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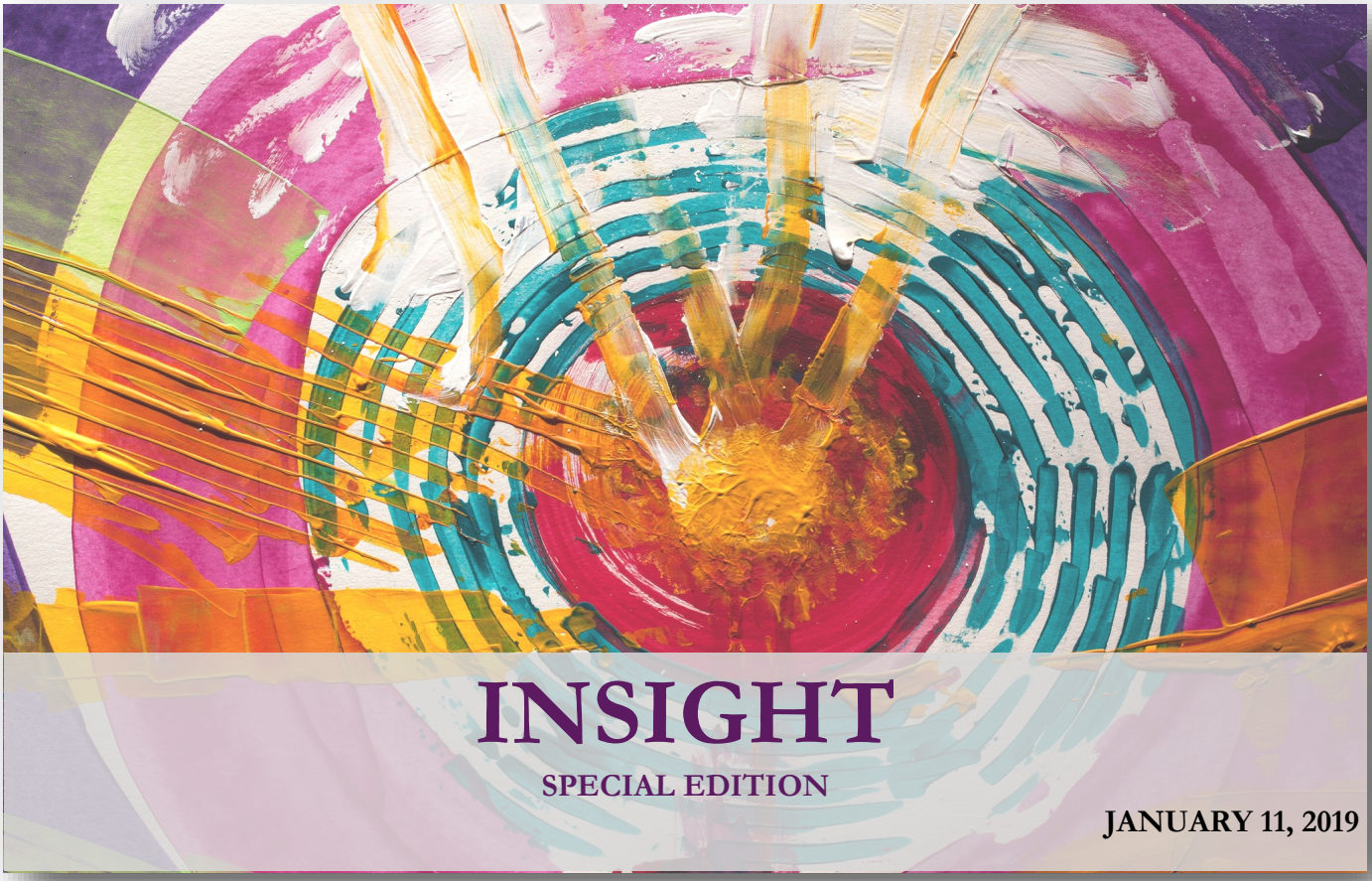

INSIGHT

SPECIAL EDITION

JANUARY 11, 2019

FOREWORD

It gives me great pleasure to provide you with an update on the significant legal developments affecting the corporate world in 2018 in India. I have always felt that there was a need for a round-up of the legal developments affecting the corporate world, which would summarize the developments in a language and style easy to understand for lawyers and corporate citizens.

The year 2018 has seen some significant and proactive changes being brought by the Ministry of Corporate Affairs, Securities and Exchange Board of India, and the Reserve Bank of India. Towards this objective, in this update we have focussed on legal developments in company law, securities law and foreign exchange matters which took place in 2018. We have also discussed the amendment to the Specific Relief Act, 1963.

Feedback and suggestions from our readers would be appreciated. Please feel free to send your comments to cam.publications@cyrilshroff.com.

Regards,
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The year 2018 has seen a number of crucial amendments being introduced. While some of the amendments are procedural in nature, there are others which require detailed deliberation. Some of the key changes that have been introduced in 2018 are as follows:

SIGNIFICANT CHANGES IN THE COMPANIES ACT

Significant Beneficial Owner ("**SBO**"):

Section 90 of the Companies Act, 2013 **("2013 Act")** read with the Companies (Significant Beneficial Owners) Rules, 2018, define an SBO to mean an individual, who acting alone or together with other persons or trusts, holds 'beneficial interest' in 10% or more of shares or right to exercise or actual exercise of significant influence or control in a company, but whose name is not entered in the register of members of the company. Further, 'beneficial interest in a share' has been defined under Section 89 to include the right or entitlement of a person to exercise any/ all rights attached to a share, or receive or participate in any dividend or other distribution in respect of such share. While the erstwhile Section 90 empowered the Central Government to appoint relevant persons to investigate and report the beneficial ownership with regard to the shares of a company, now all SBOs of a company must make a declaration specifying nature of their interest to the company in Form BEN-1. All SBOs of a company, as on June 13, 2018, had to make the aforesaid declaration by September 10, 2018. However, the aforesaid requirement has been put on hold since the Ministry of Corporate Affairs ("**MCA**") is revising Form BEN-1. Further, every company receiving the aforesaid declaration must file a return of SBOs in Form BEN-2 with the Registrar of Companies (**"RoC"**). Currently, filing of Form BEN-2 has also been put on hold. Also, every company must maintain a register of its SBOs.

