Court. This rule will come into effect from April 1, 2017.
- All petitions relating to winding up on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent, shall be transferred to the bench of the NCLT exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code.
- All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction (BIFR), for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to Section 20 of SICA shall continue to be dealt with by such High Court.
- All petitions filed under clauses (a) and (f) of Section 433 of the 1956 Act (on the grounds other than inability to pay debts) pending before a High Court and where the petition has not been served on the respondent shall be transferred to the bench of the NCLT exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the 2013 Act.
- Pursuant to the transfer of cases as per these rules, the relevant records shall also be transferred by the respective High Courts to the NCLT benches having jurisdiction. No fee shall be payable in respect of any proceedings transferred to the NCLT in accordance with these rules.

(MCA Notification No. G.S.R. 1119(E) published in the Gazette on December 7, 2016, with effect from December 15, 2016)

MCA notifies Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

- Pursuant to Section 230 of the 2013 Act the MCA has notified the Amalgamation Rules. These prescribe the procedure and relevant forms for filing an application for order of a meeting, directions that the NCLT may give upon hearing of the application, procedure to give notice for a meeting, procedure for advertisement of the notice of the meeting and procedure in relation to notices to statutory authorities.
- Where the NCLT sanctions the compromise or arrangement, the order shall include such directions in regard to any matter or such modifications in the compromise or arrangement as the NCLT may think fit. A certified copy of the order shall be filed with the RoC within 30 days from the date of the receipt of copy of the order, or such other time as may be fixed by the NCLT.
- For procedure in relation to objections, the transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in Form No. CAA.14 at the last intimated address of such shareholder, for acquiring the shares of such dissenting shareholders.

(MCA Notification No. G.S.R. 1134(E) published in the Gazette on December 14, 2016, with effect from December 15, 2016)

MCA notifies the NCLT (Procedure for reduction of share capital of Company) Rules, 2016

- The NCLT (Procedure for reduction of share capital of Company) Rules, 2016 prescribes the procedure: (a) for reduction of share capital in a company; (b) for issue of notice and directions by the NCLT; and (c) with regard to representations and objections received and the contents/form of the order confirming the reduction of share capital and approving the minutes.
- An application is to be made to the NCLT to confirm a reduction of share capital of a company in Form No. RSC-1 along with the prescribed fee.

(*MCA Notification No. G.S.R. 1147(E) published in the Gazette on December 16, 2016*)

Commencement of Certain Sections of 2013 Act

The MCA has notified the following Sections of the 2013 Act for commencement from December 26, 2016:

- Section 248 - Deals with the power of the RoC to remove a companies name from the register of companies.
- Section 249 - Imposes certain restrictions which bar companies from making an application for removal of names from the register of companies.
- Section 250 - Company which stands dissolved under Section 248 shall cease to operate as a company and its certificate of incorporation shall be cancelled.
- Section 251 - Deals with a fraudulent application made under Section 248.
- Section 252 - Allows a person who is aggrieved by the RoC's order to dissolve a company under Section 248 to file an appeal with the NCLT within 3 years from the date of the order for removal of name.

(*MCA Notification No S.O.4167 (E) published in the Gazette on December 27, 2016*)

MCA releases Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ("Removal of Names Rules")

- The MCA has notified the Removal of Names Rules which *inter alia* prescribes the process of removing the name of a company from the Register of Companies by giving a written notice in Form STK 1.
- Further, Rule 3 which pertains to the removal of name of a company on a suo-moto basis is not applicable to, *inter alia,* listed companies, companies delisted due to non-compliance with the listing regulations, companies against which any prosecution is pending for any offence in a court, and companies having charges which are pending for satisfaction.
- The notice to be given by the ROC or the company, as the case may be, under the provisions of Section 248 (1) and (2) which pertains to the removal of name of a company from the register of companies either *suo-moto* or on an application by the company shall be in STK 5 or STK 6 and shall be placed on the website of the MCA and published in the official gazette as provided for in Rule 7.
- Applications pending with the RoC before the commencement of this Removal of Names Rules shall be dealt with under the Rules formulated under the 1956 Act.

(*MCA Notification No G.S.R. 1174(E) published in the Gazette on December 27, 2016*)

FOREIGN INVESTMENT AND RBI UPDATES

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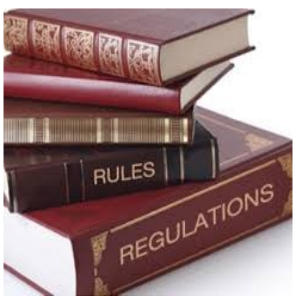
RBI amends FEMA 20 pertaining to FPI investment in corporate bonds



- FEMA 20 has been amended to expand the investment basket of eligible instruments for investment by FPIs under the corporate bond route to include:

  (i) unlisted corporate debt securities in the form of non-convertible debentures/ bonds issued by public or private companies subject to minimum residual maturity of three years and end use-restriction on investment in real estate business, capital market and purchase of land; and

  (ii) securitised debt instruments as follows:

  - ✓ any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s where banks, financial institutions or Non-Banking Financial Companies ("**NBFCs**") are originators; and/or
  - ✓ any certificate or instrument issued and listed in terms of the SEBI Regulations on Public Offer and Listing of Securitised Debt Instruments, 2008.

