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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 implications of the constitution of the National Company Law Tribunal and the National Company Law Appellate Tribunal.

Apart from the above, we have also captured developments in relation to the various notifications and orders 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 Securities and Exchange Board of India in relation to foreign investment into India and securities laws respectively.

Any feedback 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.

Regards,
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INDIA'S NATIONAL COMPANY LAW TRIBUNAL – *FORUM CONVENIENS*?

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The wait is finally over. On June 1, 2016, the Ministry of Corporate Affairs ("**MCA**") notified the constitution of the National Company Law Tribunal ("**NCLT**") and the National Company Law Appellate Tribunal ("**NCLAT**"). The NCLT and the NCLAT (together referred to as "**Company Law Tribunals**") were envisioned to be specialised tribunals dedicated to exclusively handle matters relating to companies in India and serve as a single window forum for corporate matters. This issue of *Insight* explores the impact of the constitution of the said tribunals.

Background

The Company Law Tribunals were first recommended by the Justice Eradi Committee in 2000 which recommended an amendment to the provisions of Part VII of the erstwhile Companies Act, 1956 ("**1956 Act**") to include provisions for setting up of a national tribunal which will have:

(i) the jurisdiction and powers exercised by Company Law Board ("**CLB**") under the 1956 Act;

(ii) the power to consider rehabilitation and revival of companies which is a mandate that is entrusted to the Board for Industrial and Financial Reconstruction ("**BIFR**") or the Appellate Authority for Industrial and Financial Reconstruction ("**AAIFR**") under the Sick Industrial Companies (Special Provisions) Act, 1985; and

(iii) the jurisdiction and power relating to winding up of companies that was vested in the High Courts.

Based on these recommendations, provisions relating to the establishment and constitution of the tribunals were introduced into the 1956 Act *vide* the Companies (Amendment) Act, 2002 as Part 1B and Part 1C. However, the aforesaid provisions were never notified and were challenged in prominent cases like the *Madras Bar Association v Union of India* [(2004) 120 Comp Cas 510 (Mad)]; *Union of India v R. Gandhi* [(2010) 11 SC 1] and most recently in *Madras Bar Association v Union of India & Anr* [AIR 2015 SC 1571] on a number of grounds, the most predominant one being that the legislature does not have the competence to vest intrinsic judicial functions that have been traditionally performed by High Courts in the past to any tribunals outside the judiciary. It should be noted that in all the aforesaid cases, the overall constitutionality of the said Company Law Tribunals was upheld.

Company Law Tribunals under the Companies Act, 2013

Sections 407 to 434 of Chapter XXVII of the Companies Act, 2013 ("**2013 Act**") provide for the powers and procedures of the Company Law Tribunals.

Main Features and Characteristics of the NCLT

Section 420 of the 2013 Act authorizes the NCLT to pass orders and Section 421 of the 2013 Act provides for scope of appeal to the NCLAT from such orders within 45 days from the date on which a copy of the NCLT order is made available to the concerned aggrieved party. Section 423 of the 2013 Act provides for appeal from orders of the NCLAT only on any question of law arising from such orders within 60 days from the date on which a copy of the NCLAT order was made available to the concerned aggrieved party.

Before the constitution of the said Company Law Tribunals were notified in 2016, the Supreme Court of India in *Madras Bar Association v Union of India & Anr* had held that the constitution of Selection Committee in Section 412 of the 2013 Act (which is a committee for selecting the members of the NCLT and NCLAT) was incorrect and stated that instead of a 5 member Selection Committee, it should be a 4 member Selection Committee (i.e. 2 members from the administrative branch and 2 members from the judiciary) which would consist of:

(i) The Chief Justice or his nominee – who will have the casting vote;

(ii) A Senior Judge of the Supreme Court or a Chief Justice of the High Court;

(iii) A Secretary in the Department of Financial Services in the Ministry of Finance; and

(iv) A Secretary in the Ministry of Law and Justice.

The main features and characteristics of the said Company Law Tribunals are:

The term of appointment of the: (i) President of the NCLT; (ii) Chairperson of the NCLAT; and (iii) judicial as well as technical members of the NCLT and the NCLAT, is generally for a **term of 5 years**.

The President of the NCLT, Chairperson of the NCLAT or any other tribunal member **may be removed** if he becomes insolvent, is convicted of an offence involving moral turpitude, becomes mentally or physically incapable or has a prejudicial financial interest.

The Company Law Tribunals are not bound by the Code of Civil Procedure, 1908 and shall be guided by the principles of natural justice. Further, they shall have the power to regulate their own procedure in accordance with Section 424 of the 2013 Act and no civil court may have overlapping jurisdiction with the said tribunals.

Jurisdiction of the Company Law Tribunals

Prior to the constitution of the Company Law Tribunals, there were 3 main bodies exercising jurisdiction over company matters -

(i) The High Courts in matters of winding up, schemes of compromises and arrangements, reduction of share capital, order of restoration of defunct companies, variation of rights, etc;

(ii) The CLB in matters of calling of annual general meetings, calling of meetings of members, direction for the inspection of minutes of general meetings, causing investigations into the affairs of the company, adjudication on matters of oppression and mismanagement, compounding of offences, etc; and

(iii) The BIFR and the AAIFR in matters relating to the revival and rehabilitation of sick companies.

The notification of the constitution of the Company Law Tribunals led to the dissolution of the CLB. Therefore, all matters under the CLB will now be transferred immediately to the NCLT in the same stage as they were pending. Since the provisions relating to matters in the jurisdiction of the High Courts and the BIFR have not yet been notified, they will continue to have jurisdiction until such notification by the Central Government in this regard.

In comparison to the earlier CLB, the main differences in the newly constituted Company Law Tribunals are:

(i) Increased number of benches from 5 under the CLB to 11 (and further to be added) of the NCLT;

(ii) Wider jurisdiction over matters under company law;

(iii) Scope for appointment of amicus curie;

(iv) Appointment of other professionals like cost accountants, chartered accountants, company secretaries, etc. to represent parties;

(v) Shareholders and creditors can now file class action suits against the company;

(vi) Existence of a Selection Committee and members of the Technical Committee; and

(vii) High Courts have now been eliminated from the chain of appeal.

Transition of Cases to the Company Law Tribunals

In relation to the transition phase for current matters before the CLB, Section 434(1)(a) of the 2013 Act (*has been notified*) provides that all matters, proceedings or cases pending before the CLB immediately before the notification date of the Company Law Tribunals shall stand transferred to the NCLT. Further, Section 434(1)(b) of the 2013 Act (*has been notified*) provides that any person aggrieved by any decision or order of the CLB made before the notification date of the Company Law Tribunals may file an appeal to the High Court within 60 days from the date of communication of the decision or order of the CLB to him on any question of law arising out of such order.

However, it must noted that Sections 434(1)(c) and (d) of the 2013 Act have not yet been notified. This means that all proceedings under the 1956 Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before the notification date of the Company Law Tribunals before any District Court or High Court shall function as it did prior to the notification. Also, any references made or inquiry pending to or before the BIFR or any proceeding of whatever nature pending before the AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 shall not be affected by the said notification.

