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FOREWORD

Welcome to this issue of *Insight*.

In this issue, as the lead article, we have covered the recently notified RBI cross border merger regulations and the key issues that need to be addressed for effective implementation of the proposed framework.

Apart from the above, we have also captured the key 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 RBI and SEBI for the period under review.

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

Regards,

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FOREIGN EXCHANGE MANAGEMENT (CROSS BORDER MERGER) REGULATIONS, 2018 – A PRIMER

Background

The domestic mergers and acquisitions market in India has seen an exponential growth, both in scale and sophistication. However, the field of play for cross-border mergers and acquisitions is still nascent.

Although the erstwhile Companies Act, 1956 ("**1956 Act**") did permit the merger/ amalgamation of a foreign company (*as the transferor*) with an Indian company (*as the transferee/ resultant company*), the converse was not contemplated. This was because the definition of "transferee company" under the 1956 Act required such company to be an Indian company and hence within the purview of the Indian regulatory authorities. Noting this lacunae, the J.J. Irani Committee Report of 2005 recommended that a forward looking law on mergers and amalgamations should also permit an Indian company to merge with a foreign company.[1]

In light of the said recommendations, Section 234 of the Companies Act, 2013 ("**2013 Act**") allowed the merger / amalgamation of a foreign company with an Indian company, and *vice-versa,* with the prior approval of the Reserve Bank of India ("**RBI**"). The Ministry of Corporate Affairs ("**MCA**") notified Section 234 of the 2013 Act on April 13, 2017. Simultaneously, the MCA also amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, to insert Rule 25A specifying the manner in which cross border mergers/ amalgamations can be undertaken. In terms of Rule 25A, an Indian company may merge with a foreign company incorporated in any of the jurisdictions specified therein.

Following notification of Section 234, the RBI on March 20, 2018, notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("**RBI Merger Regulations**"). Following are the key takeaways from the RBI Merger Regulations.

Deemed Approval for Inbound and Outbound Mergers

The RBI Merger Regulations have categorized cross border mergers into 'Inbound Merger' (*where the resultant company is an Indian company*) and 'Outbound Merger' (*where the resultant company is a foreign company*).

Unlike in case of a share acquisition, a transaction involving a scheme of merger/ amalgamation involves the transfer of assets and liabilities owned and operated by one company, incorporated in one jurisdiction to another company incorporated in another jurisdiction. As such, the prevailing exchange control regulations do not permit full capital account convertibility. In case of cross border merger/ amalgamation involving an Indian company, such transfers are regulated by the Foreign Exchange and Management Act, 1999 ("**FEMA**") and therefore, as a pre-requisite, the RBI Merger Regulations needed to contemplate the various compliances for the numerous underlying transactions occurring between the Indian and foreign companies.

In terms of the RBI Merger Regulations, the following transactions on account of a cross border merger, if undertaken in accordance with the RBI Merger Regulations, FEMA and the rules and regulations notified thereunder, shall be deemed to have the prior approval of the RBI:

Inbound Mergers - Resultant Company is an Indian Company

(i) Issue of Securities (including foreign security) by the resultant Indian company to a person resident outside India, in compliance with the pricing guidelines, caps and routes as prescribed under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("**FEMA 20(R)**");

(ii) Deemed transfer of the office of the foreign transferor company to the resultant Indian company as a branch/ office outside India, which can undertake transactions permitted under the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015 ("**FEMA 10(R)**");

1 Report on Company Law, May 31, 2005 at page 120, available at http://reports.mca.gov.in/Reports/23-rani%20committee%20report%20of%20the%20expert%20committee%20on%20Company%20law,2005.pdf.

(iii) Transfer of the outstanding borrowings of the foreign transferor company. Borrowings from overseas sources which enter into the books of the resultant Indian company shall have to conform to the foreign exchange regulations governing External Commercial Borrowing ("**ECB**") within a period of two years. However, the conditions in relation to end use requirements prescribed under the ECB norms shall not be applicable. Further, no remittance for repayment of such overseas borrowings can be made from India for a period of 2 years;

(iv) Acquisition of assets or security of the foreign transferor company by the resultant Indian company, as permitted under the extant foreign exchange regulations. However, where the resultant company is not permitted to acquire certain assets or security, the same shall be sold by the resultant company within a period of 2 years from the sanction of the scheme. Where the resultant company is not permitted to acquire certain overseas liabilities, the same can be extinguished within 2 years from the proceeds of the afore-mentioned overseas assets; and

(v) Opening of an overseas foreign currency bank account by the resultant Indian company for the purpose of putting through transactions incidental to the cross border merger for a period of 2 years.

Outbound Mergers - Resultant Company is a Foreign Company

(i) Issue of Securities by the resultant foreign company to a person resident in India in accordance with the applicable FEMA regulations, including the Liberalised Remittance Scheme ("**LRS**");

(ii) Deemed transfer of the office of the Indian transferor company to the resultant foreign company as a branch office in India, which can thereby undertake any transactions permitted under the Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) Regulation, 2016 ("**FEMA 22(R)**");

(iii) Transfer of outstanding borrowings of the Indian transferor company. The outstanding borrowings payable towards an Indian lender can only be acquired by the resultant foreign company if the same is in conformity with the extant foreign exchange regulations. The outstanding borrowings of the Indian company transferred to the resultant foreign company has to be repaid in terms of the scheme sanctioned. A no-objection certificate of the lenders to this effect is to be obtained;

(iv) Acquisition of assets or security of the Indian transferor company by the resultant foreign company, as permitted under the extant foreign exchange regulations. However, where the resultant company is not permitted to acquire certain assets or security, the same has to be sold by the resultant company within a period of 2 years from the sanction of the scheme. The proceeds from the sale of the aforementioned assets can be used to repay Indian liabilities within a period of 2 years; and

(v) Opening of a Special Non-Resident Rupee Account by the resultant foreign company for the purpose of putting through transactions incidental to the cross border merger for a period of 2 years.

Any acquisition or transfer of any asset or debt on account of a cross border merger, other than the transactions specified above will require the prior approval of the RBI.

Additional Obligations

In addition to the above, entities undertaking cross border mergers also need to *inter alia* fulfil the following requirements:

(i) valuation of the companies will have to be in accordance with internationally accepted principles and is to be conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company;

(ii) the resultant company will be required to furnish reports as may be prescribed by the RBI in consultation with the Government of India, from time to time;

(iii) the companies shall ensure that regulatory actions prior to the merger in relation to non-compliance with the extant foreign exchange regulations, if any, are completed; and

(iv) the companies will have to furnish a certificate from the managing director / whole time director and company secretary, if available, ensuring compliance with the RBI Merger Regulations.