Every company is now obligated to issue a notice seeking information from a person, who the company knows or has reasonable cause to believe to be an SBO, or knows about an SBO or another person who may have such knowledge, or have been an SBO at any time during the last 3 years from date of issuance of notice. If the relevant information is not furnished on time or is not satisfactory, the company may apply to the National Company Law Tribunal ("**NCLT**") for an order directing that certain restrictions on transfer of interest, right to claim dividend and suspension of voting rights, be placed on the shares of the relevant person. In case the NCLT does place such restrictions, the aggrieved person may make an application within 1 year of NCLT's order to avoid transfer of the shares to the Investor Education and Protection Fund Authority. The aforesaid obligations are not applicable to shares held by pooled investment vehicles/ funds such as mutual funds, alternative investment funds, real estate investment trusts and infrastructure investment funds regulated by Securities and Exchange Board of India (**"SEBI"**).

Dematerialization of Securities of Unlisted Public Companies:

The revised Companies (Prospectus and Allotment of Securities) Rules, 2014 (**"Prospectus Rules"**) now require every unlisted public company to issue securities only in dematerialised form and facilitate dematerialization of all its existing securities. However, no time period has been prescribed for such dematerialization. Further, all unlisted public companies must dematerialize the entire holding of securities of its promoters, directors and key managerial personnel in accordance with provisions of the Depositories Act, 1996 prior to making any offer for issue or buyback or issue of bonus shares or rights offer. Further, every security holder, intending to transfer or subscribe to any securities of an unlisted public company on or after October 2, 2018, must dematerialize the securities prior to such transfer/ subscription. The non-resident shareholders seeking to transfer/ subscribe securities of unlisted public companies have to obtain a Permanent Account Number. Further, timely payment in the form of fees and deposits should be made to the depository, registrar to an issue and share transfer agent. Otherwise, any offer for issue or buyback or issue of bonus shares or rights offer cannot be made.

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Constitution of the National Finance Reporting Authority ("**NFRA**"):

The NFRA was constituted under the 2013 Act on October 1, 2018. It has substituted the National Advisory Committee on Accounting Standards ("**NACAS**"), which was constituted under the Companies Act, 1956. The NFRA has been vested with the power to *inter alia* make recommendations to the Central Government in respect of accounting and auditing standards after considering recommendations of the Institute of Chartered Accountants of India ("**ICAI**"); monitor and enforce compliance with the standards; oversee quality of service provided by the auditors; and investigate matters and initiate action in cases involving misconduct by the auditors, of the entities as prescribed under the NFRA Rules, 2018. For purposes of monitoring and enforcing compliance with (a) the accounting standards (the NFRA has the power to review financial statements of the concerned entity and direct such entities or their auditors to provide further information in this regard); and (b) the auditing standards (the NFRA may review *inter alia* audit plans, audit related communications and the audit systems of the concerned auditors). The power to initiate action against auditors of body corporates and companies falling outside the ambit of NFRA continues to vest with the ICAI.

Each body corporate, excluding a company, governed by the NFRA had to file the relevant form with the NFRA intimating details of its auditor by December 12, 2018. However, the aforesaid form filing has been currently put on hold by the MCA. Further, the auditor of an entity governed by the NFRA is required to file an annual return with the NFRA. While non-compliance with the NFRA Rules is punishable with a fine, auditors who commit misconduct shall be liable for a monetary penalty and may be barred from practice for a specified period of time.

Removal of Independent Director ("**ID**"):

An ID can be re-appointed for a second term only by way of a special resolution passed by the members. However, in terms of erstwhile Section 169(1) of the 2013 Act, an ID who is re-appointed for a second term as specified above, could be removed by way of an ordinary resolution. In order to strengthen corporate governance mechanisms and mitigate promoter influenced ousters of IDs, Section 169 of the 2013 Act has been amended to now require a special resolution for removing such an ID who has been re-appointed for a second term pursuant to a special resolution.

Amendment to Companies (Registered Valuers and Valuation) Rules, 2017 ("**Valuation Rules**"):

It has been clarified that the Valuation Rules only govern valuations as required under the 2013 Act and that the conduct of valuations under other laws would not be affected by virtue of the Valuation Rules. Further, the transition period under the Valuation Rules has been extended and a valuer may now continue to provide valuation services under the 2013 Act without obtaining a certificate of registration up to January 31, 2019.

Private Placement:

The entire framework on private placement of securities has been modified by the Companies (Amendment) Act, 2017 ("**Amendment Act**") and the amendments to the Prospectus Rules, with effect from August 7, 2018. They key changes in this regard are as follows:

i. *Issuance offer letter-cum-application ("**Offer Letter**")*: The Offer Letter can be issued only after the special resolution or board resolution approving the private placement has been filed with the RoC. Further, filing of the board resolution required to be passed under Section 179 of the 2013 Act, has been made mandatory even for private companies, which were earlier exempted from making such filing.

ii. *Issuance of Non Convertible Debentures ("**NCDs**"):* Earlier, a special resolution was required to be passed once a year for private placement of NCDs during that year. The aforesaid requirement of a special resolution has been dispensed with if the NCDs are issued within the threshold specified in Section 180(1)(c) of the 2013 Act, in which case a board resolution in terms of Section 179 (3)(c) of the 2013 Act will suffice. If the threshold specified in Section 180(1)(c) of the

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2013 Act is attracted, then a previous special resolution passed during that year for such debentures will be sufficient.

iii. *Utilization of Subscription Money:* It has now been clarified that a company is prohibited from utilizing money raised through private placement unless the allotment is made and the return of allotment is filed in Form PAS-3 with the RoC.

iv. *Details of Explanatory Statement:* The revised Prospectus Rules prescribe that *inter alia* particulars of offer, date of board resolution, nature and price of securities offered, and name and address of valuer are to be disclosed in the explanatory statement to the notice to shareholders.

v. *Changes in filing requirements:* The time period for filing the return of allotment in Form PAS-3 has been reduced from 30 days to 15 days, from the date of allotment. Further, the Offer Letter in Form PAS-4 and the record of such Offer Letters required to be maintained by the company in Form PAS-5, are no longer required to be separately filed with the RoC.