  Note that investment by FPIs in securitised debt instruments shall not be subject to the minimum 3-year residual maturity requirement.
- Investment by FPIs in the unlisted corporate debt securities and securitised debt instruments must not exceed Rs. 35,000 crore within the extant investment limits prescribed for corporate bond from time to time (which currently is Rs. 2,44,323 crore).
- All other existing conditions for investment by FPIs in the debt market remain unchanged.

(RBI/2016-17/138 A.P. (DIR Series) Circular No. 19 dated November 17, 2016 and Notification No. FEMA. 374/2016-RB dated October 24, 2016)

RBI amends Schedule 1 of FEMA 20

- FEMA 20 has been amended whereby a wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100% foreign investment is allowed in the automatic route and there are no FDI linked conditionalities, has been permitted to issue equity shares or preference shares or convertible debentures or warrants to the said non-resident entity against pre-incorporation/ preoperative expenses incurred by the said non-resident entity up to a limit of 5% of its capital or USD 500,000 whichever is less, subject to the following key conditions:
  - ✓ The Indian company shall report the transaction in Form FC-GPR to RBI within 30 days from the date of issue of equity shares or preference shares or convertible debentures or warrants but not later than 1 year from the date of incorporation or such time as RBI or Government of India permits
  - ✓ The valuation of the equity shares or preference shares or convertible debentures or warrants shall be subject to the provisions of Paragraph 5 of Schedule 1 of FEMA 20.

- ✓ A certificate issued by the statutory auditor of the Indian company that the amount of pre-incorporation/preoperative expenses against which equity shares or preference shares or convertible debentures or warrants have been issued has been utilized for the purpose for which it was received should be submitted with the Form FC-GPR.

- Pre-incorporation/pre-operative expenses shall include amounts remitted to Investee Company's account, to the investor's account in India if it exists, to any consultant, attorney or to any other material/ service provider for expenditure relating to incorporation or necessary for commencement of operations.

(*Notification No.FEMA.373/2016-RB dated October 24, 2016*)

Revisions to various sectoral caps for FDI

- RBI has amended FEMA 20 to incorporate the review of sectoral caps and simplification of FDI Policy effected by the Central Government vide its Press Note No. 6 (2015 Series) dated June 3, 2015, Press Note No. 7 (2015 Series) dated June 03, 2015, Press Note No. 8 (2015 Series) dated July 30, 2015, Press Note No. 11 (2015 Series) dated October 01, 2015 and Press Note No. 12 (2015 Series) dated November 24, 2015 (*the details of the said press notes have been covered in detail in our previous issue of Insight Volume VIII, Issue 1*).

- The changes include, *inter alia*, the following:

  - ✓ In all sectors where there is a limit/cap on foreign investment, such limit/cap shall be reckoned in a composite manner. However, Foreign Currency Convertible Bonds and Depository Receipts having underlying instruments which can be issued under Schedule 5 of FEMA 20 shall not be treated as foreign investment under such composite limit/cap.

  - ✓ Portfolio investment up to aggregate foreign investment level of 49% or sectoral/statutory cap, whichever is lower, will not be subject to either Government approval or compliance with the sectoral conditions, provided such investment does not result in change in ownership leading to control of Indian entities within the meaning of FEMA.

  - ✓ A company shall be considered as owned by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens.

  - ✓ A Limited Liability Partnership ("**LLP**") will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/ or entities which are ultimately 'owned and controlled by resident Indian citizens' and such resident Indian citizens and entities have majority of the profit share.

  - ✓ 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

  - ✓ For the purpose of LLP, 'control' shall mean right to appoint majority of the designated partners, where such designated partners, with specific exclusions to others, have control over all the policies of the LLP.

- ✓ Foreign investment by way of swap of shares has been permitted provided the resident company in which the investment is made is engaged in an automatic route sector, and valuation of the shares involved in the swap arrangement will have to be made by a Merchant Banker registered with the SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

- ➢ FEMA 20 has further been amended to permit FDI up to 100% in Asset Reconstruction Companies ("**ARCs**") under the automatic route, and FDI up to 49% under automatic route in pension funds subject to the following conditions:

  For ARCs:

  - ✓ Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"). Similarly, investment by institutional/ non-institutional investors will also be governed by the said SARFAESI Act.
  - ✓ The total shareholding of a single FII/FPI shall be below 10% of the total paid-up capital.
  - ✓ FIIs/FPIs can invest in the Security Receipts ("**SRs**") issued by ARCs. FIIs/ FPIs may be allowed to invest up to 100% of each tranche in SRs issued by ARCs, subject to directions/ guidelines of RBI. Such investment should be within the relevant regulatory cap as applicable.
  - ✓ All investments would be subject to provisions of the SARFAESI Act.