Key Issues

While this is a move in the right direction, there are certain areas of concern that need to be addressed.

(i) The Securities and Exchange Board of India ("**SEBI**") does not contemplate cross-border mergers involving listed Indian transferee or transferor companies in its framework for 'schemes of arrangements by listed companies' (*applicable to all schemes filed on and from March 10, 2017*). As per SEBI's framework, a listed entity requires prior approval of SEBI for undertaking mergers/ amalgamations. SEBI should accordingly expand its framework and lay down regulations for cross border mergers involving listed Indian companies.

(ii) Section 47(vi) of the Income Tax Act, 1961 ("**IT Act**") exempts from tax, any transfer of capital assets by a transferor company by way of a scheme of amalgamation wherein the resulting company is an Indian company. However, a merger of an Indian company with a foreign company will be a taxable transaction. This lack of tax neutrality may limit the attractiveness of outbound mergers in India.

(iii) Although Section 234 of the 2013 Act only allows mergers/ amalgamations between an Indian company and a foreign company, Section 232 of the 2013 Act does allow for de-merger/ slump sale/ slump exchange in cases where the resulting entity is an Indian entity. However, as the RBI Merger Regulations do not contemplate deemed RBI approval for de-mergers/ slump sale/ slump exchange, companies undertaking such transactions will have to separately apply to the RBI for an approval in such cases.

(iv) The manner in which the cross border merger regime will be implemented within the FEMA framework needs consideration, for instance:

(a) In case of outbound mergers, securities of another Indian company held by the Indian transferor company can only be transferred to the foreign resultant company if the same is compliant with the FEMA 20(R). Therefore, if such securities are in the nature of optionally convertible securities, either the terms of the security will have to be modified to adhere to the extant ECB norms or the company shall have to sell such securities. In such a case, given that this would be akin to a distressed sale, the pricing would be at a discount to the market value.

(b) In case of inbound mergers, an office of the foreign transferor company outside India will be deemed to be a branch office of the resultant Indian company. However, in terms of the FEMA 10(R), there are restrictions on the amount that can be remitted by the Indian resultant company to the foreign currency accounts of its branches outside India to meet their expenses. This will restrict the ability of the Indian company to fund its overseas branch, when required. Further, in case of outbound mergers, the branch office of a foreign company in India can only undertake the activities prescribed under FEMA 22(R), such an office will not be permitted to operate factories/ manufacturing facilities of the Indian transferor company, if any.

(v) In order for the resultant company to retain assets/ liabilities which are not in compliance with the RBI Merger Regulations, the companies may seek specific approval from the RBI. However, in such a situation, there is no clarity on the timelines within which such approval may be granted by the RBI.

Given the aforementioned concerns, a substantial number of changes would be required in various Indian laws apart from the SEBI regulations and the IT Act, such as the 2013 Act, FEMA, taxing statutes, industrial and labour legislations, property related legislations, and host of other laws and regulations, before an outbound merger can be completed.

Keeping these apprehensions aside, the RBI Merger Regulations is a first step in providing an initial framework for cross border mergers. The notification of the RBI Merger Regulations will hopefully pave the way for business expansion and consolidation with different structuring options for cross-border transactions across sectors, subject of course to necessary clarifications being provided.

For an analysis of the changes brought about by the RBI Merger Regulations *vis-a-vis* the draft RBI regulations, and its implications, please refer to our blog post at https://corporate.cyrilamarchandblogs.com/2018/04/india-finally-notifies-cross-border-merger-regulations/

COMPANY LAW UPDATE

AMENDMENTS AND CIRCULARS

Amendment to the Companies (Appointment and Qualification of Directors) Rules, 2014

The MCA has notified the Companies (Appointment and Qualification of Directors) Amendment Rules, 2018, to provide for the following:

- In case of proposed directors of a company who do not have approved director identification numbers ("**DIN**"), the particulars of maximum 3 directors may be mentioned in Form INC-32 (SPICe) and DIN may be allotted through such form.
- An applicant seeking allotment of DIN from the Central Government shall also provide resolution of the board of the concerned company proposing his appointment as director.
- Form DIR-3 shall now be required to be verified digitally by a company secretary, managing director, director, CEO, or CFO of the concerned company.

(*MCA Notification No. G.S.R. 51(E) dated January 22, 2018, w.e.f. January 26, 2018*)

Commencement of certain sections of the Companies (Amendment) Act, 2017

The MCA has notified certain sections of the Companies (Amendment) Act, 2017 :

- Section 4(5) of the 2013 Act, with respect to reservation of company name by the Registrar of Companies ("**ROC**") has been amended w.e.f. January 26, 2018.
- The following provisions of the 2013 Act, *inter alia,* have been amended w.e.f. February 9, 2018:
  - Section 2: Definition of 'financial year', 'net worth', 'related party', etc.;
  - Section 3A: Several liability of members in case a company carries on its business for more than 6 months without the prescribed minimum number of members;
  - Section 21: Authentication of documents by an employee of a company;
  - Section 35: No liability for bona fide statements made in the prospectus in reliance of the statements of an expert;
  - Section 54(1)(C): Issuance of sweat equity shares before the lapse of 1 year from the commencement of business by a company;
  - Section 188: Relaxation of restriction on related parties from voting on resolutions pertaining to related party transactions in case of companies in which 90% or more members, in number, are relatives of the promoters/ related parties; and
  - Section 194: Deletion of the provisions in relation to forward dealing and insider trading.

(*MCA Notification dated January 23, 2018 and Notification no. S.O. 630(E) dated February 9, 2018*)

Amendment to the Companies (Incorporation) Rules, 2014

The MCA has notified the Companies (Incorporation) Amendment Rules, 2018 and the Companies (Incorporation) Second Amendment Rules, 2018, which provide for the following:

- An application for reservation of name shall be made online by using Form 'RUN', along with the prescribed fee, which may either be approved or rejected, by the Registrar, Central Registration Centre after allowing re-submission of such application within 15 days for rectification of the defects, if any. Earlier, the application had to be made in Form INC-1.
- In case the articles of a company contain provisions for entrenchment, such company shall give notice to the ROC in Form INC-2. The reference to Form INC-7 has been deleted.
- An application for registration of a company shall be filed with the ROC in Form INC-32 (SPICe) along with the prescribed fee and the registration/ approval from the RBI, SEBI or any other regulator, if required.
- A proviso to Rule 38(1) has been inserted to provide that in case of incorporation of a company with more than 7 subscribers, or where any of the subscriber to the memorandum of association ("**MOA**")/ articles of association ("**AOA**") is signing at a place outside India, MOA/ AOA shall be filed with Form INC-32 (SPICe) without filing Form INC-33 and INC-34.
- Further, a proviso to Rule 38(2) has been inserted to state that in case of companies incorporated with effect from the January 26, 2018, with a capital of less than or equal to INR 10 lakhs, or in respect of companies not having a share capital whose number of members as stated in the AOA does not exceed 20, fee on Form INC-32 (SPICe) shall not be applicable.

