INSIGHT

Vol. XI | Issue III

October 01, 2019 – December 31, 2019

cyril amarchand mangaldas
advocates & solicitors

Welcome to this issue of ***Insight***.

In this issue, we have covered 2 significant judicial pronouncements in the last quarter that deal with the permissibility of cross border de-mergers and the requirement of arbitration awards to be reasoned.

Apart from the above, we have also captured the notifications under the Foreign Exchange Management Act, 1999 regarding rules / regulations governing debt instruments and non-debt instruments and other 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 cam.publications@cyrilshroff.com.

Regards,

CYRIL SHROFF
Managing Partner
Cyril Amarchand Mangaldas

Phone: +91-22-2496 4455/ 6660 4455
Fax: +91-22-2496 3666
Email: cyril.shroff@cyrilshroff.com

TABLE OF CONTENTS

TABLE OF CONTENTS

CROSS – BORDER DEMERGERS REMAIN FOREIGN TO THE COMPANIES ACT

The Ministry of Corporate Affairs ("**MCA**") had in early 2017 notified section 234 of the Companies Act, 2013 (the "**Act/Companies Act**") and simultaneously introduced a new rule 25A to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**CAA Rules**"), to give effect to the provision permitting merger or amalgamation of a foreign company with an Indian company and *vice versa*. Further, the Reserve Bank of India ("**RBI**") had on March 20, 2018 notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("**RBI Regulations**"), in terms of which cross border merger transactions were deemed to have the prior approval of the RBI, if certain specified conditions were fulfilled.

As highlighted in the lead article of the Vol. X, Issue I of *Insight* the language of section 234 (*Merger or amalgamation of company with foreign company*) of the Act only refers to "mergers" and "amalgamations" in contrast with the provisions of section 230 and 232, which refer to "compromise" and "arrangement". It has been established, by way of judicial precedents, both under the Companies Act, 1956 and the Act, that the word 'arrangement' is of the widest amplitude, and includes within its ambit, *inter alia*, demerger, slump sale and slump exchange. Given the conspicuous absence of the word 'arrangement' in section 234 and Rule 25A of the CAA Rules, there was an apprehension that section 234 does not permit a demerger, slump sale or slump exchange of an undertaking from an Indian company to a foreign company or vice versa.

The Ahmedabad bench of the Hon'ble National Company Law Tribunal ("**NCLT**") has in its recent order dated December 19, 2019 in the matter of *Sun Pharmaceuticals Industries Limited* ("**Sun Pharma**"), with respect to a proposed crossborder merger, affirmatively ruled that section 234 of the Act does not contemplate demergers.

The scheme in the present instance envisaged the demerger and transfer of two investment undertakings of Sun Pharma to two of its wholly owned subsidiaries (directly or indirectly) incorporated in Netherlands and the United States of America (USA), respectively. Based on the difference in the language of Sections 230-232 and Section 234, the NCLT rejected the scheme, while holding that "*Section 234 which relates to the cross border mergers of Indian companies with foreign companies and vice versa, mention only about the words "merger" and "amalgamation" and do not seem to contain the words "compromise" and / or "arrangement" and/or "demerger" of the Indian companies with foreign company and vice versa. In other words, it can be said that the provisions of* ***Section 234 of the Companies Act, do not provide for or rather restrict the demerger of the Indian companies with foreign company.*** *" (emphasis)*

The NCLT also drew attention to the provisions of the RBI Regulations and the variance between the draft regulations and the regulations finally notified. While the definition of "cross border merger" under the draft regulations included a reference to "demerger", this reference has specifically been deleted from the notified RBI Regulations – this, the NCLT held, indicated a specific intention to not permit cross-border demergers.

Given the clear ruling in the order of the Ahmedabad NCLT and the clear language of Section 234 and Rule 25A of the CAA Rules, this interpretation by the NCLT would need to be kept in mind by Indian corporates desirous of transferring one or more of their business undertakings to their overseas subsidiaries / holding companies.

For a critical analysis of the order of the Ahmedabad NCLT, please refer to our blog "Cross-Border Demergers: Lack of Legislative Intent" which is available on our website.

IS AN UNREASONED ARBITRAL AWARD SUSTAINABLE?

Section 31 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") provides that an arbitral award shall state the reasons upon which it is based. The only exception is when the parties to the arbitration have agreed that no reasons are to be given.

Further, in terms of section 34 of the Arbitration Act, an arbitral award can be challenged before the courts on a few limited grounds, such as – a party being under incapacity, the arbitration agreement not being valid under the law to which it is subject, a party not having been given notice of appointment of arbitrator or the arbitration proceedings or being unable to present his case, or if arbitral award deals with a dispute not contemplated / not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration, etc.