Amendments to the Companies (Acceptance of Deposits) Rules, 2014:

In light of the amendments made to Section 73 of the 2013 Act by the Amendment Act, the following changes have been made to the aforesaid rules:

i. *Certificate Regarding Past Default:* Earlier, as one of the conditions for acceptance of deposits, a company had to submit a self-certified certificate stating that it has not committed any default in repayment of deposits and interest thereon. Now, even companies that have defaulted on payment of deposits can invite further deposits after obtaining a certificate stating that (a) the company has made good the default, and (b) a period of 5 years has lapsed since the date of making good such default. The aforesaid certificate should be obtained from the statutory auditor of the company and separately attached to Form DPT-1, which is issued to the members for inviting deposits.

ii. *Deposit Repayment Reserve Account:* Earlier, as one of the conditions for acceptance of deposits, a company had to deposit an amount not less than 15% of the amount of deposits maturing during a financial year and the next financial year, with a scheduled bank. Now, a company must deposit an amount not less than 20% of the amount of deposits maturing during a financial year. This amendment ensures that a lower percentage of borrowings is kept in a separate account. Further, the amount deposited in the separate bank account shall not at any time fall below 20% of the amount of deposits maturing during a given financial year.

iii. *Deposit Insurance:* The earlier requirement of obtaining a deposit insurance has been removed as none of the insurance companies were providing such an insurance product.

Companies (Amendment) Ordinance, 2018 ("**Ordinance**"):

The Ordinance, came into effect on November 2, 2018. It has made several changes to the 2013 Act relating to corporate compliance and governance, re-categorization of offences to reduce the burden on Special Courts, and provisions relating to shell companies. The key changes introduced by the Ordinance are as follows:

i. *Strengthening Corporate Governance:* Several amendments have been made to enhance good corporate governance and to strike off shell companies. A company cannot commence business without (i) the directors having filed a declaration with the RoC that all subscribers to the memorandum of association have paid the value of shares subscribed by them; and (ii) verifying its registered office. Further, where a director fails to file the aforesaid declaration, the RoC may initiate the process for striking off name of the company. The RoC may also inspect and initiate the aforesaid process if it has reasonable cause to believe that the company is not carrying on business at its registered office.

ii. *Disqualification of director:* A new ground, which is non-compliance with the maximum number of directorships that a person may hold in terms of Section 165(1) of the 2013 Act, has been added to the grounds for

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disqualification of a director under Section 164 of the 2013 Act.

iii. *Easing the burden of the NCLT:* Any (a) alteration of the articles of association of a company resulting in its conversion from a public to a private company; or (b) change in the financial year of a company shall now require approval of the Central Government and not the NCLT (except for applications already pending before the NCLT as on November 2, 2018). Further, the pecuniary jurisdiction of the Regional Directors or any officer so authorized by the Central Government in relation to compounding of offences has been extended from INR 5 lakhs to INR 25 lakhs.

iv. *Re-categorization of Offences:* Several offences under the 2013 Act, such as those in respect of issuance of shares on discount, non-filing of annual return and financial statements within the prescribed time period, have been re-categorized as mere civil defaults with levy of a penalty instead of punishment, thus bringing such offences under the ambit of in-house adjudication and reducing the load on the Special Courts constituted under the 2013 Act.

Amendments to Various Rules:

The Amendment Act has resulted in corresponding changes to various rules issued under the 2013 Act, including the Companies (Meeting of Board and its Powers) Rules, 2014; the Companies (Management and Administration) Rules, 2014; and the Companies (Appointment and Qualification of Directors), Rules, 2014. Some of the key changes are as follows:

i. The requirement of ratifying the appointment of an auditor at every annual general meeting held during their tenure has been omitted.

ii. In respect of matters that cannot be dealt by the board of directors through video conference and other audio visual means, if the quorum requirements in respect of such matters get fulfilled in the physical meeting, then the other directors may attend such a meeting through the aforesaid means.

iii. Sections 177 and 178 of the 2013 Act were amended to stipulate that every 'listed public company' instead of every 'listed company' must have an Audit Committee and Nomination and Remuneration Committee respectively. This amendment has been made to exclude privately held companies whose securities are listed.

iv. The requirement to send in advance a copy of the shareholders' resolution, obtained for keeping the registers and copies of annual returns of a company at a place other than the registered office, to the RoC has been removed, since special resolutions are to be filed with the RoC in any case.

v. A company, which is required to provide an e-voting facility to its members, can now hold general meetings even for matters requiring postal ballot.

vi. As a qualification criterion for IDs, the relatives of an individual ID must not (a) be indebted to the company, its holding company, subsidiary, associate, or their promoters or directors; and (b) have given a guarantee/ security in respect of a third party indebtedness to the company, its holding company, subsidiary, associate or their promoters, or directors of such holding company, for an amount exceeding INR 50 lakhs at any time during the 2 immediately preceding financial years or during the current financial year.

vii. The requirement for a resigning director to forward a copy of the resignation letter to the RoC has now been made optional.

viii. Section 93 of the 2013 Act, which required every listed company to file a return with the RoC in case of a change in the number of shares held by a promoter and top 10 shareholders, has been omitted to avoid duplicity in filings, since similar disclosures are required to be made to the stock exchanges under the listing regulations issued by the SEBI.