(*MCA Notification No. G.S.R. 49(E) dated January 20, 2018, w.e.f. January 26, 2018, and Notification No. G.S.R 284(E), dated March 23, 2018, w.e.f. March 23, 2018*)

Amendment to the Companies (Registered Valuers and Valuation) Rules, 2017

The MCA has amended Rule 11 of the Companies (Registered Valuers and Valuation) Rules, 2017 providing that any person who is rendering valuation services under the 2013 Act, on the date of commencement of these rules, may continue to render valuation services without a certificate of registration under these rules up to September 30, 2018. Further, if a company has appointed a valuer before such date and the valuation or any part of it has not been completed before September 30, 2018, the valuer shall complete such valuation or such part within 3 months thereafter.

(*MCA Notification No. G.S.R. 155 (E) dated February 9, 2018, w.e.f. February 12, 2018*)

Companies (Removal of Difficulties) Order, 2018

The MCA has, through the Companies (Removal of Difficulties) Order, 2018, amended Section 169(1) of the 2013 Act providing that an independent director re-appointed for second term under sub-section (10) of section 149 can be removed by the company by passing a special resolution and after giving him a reasonable opportunity of being heard.

(*MCA Notification dated February 21, 2018 w.e.f. February 22, 2018*)

Amendment to the Companies (Accounts) Rules, 2014

The MCA has amended the Companies (Accounts) Rules, 2014 to add a proviso to Rule 10 to provide that the companies which are required to comply with Companies (Indian Accounting Standards), 2015 shall forward their statement in Form AOC-3A. A new Form AOC-3A has also been provided.

(*MCA Notification dated February 27, 2018*)

MCA exempts certain Government Companies from deferred tax liability under accounting standard

The MCA has exempted government companies which are: (i) a public financial institution under section 2(72)(iv) of the 2013 Act; (ii) Non-Banking Financial Company ("**NBFCs**") registered with the RBI; (iii) engaged in the business of infrastructure finance leasing with not less than 75% of its total revenue being generated from such business with Government companies or other entities owned or controlled by Government, from the provisions of Accounting Standard 22 or Indian Accounting Standard 12 relating to deferred tax asset or deferred tax liability, w.e.f. April 1, 2017.

(*MCA Notification No. S.O 1965(E) dated April 2, 2018*)

Amendment to the Companies (Share Capital and Debentures) Rules, 2014

The MCA has notified the Companies (Share Capital and Debentures) Amendment Rules, 2018 ("**SCD Amendment Rules**") to amend Rule 3(5) of the Companies (Share Capital and Debentures) Rules, 2014 to provide for the following:

- The certificate of shares shall now specify the shares to which they relate, the amount paid-up thereon and shall be signed by 2 directors or by a director and the company secretary, wherever the company has appointed a company secretary. If the company has a common seal it shall be affixed in the presence of persons required to sign the certificate.
- In case of a one person company, the certificate can be signed by a director and the company secretary or any person authorised by the board of such company.

(*MCA Notification No. G.S.R 363 (E), dated April 10, 2018*)

Amendment to Schedule I of the 2013 Act

The MCA has altered Schedule I of the 2013 Act to provide for the following:

- Sub-paragraph (2)(ii) of Table F (*AOA of Company Limited by Shares*) to give effect to the SCD Amendment Rules as above.
- In sub-paragraph (79) of Table F (*The Seal*) as well as in paragraph II, in sub-paragraph (30) of Table H (*The Seal*), an explanation has been added clarifying that on and from the commencement of the Companies (Amendment) Act, 2015, effective May 29, 2015, a company may not be required to have the seal by virtue of registration under the 2013 Act and if a company does not have the seal, the provisions of sub-paragraph (79) shall not apply.

(*MCA Notification No. G.S.R 362 (E), dated April 10, 2018*)

FOREIGN INVESTMENT AND RBI UPDATE

AMENDMENTS AND CIRCULARS

Risk Management and Inter-bank Dealings: Revised guidelines relating to participation of a person resident in India and Foreign Portfolio Investor in the Exchange Traded Currency Derivatives Market

- At present, residents and Foreign Portfolio Investors ("**FPIs**") are allowed to take a long (bought) or short (sold) position in USD-INR up to USD 15 million per exchange without having to establish existence of underlying exposure. Additionally, residents and FPIs are also allowed to take long or short positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, up to USD 5 million equivalent per exchange without having to establish existence of any underlying exposure.
- The RBI has released revised guidelines relating to participation in the Exchange Traded Currency Derivatives ("**ETCD**") market, and has permitted residents and FPIs to take positions (long or short), without having to establish existence of underlying exposure, up to a single limit of USD 100 million equivalent across all currency pairs involving INR, put together, and combined across all exchanges.
- The participants in the ETCD market shall be responsible for complying with the provisions of this circular. These limits shall also be monitored by the exchanges, and breaches, if any, reported to RBI.

(*RBI A.P. (DIR Series) Circular No. 18 dated February 26, 2018*)

Separate limit of Interest Rate Futures for FPIs

- Currently, the FPI limit for Government Securities ("**G-secs**") is fungible between investments in G-secs and investment in Interest Rate Futures ("**IRFs**"). FPI long positions in IRF are not allowed on G-sec limit utilisation reaching 90%.
- The RBI has amended the Interest Rate Futures (Reserve Bank) Directions, 2013 to allocate FPIs a separate limit of INR 5,000 crore for long positions in IRFs.
- The limits prescribed for investment by FPIs in G-secs (currently INR 3,01,500 crores) will be exclusively available for investment in G-secs.

(*RBI Notification No. RBI/2017-18/137 dated March 01, 2018*)

Discontinuance of Letters of Undertaking and Letters of Comfort for Trade Credits

- In the wake of certain recent controversies surrounding the issuance of Letters of Undertaking ("**LoU**") and Letters of Comfort ("**LoC**"), the RBI has decided to discontinue the practice of issuance of LoCs and LoUs by Authorised Dealer Banks ("**AD Banks**") for trade credits for imports into India with immediate effect.
- Prior to this notification, AD Banks were permitted to issue LoU / LoC in favour of overseas supplier, bank or financial institution for up to USD 20 million per

import transaction for a maximum period of up to 1 year in case of import of non-capital goods (except gold, palladium, platinum, rhodium, silver, etc) and up to 3 years for import of capital goods.