The Supreme Court has, in its recent judgement in ***Dyna Technologies* v. *Crompton Greaves Ltd.***, looked at the question of the requirement of a reasoned arbitral award and what constitutes a reasoned award, and when can an award be set aside under Section 34.

Factual Background

In the instant case, the arbitral award was passed by the arbitral tribunal on May 5, 1998. The arbitral tribunal, *inter alia,* directed the respondent to pay to the appellant compensation for a sum of INR 27, 78,125 (with interest at 18% per annum), on account of losses due to unproductive use of machinery. This portion of the award was disputed by the respondent as the contract between the parties itself did not contemplate a provision for payment of compensation in case of premature termination of the contract. In fact, the contract specifically provided that no compensation would be payable if the contract is terminated on account of termination of the project.

The respondent's petition under Section 34 of the Arbitration Act to set aside the award in respect of the aforesaid claim was dismissed by the single judge of the Madras High Court in 2001. On appeal under section 37, the division bench of the Madras High Court in 2007 partly allowed the appeal and set aside the award relating to the claim for compensation, while holding that the award did not set out the reasons forming the basis of awarding the compensation to the appellant. The order of the division bench was appealed before the Supreme Court by the appellant.

Judgment of the Supreme Court

At the outset, the Supreme Court re-iterated the jurisprudence behind section 34 and observed that the a challenge to an arbitral award under Section 34 has to be strictly based on the grounds set out therein and the courts must be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.

The Supreme Court then proceeded to consider the law on the requirement of a reasoned award under Section 31 and to list out the three characteristics of a reasoned award:

(a) ***The reasoning must be proper*** - If the reasoning in the award is improper, they reveal a flaw in the decision making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act.

(b) ***The reasoning must be intelligible*** - If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all.

(c) ***The reasoning must be adequate*** - The court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the arbitral tribunal, the court needs to have regard to the documents submitted

by the parties and the contentions raised before the arbitral tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the requirement for a reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

The Supreme Court further held that in case of absence of or any gaps in reasoning, the recourse has been provided under Section 34(4) to cure such defects. Only when there is complete perversity in the reasoning, can it be challenged under the provisions of Section 34. In the present instance, the Supreme Court held that "*while the arbitral tribunal has dealt with claims separately under different sub-headings, the award is confusing and has jumbled the contentions, facts and reasoning, without appropriate distinction....Inspite of our independent application of mind based on the documents relied upon, we (sic) cannot sustain the award in its existing form as there is a requirement of legal reasoning to supplement such conclusion..."* The Supreme Court held that the award was not reasoned and was unintelligible, and hence, could not be sustained.

Curiously, however, while upholding the High Court's decision and setting aside the award, the Supreme Court directed the respondents to pay Rs. 30,00,000/- to the appellant, for unproductive use of machinery, with a view to *"providing quietus to the litigation*."

Key Takeaway

The arbitral award, insofar it related to the claim for compensation for unproductive use of machinery, was set aside by the Supreme Court for want of a reasoned and intelligible award. Given the foregoing, it becomes imperative for parties to an arbitration to ensure that their claim statement to the arbitral tribunal specify in adequate clarity the factual background, the claims made, the grounds for each of the claims, the evidence being adduced and the reasoning for the same, with sufficient distinction. Further, the party in whose favour a claim has been awarded should also ensure that the award provides adequate reasoning for the same. In the absence of a reasoned award, where the counter-party has applied for setting aside the award under Section 34, the party in whose favour the award has been passed may request the High Court under section 34(4), seeking directions to the arbitral tribunal to provide reasons for its award, so as to eliminate the grounds for setting aside the award.

FOREIGN INVESTMENT AND RBI UPDATE

1. Rule making power regarding 'Capital Account Transactions' now vested in the Central Government

Sections 139(I), 143 and 144 of the Finance Act, 2015 sought to amend the Foreign Exchange Management Act, 1999 ("**FEMA**"), to transfer the power of making rules / regulations in relation to 'permissible capital account transactions (other than debt instruments)' from the RBI to the Central Government.

The Ministry of Finance ("**MoF**") has notified the commencement of the aforementioned sections of the Finance Act, 2015 with effect from October 15, 2019.

(MoF notification no. S.O. 3715 (E) dated October 15, 2019)

2. MoF has notified the list of instruments to be considered as "debt instruments" and "non-debt instruments"

Further to the transfer of the rule making power regarding Capital Account Transactions vested in the Central Government, the MoF has notified the list of instruments to be considered as "debt instruments" in terms of sub-section (7) of section 6 (*capital account transactions*) of the FEMA.