The Company Law Tribunals' notification states that the matters pending before CLB shall be transferred to the NCLT at the same stage as they were before the CLB. There is no clarity, however, on matters which are in different stages in appeal before the High Courts under Section 10F (*Appeals against the orders of the CLB*) of the 1956 Act. It is not yet certain whether these matters would stand transferred to the NCLAT. Also, there is no clarity about the interim orders granted by the CLB prior to June 1, 2016 and the procedure to be followed by concerned parties in this regard.

Conclusion

The Company Law Tribunals have been envisioned to play a cardinal role in expediting matters of company law in India, in line with the current Central Government's 'Ease of Doing Business' in India policy.

Immediately after the constitution of the Company Law Tribunals, the judicial and technical members of the Company Law Tribunals have been on vacation from June 6, 2016 until July 1, 2016. Hence, the procedure and functioning of these Company Law Tribunals are yet to be effectively implemented and structured. Further, the Central Government is yet to notify the rules pursuant to Section 434(2) (*Procedural rules for timely transfer of matters before the CLB or High Courts*) of the 2013 Act, which will lead to a delay in the pending CLB cases. It should be noted that the MCA has issued the NCLT Rules, 2016 and the NCLAT Rules, 2016 pursuant to Section 469 of the 2013 Act but the said rules have not yet been notified.

While it is still too premature to comment on how efficacious the Company Law Tribunals will be as a single consolidated forum for all company related disputes, it is likely that this forum will evolve to provide expeditious remedies in corporate law matters. The Company Law Tribunals will face their true litmus test once all the provisions of the Companies Act 2013, including those relating to mergers and amalgamations are also notified.

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RBI Consultation Paper on Peer to Peer Lending

Pursuant to the First Bi-monthly Monetary Policy Statement, 2016-17, issued by the Reserve Bank of India ("**RBI**") and with a view to cover peer to peer lending ("**P2P Lending**") within its ambit, the RBI released a consultative paper on P2P Lending on April 29, 2016, inviting comments on the proposed framework on P2P Lending by May 31, 2016. P2P lending is a form of crowd-funding on an online platform which is used to raise unsecured loans by matching lenders with borrowers. The key highlights are as follows:

- **Recognition as an intermediary:** It is proposed that the platform providing P2P Lending ("**P2P Platform**") will be defined as Non-Banking Financial Institutions under Section 45I (f)(iii) of the Reserve Bank of India Act, 1934. P2P Platforms could be registered only as an intermediary (as opposed to a banking company).

- **Permitted Activities by P2P Platforms:** The role of a P2P Platform would be limited to bring the borrowers and lenders together without the lending and borrowing getting reflected in the balance sheet of such P2P Platform. The P2P Platform will be prohibited from giving any assured return directly or indirectly. However, it will be allowed to opine on the suitability of the lenders and creditworthiness of the borrowers. In order to mitigate money laundering, funds from a peer to peer ("**P2P**") lender's account will have to be necessarily credited directly to the borrower's account. Regulations on advertisements by P2P Platforms would also be specified.

- **Cross Border P2P Activities**: The proposed framework will prohibit P2P Platforms being used for any cross-border transactions between the lenders and borrowers.

- **Prudential Requirements:** P2P Platforms will be required to have a minimum capital of Rs. 2,00,00,000. Mandating maintenance of a particular leverage ratio by P2P Platforms and prudential limits on maximum contribution by a lender to a particular segment of activity could be also considered under the proposed framework.

- **Governance Requirements:** Necessary fit and proper criteria for promoters, directors and chief executive officer of P2P Platforms, composition of board of directors, etc. will be set out. Further, management and operational personnel of the P2P Platform will need to be stationed in India. The proposed framework may also mandate lenders to have a place of business in India.

- **Business Continuity Plan:** Proposed framework will provide that P2P Platforms should have a 'living will' or alternative arrangement in the form of an agreement for continuation of their operations to mitigate losses arising out of failure of P2P Platforms to continue their operations.

- **Customer Interface:** Confidentiality of customer data and data security would be the responsibility of the P2P Platform. A 'fair practices code' shall be mandated to ensure transparency in operations, data confidentiality and minimum disclosure requirements by lenders and borrowers. Current regulations applicable to other non banking finance companies will be made applicable to P2P Platforms which perform the role of recovery agents for recovery of loans on behalf of the lenders. P2P Platforms will be mandated to have proper grievance redressal mechanism to address complaints from both lenders and borrowers.

- **Reporting Requirements:** P2P Platforms will be required to submit regular reports on *inter alia* their financial position, loans arranged each quarter, complaints to the RBI.

- **Permitted Entities for P2P Lending:** Since RBI has powers only to regulate companies and cooperative societies, the proposed framework may specify that all P2P Platforms shall be companies. Alternatively, the proposed framework could provide that other forms of P2P Platforms may be regulated by the State Governments.

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COMPANY LAW UPDATE

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MCA publishes the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2016

MCA has amended the proviso to Rule 3 of the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015 in order to exempt housing finance companies from the requirement of filing financial statements and other documents under Section 137 of the 2013 Act in e-form AOC-4 XBLR in extensible business reporting language.

(*MCA Notification dated April 4, 2016*)

MCA notifies amendment to Schedule III of the 2013 Act

- MCA has amended Schedule III of the 2013 Act to insert instructions for preparing financial statements of companies that are required to comply with the Companies (Indian Accounting Standards) Rules, 2015.
- The existing instructions under Schedule III shall apply to the companies whose financial statements are required to comply with the Companies (Accounting Standards) Rules, 2006.

(*MCA Notification No. G.S.R. 404(E) published in the Gazette on April 6, 2016*)

MCA circulars extending the time for filing e-forms and one time waiver of additional fees

- MCA has relaxed the additional fee payable on e-forms which are due for filing between March 25, 2016 to June 30, 2016, as a one time waiver.
- Also, it has been clarified that the last date for filing such documents and availing the benefit of waiver is July 10, 2016.

(MCA Circulars No. 03/2016, 06/2016 and 07/2016 published in the Gazette on April 12, 2016, May 16, 2016 and May 31, 2016)

Delegation of powers to Regional Directors under the 2013 Act

The Central Government has delegated the power to appoint inspectors for inspection of books and papers of a company under Section 206(5) of the 2013 Act to Regional Directors.

(MCA Notification dated April 29, 2016)

MCA issues clarifications on Corporate Social Responsibility ("**CSR**") and notifies the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2016

In continuation to the circular dated January 12, 2016 issued by the MCA (covered in detail in *Insight: Volume VIII, Issue 1*), the MCA has clarified that the CSR activities undertaken by the companies under the provisions of the 2013 Act should not contravene any laws of India including the Cigarettes and Other Tobacco Products Act, 2003.

The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2016 substitutes Rule 4(2) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 to permit CSR activities as approved by the CSR committee to be undertaken, *inter alia*, through a company under Section 8 of the 2013 Act, a registered trust or a registered society established by the Central or State government or any entity established under an Act of Parliament or State Legislature.