- Notwithstanding the discontinuation of LoU and LoC, letters of credit and bank guarantees for trade credits for imports into India may be continued to be issued subject to compliance with applicable RBI guidelines.

(*RBI A.P. (DIR Series) Circular No. 20 dated March 13, 2018*)

Notification of the amendments to the FEMA 20(R) Regulations

- The Union Cabinet had by way of a press note dated January 10, 2018 ("**Cabinet Note**") approved liberalisation of Foreign Direct Investment ("**FDI**") in single brand retail trading, real estate broking services, civil aviation, investment companies registered as NBFC with the RBI, as well certain other changes, including *inter alia,* issuance of shares against pre-incorporation expenses and import of machinery under the automatic route. This was covered as the lead article in the last issue of *Insight* (Vol. IX, Issue 4).
- Pursuant to the Cabinet Note, the Department of Industrial Policy & Promotion ("**DIPP**") had on January 23, 2018 issued the Press Note. 1 (2018 Series) setting forth amendments to the FDI Policy 2017 ("**FDI Policy**"), to take effect from the date of the FEMA notification.
- Accordingly, the RBI has now notified the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations, 2018 to give effect to the aforementioned amendments.
- It may be noted that while the Cabinet Note had approved liberalisation of FDI in Indian investment companies/ LLPs regulated by other financial sector regulators (viz. IRDAI, SEBI, etc.), from government route to automatic route, the present amendment restricts this relaxation only to entities registered with the RBI as NBFCs.

(*RBI Notification No. FEMA.20(R) (1)/2018-RB published in the Gazette on March 26, 2018*)

Notification of Revised RBI Regulations on Acquisition and Transfer of Immovable Property in India

- The RBI has notified the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 ("**FEMA 21(R)**") with effect from March 26, 2018 in supersession of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.
- The FEMA 21(R) has now done away with the concept of a 'person of Indian origin ("**PIO**")' and all references therein to PIO have been substituted with references to 'Overseas Citizen of India ("**OCIs**")' cardholders.
- The FEMA 21(R) has now made the conditions for acquisition or transfer of immovable property in India uniform for non-resident Indians ("**NRIs**") and OCIs. In addition, the following changes have been made:
  - NRIs & OCIs can henceforth acquire immovable property (other than agricultural land/ farmhouse / plantation etc.) as gift only from a resident Indian, NRI or OCI, who is a relative within the meaning of section 2(77) of the 2013 Act.
  - OCIs can now sell immovable property (other than agricultural land / farmhouse / plantation etc.) to NRIs and OCIs, in addition to resident Indians.
  - The restriction on sale or gift by OCIs of immovable property (being an agricultural property) only to resident Indians who are citizens of India has been liberalised, and henceforth, such property can be sold to resident Indians.
- The ceiling (equal to cost of acquisition of property) on repatriation of proceeds from the sale of immovable property (other than agricultural land/ farm house / plantation property) by an NRI or OCI has been removed i.e. henceforth gains made by NRI/ OCI from such sale can be repatriated, subject to tax and other levies.
- It has been clarified that the restriction on citizens of specified countries from acquiring or transferring immovable property in India (other than on a 5 year

lease) without prior RBI approval, shall apply to both natural persons and legal entities.

- An AD Bank in India, being the Indian correspondent of an overseas lender, has been permitted to create a mortgage over immovable property owned by an NRI/ OCI being a director of a company outside India, for a loan to be availed by the company from an overseas lender.

(*RBI Notification No. FEMA.21(R)/2018-RB published in the Gazette on March 26, 2018*)

Definition of Start-up amended, tax benefits to start-up that have raised INR 10 crore from angel investors

- The DIPP has released a notification refining the definition of start-up and the process for recognition of the same.
- ***Definition*** – An entity shall be considered a 'start-up' upto a period of **7 years** from the date of incorporation/registration, if it is incorporated as a private limited company (as defined in the 2013 Act) or registered as a partnership firm under Section 59 of the Partnership Act, 1932 or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India; and upto a period of **10 years** in case of start-up companies in the biotechnology sector, subject to the following conditions:
  - Turnover of the entity for any of the financial years since incorporation/registration has not exceeded INR 25 crore.
  - The entity is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.
  - The entity has not been formed by splitting up or reconstruction of an existing business.
- ***Recognition*** - The start-up is required to make an online application over the mobile app or portal set up by DIPP with a copy of certificate of incorporation / registration and a write-up about the nature of business highlighting its work towards innovation, development or improvement of products or processes or services, or its scalability in terms of employment generation or wealth creation, pursuant to which the DIPP may recognise the entity as a 'start-up'.
- ***Tax Benefits*** – In addition, the notification also puts in place a mechanism for such start-up entities to secure the exemption from levy of income tax in case of issuance of shares to 'angel investors' at a value in excess of the fair value.
- The definition of a 'start-up', as aforementioned, shall be applicable for the purposes of the FDI Policy.

(*DIPP Notification No. GSR 364(E) published in the Gazette on April 11, 2018*)

Daily reporting of transactions under the Liberalized Remittance Scheme

- In order to improve monitoring and also to ensure compliance with the limits imposed under the LRS, the RBI has decided to put in place a daily reporting system by AD Banks of transactions undertaken by individuals under LRS, which will be accessible to all the other AD Banks.
- Henceforth, all AD Banks are required to upload daily transaction-wise information undertaken by them under LRS at the close of business of the next working day, in the prescribed format on a specified link. In case no data is to be furnished, AD Banks are required upload a 'Nil' report.

(*RBI A.P. (DIR Series) Circular No. 23 dated April 12, 2018*)

Minimum Capital Requirements for foreign investment in 'Other Financial Services' which are not regulated by any Financial Sector Regulator

- In terms of the FDI Policy, financial services activities regulated by financial sector regulators are treated differently from financial services activities which are not regulated by any financial services regulator or only partly regulated or where there is doubt regarding the regulatory oversight **("Unregulated FSA")**.
- The FDI Policy permitted 100% foreign investment under the Government approval route in such Unregulated FSAs, subject to conditions, including minimum capitalization requirement as may be decided by the Government. However, the FDI Policy did not specify the minimum capitalization requirement for such Unregulated FSAs.

- In this regard, the Ministry of Finance has now issued a press release setting the following minimum capital requirements for foreign investment into an Unregulated FSA:
  - USD 20 million for fund-based activities including *inter alia* merchant banking, stock broking, portfolio management services, asset management.
  - USD 2 million for non-fund based activities including *inter alia* investment advisory services, financial consultancy and credit rating agencies.
- This requirement will impact *inter alia* entities which are not registered or are exempted from registering with the concerned financial sector regulator such as SEBI/ RBI. There is also an open question on whether the aforementioned capital requirements would apply to already existing Unregulated FSAs with foreign investment, which will have to be clarified.