- Accordingly, the following have been categorised as debt instruments:
  1. government bonds;
  2. corporate bonds;
  3. all tranches of securitisation structure which are not equity tranches;
  4. borrowings by Indian firms through loans; and
  5. depository receipts whose underlying securities are debt securities.

- The following instruments shall be considered as non-debt instruments:-
  1. all investments in equity in incorporated entities (public, private, listed and unlisted);
  2. capital participation in limited liability partnerships ("**LLP**");
  3. all instruments of investment as recognised in the Foreign Direct Investment ("**FDI**") policy as notified from time to time;
  4. investment in units of alternative investment funds ("**AIFs**") and real estate investment trust ("**REITs**") and infrastructure investment trusts ("**InvITs**");
  5. investment in units of mutual funds and exchange-traded fund which invest more than fifty per cent in equity;
  6. the junior-most layer (i.e. equity tranche) of securitization structure;
  7. acquisition, sale or dealing directly in immovable property;
  8. contribution to trusts; and
  9. depository receipts issued against equity instruments.

- All other instruments which have not been categorised as debt or non-debt instruments above, shall be deemed to be debt instruments.

(MoF Notification no. S.O. 3722 (E) dated October 16, 2019)

3. Notification of the new FEMA regulations / rules governing Debt Instruments and Non-Debt Instruments

- Consequent to the vesting of the rule making power in relation to 'permissible capital account transactions' in the Central Government, the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("**FEMA 20R**") and Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 with effect from October 17, 2019 have been superseded and replaced by the following:

  1. The Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("**Debt Instruments Regulations**") issued by the RBI; and

  2. The Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**Non-debt Instruments Rules**') issued by the MoF.

- The provisions governing debt instruments under the Debt Instruments Regulations materially remain the same as that of FEMA 20R.

- While the content of the Non-Debt Instruments Rules is broadly in line with the FEMA 20R, the key changes introduced by Non-debt Instruments Rules (as amended on December 05, 2019) are as follows:

  1. Power to grant specific dispensation:

     (I) While the power to grant specific dispensation from the provisions of the Non-debt Instruments Rules continues to vest in the RBI, it is now required to be exercised by the RBI, in consultation with the Central Government.

     (ii) The pricing guidelines, documentation and reporting requirements relating to sale/ purchase of securities by persons resident outside India to/ from persons residents in India shall now be specified by the RBI, in consultation with the Central Government, from time to time.

  2. Aggregate Limits for investments under the by Foreign Portfolio Investors ("**FPIs**"):

     (i) The Non-debt Instruments Rules provide that with effect from April 1, 2020, the aggregate limit shall be the sectoral caps applicable to the Indian company. This aggregate limit may be decreased by the Indian company concerned to a lower threshold limit of 24% or 49% or 74% as deemed fit, with the approval of its board of directors and approval of the shareholders through a special resolution, before March 31, 2020.

     (ii) Further, the Indian company which has decreased its aggregate limit to 24% or 49% or 74%, may increase such aggregate limit to 49% or 74% or the sectoral cap or statutory ceiling respectively as deemed fit, provided approval of its board of directors and approval of shareholders through a special resolution is obtained. However, the aggregate limit cannot be reduced to a lower threshold once it has been increased to a higher threshold. The aggregate limit with respect to an Indian company in a sector where FDI is prohibited has been prescribed as 24%.

  3. Individual/Group Limits for investments by FPIs:

     (i) In terms of FEMA 20R, in case an FPI or an investor group acquires shares of an Indian company in excess of 10% of the total paid-up equity capital on a fully diluted basis or 10% of the paid-up value of each series of debentures or preference shares or share warrants, such FPI could divest the excess shareholding within 5 trading days, failing which the total investment in the company by the FPI and its investor group shall be considered FDI.

     (ii) The Non-debt Instruments Rules additionally require the FPI which chooses not to divest the excess shareholding to, through its designated custodian, bring the

same to the notice of the depositories as well as the concerned company for effecting necessary changes in their records, within 7 trading days from the date of settlement of the trades triggering the limit.

4. The definition of 'equity instruments' and 'listed Indian company':

   (i) The definition of 'equity instruments' has been introduced under the Non-debt Instruments Rules and have been defined to mean equity shares, convertible debentures, preference shares and share warrants issued by an Indian company.

   (ii) The definition of 'listed Indian company' has been modified to include a company which has any of its debt instruments listed on a recognised stock exchange in India.