(MCA General Circular No. 05/2016 dated May 16, 2016 and MCA Notification No. G.S.R 540(E) published in the Gazette on May 23, 2016)

MCA notifies provision in relation to Special Courts

- MCA has notified provisions in respect of Special Courts for trial of offences punishable under the 2013 Act with imprisonment of 2 years or more in terms of Section 435 of the 2013 Act (*Establishment of Special Courts*).
- Accordingly, Sections 2(29)(iv) (*definition of Courts to include Special Courts*), Sections 435 (*Establishment of Special Courts*), 436 (*Offences triable by Special Courts*), 437 (*Appeal and Revision*), 438 (*Application of the Code of Criminal Procedure, 1973 to proceedings before Special Courts*) and 440 (*Transitional provision until a Special Court is established*) stand notified with effect from May 18, 2016.
- MCA has designated Special Courts for the state of Jammu & Kashmir, Maharashtra, Goa, Gujarat, Madhya Pradesh, West Bengal, Union Territories of Dadra and Nagar Haveli, Daman and Diu and Andaman and Nicobar Islands.

(MCA Notifications No. S.O. 1795(E) and S.O. 1796(E) published in the Gazette on May 18, 2016)

MCA publishes the Companies (Acceptance of Deposits) Amendment Rules, 2016

- MCA has published amendments to the Companies (Acceptance of Deposits) Rules, 2014 ("**Deposit Rules**") which *inter alia*, includes the following:
  - ✓ The definition of "deposits" under Rule 2(1)(c) of the Deposit Rules has been amended to, *inter alia*, exclude the following:
    - amounts raised by issue of bonds or debentures compulsorily convertible into shares within 10 years (as opposed to 5 years under the existing provision);
    - amounts raised by issue of non-convertible debentures not constituting a charge on the assets of the company and listed on a recognised stock exchange;
    - any non-interest bearing amount received and held in trust (as opposed to an amount received or held in trust);
    - amounts received in course of business of the company as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;
    - as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications; and
    - amount of Rs. 25,00,000 or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding 5 years from the date of issue) in a single tranche, from a person.
- "Start-up company" has been defined to mean a private company incorporated under the 2013 Act or the 1956 Act and recognised in accordance with the relevant notification of the Department of Industrial Policy and Promotion ("**DIPP**").
- Amendment to Rule 3(3) of the Deposit Rules to prohibit companies from receiving or renewing deposits from its members, if such deposits along with any other outstanding deposits (as on the date of acceptance or renewal) exceeds 35% (as opposed to 25% under the existing provisions) of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.
- Insertion of proviso to Rule 3(3) of the Deposit Rules to permit private companies from accepting monies from its members not exceeding 100% of the aggregate of the paid-up share capital, free reserves and securities premium account of the company along with filing of details of such monies accepted with the Registrar of Companies.
- Insertion of Rule 16A of the Deposit Rules to require every private company to disclose the monies received from the directors or relatives of directors in the notes to its financial statements. Additionally, other companies are required to disclose the monies received from a director in the notes to its financial statements.

(*MCA Notification dated June 29, 2016*)

MCA publishes the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016

MCA has published amendments to the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016 which include the following:

- Dispensation from requirement of filing of Form MR 1 (*Return of Appointment of Managerial Personnel*) for appointment of Chief Executive Officer, Company Secretary and Chief Financial Officer of a company;
- Dispensation from certain disclosures to be made by a listed company in the report of its board of directors, which, *inter alia*, includes: (i) explanation on the relationship between the average increase in remuneration and company's performance; (ii) comparison of the remuneration of key managerial personnel against the performance of the company; and (iii) key parameters for any variable component of remuneration availed by directors etc;
- Addition of the requirement of reflecting the names of top ten employees in terms of remuneration drawn, in the report of the board of directors; and
- Substitution of Form MR 1 (*Return of Appointment of Managerial Personnel*).

(*MCA Notification dated June 30, 2016*)

Key changes proposed in the Companies (Amendment) Bill, 2016

The Companies (Amendment) Bill, 2016, which was introduced on March 16, 2016 in the Lok Sabha, is pending before the Lok Sabha and is proposed to be taken up during the monsoon session of the Parliament scheduled from July 18, 2016 to August 12, 2016. The Companies (Amendment) Bill, 2016 proposes key changes to the 2013 Act, including, *inter alia*, removal of restriction on investment through more than two investment companies, removal of the requirement of annual ratification of appointment of an auditor at every annual general meeting, insertion of penalties in case a company operates with members less than the statutory limit prescribed under the 2013 Act for more than 6 months.

FOREIGN INVESTMENT AND RBI UPDATES

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FDI up to 100% in Asset Reconstruction Companies under Automatic Route

DIPP has, with immediate effect, allowed 100% foreign direct investment ("**FDI**") in asset reconstruction companies ("**ARCs**") under automatic route subject to the following:

- Persons resident outside India can invest in the capital of ARCs registered with the RBI, up to 100% under the automatic route.
- All investments including:
  - ✓ investment limits of a sponsor in the shareholding of an ARC; and
  - ✓ investment by institutional/non-institutional investors,
- shall be governed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).

➢ The total shareholding of an individual foreign institutional investor ("**FII**")/foreign portfolio investor ("**FPI**") shall be below 10% of the total paid-up capital.
➢ FII/FPIs have been permitted to invest up to 100% of each tranche in security receipts issued by ARCs, subject to the directions/guidelines of the RBI.

(Press Note No. 4 (2016 Series) dated May 6, 2016)

DIPP issues Consolidated FDI Policy, 2016

The DIPP has issued the Consolidated FDI Policy, 2016 ("**2016 FDI Policy**") effective on and from June 7, 2016.

In keeping with the objective of the consolidation exercise, the 2016 FDI Policy consolidates the various changes made since May 12, 2015 till date in respect of sectoral caps and conditionalities for foreign investment.

Snapshot of the 2016 FDI Policy
Introduction of Composite Caps
Composite caps have been introduced to bring about uniformity across sectors, and for the purposes of (a) foreign investment; (b) computation of indirect foreign investment; and (c) sectoral caps/maximum permissible foreign investment in each sector, all types of foreign investment, direct and indirect, shall be included, regardless of whether the foreign investments have been made under Schedule 1 (FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 9 (LLPs), 10 (DRs) or 11 (Investment Vehicles) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA 20**"), but excluding foreign currency convertible bonds (FCCBs) and depository receipts (DRs) having underlying instruments, being in the nature of debt. *(Press Note No. 8 (2015 Series) dated July 30, 2015)*
Portfolio Investment by FIIs/FPIs
➢ Investment by FIIs/FPIs is permitted in the capital of an Indian company under the Portfolio Investment Scheme subject to a limit of below 10% for the individual holding, and an aggregate investment limit of 24%, or the applicable sectoral ceiling, in the manner prescribed in the 2016 FDI Policy. ➢ However, no approval or compliance of 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. ➢ It has been clarified that foreign investment, resulting in transfer of ownership and/or control of Indian entities from resident to non-resident entities, in sectors/activities which are under: (a) Government approval route, will be subject to Governmental approval; and (b) automatic route but with conditionalities, will be subject to compliance of such conditionalities. Sectors under 100% automatic route without conditionalities will not be affected. *(Press Note No. 8 (2015 Series) dated July 30, 2015)*

- It may be noted that while Press Note No. 8 (2015 Series) included qualified foreign investor (QFI) investments for the purposes of determining foreign investment and portfolio investment as above, the same has not been included in the 2016 FDI Policy.