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SIGNIFICANT CHANGES UNDER SECURITIES LAWS

SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR**") – Key Amendments

SEBI has brought about substantial amendments to the LODR, primarily in light of the recommendations of the Kotak Committee on Corporate Governance. Save as otherwise specifically provided below, the amendments shall come into force with effect from April 1, 2019. The key amendments are as follows:

i. Addition of new proviso to the definition of 'related party', clarifying that any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more of shareholding in the listed entity shall be deemed to be a related party.

ii. The definition of an ID has been amended to (a) exclude persons who constitute the 'promoter group' of a listed entity, and (b) exclude a person who is a non-ID on another company on the board of which another non-ID of the listed entity is an ID. These amendments shall come into force with effect from October 1, 2018.

iii. The criteria to classify an entity as a 'material subsidiary' for the purposes of Chapter IV, has been amended, to mean a subsidiary, whose income/ or net worth exceeds 10%, instead of the earlier 20%, of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year.

iv. The top 500 listed entities are required to have at least one women director by April 2019 and by April 1, 2020 in the top 1000 listed entities. A new requirement has been added requiring that there be minimum 6 directors in the board of directors of the top 1000 listed entities by April 1, 2019 and in the top 2000 listed entities, by April 1, 2020.

v. A new requirement has been added, that a non -executive director ("**NED**") cannot continue beyond 75 years of age unless a special resolution is passed to that effect, where the explanatory statement indicates the justification for appointing such a person. Note that a similar requirement is already present under the 2013 Act for appointment of persons older than 70 years as whole time director.

vi. W.e.f. April 1, 2020, the top 500 listed entities, which have identifiable promoters, shall ensure that the chairperson of the board shall –

   (a) be a NED;

   (b) not be a relative (as defined under the 2013 Act) of the Managing Director or the Chief Executive Officer.

vii. Quorum for board meetings shall be 1/3rd of the size of the board or 3 members, whichever is higher (including at least 1 ID), in the top 1000 listed entities by April 1, 2019 and in the top 2000 listed entities, by April 1, 2020.

viii. In any year, where the annual remuneration payable to a single NED exceeds 50% of the total annual remuneration payable to all NEDs, approval of shareholders shall be obtained by way of a special resolution, by giving details of the remuneration thereof. Further, the fees/ compensation payable to executive directors who are promoters or members of the promoter group, shall be subject to the approval of the shareholders by special resolution in general meeting, if-

   (a) the annual remuneration payable to such executive director exceeds INR 5 crore or 2.5% of the net profits of the listed entity, whichever is higher; or

   (b) where there is more than 1 such director, the aggregate annual remuneration to such directors exceeds 5% of the net profits of the listed entity:

   such approval shall be valid only till the expiry of the term of such director.

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ix. A person shall not be a director in more than 8 listed entities with effect from April 1, 2019 and in not more than 7 listed entities with effect from April 1, 2020. Further, a person shall not serve as an ID in more than 7 listed entities.

x. The policy on materiality of related party transactions should include clear threshold limits duly approved by the board of directors, and the policy should be reviewed by the board of directors at least once every 3 years.

xi. A transaction involving payments made to a related party with respect to brand usage or royalty shall be considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceed 2% of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

xii. Within 30 days from the date of publication of its standalone and consolidated financial results for the half year, the company should disclose related party transactions on a consolidated basis and publish the same on its website. The amendment shall come into force with effect from the half year ending March 31, 2019.

xiii. At least 1 ID on the board of directors of the listed entity shall be a director on the board of directors of an unlisted material subsidiary, whether incorporated in India or not. Previously this requirement was limited to unlisted subsidiaries in India

xiv. Every listed entity and its material unlisted subsidiaries incorporated in India should undertake secretarial audit and annex the same with its annual report, with effect from the year ended March 31, 2019.

xv. W.e.f. October 1, 2018, the top 500 companies must undertake D&O (directors and officers) insurance for its IDs. Also, w.e.f. October 1, 2018, the appointment or continuation of an alternate director for IDs will not be permitted.

xvi. Where an entity has raised funds through preferential allotment or qualified institutional placement, the listed entity shall disclose every year, the utilization of such funds during that year in its annual report until such funds are fully utilized.

Buy-Back Regulations

SEBI has introduced new buy back regulations in place of SEBI (Buy-back of Securities) Regulations, 1998. The key changes brought in by the SEBI (Buy-Back of Securities) Regulations, 2018 ("**Buy-Back Regulations**") have been set out below:

i. *Definition of Buy-Back Period:* A new definition of Buy-Back Period has been introduced to mean the period between the date of authorization for buyback by a company's board of directors and the date on which the payment is made to shareholders who have accepted the offer. The definition brings clarity to what constitutes the expiry of the period, as against the earlier usage of the term 'closure of offer'.

ii. *Routes for funding buy-back:* The Buy-Back Regulations specify that buy-back can be undertaken though free reserves or securities premium account. However, buy-back cannot be made out of the proceeds from the issuance of the same kind of specified securities.

iii. *Timelines for Buy-Back process:* The Buy-Back Regulations now specify that the public announcement should be made within 2 days from the date of declaration of the results of the board meeting or the shareholders meeting, as the case maybe, as compared to the earlier requirement of 2 working days from the date of passing of the resolution.

The regulations also specify that the entire buyback process should be completed within a period of 1 year from the date of the special resolution passed at the general meeting or the resolution passed in the board meeting. The previous regulations did not specify the maximum tenure during which the buy-back should be completed.

iv. SEBI powers to relax enforcement: SEBI has been accorded with discretionary powers to relax strict enforcement of procedural requirements under the Buy-Back Regulations, subject to certain exceptions.