  For Pension Funds:

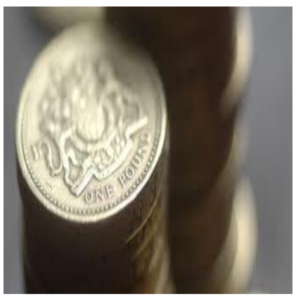
  - ✓ Foreign investment in Pension Funds is allowed as per the Pension Fund Regulatory and Development Authority Act, 2013 ("**PFRDA Act**").
  - ✓ Entities bringing in foreign investments as equity shares or preference shares or convertible debentures or warrants as per Section 24 of the PFRDA Act, 2013 shall obtain necessary registration from the PFRDA and comply with other requirements as per the PFRDA Act, 2013 and Rules and Regulations framed thereunder.
  - ✓ the ownership and control of the pension fund must at all times remain in the hands of resident Indian entities as determined by the Government of India/ PFRDA as per the rules/ regulations issued by them from time to time.

- ➢ Pursuant to the Cabinet approving foreign investment in Other Financial Services sector in August 2016, Department of Industrial Policy and Promotion has issued Press Note 6 to give effect to the Cabinet Press Release approving foreign investment in Other Financial Services sector.

  - ✓ Consequently, 100% FDI under the automatic route is allowed in "Other Financial Services", that is financial service activities regulated by financial sector regulators (viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India):

- ✓ Minimum capitalisation norms to be complied with as per those prescribed by the concerned sector regulator.
- ✓ 'Other Financial Services' activities need to be regulated by one of the financial sector regulators. In all such financial services activity which are not or are partly regulated by any financial sector regulator or where there is doubt regarding the regulatory oversight, foreign investment up to 100% will be allowed under government approval route subject to conditions including minimum capitalization requirement, as may be decided by the government.
- ✓ Any activity which is specifically regulated by an Act, the foreign investment limits will be restricted to those levels/ limit that may be specified in that Act, if so mentioned.
- ✓ Downstream investment by any of these entities engaged in "Other Financial Services" will be subject to extant sectoral regulations and provisions of FEMA 20 as amended from time to time.

(A.P. (DIR Series) Circular No. 6 dated October 20, 2016, Notification No. FEMA. 372/ 2016 -RB dated October 27, 2016, Notification No. FEMA. 379/ 2016-RB dated November 04, 2016, and Press Note 6 of 2016, D/o IPP File No. 9/4/2016 – FC.I dated October 25, 2016)



FPIs allowed to purchase NCDs/ bonds as per market practice

- ➢ The RBI has allowed FPIs to purchase/ acquire securities indicated in Schedule 5 of FEMA 20 (i.e., non-convertible debentures/ bonds) issued by Indian companies either directly or in any manner as per the prevalent/ approved market practice.
- ➢ Earlier FEMA 20 allowed FPIs to purchase securities indicated in Schedule 5 on repatriation basis and subject to such terms and conditions as specified by the SEBI and the RBI from time to time.

(A.P. (DIR Series) Circular No.23 dated December 27, 2016)

RBI permits start-up enterprises to access loans under External Commercial Borrowing ("**ECB**") framework

- ➢ Start-ups (as recognised by the Central Government) have been allowed to raise ECBs, subject to the following key conditions:
  - ✓ **Minimum Maturity:** Minimum average maturity period of ECB will be 3 years.
  - ✓ **Recognised Lender:** Lender/ investor shall be a resident of a country who is either a member of Financial Action Task Force ("**FATF**") or a member of a FATF-Style Regional Bodies; and shall not be from a country identified in the public statement of the FATF as either (i) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.
  - ✓ **Forms:** The borrowing can be in the form of loans or non-convertible, optionally convertible or partially convertible preference shares.

- ✓ **Currency:** The borrowing should be denominated in any freely convertible currency or in INR or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/ outright sale undertaken through an Authorized Dealer Category-I bank in India.

- ✓ **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.

- ✓ **All-in-cost:** Shall be mutually agreed between the borrower and the lender

- ✓ **End-uses:** For any expenditure in connection with the business of the borrower.

- ✓ **Conversion into equity:** Conversion into equity is freely permitted, subject to regulations applicable for foreign investment in start-ups.

- ✓ **Security:** The choice of security to be provided to the lender is left to the borrowing entity.

- ✓ **Corporate and personal guarantee:** Issuance of corporate or personal guarantee is allowed. Guarantee issued by non-resident(s) is allowed only if such parties qualify as a recognised lender. 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.

- ✓ **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.