5. Foreign investments in trusts made permissible:

   'Contribution to trusts' has been included as one of the non-debt instruments under the Non-debt Instruments Rules, thereby permitting foreign investments in trusts in accordance with the regulations.

(Notification No. S.O. 3732(E) dated October 17, 2019)

4. Notification of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019

- Consequent to the Non-debt Instruments Rules, the RBI has also issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-debt Instruments) Regulations, 2019 ("**MOPR Regulations**") relating to mode of payment and reporting requirements for investment in India by a person resident outside India (Non-Resident).

- The following additions have been made under Regulation of 3 of MOPR Regulations, on the mode of payment and remittance of sale proceeds:

  1. Investments by FPI - The sale proceeds of units of investment vehicles other than domestic mutual fund may be remitted outside India.

  2. Investments by Non-Resident Indian ("**NRI**") or Overseas Citizen of India ("**OCI**") on repatriation basis:

     (i) Investment in units of domestic mutual fund shall be paid as inward remittance from abroad through banking channels or out of funds held in Non-Resident External ("**NRE**")/Foreign Currency Non-Resident (Bank) ("**FCNR(B)**") account.

     (ii) Subscription to National Pension System shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/ Non-Resident Ordinary Rupee ("**NRO**") account.

     (iii) The sale proceeds (net of taxes) of units of mutual funds and subscription to National Pension System may be remitted outside India or may be credited to NRE Portfolio Investment Scheme ("**PIS**") / FCNR(B) / NRO account of the person concerned at the option of the NRI/OCI investor.

(Notification No. FEMA. 395/2019-RB dated October 17, 2019)

5. Amendment to the Foreign Exchange Management (Deposit) Regulations, 2016 in respect of SNRR accounts

RBI has amended the Foreign Exchange Management (Deposit) Regulations, 2016 ("**FEMA 5(R)**"). In terms of the amendment, Schedule 4 of FEMA 5(R), now provides for the following in respect of Special Non-Resident Rupee ("**SNRR**") account:

1. Any Non-Resident having a business interest in India, may open SNRR account with an authorised dealer for the purpose of putting through bona fide transactions in rupees, not involving any violation of the provisions of the FEMA, rules and regulations made thereunder. Details regarding what constitutes 'business interest' has also been provided.

2. The tenure of the SNRR account shall be concurrent to the tenure of the contract / period of operation / the business of the account holder and

shall not exceed seven years (except for the SNRR accounts opened for the transactions specified in Paragraph 1 of Schedule 4).

3. Any amount due/ payable to Non-Resident nominee from the account of a deceased account holder, shall be credited to NRO/NRE account of the nominee with an authorised dealer/ authorised bank in India or by remittance through normal banking channels

(Notification No. FEMA 5 (R)/(3)/2019-RB dated November 13, 2019)

6. Amendments made to the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 with respect to SNRR accounts

The RBI has amended the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 ("**FEMA 14(R)**") with respect to the SNRR accounts. The amendments include:

1. Under sub-regulation (1) of Regulation 4 (*Manner of Receipts in certain cases*), receipt for export by the exporter by way of debit to SNRR account has been allowed in addition to FCNR and NRE account.

2. In accordance with sub-regulation (3) of Regulation 4, payment may also be received in rupees by a person resident in India from SNRR account of a Non-Resident after ensuring that the underlying transactions are in conformity with FEMA provisions.

3. A person resident in India has been permitted to make payments for imports into India:

   (i) by credit to SNRR account maintained by a Non-Resident with an authorised dealer or an authorised bank in India; and

   (ii) in rupees to SNRR account of the Non-Resident after ensuring that the underlying transactions are in conformity with FEMA provisions.

(Notification No. FEMA 14(R)/(1)/2019-RB dated November 13, 2019)

CORPORATE LAW UPDATES

1. Amendments to the Companies (Meetings of Board and its Powers) Rules, 2014

MCA has amended the following rules of the Companies (Meetings of Board and its Powers) Rules, 2014:

(a) sub-rule (2) of Rule 11 (*Loan and investment by a company under section 186 of the Act*) has been amended to replace the reference to "*business of financing of companies"* therein to the expression *"**business of financing industrial enterprises**"*.