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Reclassification of Promoters:

SEBI has amended the provisions relating to reclassification of promoters under the LODR. The amendment would now allow promoters who have minority shareholding and are not engaged in the control/ management, to be reclassified as public shareholders. The key amendments include:

i. *Eligibility of promoters for seeking reclassification:* Promoters of companies who hold more than 10% of the voting rights are not eligible to apply for reclassification. Previously, the threshold of 10% was computed based on paid-up equity capital which could be different from the actual voting rights. Additionally, the amendment restricts promoters who are willful defaulters or fugitive economic offenders from seeking reclassification.

ii. *Eligibility of listed entity:* The amendment has incorporated certain compliance requirements for the listed entity in which the promoters are seeking reclassification. The listed entity should be compliant with the minimum public shareholding requirement, should not have its trading suspended by any stock exchanges and should not have any outstanding dues with the SEBI, depositories or stock exchanges.

iii. *Revision in the process of reclassification:* The amendment now provides a timeline within which the application for reclassification of promoters as public shareholders has to be placed before the shareholders for their approval. The board of directors should place the re-classification application before the shareholders in a general meeting, which shall happen between 3 – 6 months after the board meeting. Shareholders' approval should be obtained by an ordinary resolution in a general meeting, with the relevant promoters abstaining.

LODR exemptions for entities undergoing insolvency:

SEBI has amended a number of regulations to provide certain dispensations for listed companies undergoing the corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016 ("**IBC**"). The following provisions of the LODR have been exempted for entities undergoing an insolvency process:

i. Regulations 17 to 21 relating to board of directors and setting up of committees, provided the roles and responsibilities of the board and the respective committees are fulfilled by the resolution professionals.

ii. Regulation 23(4), which requires prior approval of the shareholders for material related party transactions, provided the same is disclosed to the stock exchange within 1 day of the resolution plan being approved.

iii. Regulation 24(5) that provides that a listed entity shall not dispose its shares in its subsidiary to less than 50% or cease the exercise of control over its subsidiary without passing a special resolution in a shareholders meeting, provided the same is disclosed to the stock exchange within 1 day of the resolution plan being approved.

iv. Regulation 24(6) that provides that a listed entity shall not dispose of assets amounting to 20% or more of a material subsidiary, without passing a special resolution in a shareholders meeting, provided the same is disclosed to the stock exchange within 1 day of the resolution plan being approved.

v. If the reclassification of promoters is as per the resolution plan, then Regulations 31A(3) and (4) relating to eligibility of promoters for reclassification and disclosure regarding receipt of reclassification request and board minutes considering the request will be exempted, provided the existing promoters will not remain in control.

vi. If the scheme of arrangement of an entity is part of the resolution plan then such entity shall be exempt from the applicability of Regulations 37 and 94 which govern the scheme of arrangement of listed entities, provided the details of the arrangement are disclosed to the stock exchange within 1 day of the resolution plan being approved.

Delisting Regulations:

SEBI has amended the SEBI (Delisting of Equity Shares) Regulations, 2009 ("**Delisting Regulations**"). The key amendments relate to the (i) Floor Price; (ii) Counter Offer; and (iii) Exemption in case of insolvency matters.

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i. *Floor Price:* The amendment has provided an explanation with respect to the reference date for computing the floor price. The reference date for computation of the floor price is the date on which the stock exchanges are notified of the board meeting in which the delisting is to be considered. This implies that the date of computation of the floor price would be 2 working days prior to the date on which the board meeting is conducted (excluding the date of intimation and the date of meeting). Earlier the floor price was required to be computed in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 ("**Takeover Code**"), as per which, the reference date for computation of the floor price had to commence from the date of public announcement.

ii. *Counter Offer:* The amendment has introduced the concept of 'counter offer' wherein if the acquirer / promoter is not satisfied with the price discovered under the reverse book building process, then such acquirer / promoter may make a counter offer to the public shareholders. The counter offer needs to be made within 2 working days from the date of the price discovery and cannot be less than the book value of the company as certified by a merchant banker. The counter offer will be successful only if post offer shareholding of the promoters (taken together with the shares acquired pursuant to the counter-offer) is at least 90%. Prior to the amendment, there was no concept of a counter -offer – the acquirer / promoter could have either (a) accepted a price equal to or more than the discovered price or (b) rejected the offer price in which case the entire delisting exercise would become futile.

iii. *Exemption:* The Delisting Regulations will not be applicable in cases of delisting proposals which have been made pursuant to a resolution plan approved under Section 31 of the IBC provided (i) the plan lays down the specific procedure to be followed for the delisting and (ii) such plan provides the existing public shareholders an exit option at the price specified in the resolution plan, and such price is not below the liquidation value as determined under the IBC after making necessary adjustments specified thereunder. If the delisting proposal also provides an exit to the existing promoters at a price higher than the aforesaid liquidation value, then the public shareholders should also be provided an exit at a price not less than the price being given to the promoters. Details of the delisting proposal have to be disclosed to the stock exchanges within 1 working day of approval of the resolution plan.

Additional options for complying with Minimum Public Shareholding

SEBI has issued a circular which allows the following additional methods to comply with the minimum public shareholding requirement:

i. *Qualified Institutional Placements (**"QIP"**):* Allotment of securities to be made through QIP in accordance with the SEBI Issue of Capital and Disclosure Requirements Regulations, 2009. Earlier, allotment to QIP could be made only by those entities who have complied with the minimum public shareholding requirement.

ii. *Open Market Sale:* Sale of shares held by the promoters/promoter group up to 2% of the total paid-up equity share capital of the company in the open market, subject to 5 times' average monthly trading volume. The listed entity is required to make certain disclosures to the stock exchanges, 1 day prior to the proposed sale.

Prior to this change, an entity could reach the minimum public shareholding requirement through issuance of shares to public through prospectus, sale of shares held by promoters through secondary market through stock exchange mechanism, institutional placement programme, offer for sale to public through prospectus, rights issue and issue of bonus shares to public shareholders.