➢ Other provisions regarding ECBs shall be applicable to startups in terms of the ECB framework dated November 30, 2015. However, the provisions on leverage ratio and ECB liability: Equity ratio will not be applicable.

(*A.P. (DIR Series) Circular No. 13 dated October 27, 2016*)

RBI allows Indian banks to issue Rupee denominated bonds overseas

➢ Indian banks have been allowed to issue:

- ✓ Perpetual Debt Instruments ("**PDI**") qualifying for inclusion as Additional Tier 1 capital and debt capital instruments qualifying for inclusion as Tier 2 capital, by way of Rupee Denominated Bonds overseas; and

- ✓ Long Term Rupee Denominated Bonds overseas for financing infrastructure and affordable housing.

- ✓ Within the limit set for foreign investment in corporate bonds (INR 244,323 crores at present).

➢ The provisions contained in External Commercial Borrowings ("**ECB**") Policy - Issuance of Rupee denominated bonds overseas dated September 29, 2015, Issuance of Rupee denominated bonds overseas dated April 13, 2016, paragraph No. 3.3.2 and 3.3.3 of Master Direction on ECBs and Trade Credits dated January 1, 2016 stand modified for the limited purpose of treating Indian banks as eligible borrowers under this route.

- PDI, debt capital instruments and long terms bonds, issued by Indian banks by way of Rupee Denominated Bonds overseas should conform to the provisions contained in the Master Circular on Basel III Capital Regulations dated July 01, 2015 and Circular on Guidelines on Issue of Long Term Bonds by Banks – Financing of Infrastructure and Affordable Housing dated July 15, 2014 issued by the RBI (as amended from time to time).
- Underwriting by overseas branches/subsidiaries of Indian banks for issuances of such instruments are not allowed.

(A.P. (DIR Series) Circular No. 14 dated November 3, 2016 and RBI/2016-17/108 DBR.BP.BC.No. 28/21.06.001/2016-17 dated November 03, 2016)

RBI issues clarifications on hedging for ECBs

- In order to provide clarity to the Master Direction on ECB, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers dated January 1, 2016 and Circular dated March 30, 2016, RBI has issued clarifications on hedging for ECBs.
- These clarifications seek to bring uniformity in hedging practices in the market so as to effectively address currency risk at a systemic level.
- The important highlights of the clarifications are as follows:
  - ✓ Wherever hedging is mandated by RBI, the ECB borrower will be required to cover principal as well as coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure.
  - ✓ A minimum tenor of one year of financial hedge will be required with periodic rollover duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of ECB.
  - ✓ 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 has the maturity/ cash flow within same accounting year.
  - ✓ The designated bank will have the responsibility of verifying that 100% hedging requirement is complied with.

(A.P. (DIR Series) Circular No. 15 dated November 07, 2016)

Memorandum under Foreign Exchange Management (Insurance) Regulations, 2015 modified

- Foreign Exchange Management (Insurance) Regulations, 2000 ("**FEMA 12**") were repealed and superseded by Foreign Exchange Management (Insurance) Regulations, 2015 effective December 29, 2015.
- RBI has now modified the memorandum of Foreign Exchange Management Regulations relating to General/ Health Insurance ("**GIM**") and Life Insurance ("**LIM**") in India. The key changes are as follows.

- General/ Health Insurance Manual (GIM):
    - ✓ All general/ health insurance policies permitted by Insurance Regulatory and Development Authority of India ("**IRDAI**") are allowed to be placed in foreign exchange.
    - ✓ RBI permission not required for issuance/ renewal of any insurance policy.
    - ✓ Payment of insurance premium in foreign currency by Indian Resident is no longer required irrespective of currency for settlement of claim.
    - ✓ A resident outside India may obtain general/ health insurance policy on payment of insurance premium in foreign currency irrespective of currency for settlement of claim. However, if the premium is paid in rupees, settlement of claim will be in rupees.
    - ✓ Indian Resident going abroad for employment purpose may also take health insurance policy on payment of premium in rupees.
    - ✓ Claim settlements under cashless international health insurance policies to hospitals providing treatment or through a third-party administrator has been allowed.
    - ✓ RBI has enabled overseas investment by insurance companies.
    - ✓ Quarterly report on settlement of claims of policies issued with permission of RBI has been discontinued.
- Life Insurance Manual (LIM)
    - ✓ Requests received for payment in foreign currency towards premium on policies issued to Indian nationals and persons of Indian origin resident abroad by overseas offices of Insurer in India may be permitted by authorised dealers provided the policy holder undertakes to repatriate to India the maturity proceeds or any claim amounts due on the policy through normal banking channels within a period of seven days from the receipt thereof.