FDI in White Label ATM Operations

FDI in White Label ATM Operations is permitted up to 100% under the automatic route subject to the prescribed conditions.

(Press Note No. 11 (2015 Series) dated October 1, 2015)

Liberalisation *vide* Press Note No. 12 of 2015

The 2016 FDI Policy incorporates the changes brought about pursuant to Press Note No. 12 (2015 Series) dated November 24, 2015 in a manner consistent with the provisions of the extant FDI Policy. The same have been captured in detail in *Insight Special Edition: Volume VII, Issue 4* and summarised hereinbelow.

- **Sectoral Caps**
  - ✓ The sectoral caps have been increased in the following sectors: (a) Defence; (b) Information and Broadcasting; (c) Civil Aviation; (d) Credit Information Companies; (e) Satellites – Establishment and Operation; and (f) FII/FPI investment cap in the Private Banking Sector.
  - ✓ Further, the permissible activities for FDI in the plantation sector have been increased, and 100% FDI is now permitted under automatic route in Duty Free Shops located and operated in the customs bonded areas.
  - ✓ Additionally, FDI in limited liability partnerships is now permitted upto 100% under the automatic route in sectors/activities where 100% FDI is allowed through the automatic route, and there are no FDI-linked performance conditions, and subject to compliance with conditions of the Limited Liability Partnership Act, 2008.
- **Conditionalities and Other Changes**
  - ✓ There has been a relaxation of sector specific conditionalities in the following sectors: (a) Defence; (b) Construction-Development Projects; (c) Cash and Carry Wholesale Trading; and (d) Single Brand Retail Trading, with a view to opening up the sectors for increased foreign investment.
- **Downstream Investment**
  - ✓ For infusion of foreign investment into an Indian company which does not have any operations and also does not have any downstream investments, no Government approval will be required for undertaking activities which are under automatic route and without FDI-linked performance conditions, regardless of the amount or extent of foreign investment.
- **Share Swap**
  - ✓ No Government approval is required for investment in automatic route sectors by way of swap of shares.

- **Increased Threshold for approval of the Foreign Investment Promotion Board ("FIPB")**
    - ✓ The threshold limit for FIPB approval has been increased to Rs. 5,000 crore, beyond which proposals shall be recommended by the FIPB to the Cabinet Committee on Economic Affairs.
- **Definition of 'Manufacture'**
    - ✓ The definition of 'Manufacture' has been inserted and a manufacturer will be permitted to sell its products through wholesale and/or retail, including through e-commerce, without Government approval.

(Press Note No. 12 (2015 Series) dated November 24, 2015)

FDI in Insurance Sector

- FDI is permitted up to 49% of the total paid-up equity of an Indian insurance company under the automatic route, subject to verification by the Insurance Regulatory Development Authority of India ("**IRDAI**").
- The determination of Indian ownership and control of the Indian insurance company shall be in the manner prescribed by the Department of Financial Services/IRDAI from time to time.

(Press Note No. 1 (2016 Series) dated March 23, 2016)

FDI in Pension Sector

FDI is permitted up to 49% under the automatic route in the pension sector subject to compliance with the conditions set out in the Pension Fund Regulatory and Development Authority Act, 2013.

(Press Note No. 2 (2016 Series) dated March 23, 2016)

FDI in E-Commerce

FDI is permitted up to 100% under the automatic route in business to business (B2B) e-commerce, through the marketplace model, subject to the conditions prescribed in this regard.

(Press Note No. 3 (2016 Series) dated March 29, 2016)

FDI in ARCs

FDI is permitted up to 100% under the automatic route in ARCs, subject to the conditions detailed above.

(Press Note No. 4 (2016 Series) dated May 6, 2016)

Definition of Non-Resident Indian ("NRI")

Definition of 'NRI' has been amended to include 'Overseas Citizen of India' (OCI) cardholders and/or 'Persons of Indian Origin' (PIO) cardholders.

(Press Note No. 7 (2015 Series) dated June 3, 2015 and Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations, 2016 dated February 15, 2016)

Clarification on NRI investment under Schedule 4 of FEMA 20
Investment by NRIs under Schedule 4 of FEMA 20 shall be deemed to be domestic investment at par with the investment made by residents. *(Press Note No. 7 (2015 Series) dated June 3, 2015 and Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations, 2016 dated February 15, 2016)*
Partly Paid Shares and Warrants
Partly paid shares and warrants have been allowed as eligible capital instruments for the purposes of making foreign investments subject to such conditions as may be prescribed by the RBI from time to time. *(Press Note No. 9 (2015 Series) dated September 15, 2015)*
Definitions of 'Investment Vehicle' and 'Unit'
➢ Investment Vehicles shall include Real Estate Investment Trusts (**REITs**), Infrastructure Investment Trusts (**InvITs**), and Alternative Investment Funds (**AIFs**), governed by the respective Securities and Exchange Board of India ("**SEBI**") regulations. ➢ FDI in units of an Investment Vehicle is permitted subject to the conditions set out in Schedule 11 of FEMA 20. *(Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Eleventh Amendment) Regulations, 2015 dated November 16, 2015)*
Other Additions
➢ The 2016 FDI Policy has included the definitions of 'Employees' Stock Option' ("**ESOPs**") and 'Sweat Equity Shares'. ➢ It has been provided that the issuance of ESOPs and/or sweat equity shares to non-resident employees or directors must be in compliance with the sectoral cap applicable to the company. ➢ It has also been clarified that the issuance of ESOPs and/or sweat equity shares by a company where FDI is under the approval route will require prior FIPB approval. *(Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fourth Amendment) Regulations, 2015 dated June 11, 2015)*

Further liberalisation of the FDI policy

With a view to reinforce the "Make in India" campaign, the Government of India announced certain measures to liberalise the flow of FDI in the country. The same have been captured in detail in *Insight Special Edition: Volume VIII, Issue 2*. Such changes have been formalized by the DIPP in its Press Note No. 5 of 2016 on substantively similar terms as that of the Press Release. However, it may be noted that:

- with respect to the SBRT regime, the domestic sourcing norms, as applicable in case of FDI beyond 51%, have been relaxed for up to 3 years in respect of products having 'state-of-art' and 'cutting-edge' technology, or where local sourcing is not possible (as opposed to the Press Release which had announced relaxation of local sourcing norms up to 3 years and a relaxed sourcing regime for another 5 years for entities undertaking SBRT of products having 'state-of-art' and 'cutting edge' technology);

- with respect to the pharmaceutical industry, it has been specified that certain conditions including those relating to maintenance of production levels of National List of Essential Medicines drugs and maintenance of R&D expenses at the prescribed levels will need to be complied with in case of FDI in brownfield ventures, whether under automatic or approval route. It may be noted that such conditions, although not prescribed in the FDI policy earlier, are routinely incorporated in approvals granted by the FIPB.

(*Press Information Bureau Press Release dated June 20, 2016 and Press Note No. 5 (2016 Series) dated June 24, 2016*)

Acceptance of deposits under Section 160 of the 2013 Act does not attract FEMA (Deposit) Regulations, 2016

The RBI has clarified that keeping deposits with an Indian company by persons resident outside India, in accordance with Section 160 (*Re-appointment of directors*) of the 2013 Act, is a current account (payment) transaction and, as such, does not require any approval from RBI.