Amendment to the March 10, 2017 circular on merger/demerger of listed entities

SEBI has amended the March 10, 2017 circular which laid down the framework for schemes of arrangement by listed entities. The key

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amendments to the circular have been set out below:

i. The exemption under the circular has been broadened to include demerger from a wholly-owned subsidiary into its parent company. Prior to the amendment, only merger of a wholly-owned subsidiary with its parent company was exempt.

ii. The valuation report and the fairness opinion required to be submitted to the stock exchanges should be provided by an independent chartered accountant and independent SEBI registered merchant banker. The independence requirement was not set out earlier.

iii. The requirement to submit certain documents in relation to the scheme with the stock exchange (such as copy of the NCLT order, complaints report), consequent to the NCLT approving a scheme of arrangement has been done away with.

iv. The amendment provides that in the event the shares of a company are locked in, as result of merger or demerger of a listed entity into an unlisted entity, the locked-in shares may be pledged as a security with any scheduled commercial bank or public financial institution. Additionally, the shares locked-in may be transferred inter-se among promoters.

v. The amendment clarifies that the calculation of the post-arrangement shareholding of the pre scheme public shareholders of listed entity and the Qualified Institutional Buyers of unlisted entity should be on a fully diluted basis.

SEBI amendment to the Takeover Code

SEBI has made amendments to the Takeover Code. The key amendments have been set out below:

i. *Delisting* : In case an acquirer has an intention to delist, then the intention should be disclosed at the time of making the detailed public statement and a subsequent declaration for delisting will not suffice.

ii. *Fugitive economic offenders*: Fugitive economic offenders are prohibited from making an open offer or a competing offer.

iii. *Minimum offer size*: In relation to a voluntary open offer, the amendment specifies that a voluntary open offer should be for acquisition of at least 10% voting rights of the target company. Earlier, the minimum requirement was acquisition of at least 10% of the entire shares and was not specific to voting rights.

iv. *Open offer Exemption*: Regulation 10 provides conditions to avail exemption from open offer. An explanation has been added to Regulation 10(1)(a)(iii), pursuant to which inter se transfer of shares amongst qualifying persons is exempt, that company will include a body corporate whether foreign or Indian. Prior to the amendment there was no clarity whether company referred to an Indian company or also included a foreign body corporate.

v. *Offer price revision*: An acquirer may make upward revisions to the offer price at any time till 1 day prior to the commencement of the tendering period. Prior to the amendment, upward revisions to the offer price could be made only till 3 days prior to the tendering period.

vi. *IBC exemption*: An acquirer can acquire more than 75% of the share capital of a listed company pursuant to a resolution plan under Section 31 of the IBC. Earlier, even though exemption from an open offer was available for acquisitions proposed through a resolution plan under the IBC, the obligation to maintain the minimum public shareholding of 25% continued.

Online filing of draft documents with SEBI

SEBI has introduced an online portal for filing draft offer documents, draft letter of offers and draft scheme of arrangement, for seeking observations/comments from SEBI in relation to public issues, rights issues, institutional placement programme, schemes of arrangement, takeovers and buybacks.

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Penalties for non-compliant listed entities

SEBI has put in place a new framework/ mechanism to check non-compliance of the LODR. The key changes under the new framework have been set out below:

i. Fine ranges from INR 1000 to INR 10000 for each day during which the non-compliance continues. SEBI had earlier prescribed penalties for certain specified non-compliances of LODR in relation to non-submission of certain periodic reports. Most of such penalties had a cap of INR 1 crore. SEBI has enlarged the list of non-compliances for which penalties have been prescribed and has removed the cap on penalty amounts.

ii. The board of directors is now required to be informed of the non-compliance and action taken by the stock exchanges, and the comments of the board of directors are to be shared with the stock exchange.

iii. Additional non-compliances have been introduced such as absence of a woman director on the board of directors and failure to constitute Audit Committee for 2 consecutive quarters, which will result in suspension. The entity can avoid getting suspended if the entity ensures compliance before 2 days of the suspension. Earlier this period was 5 days.

iv. Additionally, if the entity does not ensure compliance for a period of 6 months after suspension, the entity can be delisted.

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SIGNIFICANT CHANGES UNDER FOREIGN EXCHANGE MANAGEMENT LAWS

Overhaul in the reporting mechanism in relation to foreign investments:

i. The Reserve Bank of India ("**RBI**") on June 7, 2018 introduced the Single Master Form ("**SMF**") with an objective to integrate the reporting structures of various types of foreign investment in India. SMF would provide the facility for reporting total foreign investment in an Indian entity[1], as also investment by persons' resident outside India in an investment vehicle. Prior to SMF filing, Indian entities which had any foreign investment were required to provide such information to the RBI in the Entity Master Form.

ii. Pursuant to introduction of SMF, RBI vide its notification on August 30, 2018 removed the requirement to file Advance Remittance Form, within 30 days from the date of receipt of consideration for issue of capital instrument.

Liberalisation in various sectors:

The Department of Industrial Policy and promotion ("**DIPP**") had reviewed the Foreign Direct Investment ("**FDI**") policy on various sectors, pursuant to which the RBI amended Foreign Exchange Management (Transfer or Issue of Security by Person Resident Outside India) Regulations, 2017 ("**FEMA 20**") in March 2018. Some of the important changes in the FDI policy are:

i. *Foreign investment in investing companies:* Foreign investment in investing companies registered as Non-Banking Financial Companies ("**NBFC**") with RBI, is now allowed under 100% automatic route; whereas foreign investment in Core Investment Companies and other investing companies, engaged in activity of investing in the capital of other Indian entities, has been permitted through government approval route.

ii. *Civil Aviation:* Though foreign airlines were permitted to invest in Indian companies operating scheduled and non-scheduled air transport services upto 49% under government approval route, such investment was not permitted in Air India Limited. This restriction has now been liberalised, whereby foreign airlines can invest in Air India Limited, provided that the aggregate FDI limit in Air India Limited does not exceed 49% (directly or indirectly) and substantial ownership and effective control of Air India continues to vest in Indian nationals.

iii. *Construction Development w.r.t. Townships, Housing, Built-up Infrastructure and Real Estate Broking Services:* Government has clarified that real estate broking does not amount to real estate business and 100% FDI is allowed in the activity under automatic route.