(A.P. (DIR New Series) Circular No.18 [(1)/12 (R)] dated November 17, 2016)

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SECURITIES LAW UPDATE

SEBI Circular to Exclusively Listed Companies (the "**ELCs**") of De-recognised / Non-operational / Exited stock-exchanges Placed in the Dissemination Board (the "**ELC Circular**")

SEBI has issued a circular to ELCs to clarify the process for raising further capital for listing on nationwide stock-exchanges or for exit from the dissemination board respectively. ELCs on the dissemination board may:

- Raise capital, for meeting the listing requirement, through preferential issue by following the procedures prescribed under the ICDR Regulations to the extent possible, subject to receipt of the in-principal approval of the nationwide stock exchange hosting the ELC on its dissemination board (the "**designated stock exchange**").

Any preferential allotment so made to the promoters/public shall not be subject to the thresholds of acquisition (5% or 25%, as applicable) under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "**Takeover Regulations**"), provided that promoter group holding does not exceed 75% of the paid up capital of the ELCs; and

- Provide a mechanism of exit to shareholders as prescribed in the ELC Circular, in case the ELCs fail to list on the designated stock exchange. The oversight and monitoring of such exit mechanism shall be carried out by the designated stock exchange.

ELCs which have not already indicated their intention to list or to provide exit to shareholders are required to submit their plan of action within three months from the date of the ELC Circular, failing which, action will be taken against such ELCs, their directors and promoters as prescribed in the ELC Circular.

(SEBI circular SEBI/HO/MRD/DSA/CIR/P/2016/110 dated October 10, 2016)

SEBI informal guidance on reclassification of promoter group members to public category

SEBI, in its informal guidance, on an application made by Alembic Pharmaceuticals Limited ("**APL**") has clarified to APL that shareholder's approval is not required for re-classification of shareholding from promoter group category to public category, in the circumstances specified, and APL can directly approach the stock exchanges for permission under Regulation 31A (2) & (3) of the Listing Regulations, subject to compliance with the Regulation 31A of the Listing Regulations.

(SEBI Informal Guidance CFD/FAC/PR/28614/2016 dated October 17, 2016)

SEBI circular on format for disclosures in case of listed insurance companies

- SEBI has issued a circular on disclosures in relation to publishing of financial results by listed insurance companies. SEBI has through this circular prescribed that listed insurance companies (both life insurance and non-life insurance companies) will be required to submit the quarterly financial results, along with segment wise revenue, results and capital employed for quarters ending September 30, 2016 and December 31, 2016 in the formats as specified by the Insurance Regulatory and Development Authority of India (the "**IRDAI**").
- However, for publication of standalone / consolidated results in the news papers, the formats specified under the circulars dated November 30, 2015 and July 5, 2016 issued by SEBI shall be followed and will carry the additional disclosures prescribed by IRDAI.

(SEBI circular CIR/CFD/DIL/115/2016 dated October 24, 2016)

SEBI Circular on freezing of Promoter and Promoter group Demat accounts for non-compliance with certain provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the "**Listing Regulations**")

- In order to ensure effective enforcement of SEBI circular dated November 30, 2015, which prescribed a uniform fine structure for violation of certain provisions of Listing Regulations and standard operating procedures for suspension and revocation of securities (the "**November Circular**"), SEBI has issued a circular directing the recognized stock exchanges to freeze promoter and promoter group demat accounts for non-compliance with the November Circular.

- According to this circular, where the listed entity fails to pay the fine levied by the concerned stock-exchange within the period as prescribed in the notice issued by such stock-exchange, then upon expiration of the notice period, other securities of the promoter and promoter group in the demat account shall be frozen to the extent of the liability.
- In case of non-compliance for two consecutive periods, entire shareholding of the promoter and promoter group in such listed entities will be frozen along with other securities to the extent of the liability. The liability for this purpose will be calculated on a quarterly basis.
- The concerned stock exchange shall have the discretion in determining which of the securities and holdings of promoter or promoter group entity are to be frozen.

(SEBI circular SEBI/HO/CFD/CMD/CIR/P/2016/116 dated October 26, 2016)

SEBI issues clarification on day count convention for debt securities issued under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (the "**Debt Listing Regulations**")

In order to ensure consistency in relation to day count conventions being followed with respect to calculation of interest payments/redemption of debt securities issue under the Debt Listing Regulations, SEBI has issued certain clarifications which are as follows:

- If the interest payment date falls on a holiday, then the payment may be made on the following working day. However the dates of the future coupon payments would remain unchanged;
- In case of leap year, for calculation of interest payments, a uniform methodology is to be followed and 366 days for a whole one year period will be taken into account for such leap year irrespective of the frequency of interest payments; and
- Interest / redemption payments with respect to debt securities shall only be made on the days when the money market is functioning in Mumbai.

(SEBI circular CIR/IMD/DF-1/122/2016 dated November 11, 2016)

Corporate Governance Issues in Compensation Agreements

Further to SEBI's consultative paper on corporate governance issues in compensation agreement dated October 4, 2016 and the comments received thereon, SEBI, in its board meeting of November 23, 2016, has approved the proposal to amend Listing Regulations to enforce disclosures and shareholder approval for all such agreements including existing agreements that extend beyond the date of the amendment.