(b) sub-rule (3)(a) of Rule 15 (*Contract or arrangement with a related party*) to simplify the thresholds above which related party transactions require shareholders' approval under Section 188(1) of the Act, as follows:

(i) for contracts of sale, purchase or supply of any goods or materials, directly or through appoint of agent, as mentioned in clause (a) and clause (e) of sub-section (1) of section 188, a value amounting to 10% or more of the company's turnover;

(ii) for contracts of sale or otherwise disposing of or buying immovable property of any kind, directly or through appointment of an agent, as mentioned in clause (b) and (e) of sub-section (1) of section 199, a value amounting to 10% of more of the company's networth;

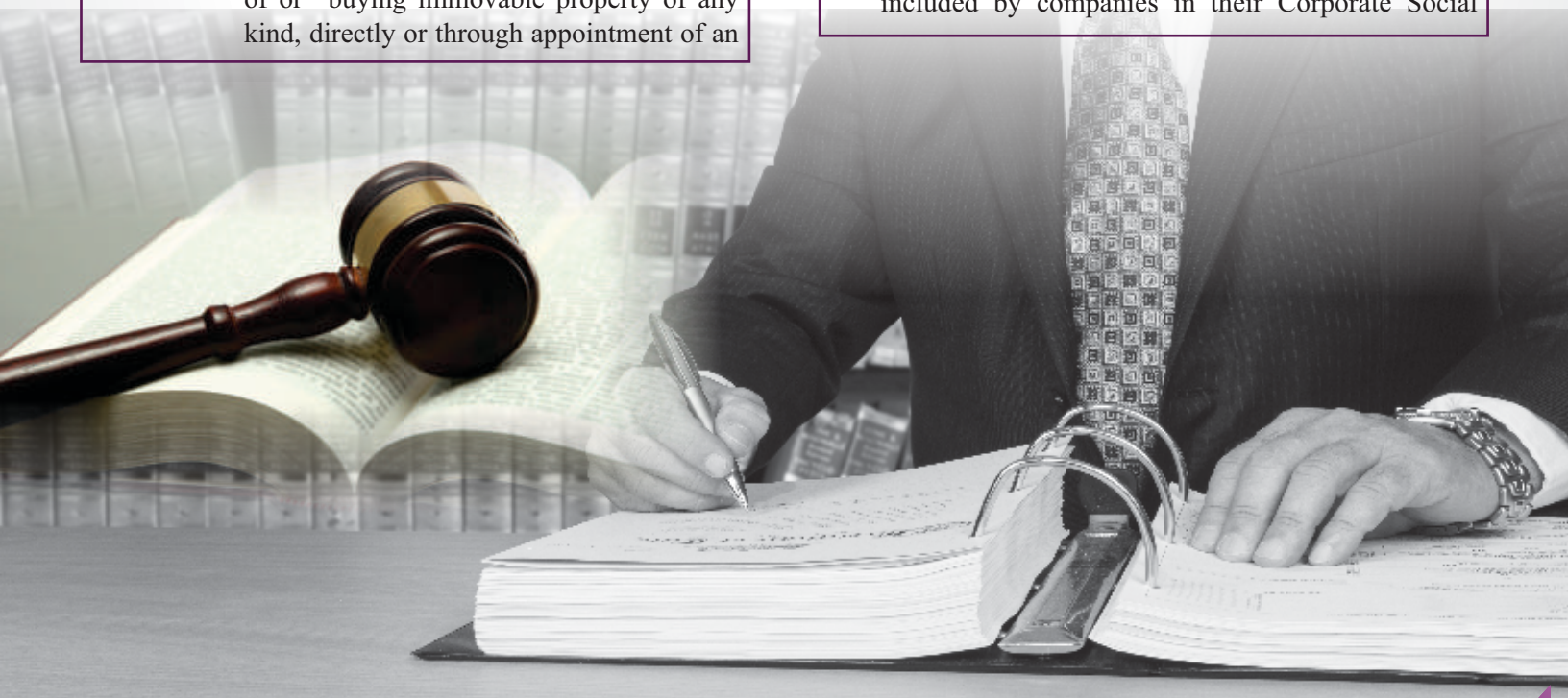
(iii) for contracts for leasing property of any kind as mentioned in clause (c) of sub-section (1) of section 188, a value amounting to 10% or more of the company's turnover; and

(iv) for contracts for availing or rendering of any services, directly or through appointment of agent, as mentioned in sub-clause (d) and (e) of sub-section (1) of section 188, a value amounting to 10% or more of the company's turnover.