(*Ministry of Finance Clarification via Press Release dated April 16, 2018*)

DISCUSSION PAPER

RBI's Statement on Developmental and Regulatory Policies – April 2018

RBI has released the Statement on Developmental and Regulatory Policies, setting out various policy measures for strengthening regulation and supervision, broadening and deepening financial markets, improving currency management, promoting financial inclusion and literacy and facilitating data management. The RBI has, *inter alia,* proposed that by June 30, 2018, the reporting of FDI in India, which is presently made in a disintegrated manner across various platforms/ modes, will be made online *via* a single master form that shall subsume all reporting requirements, irrespective of the instrument through which the foreign investment is made.

(*RBI's Statement on Developmental and Regulatory Policies dated April 05, 2018*)

SECURITIES LAW UPDATE

AMENDMENTS AND CIRCULARS

Participation by Strategic Investors in Infrastructure Investment Trusts and Real Estate Investment Trusts

SEBI has issued a circular which sets out the operational modalities for participation by strategic investors in Infrastructure Investment Trusts **("InvITs")** and Real Estate Investment Trusts ("**REITs**"), when an InvIT or REIT invites subscriptions. The key conditions for such subscriptions include, *inter alia*, the following:

- Investment by the strategic investors (either jointly or severally) to be not less than 5% and not more than 25% of the total offer size.
- A binding unit subscription agreement to be executed between the investment manager / manager on behalf of the InvIT / REIT and the strategic investors, which shall not be terminated except in the event the issue fails to collect minimum subscription. Details of the same is to be disclosed in the draft offer document or offer document.
- The entire subscription price to be deposited in a special escrow account prior to opening of the public issue.
- The units subscribed by strategic investors to be locked-in for a period of 180 days from the date of listing in the public issue.

(*SEBI Circular No. SEBI/HO/DDHS/CIR/P/2018/10 dated January 18, 2018*)

Online Filing Systems for Offer Documents, Schemes of Arrangements, Takeovers and Buy Backs through SEBI Intermediary Portal

SEBI has introduced an online system for filings related to public issues, rights issues, institutional placement programme, schemes of arrangement, takeovers and buy backs. The circular directs the concerned merchant bankers who are required to file the offer documents and the recognized stock exchanges, who are required to file the draft scheme of arrangements and related documents, in physical form with SEBI, to simultaneously file the same online through the SEBI intermediary portal until March 31, 2018. Thereafter, from April 1, 2018, SEBI has discontinued the physical filing of the aforesaid documents, thereby making online filing the only acceptable route.

(*SEBI Circular No. SEBI/HO/CFD/DIL1/CIR/P/2018/011 dated January 19, 2018*)

Online Registration Mechanism and Filing System for Stock Exchanges

- SEBI has introduced a digital platform for online filings related to stock exchanges in order to ease the process of application for recognition, renewal, reporting and other filings in terms of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 and other circulars thereof.

- Apart from providing the facility to applicants to submit their applications and relevant documents online, the digital platform allows the stock exchanges to submit their respective annual financial statements and returns, monthly development reports, rules and bye-laws.

(*SEBI Circular No. SEBI/HO/MRD/PSA/CIR/P/2018/13 dated January 29, 2018*)

Amendment to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

SEBI has notified the SEBI (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2018, thereby removing the requirement of compliance with the minimum public shareholding as an eligibility criteria for undertaking a qualified institutions placement.

(*SEBI Notification No. SEBI/LAD-NRO/GN/2018/01 dated February 12, 2018*)

Compensation of Retail Individual Investors for failure to allot shares in an Initial Public Offer

SEBI has laid down certain unified policies for calculation of minimum compensation payable to retail individual investors ("**RIIs**") in case such investors have not been considered for allotment, due to failure on the part of self-certified syndicate banks ("**SCSBs**"). SEBI has now proposed a formula for calculation of minimum fair compensation. In case the issue is subscribed between 90-100%, RIIs would be compensated for all the shares which they would have been allotted. However, the RIIs would not be paid any compensation if the listing price is below the issue price. The aggrieved RII would have an option to seek redressal within 3 months of the listing date with the relevant SCSB. In case of failure to resolve such an application within 15 days, the SCSB would be required to pay interest at the rate of 15% per annum.

(*SEBI Circular No. SEBI/HO/CFD/DIL2/CIR/P/2018/22 dated February 15, 2018*)

Easing of investment norms for FPIs and subsequent clarifications

SEBI has issued a circular amending the extant regulations applicable to FPIs ("**FPI Investment Circular**") including *inter alia* the following changes for easing investment access for FPIs:

- An FPI/ its global custodian no longer requires SEBI approval for changing its local custodian /designated depository participant ("**DDP**"). Upon receipt of no objection from the transferor local custodian / DDP, such change only has to be intimated to SEBI.
- On such a change of local custodian / DDP, the new DDP can now rely on the due diligence already carried out by the old DDP to ascertain the eligibility of the FPI.
- Prior approval of the DDP is no longer required to be obtained for addition of classes of shares by the FPI, as long as the common portfolio of Indian securities is maintained across all classes and the broad based criteria is fulfilled at the portfolio level.
- FPIs operating under a multiple investment managers structure can now appoint different local custodians / DDPs.
- Private banks and merchant banks classified as Category II FPIs are now permitted to undertake investments on behalf of their investors subject to certain prescribed conditions.

Pursuant to queries received from stakeholders regarding the FPI Investment Circular, SEBI has issued the following clarifications:

- Private banks / merchant banks investing on behalf of clients need to *inter alia*, ensure compliance with the know your client norms, identify the beneficial owners ("**BO**") of the client and ensure that such BO is eligible in terms of the applicable SEBI regulations.
- Other appropriately regulated persons recognized as Category II FPIs such as asset management companies, investment managers / advisors are permitted to invest their proprietary funds and can also, by taking a separate registration, invest with client funds as an overseas direct investor, subject to conditions specified therein.

(*SEBI Circular No. CIR/IMD/FPIC/26/2018 dated February 15, 2018 and SEBI Circular No. IMD/FPIC/47/2018 dated March 13, 2018*)

Acceptance of Bank Guarantees by Clearing Corporations at IFSCs

SEBI has amended its circular dated November 28, 2016 on functioning of stock exchanges and clearing corporations at International Financial Services Centres ("**IFSC**") to allow clearing corporations to accept *inter alia* cash and cash equivalents (which include major foreign currencies as may be decided by the clearing corporation from time to time, term deposit receipts and bank guarantees issued by bank branches located in IFSC) and Indian securities held with foreign depositories, as eligible collateral for trades in all product categories. Provided that, cash and cash equivalents form at least 50% of the total liquid assets at all times.