The revised norms are as follows:

- No employee including key managerial personnel, director or promoter of a listed entity shall enter into any agreement for himself or on behalf of any other person, with any shareholder or any other third party with regard to compensation or profit sharing without prior approval of the board of directors and the public shareholders of the company;
- All such agreements entered into during the last three years to be disclosed to the stock exchanges including those which may not be currently valid.

- Existing agreements entered into prior to the date of notification and which may continue to be valid beyond such date to be informed to the stock exchanges and approval of the public shareholders to be obtained by way of an ordinary resolution in the forthcoming general meeting; and
- The interested persons involved in the transactions are required to abstain from voting on such resolution.

(SEBI Board Meeting dated November 23, 2016)

Amendments to the SEBI (REITs) Regulations, 2014 (the "**REIT Regulations**") and the SEBI (InvITs) Regulations, 2014 (the "**InvIT Regulations**")

The SEBI has notified the SEBI (REITs) (Amendment) Regulations, 2016 (the "**REIT Amendments**") and the SEBI (InvITs) (Amendment) Regulations, 2016 (the "**InvIT Amendments**").

Following amendments are common to both REITs and InvITs, as set out in the REIT Amendments and InvIT Amendments, respectively:

- REITs and InvITs are now permitted to invest in SPVs through a holding company, subject to certain conditions. A holding company has been defined to mean a company or an LLP (i) in which the REIT / InvIT holds or proposes to hold controlling interest and not less than 51% of the equity share capital or interest and which in turn has made investments in other SPVs, which ultimately hold the real estate / infrastructure assets; and (ii) which is not engaged in any other activity other than holding of the underlying SPVs, holding of real estate properties / infrastructure projects and any other activities pertaining to and incidental to such holdings. In this regard, a holding company is now required to distribute to the REIT / InvIT (a) 100% of cash flows received by it from the SPVs; and (b) 90% of the net distributable cash flows generated by it on its own;
- Limit on maximum number of sponsors has been removed;
- Units with subordinate voting or other rights are now allowed to be issued to sponsors and its associates. Such subordinate units may carry only inferior voting or any other rights compared with other units. However, issuing multiple classes of units and units with superior voting rights or any other over other unit holders is prohibited;
- A minimum subscription of 90% of the issue size is required for a public offer as opposed to the earlier 75%;
- SEBI, subject to certain conditions, has the power to relax strict enforcement of REIT Regulations / InvIT Regulations in the interest of investors or for the development of the securities market;
- The definition of "associate" has been amended to broadly bring it into line with the 2013 Act and the applicable accounting standards. The scope of the definitions has been narrowed down and is less onerous as opposed to the earlier definition;
- The minimum public holding in a REIT / InvIT IPO, as the case may be has been aligned with the minimum public thresholds applicable to an IPO of equity shares in terms of the Securities Contracts (Regulation) Rules, 1957.

- The units proposed to be offered to the public (a) shall be at least 25% of the total outstanding units of the REIT / InvIT, as the case may be, if the post issue capital of the REIT calculated at offer price is less than Rs. 1,600 crore, provided that the offer size is not less than Rs. 250 crore; (b) of the value of atleast Rs. 400 crore, if the post issue capital of the REIT / InvIT calculated at offer price is equal to or more than Rs. 2,600 crore and less than Rs. 4,000 crore; or (c) shall be atleast 10% of the total outstanding units of the REIT / InvIT, as the case may be, if the post issue capital of the REIT / InvIT, as the case may be, calculated at offer price is equal to or more than Rs. 4,000 crore. Any listed REIT / InvIT, as the case may be which has public holding below 25% on account of sub-clauses (b) and (c) above, shall be required to increase its public holding to at least 25%, within 3 years from the date of listing pursuant to initial offer; and

- The amount raised through REIT / InvIT units can now be used for 'general purposes' (as defined in the amendments) subject to such amount being used for general purposes not exceeding 10% of the total amount being raised by the REIT / InvIT, as the case may be.

Additionally, the REIT Amendments, *inter alia*, provides the following amendments:

- The definition of "real estate" or "property" has been amended to include certain classes of assets such as (a) hotels, hospitals or convention centers forming part of the composite real estate project whether rent generating or income generating; and (b) common infrastructure for composite real estate projects, industrial parks and special economic zone which falls under the purview of 'infrastructure' as defined in the notification dated October 7, 2013, as amended by the Ministry of Finance, Government of India including any amendment or additions to such notification;

- The concept of "sponsor group" has been introduced, which includes entities or persons controlled by the sponsor, entities or persons controlling the sponsor and entities or persons under common control as the sponsor. In terms of the REIT Regulations, the sponsors and the sponsor group are required to collectively hold at least 25% of the post-issue capital of the REIT for a period of three years from the date of listing;

- Not less than 51%. (as opposed to the earlier 75%.) of the revenues of the REIT, the holding company and the SPV, other than gains arising from disposal of properties, shall be, at all times, from rental, leasing and letting real estate assets or any other income incidental to the leasing of such assets;

- Definition of "related party" has been broadly aligned with 2013 Act and applicable accounting standards. The scope of the same has also been reduced; and

- For decisions to be made at the meetings of the unit holders the threshold for seeking approval from the unit holders has been reduced such that votes cast in favour of the resolution shall be more than the votes cast against the resolution as opposed to earlier requirement of at least one and half times.