iv. *Power Exchanges:* Earlier, the FDI policy provided for 49% FDI under automatic route in Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010. However, FII/FPI purchases were restricted to secondary market only. Now this restriction is done away with by allowing the FIIs/FPIs to invest in Power Exchanges through primary market also.

v. *Pharmaceuticals:* The definition of 'medical device' as contained in the erstwhile FDI Policy was subject to amendments in the Drugs and Cosmetics Act 1940. As the definition contained in the FDI Policy is complete in itself, the reference to Drugs and Cosmetics Act has been dropped from the FDI policy.

vi. *Single Brand Retail Trading ("**SBRT**"):* 100% FDI has now been permitted for SBRT under automatic route. Earlier, it was limited to 49% under automatic route, with government approval for higher investments. Further, a SBRT entity which is obligated to comply with the 30% local sourcing norms, will now be permitted to set off its incremental sourcing for its global operations during initial 5 years, beginning 1st April of the year of the opening of first store against the current mandatory sourcing requirement of 30% of purchases

[1] Regulation 2(xxv) defines Indian entity as an Indian company or LLP.

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from India. Incremental sourcing shall mean the increase in terms of value of such global sourcing from India for that single brand, over the preceding financial year. After completion of this 5 year period, the SBRT entity shall be required to meet the 30% sourcing norms directly towards its India's operation, on an annual basis.

vii. *Downstream Investment*: In cases of downstream investment, FEMA 20 made reference to an 'Indian company' making the downstream investment in another 'Indian company'. Pursuant to amendments to FEMA 20 with effect from September 1, 2018, the reference to 'Indian company' has been substituted with 'Indian entity or an investment vehicle' in order to broaden the entities in which downstream investment is made, such as LLPs.

viii. *Other Approval Requirements under FDI Policy:* Earlier, government approval was necessary for issuance of shares against import of capital goods and pre-operative/pre-incorporation expenses, subject to certain specified conditions. Pursuant to the amendments, issue of shares against the aforesaid non-cash considerations will require government approval only in cases where the investment is made in a sector which requires government approval**.**

ix. *Joint audit:* In case a foreign investor specifies a particular auditor/audit firm having international network for an Indian investee company, then the audit of such investee company should be carried out as a joint audit wherein one of the auditors should not be part of the same network.

Press Note 2 of 2018 – revisions to FDI in e-Commerce

The DIPP has issued Press Note 2 (2018) dated December 26, 2018 in relation to FDI in e-commerce. The new policy will be effective from February 1, 2019. It has introduced certain provisions that are likely to adversely impact the business model of FDI funded e-commerce companies and resellers. The key provisions introduced by Press Note 2 (2018) are as follows:

i. An e-commerce entity providing a marketplace should not exercise ownership or control over the inventory that is to be sold. Such ownership will render the business into an inventory based model where FDI is prohibited. Inventory of a vendor will be deemed to be controlled by an e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.

ii. an entity having equity participation by an e-commerce marketplace entity or its group companies, or having control on its inventory by an e-commerce marketplace entity or its group companies, cannot sell its products on the platform run by such e-commerce marketplace entity.

iii. Services provided by e-commerce marketplace entities or other entities in which e-commerce marketplace entities have direct or indirect equity participation or common control, to vendors on the platform should be at arm's length and in a fair and non-discriminatory manner.

iv. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory.

v. E-commerce marketplace entities cannot mandate any seller to sell products exclusively on its platform.

Foreign Exchange Management (Cross Border Merger) Regulations, 2018

RBI through its notification on March 20, 2018 introduced cross border merger regulations between Indian companies and foreign companies. RBI has defined 'cross border mergers' as any merger, amalgamation or arrangement between an Indian company and a foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 ("**2016 Rules**"). Some of the salient points in the regulations are as follows:

i. *Meaning*: 'Inbound merger' is defined as a cross border merger where the 'resultant company' is an Indian Company, whereas 'outbound mergers' are those where the 'resultant company' is a foreign company. The term 'resultant company' means an Indian company or a foreign company which takes

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over the assets and liabilities of the companies involved in the cross border merger.

ii. *Provisions related to inbound merger*: Considering this would be merger of a foreign company into an Indian company, the resultant Indian company can issue / transfer shares as merger consideration to the shareholders of the foreign company in accordance with the conditions laid down in FEMA 20. In case the foreign company is a Joint venture ("**JV**")/ Wholly Owned Subsidiary ("**WOS**") of the Indian company, then it is required to comply with the conditions prescribed for transfer of shares of such JV / WOS as laid down under Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004 ("**ODI Regulations**").

The overseas office of the foreign company will be deemed to become the branch/office outside India of the Indian company. The guarantees or outstanding borrowings of the foreign company from overseas sources which become the borrowings of the Indian company, shall be required to conform to the overseas borrowing regulations (other than end use requirements) within 2 years. If pursuant to the merger, the Indian company acquired an asset outside India which it is not permitted to hold under the extant laws, the Indian company is required to sell those asset within 2 years and the sale proceeds have to be immediately repatriated to India.

iii. *Provisions related to outbound merger:* In case of outbound mergers, a person resident in India is allowed to acquire or hold securities of the overseas company in accordance with the ODI Regulations. In case of individuals, they can hold such securities provided the fair market value thereof is within the limits prescribed under the Liberalised Remittance Scheme.

Similar to an inbound merger, an office in India of the Indian company will be deemed to become the branch/office in India of the resultant company. Guarantees or outstanding borrowings of the Indian company which become the liabilities of the overseas company, will be repaid as per the scheme sanctioned by the NCLT. Further, the overseas company cannot acquire any liability payable towards a lender in India in rupees which is not in conformity with the foreign exchange laws and a no objection certificate to this effect has to be obtained from lenders in India of the Indian company. If an asset is acquired in India by the overseas company pursuant to the merger, which it is not permitted to hold, it has to sell such asset within 2 years and proceeds will have to be repatriated outside India.