(*SEBI Circular No. CIR/MRD/DRMNP/41/2018 dated February 20, 2018*)

Manner of Achieving Minimum Public Shareholding

- SEBI has further facilitated listed entities to comply with the Minimum Public Shareholding ("**MPS**") requirements, by allowing an open market sale of shares held by the promoters or promoter group up to 2% of the total paid-up equity share capital of the listed entity (subject to five times' average monthly trading volume of the shares of the listed entity) and allotment of eligible securities through qualified institutions placements in terms of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**SEBI ICDR Regulations**").
- The circular further lays the conditions for the open market sale, of which the key conditions are:
  - The listed entity to, at least one trading day prior to every such proposed sale, announce to the relevant stock exchange(s), the intention of the promoter or promoter group to sell along with certain other prescribed details.
  - The listed entity shall also submit an undertaking of the persons belonging to the promoter(s) and promoter group to the recognized stock exchange(s) that such persons shall not buy any shares in the open market on the dates on which the shares are being sold by the relevant promoter and promoter group.

(*SEBI Circular No. SEBI/HO/CFD/CMD/CIR/P/43/2018 dated February 22, 2018*)

Amendment to the SEBI (Mutual Funds) Regulations, 1996 – Cross Holding Restrictions

SEBI has notified the SEBI (Mutual Funds) (Amendment) Regulations, 2018 ("**MF Amendment Regulations**") introducing Regulation 7B which prescribes the following:

- A sponsor of a mutual fund, its associates or group company including the asset management company ("**AMC**") will be restricted from individually or collectively, directly or indirectly holding 10% or more of the shareholding or voting rights or board representation of the AMC or the trustee company of any other mutual fund.
- Any shareholder holding 10% or more shareholding or voting rights in an AMC or the trustee company of a mutual fund will not be permitted to directly or indirectly, have board representation or to hold 10% or more of the shareholding or voting rights in the AMC or the trustee company of any other mutual fund.

A period of one year has been prescribed from the date of the coming into force of this regulation for compliance with the above provisions.

(*SEBI Notification No. SEBI/LAD-NRO/GN/2018/02 dated March 13, 2018*)

New Policy Measures in relation to Investor Grievance Redressal Mechanism

- SEBI has issued this circular in order to facilitate the redressal of investor grievances through SEBI Complaints Redress System ("**SCORES**") platform. The circular lays down a detailed procedure to be followed, for filing and redressal of investor grievances using SCORES. The complainant may use SCORES to submit its grievances directly to companies or intermediaries in the first instance. Further, the company receiving the complaints is required to redress the investor grievance with 30 days, failing which the complaint shall be registered in SCORES.
- The investor may lodge a complaint on SCORES within 3 years from the date of cause of complaint only under circumstances where the investor has approached the listed company or registered intermediary for redressal of the complaint and the concerned listed company or registered intermediary rejected the complaint, or the complainant did not

receive any communication from the listed company or intermediary concerned, or the complainant was not satisfied with the reply given to him or redressal action taken by the listed company or an intermediary.

(*SEBI Circular No. SEBI/HO/OIAE/IGRD/CIR/P/2018/58 dated March 26, 2018*)

Clarifications with respect to the circular on "Specifications related to International Securities Identification Number for debt securities issued under the SEBI (Issue and Listing of Debt Securities) Regulations 2008"

SEBI has issued *inter alia* the following key clarifications in relation to the circular on "Specifications related to International Securities Identification Number ("**ISINs**") for debt securities issued under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008" dated June 30, 2017 ("**ISIN Circular**"):

- The ISIN Circular provided that an issuer issuing only 'structured / market linked debt securities', may utilise the entire bucket of 12 ISINs in a financial year only for 'structured / market linked debt securities'. This circular clarifies that in case of debt securities, where call and/or put option is exercised, the issuer may issue additional debt securities for the remaining period of maturity of earlier debt securities (subject to condition mentioned therein).
- This circular clarifies that the limit of 12 / 5 ISINs shall be applicable to all the debt securities issued on or after July 1, 2017 in the financial year 2017-18 irrespective of the financial year in which they mature.
- All India Term Lending and Refinancing Institutions as notified by the RBI and infrastructure debt funds registered as NBFCs shall be exempted from the application of the ISIN Circular, subject to them issuing debt securities with minimum 5 years maturity. Further, no exemption from the applicability of ISIN Circular shall be available to any issuer for debt securities issued on or after July 1, 2020.

(*SEBI Circular No. CIR/DDHS/P/59/2018 dated March 28, 2018*)

Monitoring of foreign investment limits in listed Indian companies

In order to facilitate compliance by listed Indian companies with the various foreign investment limits, SEBI in consultation with the RBI has put in place a new system for monitoring the foreign investment limits which will be made operational from May 1, 2018.

- The monitoring system shall be implemented by the designated depository appointed by the company for this purpose. The company shall provide the requisite information including *inter alia* the sectoral cap, permissible limit for investment by FPIs, details of shares held by FPIs, NRIs and other foreign investors, details of indirect foreign investment etc.
- The system will calculate the investment headroom available at the end of the day with respect to the respective aggregate investment limits. A red flag shall be activated for the company if the available headroom is 3% or less than 3% of the aggregate investment limit.
- Once the investment limits or the sectoral caps have been breached, the depositories shall inform the exchanges and halt further purchases by the FPI/ NRI, in case the aggregate limit is breached or all foreign investors, if the sectoral cap is breached.
- A proportionate disinvestment methodology shall be followed for disinvestment of the excess shares so as to bring the foreign investment within permissible limits.

(*SEBI Circular No. IMD/FPIC/CIR/P/2018/61 dated April 5, 2018*)

Measures to strengthen Algorithmic Trading and Co-location / Proximity Hosting Framework

SEBI had issued a discussion paper on algorithmic trading and co-location / proximity hosting facility offered by stock exchanges on August 05, 2016 which was covered as lead article in a previous issue of *Insight* (Volume VIII, Issue 4) dated October 25, 2016. In light of the public comments received on the discussion paper, SEBI has introduced *inter alia* the following measures in connection thereto:

- Introduction of 'managed colocation services' to provide co-location facility to small and medium

members who otherwise find it difficult to avail of such facilities. The eligible vendors to whom the stock exchanges allot space/ rack in a co-location facility shall provide technical know-how and other expertise to the trading members as services. Stock exchanges shall supervise and monitor such facilities on a continuous basis.