Further, the InvIT Amendments, *inter alia*, provide the following amendment:

- the minimum post-issue basis holding for sponsors has been reduced from 25% to 15% of the total units of the InvIT; and

- Changes / clarifications have been brought about in relation to private placement of InvIT units, including (a) clarification with regard to asset ownership - an InvIT with any asset mix (of under construction and completed and revenue generating assets) may undertake a private placement, subject to compliance with specified bid lot and trading lot conditions; (b) the requirement for submitting a draft of the placement memorandum with any regulatory authority for review has been done away with; and (c) disclosures under Schedule III (earlier applicable only for public issue) have been made applicable to private placements.

(SEBI Notifications SEBI/LAD/NRO/GN/2016-17/022 and SEBI/LAD/NRO/GN/2016-17/021 dated November 30, 2016)

Additionally, in relation to REITs and InvITs, SEBI has issued the following circulars on:

- Disclosure of financial information in offer document/placement memorandum for InvITs dated October 20, 2016;
- Continuous disclosures and compliances by InvITs dated November 29, 2016;
- Guidelines for public issue of units of REITs dated December 19, 2016; and
- Disclosure of financial information in offer document for REITs dated December 26, 2016.

Amendment to the ICDR Regulations

The SEBI has notified the ICDR (Fourth Amendment) Regulations, 2016 whereby it introduces a proviso after Regulation 42(4)(g) of the ICDR Regulations stating that in case of under subscription in the employee reservation portion, the unsubscribed portion may be allotted on a proportionate basis, for a value in excess of ₹ 0.2 million, subject to total allotment to an employee not exceeding ₹0.5 million.

(SEBI Notification SEBI/LAD/NRO/GN/2016-17/017 dated November 30, 2016)

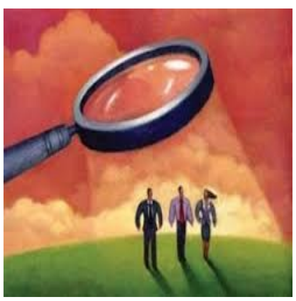
Review of guidelines for co-location / proximity hosting facility offered by stock exchanges

- SEBI, in consultation with technical advisory committee of SEBI, has reviewed the applicable provisions of the SEBI circular dated May 13, 2015 regarding guidelines to be followed by stock exchanges while facilitating co-location / proximity hosting.
- Based on such review, the stock exchanges have been advised, *inter alia*, to allow direct connectivity between co-location facilities of various recognized stock exchanges; allow direct connectivity between servers of a stock broker placed in the co-location facilities of recognized stock exchange and servers of the same stock broker placed in the co-location facilities of a different recognized stock exchange.
- The circular is not applicable to commodity derivatives exchanges and all the other conditions specified in the SEBI circular dated May 13, 2015 will remain unchanged.
- SEBI has clarified that co-location services provided by a third party or outsourced from a third party will be deemed to be provided by the stock exchanges. Stock exchanges are required to ensure complete control and jurisdiction over the matters related to its co-location facility and shall also remain responsible and accountable for actions of such outsourced entity with respect to co-location services.

- Further, facilities that allow stock brokers / data vendors to connect to the stock exchange trading system over a LAN will fall within the definition of "co-location / proximity hosting" as provided in SEBI circular dated May 13, 2015.

(SEBI Circular SEBI/HO/MRD/DP/CIR/P/2016/129 dated December 01, 2016)

Notification of the SEBI (Change in Conditions of Registration of Certain Intermediaries) (Amendment) Regulations, 2016 (the "**Amendment Regulations**")



The Amendment Regulations has amended the application SEBI Regulations for Merchant Bankers, Registrars to an Issue and Share Transfer Agents, Underwriters, Debenture Trustees, Portfolio Managers, Bankers to an Issue, Depositories and Participants, Credit Rating Agencies, KYC (Know Your Client) Registration Agency, Investment Advisers and Research Analysts, (collectively, such intermediaries, the "**Intermediaries**").