Further, all refunds of such deposits, arising in the event of selection of the person as director or getting more than 25% votes, shall be treated similarly.

(*RBI A.P. (DIR Series) Circular No.59 dated April 13, 2016*)

RBI revises the regime for issuance of rupee denominated bonds overseas

The RBI has made, *inter alia*, the following modifications to certain provisions of its earlier circular dated September 29, 2015 ("**2015 Circular**") on issuance of Rupee denominated bonds overseas (covered in detail in *Insight: Volume VII, Issue 3*):

- The current limit of USD 51 billion for foreign investment in corporate debt has been fixed in Rupee terms at Rs. 2443.23 billion – issuance of Rupee denominated bonds overseas will be within this aggregate limit of foreign investment in corporate debt; consequently, a maximum of Rs. 50 billion (not USD 750 million) can be borrowed by an entity in a financial year under the automatic route by issuance of these bonds. Proposals to borrow beyond Rs. 50 billion in a financial year will require prior approval of the RBI.

- Criteria for investors and location for issuance of these bonds have been modified to ensure consistency regarding eligibility of foreign investors in corporate debt. The rupee denominated bonds can only be issued in a country and can only be subscribed by a resident of a country:

  - ✓ that is a member of Financial Action Task Force ("**FATF**") or a member of a FATF Style Regional Body;

- ✓ whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding ("**IOSCO**") or a signatory to bilateral Memorandum of Understanding with SEBI for information sharing arrangements; and
- ✓ that is not a country identified in the public statement of the FATF as:
  - a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
  - 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.

- ➢ The minimum maturity period has been reduced to 3 years.
- ➢ The agreement/offer document, to incorporate a clause to enable borrower to obtain the list of primary bond holders and provide the same to the regulatory authorities in India as and when required and stating that the bonds can only be transferred/offered as security overseas subject to compliance with the aforesaid IOSCO/FATF jurisdictional requirements.
- ➢ AD Category-I banks to report the actual drawdown/repayment (principal only) along with the LRN on the date of the transaction itself.

It has been clarified that, the modified provisions are applicable from the date of the circular (April 13, 2016), earlier transactions and those in the pipe line may be concluded as per provisions of the 2015 Circular. Post-facto reporting of actual transactions, already undertaken shall, however, be done as per the revised provisions.

(*RBI A.P. (DIR Series) Circular No.60 dated April 13, 2016*)

RBI mandates norms for submission of Annual Performance Report ("**APR**")

In order to provide AD Category-I banks ("**AD Banks**") greater capability to track submission of APRs and also improve compliance in respect of submission of APRs by the Indian Party ("**IP**")/Resident Individual ("**RI**"), the RBI has mandated as follows:

- ➢ The AD Bank, before undertaking/facilitating any overseas direct investment ("**ODI**") related transaction on behalf of the eligible applicant, should necessarily check with its nodal office to confirm that all APRs in respect of all the Joint Venture ("**JV**")/Wholly Owned Subsidiary ("**WOS**") of the applicant have been submitted;
- ➢ Certification of APRs by the statutory auditor or chartered accountant need not be insisted upon in the case of RIs; self-certification may be accepted;
- ➢ In case multiple IPs/RIs have invested in the same overseas JV/WOS, the obligation to submit APR shall lie with the IP/RI having maximum stake in the JV/WOS. Alternatively, by mutual agreement among such IPs/RIs, this responsibility may be assigned to a designated entity which shall acknowledge the same by furnishing an appropriate undertaking to the AD Bank;
- ➢ An IP/RI, which has set up/acquired a JV/WOS overseas, shall submit, to the AD Bank every year, an APR in Form ODI Part II (based on the latest audited annual accounts of the JV/WOS unless specifically exempted by the RBI) in respect of each overseas JV/WOS and other reports or documents by December 31 each year or as may be specified by RBI.

(*RBI A.P. (DIR Series) Circular No.61 dated April 13, 2016*)

Rationalization and reporting of ODI Forms

- At present, Form ODI Part I (*re* overseas investments) and Part III (*re* remittances and other forms of financial commitments undertaken) are required to be submitted by the applicant undertaking ODI and Form ODI Part II (*re* APRs) and Part IV (*re* disinvestment) are to be submitted by the AD Bank on behalf of the applicant. In order to capture all data pertaining to the applicant undertaking ODI as well as the related transaction, Form ODI Part II has been subsumed within Form ODI Part I. Thus, the Form ODI will have 5 sections instead of 6. The revised ODI forms are annexed to the circular and come into immediate effect.
- Further, a new reporting format has been introduced for Venture Capital Fund (“**VCF**”)/Alternative Investment Fund (“**AIF**”), Portfolio Investment and overseas investment by Mutual Funds. The reporting of purchase and repurchase of ESOPs will continue to be in the existing format.
- Any post investment changes subsequent to the allotment of the unique identification number (“**UIN**”) are required to be reported as indicated in the operational instructions on submission of Form ODI Part I.
- AD Banks, before executing any ODI transaction, must obtain the Form ODI Part I from the applicant and should report the relevant Form ODI in the online ODI application and obtain UIN while executing the remittance.

(*RBI A.P. (DIR Series) Circular No.62 dated April 13, 2016*)

New foreign investment regime for alternative investment vehicles

In connection with the permission granted for foreign investment in the units of investment vehicles registered and regulated by SEBI or other competent authority and the amendments to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations 2000 (“**FEMA 1**”) and FEMA 20 (covered in detail in *Insight: Volume VII, Issue 7*), it has been clarified that foreign investment in units of REITs registered and regulated under the SEBI (REITs) Regulations, 2014 will not be included in ‘real estate business’ for the purpose of FEMA 1.

(*A.P. (DIR Series) Circular No. 63 dated April 21, 2016*)

Amendments to FEMA 20

Investments by FVCIs:

The RBI, *vide* the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Third Amendment) Regulations, 2016, has amended FEMA 20 to allow investments by foreign venture capital investor (“**FVCI**”). The following amendments have been notified in this regard:

- Regulation 2 of FEMA 20 has been amended to include definitions of:
  - ✓ ‘**Category I Alternative Investment Fund (Cat-I AIF)**’ as an AIF registered under the SEBI (AIF) Regulations, 2012 which raises money and invests in such funds or sectors or activities or areas in accordance with the said regulations.

- ✓ '**Startup**' as an entity, incorporated or registered in India not prior to 5 years, with an annual turnover not exceeding Rs. 25,00,00,000 in any preceding financial year, working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property. Such entity should not have been formed by splitting up or reconstruction of a business already in existence.

- Regulation 5 of FEMA 20 has been amended to provide that a FVCI registered with SEBI may make investment in the manner and subject to the terms and conditions specified in Schedule 6 thereto. Schedule 6 of FEMA 20 has also been replaced by a new schedule providing for conditions for investment by FVCIs.