(MCA Notifications No. G.S.R. 777(E) dated October 11, 2019 and No. G.S.R. 857(E) dated November 18, 2019)

2. Amendments to Schedule VII (Permissible CSR Activities) of the Act

MCA has amended item (ix) and the entries relating thereto of Schedule VII (Activities which may be included by companies in their Corporate Social



Responsibility ("**CSR**") Policies) of the Act, to broaden the scope of incubators to which companies can contribute. After amendment, item (ix) of Schedule VII reads as:

"*(ix) Contribution to incubators funded by Central Government or State Government or any agency or Public Sector Undertaking of Central Government or State Government, and contributions to public funded Universities, Indian Institute of Technology (IITs), National Laboratories and Autonomous Bodies (established under the auspices of Indian Council of Agricultural Research (ICAR), Indian Council of Medical Research (ICMR), Council of Scientific and Industrial Research (CSIR), Department of Atomic Energy (DAE), Defence Research and Development Organization (DRDO), Department of Biotechnology (DBT), Department of Science and Technology (DST), Ministry of Electronics and Information Technology) engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs);".*

(MCA Notification No. G.S.R. 776(E) dated October 11, 2019 read with Corrigendum issued vide MCA Notification No. G.S.R. 859(E) dated November 19, 2019)

3. Amendments to Companies (Incorporation) Rules, 2014

MCA has amended the Companies (Incorporation) Rules, 2014 as follows:

S. No.	Rule	Amendment
1	Rule 8A(1)(b)	Rule 8A(1)(b) provided that the name of a company shall be considered undesirable if the name includes a trade mark registered under the Trade Marks Act, 1999 in the same class of goods or services in which the activity of the company is being carried out or is proposed to be carried out, unless the consent of the owner **or applicant for registration**, of the trade mark has been obtained and produced by the promoters. Post the amendment, the phrase "or applicant for registration" has been omitted from the language of Rule 8A(1)(b).
2	Rule 25A(1) (Active Company Tagging Identities and Verification (ACTIVE))	Rule 25A required companies incorporated on or before the December 31, 2017 to file e-Form ACTIVE on or before June 15, 2019. Item (iii) of the fourth proviso states that the company will not be allowed to file DIR-12 (Changes in Director except cessation) if it fails to file e-Form ACTIVE within the timelines prescribed. Item (iii) has now been substituted to provide that if a company does not comply with the prescribed timelines of filing e-Form ACTIVE, it will not be allowed to file form DIR-12 except in case of: (i) cessation of any director; or (ii) the total number of directors falling below the statutory minimum under section 149(1)(a) on account of disqualification. (iii) where DINs of all or any its directors have been deactivated. (iv) appointment of directors for implementation of the order passed by the Court or Tribunal or Appellate Tribunal under the provisions of this Act or under the Insolvency and Bankruptcy Code, 2016.
3	Rule 28 (Shifting of registered office within the same State)	Sub-rules (2) and (3) have been added to Rule 28 providing that the Regional Director shall examine the application for shifting the registered office within the same State and the application may be put up for orders without hearing. The order either approving/rejecting the application shall be passed within fifteen days of the receipt of application. The certified copy of order of the Regional Director, approving the alteration of memorandum for transfer of registered office of company within the same State, shall be filed in Form No.INC-28 along with fee with the Registrar of State within thirty days from the date of receipt of certified copy of the order.

(MCA Notification No. G.S.R. 793(E) dated October 16, 2019)

4. Notification of rules for creation of databank of Independent Directors

MCA has issued the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, pursuant to Section 150 of the Act. These rules provide for, *inter alia*, the following:

(a) The Indian Institute of Corporate Affairs (the "**Institute**") shall create and maintain an online databank of persons willing and eligible to be appointed as independent directors. The expression "persons willing and eligible to be appointed as independent director" shall include individuals already serving as independent directors on the Board of companies.

(b) The databank shall contain details in respect of each person eligible and willing to be appointed as independent director such as DIN (Director Identification Number), Income Tax PAN, name and surname, contact details (Address, phone number, e-mail id), educational and professional qualifications, experience / expertise, any pending criminal proceedings as specified in S. 164(1)(d)(o) of Act.

(c) The databank should also contain list of:

(i) limited liability partnerships (LLPs)in which he is or was a designated partner along with - the name of LLP; the nature of industry; and the duration- with dates;

(ii) companies in which he is or was director along with - the name of the company; the nature of industry; the nature of directorship and duration - with dates.

(d) The institute, shall with the prior approval of the Central Government, charge a fee to individuals for inclusion of their names in the data bank of independent directors and companies for accessing the information on independent directors.

(e) The institute shall conduct an online proficiency self-assessment test covering areas relevant to the functioning of an individual acting as an independent director. It shall also provide an option for individuals to take advanced tests in the areas specified and prepare the necessary advanced study material in this respect. It shall also prepare basic study material, online lessons for individuals taking the online proficiency self-assessment test. No separate fees shall be charged for the above.