The Amendment Regulations *inter alia* provide that:

- The Certificate of Registration (the "**CoR**") will remain valid unless the registration is suspended or canceled by SEBI for all the Intermediaries including existing Intermediaries;
- The requirement to obtain CoR for an initial period and then on permanent basis has been done away with;
- The fee in relation to application for registration and for continuance of registration has been revised and shall be payable every three years / five years, as the case may be, from the sixth year of the grant of CoR or from the grant of the certificate of initial registration under the respective earlier (un-amended) regulations, or from the grant of CoR, as the case may be;
- The fee will be payable three months before the expiry of existing block for which the fee has been paid; and
- SEBI may reject the application where it is of the opinion that the CoR should not be granted to the applicant after giving a reasonable opportunity of being heard and such decision will be communicated within 30 days from the date of such decision stating therein the grounds of rejection (with exceptions).

(SEBI notification SEBI/LAD/NRO/GN/2016-17/023 dated December 8, 2016)

Streamlining the process for acquisition of shares pursuant to tender-offers made for takeovers, buy back and delisting of securities

- SEBI in consultation with the stock exchanges and depositories has revised the mechanism for acquisition of shares through stock exchange mechanism pursuant to tender-offers for the purpose of takeovers, buy back and delisting of securities.
- The revised mechanism prescribes that the transfer of shares of shareholders under the tender offers would be made directly to the account maintained by the clearing corporation as compared to the current system where the shareholders submit their bids through stock brokers and subsequently, the brokers transfer the shares to the special account of the clearing corporation.

- After such transfer of securities, the clearing corporation will be allowed to utilize the securities towards the settlement obligations under such offers. Further, consideration for the accepted shares in the tender offer and shares tendered but not accepted under such offer would be credited directly to shareholders' bank and demat accounts respectively.
- SEBI has also prescribed the procedural aspects for tendering and settlement of shares under the revised system. The revised system shall be applicable to all the offers for which the public announcement is made on or after January 02, 2017.

(SEBI Circular CFD/DCR2/CIR/P/2016/131 dated December 09, 2016)

SEBI Circular on System-driven disclosures in the Securities Market

SEBI has issued a circular on system-driven disclosures in the securities market, whereby depositories have been mandated to furnish the transaction data of promoters / promoter group on a daily basis to stock-exchanges directly for necessary disclosures under the Takeover Regulations and the SEBI (Prevention of Insider Trading) Regulations, 2015 on their website from January 2, 2017.

(SEBI circular CFB/DCR/CIR/2016/139 dated December 21, 2016)

SEBI Circular on filing of Forms PAS-4 and PAS-5 in case of issuance of debt securities on private placement basis

SEBI has issued a circular whereby it has mandated that the Forms PAS-4 and PAS-5 prescribed under the Companies (Prospectus and Allotment of Securities) Rules, 2014 will be filed with SEBI in a compact disk for issuance of listed debt securities on a private placement basis.

(SEBI circular SEBI/HO/IMD/DF1/CIR/P/2016/140 dated December 23, 2016)

SEBI Board Meeting regarding the Regulatory Framework on Schemes of Arrangement

SEBI in its board meeting held at Jaipur has approved, *inter alia*, the following proposals in relation to the regulatory framework governing schemes of arrangement:

- In the case of merger of an unlisted company with a listed company:

  (i) the unlisted company, *inter alia,* is required to comply with the requirement of disclosure of material information as specified in the format for abridged prospectus;

  (ii) in the post scheme shareholding pattern of the merged company, the holdings of pre-scheme public shareholders of the listed entity and qualified institutional buyers of the unlisted company shall not be less than 25%; and

  (iii) an unlisted company can be merged with a listed company if it is listed on a stock exchange having nationwide trading terminals.

- To prevent, pursuant to a scheme, issue of shares to a select group of shareholders instead of all shareholders SEBI has clarified that the pricing formula specified under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, shall be applicable in such instances.

- SEBI has extended the requirement of obtaining public shareholder approvals through e-voting to the following cases of schemes where:

  (i) merger of an unlisted company which result in reduction in voting share percentage of pre-scheme public shareholders by more than 5% of the total capital of the merged entity;

  (ii) the transfer of the whole or substantially the whole of the undertaking of a listed company and consideration for such a transfer is not in the form of listed equity shares; or

  (iii) the merger of an unlisted subsidiary with a listed holding company where the shares of the unlisted subsidiary have been acquired by the holding company directly or indirectly from the promoters/ promoter group.

- Schemes which provide for merger of a wholly owned subsidiary with its parent company need not be filed with SEBI, but will need to be filed with stock exchanges for the limited purpose of disclosures only.

- Companies to submit compliance report confirming compliance with the circular and accounting standards duly certified by their company secretary, chief financial officer and managing director.

The above proposed policy changes could have important ramifications for listed companies evaluating schemes, and further details are awaited from SEBI in order to examine this.

(SEBI Board Meeting PR No. 5/2017 dated January 14, 2017)

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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas on the issues reported herein and should you have any queries in relation to any of the issues reported herein or on other areas of law, please feel free to contact us at the following co-ordinates:

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