(*Notification No.FEMA.363/2016-RB dated April 28, 2016*)

Deferred consideration permitted on automatic route:

With a view to facilitate foreign investments, the RBI has amended FEMA 20 *vide* Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Seventh Amendment) Regulations, 2016 permitting 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:

- a maximum of 25% of the total consideration can be paid by the buyer on a deferred basis;
- the deferred consideration to be paid within 18 months from date of the transfer agreement; and
- an escrow arrangement may be entered into between the buyer and the seller in respect of payment of the deferred consideration.

Moreover, the RBI has liberalized the existing framework regarding the payment of indemnity in case the total consideration is paid upfront by the buyer to the seller, subject to the indemnity not exceeding 25% of the total consideration and for a period not exceeding 18 months from the date of payment of the full consideration.

(*Notification No.FEMA.368/2016-RB dated May 20, 2016*)

Detailed directions relating to dealings of AD Banks with their exporter clients

Pursuant to the Foreign Exchange Management (Exports of Goods and Services) Regulations, 2015 notified on January 12, 2016, the RBI has specified detailed procedural directions relating to dealings of AD Banks with their exporter clients.

(*RBI A.P. (DIR Series) Circular No.68 [(1)/23(R)] dated May 12, 2016*)

Revised regulations issued under FEMA

The RBI has released the following revised regulations, which repeal the original notifications and the subsequent amendments thereto:

New Regulation	Date of issue of Notification	Date of issue of Circular
Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016	May 2, 2016 Notification No. FEMA 14(R)/2016-RB	-

New Regulation	Date of issue of Notification	Date of issue of Circular
Foreign Exchange Management (Deposit) Regulations, 2016	April 1, 2016 Notification No. FEMA 5(R)/2016-RB	May 5, 2016 A.P. (DIR Series) Circular No. 67/2015-16 [(1)/5(R)]
Foreign Exchange Management (Remittance of Assets) Regulations, 2016	April 1, 2016 Notification No. FEMA 13 (R)/2016-RB	April 28, 2016 A.P. (DIR Series) Circular No. 64/2015-16 [(1)/13(R)]
Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 (covered in *Insight: Volume VIII, Issue 1*)	March 31, 2016 Notification No. FEMA 22(R)/2016-RB	May 12, 2016 A.P. (DIR Series) Circular No. 69 [(1)/22(R)]

(*Notification No.FEMA.368/2016-RB dated May 20, 2016*)

Disclosure of compounding orders under FEMA, 1999

With a view to minimise transaction costs and heightened transparency the RBI:

- has decided that the compounding orders passed on or after June 1, 2016 shall be hosted on the RBI's website (www.rbi.org.in); and
- has published the guidelines basis which the amount to be imposed during compounding proceedings is calculated, for information of general public.

It has also been clarified that the guidelines are meant only for the purpose of broadly indicating the basis on which the amount to be imposed is derived by the compounding authorities in RBI. The actual amount imposed may sometimes vary, depending on the circumstances of the case taking into account prescribed factors.

(*RBI A.P. (DIR Series) Circular No.73 dated May 26, 2016*)

RBI amends FEMA 10 to liberalize the regulation for startups

RBI has amended the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015 ("**FEMA 10**") permitting 'Startups' and 'Insurance/Reinsurance Companies' to open foreign currency accounts ("**FCA**"):

- The newly inserted sub-regulation (E) of Regulation 5 of FEMA 10 provides that an Indian Startup or any other entity notified by RBI, having an overseas subsidiary, can open a FCA with a bank outside India for crediting its foreign exchange earnings out of exports/sales and/or the receivables, arising out of exports/sales, of its overseas subsidiary.

- The balances in the account must be repatriated to India within the period specified in the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 ("**FEMA 23**") for realization of export proceeds. Accordingly, Schedule 1 of FEMA 10 has also been amended.

- Sub-regulation (3) of (the re-numbered) Regulation 5(F) is substituted to allow insurance/reinsurance companies registered with IRDAI and carrying out insurance/reinsurance business to open, hold and maintain a FCA with a bank outside India for meeting the expenditure incidental to the insurance/reinsurance business and to credit the FCA with the insurance/reinsurance premia received by them overseas.

(*FEMA 10(R)/1/2016-RB dated June 1, 2016 and RBI A.P. (DIR Series) Circular No. 77 [(2)/10(R)] dated June 23, 2016*)

RBI expedites External Commercial Borrowings ("**ECB**") approval process

In order to rationalize and expedite the approval process for ECB proposals requiring approval, RBI has decided that ECB proposals received above a specified threshold (recalibrated from time to time) shall be placed before the Empowered Committee and RBI will take a final decision in such cases taking into account the committee's recommendation.

(*RBI A.P. (DIR Series) Circular No. 80 dated June 30, 2016*)

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Electronic book mechanism for issuance of debt securities on private placement basis

- In order to streamline the procedures for issuance of debt securities on private placement basis and to enhance transparency to discover prices, SEBI has provided a framework for issuance of debt securities on private placement basis through an electronic book mechanism. SEBI has made it mandatory for all private placements of debt securities in primary market with an issue size of Rs. 500 crores and above, inclusive of green shop option, if any, to follow the electronic book mechanism. Through this circular, SEBI has laid down the procedure for: (i) appointment of an electronic book provider; (ii) participants involved in an issuance through electronic book mechanism and their roles and responsibilities; and (iii) issuance of debt securities through electronic book mechanism. The provisions of this circular shall come into effect on July 1, 2016.

(*SEBI Circular dated April 21, 2016*)

FAQs on SEBI (Delisting of Equity Shares) Regulations, 2009

- SEBI has revised the FAQs on SEBI (Delisting of Equity Shares) Regulations, 2009 ("**Delisting Regulations**") by inserting a clarification in regard to Regulation 27(3)(d) which requires atleast 90% of the public shareholders of the company to give their positive consent in writing to the proposal for delisting. SEBI has clarified that that the promoter of a small company would be considered to have complied with the condition under Regulation 27(3)(d) of the Delisting Regulations if the <u>public shareholders, irrespective of their numbers, holding 90% or more of the public shareholding</u> give their positive consent in writing to the proposal for delisting. This clarification is following the order of the Securities Appellate Tribunal in the matter of *V. T. Somasundaram and M/s. Trichy Distilleries & Chemicals Limited vs. Madras Stock Exchange* on November 4, 2011.

(*FAQs on SEBI (Delisting of Equity Shares) Regulations, 2009 dated April 21, 2016*)

SEBI prescribes revised formats under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

- SEBI has prescribed a reporting period of 3 years for compliance with the reporting requirement to the stock exchanges pursuant to acquisitions made under Regulation 10(1) (a) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**SAST Regulations**") including in respect of acquisitions made in reliance of exemptions provided thereunder. The formats prescribed by SEBI for such reporting *vide* its circular dated September 23, 2011 have been amended accordingly.

(SEBI Circular dated May 2, 2016)

Procedure to deal with cases prior to April 1, 2014 involving offer/allotment of securities to more than 49 and up to 200 in a financial year

- SEBI had, pursuant to its circular no. CIR/CFD/DIL3/18/2015 dated December 31, 2015 ("**Circular**"), laid down the procedure to deal with cases involving offer/allotment of securities to more than 49 and up to 200 persons. While the Circular required submission of a certificate from an independent peer reviewed practicing chartered accountant certifying compliance (as prescribed), SEBI now permitted submission of such certification from independent peer reviewed practicing company secretary as well.