- Stock exchanges shall now provide tick-by-tick feeds to all the trading members free of cost, in order to provide a detailed view of the entire order-book, subject to trading members creating the necessary infrastructure for receiving and processing it.
- Stock exchanges will allot a unique identifier to each algorithm approved, in order to establish an audit trail and ensure better surveillance and ensure that every algorithm order reaching on exchange platform is tagged with the unique identifier and that such unique identifier tags are part of the data set sent / shared with SEBI for surveillance purpose.

(*SEBI Circular No. SEBI/HO/MRD/DP/CIR/2018/62 dated April 9, 2018*)

Clarification on clubbing of investment limits of foreign government / foreign government related entities

SEBI has issued the following clarification with respect to clubbing of investment limits of foreign governments and related entities, such as foreign central banks, sovereign welfare funds etc.:

- The purchase of equity shares of a company by foreign government or its related entities from the same jurisdiction, registered as FPIs, shall be limited to 10% of the total paid up capital of the company.
- For the purpose of clubbing of investment limit, the BO of foreign Government entities or its related entities shall be determined in accordance with Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 ("**PMLA Rules**").
- In case the same set of BO(s) invest through multiple entities, such entities shall be treated as part of the same investor group. Further, the investment by a foreign Government agency (being an arm / department / body corporate of the Government) shall be clubbed with the investment by the foreign Government.

(*SEBI Circular No. SEBI/HO/IMD/FPIC/CIR/P/2018/66 dated April 10, 2018*)

Know your client requirements for FPIs

SEBI has made the following changes to the know your customer ("**KYC**") requirements of FPIs investing under the portfolio investment scheme:

- BOs of FPIs structured either as a company or a trust should be identified on controlling ownership interest (25%) and control basis, as prescribed under the PMLA Rules.
- Where no shareholder / owner entity is identified as BO, the senior managing official of the FPI shall be the BO.
- In respect of FPIs based out of "high risk jurisdictions", a lower materiality threshold of 10% is to be applied for identification of BO.
- NRIs / OCIs or a resident Indian cannot be a BO of an FPI. Further, the BO should not be a person mentioned in the UN Security Council's Sanction List and should not be from a non-FATF compliant jurisdiction.
- Category II & III FPIs are required to maintain a list of BOs in the format prescribed in the circular. The existing FPIs are required to provide the list of BOs as per the format within 6 months from the date of this circular.
- Existing FPI structures not in conformity with the above requirements shall not create fresh position at the end of expiry of derivative contract of April 2018. Further, FPIs shall change their structure or close their existing position within 6 months from the date of the circular.
- There should be a comprehensive KYC review of FPIs periodically, based on risk categorization of FPIs i.e. on a yearly basis for high risk clients and every 3 years for others.

(*SEBI Circular No. CIR/IMD/FPIC/CIR/P/2018/64 dated April 10, 2018*)

DISCUSSION PAPERS AND BOARD MEETING

Recommendations of the third report of the Alternative Investment Policy Advisory Committee

The Alternative Investment Policy Advisory Committee ("**AIPAC**"), constituted by SEBI in 2015, submitted its third report in November, 2017. The AIPAC has recommended *inter alia*, the following:

- ***Goods and Service Tax ("GST") Regime*** – (a) the GST paid on services rendered to an AIF should be chargeable at a rate of 5% where the majority of the investors are foreign investors; and (b) alternatively, investors in an AIF should be deemed to be the service recipients and where the foreign investment exceeds 50%, the services received by the AIF should be considered export of services, thereby chargeable to GST at zero rate.
- ***Promoting AIFs with foreign limited partners in IFSC*** – (a) Income earned by an offshore investor from offshore investments through AIFs in an IFSC should be tax exempt; (b) it should also be recognized in the IT Act that an eligible investment fund in an IFSC in India, does not constitute a business connection in India; (c) overseas investors should be allowed to invest in India through any route; and (d) current limits on overseas investments of AIFs which source funds from domestic investors should not apply to IFSC domiciled AIFs.
- ***Taxation of AIFs, including Category III AIFs*** – (a) a separate tax code for Category III AIFs and AIFs which have their units listed on a stock exchange; (b) implementing an investor-level taxation approach for Category III AIFs.

(*Report dated January 19, 2018*)

Review of the SEBI (Buyback of Securities) Regulations, 1998 and the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011

SEBI released drafts of the regulations pertaining to buyback, and the amendments to the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ("**SEBI SAST Regulations**") for public comments latest by April 15, 2018. Some of the key conditions and obligations in case of buyback of shares/ specified securities in terms of the SEBI (Buyback of Securities) Regulations, 2018 are as follows:

- The maximum limit of buyback should be 25% or less of the aggregate of paid up capital and free reserves of the company in that financial year.
- Buyback of shares/ specified securities is to be on a proportionate basis through tender offer, open market through book building process or stock exchange (subject to specified limits), and from odd-lot holders.
- It is to be out of the free reserves, the securities premium account, or the proceeds of the issue of any shares or other specified securities.
- No buyback is permitted through any subsidiary company, through any investment company or group of investment companies, or if a default is made by the company in the repayment of deposits accepted either before or after the commencement of the 2013 Act, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan to any financial institution or banking company, however, the buyback is not prohibited, if the default is remedied and a period of 3 years has lapsed after such default ceased to subsist.
- A company cannot buyback its shares or other specified securities (a) to delist the same, and (b) from any person through negotiated deals, whether on or off the stock exchange or through spot transactions or through any private arrangement. The company cannot buyback the locked-in shares or other specified securities and non-transferable shares or other specified securities till the pendency of the lock-in or till the shares or other specified securities become transferable.

Some of the key provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2018 are as follows:

- Regulation 7(2) which prescribes the minimum number of shares for which a voluntary offer has to be made specifies that the offer has to be such that entitles the acquirer to exercise an additional 10% of the "total shares" of the target company. This is to be amended to require an offer for 10% of the "voting rights" in the target company.
- An explanation to be inserted to Regulation 10(1)(a)(iii) which exempts the *inter se* transfer of the shares of the target company amongst *inter alia* a

company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than 50% of the equity shares of such company etc. to the effect that the company in this context will include a body corporate, whether Indian or foreign.

- Regulation 18(2) to be amended to allow for the letter of offer to be dispatched to the eligible shareholders of the target company through electronic mode in accordance with the provisions of the 2013 Act.
- Regulation 18(4) to be amended clarify that in the event of any revision of the offer price on or after the commencement of the tendering period, the shareholders who have already tendered their shares at the previous offer price shall be entitled to receive the revised offer price.