(f) On a daily basis, the institute shall share with the Central Government, a cumulative list of all individuals -

(i) whose names have been included in the data bank along with the date of inclusion and their Income Tax PAN or Passport number in case of foreign director (not required to have Income-Tax PAN);

(ii) whose applications for inclusion in the data bank have been rejected along with grounds and the dates of such rejection; and

(iii) whose names have been removed from the data bank along with grounds and the dates of such removal

(g) A panel consisting of 10 members nominated by Central Government shall be created for approving the outline of the courses and study material prepared by the institute.

(h) MCA launched the Independent Director's Databank on December 2, 2019 in accordance with the provisions of the Act. The Databank can be accessed at www.mca.gov.in or www.independentdirectorsdatabank.in. All existing Independent Directors are required to register themselves in the databank within 3 months from 01 December 2019. They are also required to pass a basic online proficiency self-assessment test which will available from March 2020 onwards within 12 months thereafter.

(MCA Notification No. G.S.R. 805(E) dated October 22, 2019; MCA Notification No. S.O. 3791(E) dated October 22, 2019 and MCA Press Release dated December 2, 2019)

5. Amendments to the Companies (Appointment and Qualification of Directors) Rules, 2014 to specify compliances for 'person eligible and willing to be appointed as independent director'

A new Rule 6 regarding compliances required by a "person eligible and willing to be appointed as an independent director" has been introduced providing that:

(a) Every individual:

(i) who has been appointed as an independent director in a company, as on December 01, 2019, shall within three months from such date; or

(ii) who intends to get appointed as an independent director in a company after December 01, 2019, shall before such appointment, apply online to the Indian Institute of Corporate Affairs at Manesar (notified under section 150 of the Act) for inclusion of his name in the data bank for one year or five years or for his life-time. Further, any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

(b) Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for his life-time, within 30 days from the date of expiry of the period up to which the name of the individual was applied for inclusion in the data bank. If the individual fails to file a renewal application, the name of such individual shall stand removed from the data bank of the institute. No application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

(c) Independent director shall be required to submit a declaration of compliance with the above rules along with the declaration as to his independence required under S. 149(7) of the Act.

(d) Every individual whose name included in the data bank shall pass an online proficiency self-assessment test conducted by the institute within one year from the date of inclusion of his name in the data bank, failing which, his name shall be removed from the databank. However, an individual who has served for 10 years as on the date of inclusion of his name in the databank as director or key managerial personnel (KMP) in a listed/unlisted public company having a paid-up share capital of Rs. 10 crore or more shall not be required to pass the online proficiency self-assessment test. For the purpose of calculation of 10 years referred to above any period during which an individual was acting as a director or as a KMP in 2 or more companies at the same time shall be counted only once.

(e) An individual who has obtained a score of 60% in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test. There shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.

(MCA Notification No. G.S.R. 804(E) dated October 22, 2019)

6. Amendments to the Companies (Accounts) Rules. 2014 regarding proficiency of independent directors

Rule 8(5) of the Companies (Accounts) Rules, 2014 requires certain additional details in the board report to be submitted by every listed company and every other public company having a paid up share capital of Rs. 25 crore rupees or more calculated at the end of the preceding financial year. A new sub-clause (iiia) which requires the board report to also include a statement regarding opinion of the Board with regard to integrity, expertise and experience (including the proficiency) of the independent directors appointed during the year. "Proficiency" means the proficiency of the independent director as ascertained from the online proficiency self-assessment test conducted by the institute notified under section 150(1).

(MCA Notification No. G.S.R. 803(E) dated October 22, 2019)

7. MCA issues notice regarding disqualification of directors

MCA has issued a notice stating that the Registrars of Companies (ROCs) are in process of identification and flagging of directors disqualified under section 164(2) (a) of Act for their default of non-filing of financial statement or annual return for continuous period of three financial year i.e. 2015-16, 2016-17 and 2017-18. In this regard all the defaulting directors have been cautioned to find the pending statutory returns and do necessary compliance as per provisions of law, otherwise action will be initiated under section 164 of the Act and Rules made thereunder. The DINs of such directors are not allowed to be used for filing any e-forms on MCA21 portal.

(MCA notice dated October 31, 2019)

8. Extension of timeline to file e-form BEN 1 and BEN 2 regarding significant beneficial ownership .

MCA has extended the time limit for filing e-form No. BEN-2 (*Return of Significant Beneficial Owners by a Company*) up to March 31, 2020 without payment of additional fee and thereafter fee and additional fee shall be payable. Consequent to the extension in the date of filing of e-Form BEN-2, the date of filing of Form BEN-1 may be construed accordingly.