(SEBI Circular dated May 3, 2016)

Guidelines for public issue of Infrastructure Investment Trusts

SEBI has issued the guidelines for public issue of units of Infrastructure Investment Trusts ("**InvITs**") through its circular dated May 11, 2016. The key highlights of the guidelines are as follows:

- Appointment of merchant bankers - The investment manager (on behalf of the InvIT) to appoint one or more merchant bankers, at least one of whom shall be a lead merchant banker. In case of more than one merchant banker, the inter-se responsibilities between the merchant bankers shall be pre-determined and disclosed in the offer document.
- SEBI Review Process - The public issue of units would involve preparation of draft offer document, offer document and final offer document. It further prescribed a process for the filing of these documents with the regulatory authorities (including a SEBI review process for the draft offer document). The lead merchant banker would also be required to submit due diligence certificates as per the format prescribed in the guidelines.
- Allocation in public issue of InvITs - The allocation shall be made in the following manner for an issuer undertaken through a book built process or otherwise:
  - ✓ not more than 75% to institutional investors, of which 60% may be allocated to anchor investors in the manner prescribed in these guidelines.
  - ✓ not less than 25% to other investors.

- Opening of an issue and subscription period - The issue to be opened after at least 5 working days from the date of filing the final offer document with SEBI. The issue to be kept open for minimum period of 3 working days and maximum period of 30 working days.
- Underwriting - The InvIT has an option to get the issue underwritten by appointing underwriters in accordance with Securities and Exchange Board of India (Underwriters) Regulations, 1992.
- Price and Price Band - The investment manager (on behalf of the InvIT) to determine the price of the units in consultation with the lead merchant banker or through the book building process.

These guidelines further prescribes provisions pertaining to bidding/allotment procedure, basis of allotment, maintenance of books and records, post-issue reports, security deposit, application and abridged offer document, publicity restrictions and other general conditions.

(SEBI Circular dated May 11, 2016)

Minutes of SEBI Board Meeting

SEBI in its board meeting conducted on May 19, 2016 approved the following proposals:

- Approved the proposal for formulation and disclosure by the top 500 listed companies of their dividend distribution policies in the annual reports and on their websites, and laid down the following parameters for the same: (a) circumstances under which shareholders can or cannot expect dividend; (b) financial parameters; (c) internal and external parameters: (d) policy on utilisation of retained earnings; and (e) provisions in regard to various classes of shares.
- Decided to issue a consultation paper proposing certain modifications or clarifications to the SEBI (Infrastructure Investment Trusts) Regulations, 2014 for smoothening the process of registration of InvITs and process of launching the offer. The key changes or clarifications proposed pertain to permitting InvITs to invest in a two level special purpose vehicle ("**SPV**") structure, mandatory sponsor holding in InvITs to be reduced from 25% to 10%, increasing the number of sponsors from three to five and other operational requirements. The relevant consultation paper was issued by SEBI on June 1, 2016.
- Approved the incorporation into the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 ("**Settlement Regulations**") of the contents of the guidance note issued on March 3, 2016 which clarifies, in reference to Regulation 5(2)(b) of the Settlement Regulations, that proceedings involving fraudulent and unfair trade practices which are serious and have market wide impact or have caused substantial losses to investors will not be settled.
- Noted that in regard to the amendment of the SEBI Act, 1992, the Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996 (collectively, the "**Securities Laws**") by Parliament in 2014 providing for minimum and maximum penalties, that the same was prospective and not applicable to cases falling between 2002 and 2014. Accordingly, it approved sending a proposal to the Central Government for amendment of the Securities Laws to clarify the applicability of the monetary penalty provisions in relation to cases prior to 2014.

(SEBI Board Meeting held on May 19, 2016)

SEBI amends its regulations to include the definition of 'Wilful Defaulter'

- SEBI has amended the SAST Regulations, the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("**ILDS Regulations**") the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 ("**ILNRPS Regulations**") and the SEBI (Intermediaries) Regulations, 2008 ("**Intermediaries Regulations**") (collectively, the "**SEBI Regulations**") to include the definition of 'wilful defaulter' as any person/issuer (as applicable) categorised as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the RBI, and which includes any person/issuer whose director or promoter is categorised as such.
- Accordingly, <u>corresponding changes have been made to each of the SEBI Regulations</u> which *inter alia* include: (a) the SAST Regulations have been amended to prohibit any person who is a wilful defaulter from making an open offer for acquiring shares under the SAST Regulations, with the exception of competing offers by wilful defaulters in case of any open offer; (b) the ILDS Regulations and the ILNRPS Regulations have been amended to prohibit the making of any public issue of debt securities/non-convertible redeemable preference shares if on the date of filing of the offer document, the issuer or any of its promoters or directors is a wilful defaulter; and (c) the absence of categorization as a wilful defaulter has been included as a criteria for 'fit and proper person' under Schedule II of the Intermediaries Regulations.

(SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2016, SEBI (Issue and Listing of Debt Securities) (Amendment) Regulations, 2016, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) (Amendment) Regulations, 2016 and SEBI (Intermediaries) (Amendment) Regulations, 2016, dated May 25, 2016 respectively)

Amendment to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

SEBI has notified the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2016, which came into force on the April 1, 2016, whereby SEBI made the following key amendments:

- the entities which have listed their specified securities are now required to submit their 'annual' audited standalone and consolidated financial results for the financial year within 60 days from the end of financial year together with the audit report and (i) for audit report with modified opinion, a 'statement on impact of audit qualifications', and (ii) for audit report with unmodified opinion, 'declaration' to that effect to the stock exchanges. Similar modifications have been introduced for entities which have listed only non-convertible debt securities and/or non-convertible redeemable preference shares.
- in case of a modified opinion: (i) option has now been given to the management of the listed entities to explain its views on the audit qualification in the 'statement on impact of audit qualifications'; (ii) the listed entity is now required to disclose the cumulative impact on total expenditure and total liabilities as well; and (iii) if the impact of the qualification is unquantifiable, the management to make an estimate and if it is unable to do so, then provide reasons, each of which to be reviewed by the auditor and report accordingly.
- Schedule VIII pertaining to manner of reviewing Form B accompanying annual audited results has been deleted.

- SEBI has, pursuant to its circular dated May 27, 2016, prescribed for the format for 'statement on impact of audit qualifications'.

(SEBI notification dated May 25, 2016 and SEBI circular dated May 27, 2016)

SEBI amends the SEBI (Depositories and Participants) Regulations, 1996

- SEBI has amended the SEBI (Depositories and Participants) Regulations, 1996 by inserting Regulation 35B which requires every depository to devise and maintain a wind-down plan in accordance with the guidelines specified by SEBI, where a 'wind-down plan' shall mean a process or plan of action employed for the transfer of the beneficial owner accounts and other operational powers of the depository to an alternative institution in case of events such as erosion of net worth of the depository or its insolvency or inability to provide critical depository operations or services.