(*SEBI Discussion Paper dated March 28, 2018*)

SEBI Board Meeting

SEBI in its meeting held on March 28, 2018, made the following decisions:

- Accepting several recommendations of the Kotak Committee Report on Corporate Governance, such as *inter alia* (i) enhancing the role of the various committees of listed companies; (ii) enhancing the obligations of the listed entity with respect to its subsidiaries; and (iii) enhanced disclosure of related party transactions.
- SEBI also decided to accept a few recommendations with modifications such as *inter alia* (i) at least one woman director on board for the top 500 listed entities by market capitalisation by April 01, 2009 and in the top 1000 listed entities by April 01, 2020; and (ii) minimum six directors in the top 1,000 listed entities by market capitalisation by April 01, 2009 and in the top 2000 listed entities by April 01, 2020.
- Approving proposals for strengthening the framework of the equity derivatives market by approving *inter alia* that (i) physical settlement for all stock derivatives shall be carried out in a phased and calibrated manner; (ii) stocks which are currently in derivatives but fail to meet any of the enhanced criteria, would be physically settled while those which meet the enhanced criteria shall be cash settled.
- Approving amendments to the SEBI (Alternative Investment Fund) Regulations, 2012 regarding angel funds including *inter alia* increase in the maximum investment limit in venture capital undertakings by angel funds.
- Revising the existing enforcement framework for non-compliance of listing regulations with features such as *inter alia* (i) imposition of fines by stock exchanges for non-compliance of requirements pertaining to board and committee composition and submission of corporate governance compliance report etc.; and (ii) empowering the stock exchanges to freeze the shareholding of the promoter and promoter group in such non-compliant entity and other securities.

(*SEBI Board Meeting via Press Release dated March 28, 2018*)

INFORMAL GUIDANCE

De-listing of Non-Convertible Debentures held by FPIs

- Puranik Buildcon Private Limited ("**Puranik**") had issued and allotted listed non-convertible debentures ("**NCDs**") to FPIs. At the time of issuance of the NCDs, in terms of the SEBI (Foreign Portfolio Investors) Regulations, 2014 ("**SEBI FPI Regulations**") and the FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, an FPI was permitted to invest only in listed NCDs. After the allotment of the NCDs, the relevant regulations were amended to allow FPIs to invest in unlisted NCDs, subject to the guidelines issued by the MCA including end use-restriction on investment in real estate business, capital market and purchase of land.
- Puranik sought an informal guidance on whether (a) Puranik is permitted to delist the NCDs; and (b) pursuant to such delisting, the FPI is still permitted to hold the NCDs.
- In this regard, SEBI clarified that there was no prohibition against delisting of the NCDs. However, given that Puranik is engaged in real estate business and it can be reasonably assumed that the proceeds of the NCDs might have been utilized for the real estate business, the FPI cannot hold stake in the NCDs once they are de-listed.

(*SEBI Informal Guidance No. DDHS/OW/30626/2017 dated December 07, 2017*)

Modification or reclassification of the status of the Shareholders in case of gift of shares

- Smt. Kantaben Mehta was one of the promoters of Deepak Nitrite Limited ("**DNL**") and intended to gift majority of her shares to her grandson, Shri Param Mehta who does not hold any shares in DNL and is not a promoter. DNL has sought an informal guidance in relation to whether such transfer would (i) be treated as "modification or reclassification of the status of the shareholders" under Regulation 31A (2) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, and would accordingly require the permission of the stock exchanges; (ii) trigger the open offer requirement under the SEBI SAST Regulations.
- In this regard SEBI was of the view that given that Shri Param Mehta is an immediate relative of a promoter of DNL, he would be considered a part of the promoter group in terms of the SEBI ICDR Regulations. Therefore, the proposed transaction may not be treated as reclassification or modification of the status of shareholders from promoter to public shareholder and *vice versa*. Therefore DNL may not be required to obtain permission of the stock exchanges.
- In relation to the open offer requirements, SEBI was of the view that a transaction between grandmother and a grandson is not exempted under Reg. 10(1) of the SEBI SAST Regulations. However, the proposed transaction would not trigger an open offer under the SEBI SAST Regulations because (a) the holding of the grandson i.e. Param Mehta will increase only from 0 to 0.69% while the holding of the entire promoter group will remain at 46.57%; and (b) given he would already be considered a member of the promoter group, his inclusion may not be considered a change of control.

(*SEBI Informal Guidance No. CFD/CMD/PR/31471/2017 dated December 14, 2017*)

Exemption of transfer of shares *inter-se* promoters of a promoter entity from the open offer requirement.

- Navkar Builders Limited ("**Navkar**") is a listed company whose promoter group comprises of Mr. Dakshesh Shah, Mr. Samir Patel and Navkar Fiscal Services Private Limited ("**NFSPL**"). Mr. Dakshesh Shah and Mr. Samir Patel are also the only shareholders of NFSPL. Mr. Samir Patel proposed to transfer (a) his shares in Navkar to NFSPL; and (b) his shares in NFSPL to Mr. Dakshesh Shah and his wife.
- Navkar sought an informal guidance on whether such transfers are exempt from the open offer requirement in terms of Regulation 10(1)(a) of the SEBI SAST Regulations. In this regard, SEBI clarified that the first transaction is an *inter se* transfer of shares amongst entities which have been disclosed as promoter group of Navkar for not less than 3 years prior to the acquisition and therefore is exempt from the obligation of making an open offer in terms of the SEBI SAST Regulations.

- In relation to the second transaction, SEBI clarified that the transfer of shares of NSFL amongst its promoters will result in an indirect acquisition of shares/ voting rights of Navkar through NSFL. However, the shareholding of Dakshesh Shah and Samir Patel have not been disclosed to the stock exchanges. Therefore, *inter se* transfer of shares of a promoter entity does not squarely fall under the exemption of Regulation 10(1)(a) of the SEBI SAST Regulations.

(*SEBI Informal Guidance No. SEBI/HO/CFD/DCRI/OW/P/2018/6986/1 dated March 08, 2018*)

Inclusion of non-disposal undertakings within the term 'encumbrance' in Regulation 32(2)(d) of the SEBI FPI Regulations

- UBS AG ("**UBS**") is a registered Category II FPI. In terms of Regulation 32(2)(d) of the SEBI FPI Regulations, depository participants are obligated to ensure that all equity shares held by an FPI are free from all 'encumbrances'. However, the term 'encumbrance' is not defined.

- UBS sought an informal guidance on whether the term 'encumbrance' in Regulation 32(2)(d) of the SEBI FPI Regulations would include non-disposal undertakings in relation to FPIs who are investors and not promoters. In this regard, SEBI clarified that the term 'encumbrance' would include non-disposal undertakings and therefore in light of Regulation 32(2)(d), all FPIs are restricted from executing non-disposal undertakings.

(*SEBI Informal Guidance No. SEBI/HO/IMD/FIIC/OW/P/2018/8116/1 dated March 14, 2018*)

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