Borrowing and Lending

On December 17, 2018, RBI notified Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 ("**FEMA 3(R)**"). FEMA 3(R) consolidates and streamlines the regulatory provisions dealing with borrowing and lending in foreign exchange and Indian rupees.

The important highlights of FEMA 3(R) from the perspective of corporate entities are as follows:

i. *Borrowing from outside India by a Person Resident in India*:

Eligible resident entities can raise External Commercial Borrowings ("**ECB**") in form of foreign exchange or Indian Rupees outside India as per Schedule I to FEMA 3(R). Trade Credit can be raised from outside India by importers for import of capital/non-capital goods as per provisions contained in Schedule II to FEMA 3(R).

Financial institutions, set up under an Act of the Indian Parliament, can raise rupee denominated borrowings from outside India with the prior approval of the Government for the purpose of onward lending.

Any foreign investment in the nature of debt arising out of transfer or issue of security which is not covered under FEMA 3(R) should be in compliance with the FEMA 20.

<u>*Important Conditions*</u>*:*

- *ECB and Eligible borrowers*: ECB has been defined to mean borrowings by an eligible resident entity from outside India in accordance with framework decided by RBI in consultation with the Government. Now, all entities eligible to receive FDI in terms of FEMA 20, including start-ups are eligible to raise ECBs.

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- *Eligible Lenders:* For borrowings in foreign exchange, the lender of ECB should be resident of Financial Action Task Force or International Organisation of Securities Commission compliant country. Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders. Foreign branches/ subsidiaries of Indian banks are permitted as recognised lenders only for ECBs raised in foreign exchange. For borrowings in Indian rupees, eligible Indian entities can borrow from overseas Multilateral Financial Institutions/ International Development Financial Institutions, where the source of such funds of such institutions is rupee denominated bonds issued overseas or resources raised domestically, or any other source as approved by the Government.

- *Use of Proceeds:* The proceeds of ECBs can be used for all purposes except for those activities prescribed in the negative end-use list by the RBI, such as agricultural or plantation activities, real estate activity or construction of farm houses, chit fund or Nidhi companies, investment in capital markets, etc.

- *Borrowing Limit:* All eligible borrowers can raise ECB of up to USD 750 million or equivalent per financial year. For Start-ups the amount would be limited to USD 3 million or equivalent per financial year. RBI in consultation with Government may prescribe higher limits for ECBs raised by entities in certain sectors or for certain end uses.

- *Security:* Eligible borrowers are permitted to provide security to the lenders / suppliers, as specified by the RBI from time to time. They can also provide corporate and/ or personal guarantee as security for the borrowing. However, banks, financial institutions and NBFCs cannot provide (issue) any type of guarantee in favour of overseas lenders on behalf of their constituents for their borrowings, except in accordance with specific stipulations made by the RBI.

- *Parking of Proceeds and Remittances:* The proceeds of borrowing, pending utilization for permissible end-uses may be parked abroad or in India as per the directions issued by the RBI. The designated authorised dealer shall have the general permission to make remittances of principal, interest and other charges.

- *Available Route:* All ECBs can be raised through the automatic route if it conforms to Schedule I of FEMA 3(R) and specified reporting requirements. All other cases of raising ECBs will be considered under the approval route.

- Any borrowing under erstwhile regulations can be continued as permitted up to the due date of repayment.

ii. *Lending by a Person Resident in India:*

<u>*Lending by persons other than Authorised Dealer*</u>: Eligible resident entities may extend foreign currency denominated External Commercial Lending ("**ECL**") to a borrower outside India in accordance with the provisions contained in Schedule III to FEMA 3(R).

<u>*Important Conditions*</u>:

- *ECL and Eligible Entity*: ECL has been defined to mean lending by a person resident in India to a borrower outside India in accordance with framework decided by RBI in consultation with the Government of India. All 'eligible entities' as defined under ODI Regulations, may lend to a foreign entity in which it has made direct investment.

- *Overseas branch*: Foreign branches of the Indian banks are allowed to provide foreign exchange loans in normal course of their banking business outside India.

- *Trade related*: A person resident in India may lend in foreign exchange out of funds held in his/ her EEFC account, for trade related purposes to his/ her overseas importer customer subject to certain terms and conditions as stipulated by the RBI.

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SPECIFIC RELIEF (AMENDMENT) ACT, 2018

The Specific Relief Act, 1963 ("**Act**") codifies the law in relation to grant of the relief of specific performance including injunctions. Under the Act, the remedy of specific performance was not available to a party as a matter of right, but its grant was based on the discretion of the court. Pursuant to the Specific Relief (Amendment) Act, 2018 ("**SR Amendment Act**"), the courts are bound to enforce the specific performance of a contract as a rule, subject to limited exceptions.

The other major changes include:

i. In the event of a breach of a contract, the aggrieved party is entitled to arrange for the performance of the contract by a third party or by his own agency, and, to recover the costs and expenses actually incurred. This however does not prevent the aggrieved party from claiming compensation from the defaulting party.

ii. For infrastructure project contracts, the court shall not grant an injunction in any suit, where it would cause hindrance or delay in the continuance or completion of the infrastructure project.

iii. Pursuant to the amendment, certain civil courts are to be designated as special courts, which will deal with a suit filed under the Act in respect of contracts relating to infrastructure projects. The SR Amendment Act also introduces a timeline of 12 months for the disposal of all cases filed under the Act, to be calculated from the date of the receipt of summons by the defendant. The said period may be extended by the courts up to a maximum of 6 months, after recording reasons in writing for such extension.

iv. Court can engage experts in suits where the court considers it necessary to get an expert opinion on any specific issue involved in the suit. Courts will determine the terms of payment of such experts, and the payment will be borne by the parties to the suit in such proportion, and at such time, as the court may direct.

v. Specific performance cannot be enforced for the following types of contract: (i) a contract where a party has obtained substituted performance of the contract; (ii) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise; (iii) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and (iv) a contract, which, by its nature, is determinable.

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