(SEBI (Depositories and Participants)(Third Amendment) Regulations, 2016 dated May 27, 2016)

KYC norms and reporting format for the issuance and transfer of offshore derivative instruments (ODIs), clarification regarding grandfathering of Foreign Portfolio Investors issuing ODIs pursuant to the SEBI (Foreign Portfolio Investors) Regulations, 2014, and amendment to the SEBI (Foreign Portfolio Investors) Regulations, 2014

SEBI had in its board meeting held on May 19, 2016 proposed certain norms in regard to the issuance and transfer of ODIs, and has introduced the same *vide* its circular dated June 10, 2016. Additionally, SEBI has *vide* circular dated June 29, 2016 issued clarifications regarding grandfathering of ODI issuers and accordingly modified replies of relevant FAQs of the SEBI FAQs to SEBI (Foreign Portfolio Investors) Regulations, 2014 ("**FPI Regulations**"). The FPI Regulations have also been amended w.e.f. June 22, 2016 to bring the same in line with the changes in the ODI regime. The above mentioned changes are set out below:

KYC Norms and Reporting Format
➢ <u>KYC Norms for Client Due Diligence</u> – ODI issuers will be required to identify and verify the beneficial owners in the subscriber entities who hold in excess of 25% in the case of a company and 15% in the case of partnership firms/trusts/incorporated bodies. ODI issuers will also be required to identify and verify persons who control the operations when no beneficial owner is identified based on the above materiality thresholds.
➢ <u>KYC Review</u> – The KYC review shall be done on the basis of the risk criteria determined by the ODI issuers at the time of on-boarding, (a) once every 3 years for low risk clients (within 3 years from the date of the instant circular for existing ODI subscribers); and (b) every year for all other clients.
➢ <u>Suspicious Transactions Report</u> – ODI issuers will be required to file suspicious transaction reports, if any, with the Indian Financial Intelligence Unit in regard to ODIs issued by it.
➢ <u>Reporting of Complete Transfer Trail of ODIs</u> – ODI issuers are required to capture the details of all the transfers of ODIs issued by them and make the same available to SEBI on demand, in addition to the reporting of intermediate transfers during a month as part of the monthly reports on ODI.
➢ <u>Reconfirmation of ODI positions</u> – ODI issuers will be required to carry out reconfirmation of the ODI positions on a semi-annual basis.

- Periodic Operational Evaluation – ODI issuers will be required to carry out periodical review and evaluation of its controls, systems and procedures for ODIs, and submit a certificate in regard to the same on an annual basis to SEBI within one month from the close of every calendar year.

Amendment to the FPI Regulations

- SEBI has amended the FPI Regulations by way of the SEBI (Foreign Portfolio Investors) (Amendment) Regulations, 2016 w.e.f. June 22, 2016 to include that any transfer of ODIs by the FPI issuers shall be subject to:

  (a) the fulfillment of Regulation 22(1) of the FPI Regulations, which sets out the specific conditions (including *inter alia* compliance with the abovementioned KYC norms) subject to which the FPIs may issue, subscribe or otherwise deal with ODIs; and

  (b) the prior consent of the FPI, except in cases where the transferee has been pre-approved by the FPI.

Grandfathering Provisions for FPIs issuing ODIs under the FPI Regulations

Subsistence of ODIs issued to unregulated funds under the FPI Regulations and subscription to ODIs by existing ODI subscriber – SEBI has clarified that ODI subscribers who have already subscribed to ODIs under the FPI regime can continue to subscribe to ODIs subject to compliance with Regulation 22 of the FPI Regulations, and the eligibility criteria laid down by SEBI in this regard *vide* circular dated November 24, 2014 ("**Eligibility Norms**"). ODI subscribers not meeting the Eligibility Norms, including unregulated funds with investment managers who are appropriately regulated, have a window period to hold their positions upto December 31, 2020 or the date of expiry of their positions, whichever is earlier.

- Issuance of ODIs to existing entities registered as clients but not having positions as on January 7, 2014 – SEBI has clarified that ODIs can be issued to those entities in compliance with the Eligibility Norms and such other conditions prescribed by SEBI, read along with Regulation 22 of the FPI Regulations.

- The grandfathering provisions above shall be effective from August 1, 2016 and the relevant FAQs under the SEBI FAQs to the FPI Regulations shall stand modified accordingly.

(*SEBI Board Meeting held on May 19, 2016, SEBI Circulars dated June 10, 2016 and June 29, 2016 and the SEBI (Foreign Portfolio Investors) (Amendment) Regulations, 2016 dated June 22, 2016*)

Consultation paper on the continuous disclosures to be made by InvIT registered under the SEBI (Infrastructure Investment Trusts) Regulations, 2014

With a view to provide for certain continuous disclosures to made by an InvIT in addition to the requirements provided in the SEBI (Infrastructure Investment Trusts) Regulations, 2014, SEBI has released a consultation paper for public comments, on June 15, 2016. The consultation paper provides proposals with respect to:

- Continuous financial disclosures to be made by InvIT.

- Other continuous disclosures to be made by InvIT including those relating to related party transactions, unit holding pattern and material and price sensitive information.

With a view to provide for certain continuous disclosures to made by an InvIT in addition to the requirements provided in the SEBI (Infrastructure Investment Trusts) Regulations, 2014, SEBI has released a consultation paper for public comments, on June 15, 2016. The consultation paper provides proposals with respect to:

- Continuous financial disclosures to be made by InvIT.
- Other continuous disclosures to be made by InvIT including those relating to related party transactions, unit holding pattern and material and price sensitive information.
- Framework for calculation of net distributable cash flow.

SEBI had requested for comments on the consultation paper from public by June 28, 2016.

(SEBI Consultation Paper dated June 15, 2016)

Minutes of SEBI Board Meeting

SEBI in its board meeting conducted on June 17, 2016 approved the following proposals:

- Approved the bringing out of a consultation paper for Amendments to the SEBI (Portfolio Managers) Regulations, 1993 pursuant to the introduction of Section 9A in the Income Tax Act, 1961. The changes to be proposed in the consultation papers *inter alia* include:
  - ✓ Insertion of chapter on Eligible Fund Managers, setting out their activities as portfolio managers to Eligible Investment Funds, including obligations and responsibilities of such Eligible Fund Managers;
  - ✓ High Water Mark Principle regarding calculation of fees, disclosure of fees etc.;
  - ✓ Obligation to act in fiduciary capacity;
  - ✓ Agreement to be entered into between portfolio manager and overseas fund;
  - ✓ Reporting requirements for overseas fund; and
  - ✓ Minimum investment requirements of Rs. 25,00,000, etc.
- Approved bringing out a consultation paper proposing certain modifications or clarifications to the SEBI (REITs) Regulations, 2014 for smoothening the process of registration of REITs and process of launching the offer. The key changes or clarifications proposed pertain to removing the restriction on a SPV (being a holding company) to invest in other SPVs holding the assets, modification in number of sponsors, minimum public holding to be aligned with requirements prescribed under the Securities Contracts (Regulation) Rules, 1957, as amended, rationalization of compliance relating to related party transactions, permitting REITs to invest up to 20%, in under-construction assets and roles and responsibility of trustee and its associates. The relevant consultation paper was issued by SEBI on July 18, 2016.

(SEBI Board Meeting held on June 17, 2016)

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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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