(MCA Notification No. F. No.*01/01/2018-CL-V-Pt-I, dated January 1, 2020)*

SECURITIES LAW UPDATE

INFORMAL GUIDANCE

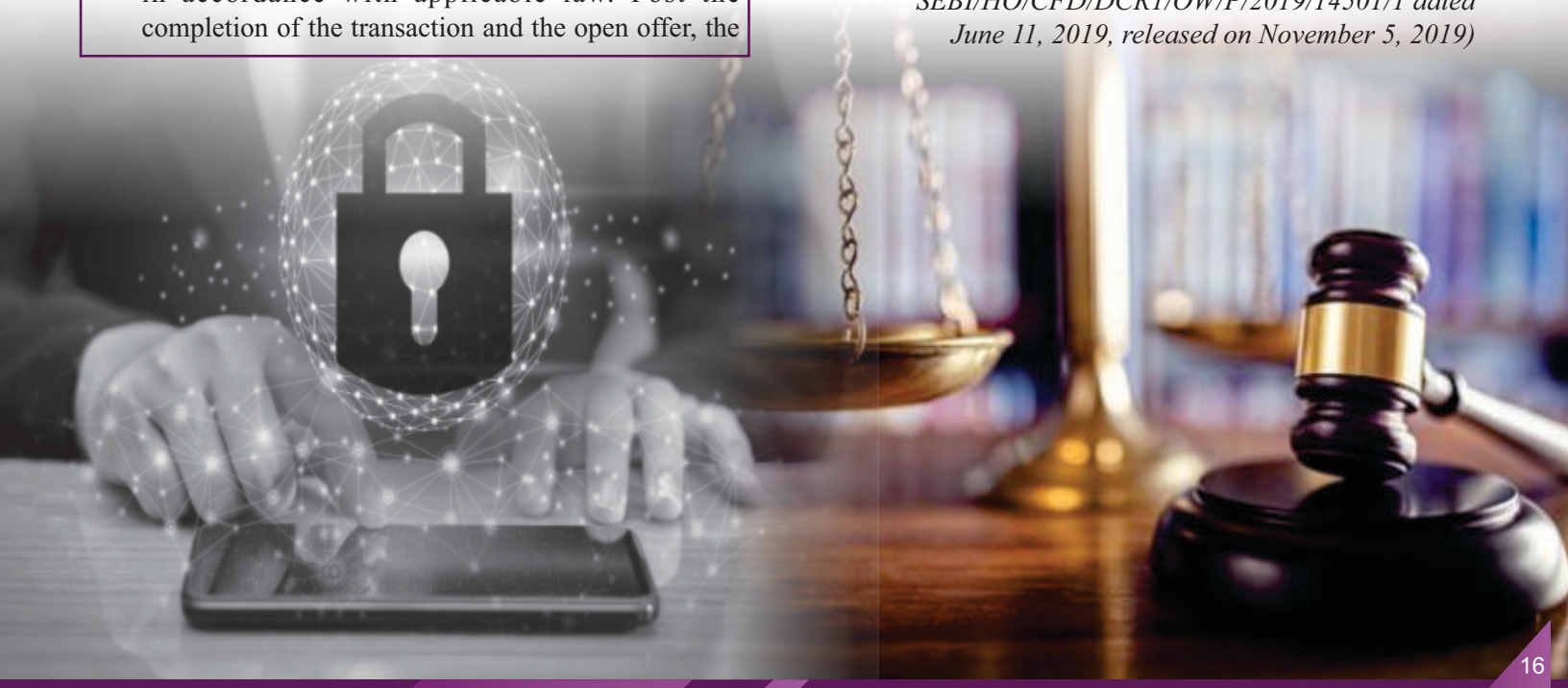
1. Informal Guidance on consequences of compulsory delisting under delisting regulations

This informal guidance was sought in context of a public listed company ("**Company**") exploring the divestiture of whole or part of its real-estate assets to potential buyers. An individual promoter of the Company ("**IP**"), holding 0.01% of shares in the Company, was also a promoter of another company that was compulsorily delisted ("**Delisted Company**"). Regulation 24 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 ("**Delisting Regulations**"), *inter alia*, prohibits a compulsorily delisted company, its whole time directors, its promoters and the companies which are promoted by any of them to directly or indirectly access the securities market or seek listing for any equity shares for a period of 10 years from the date of such delisting. In light of the above, the Company sought clarification in relation to applicability of the Regulation 24 in the following scenarios:

- **Scenario I**: The entire controlling stake and management control of the existing promoter and promoter group in the Company is sold to a third party in accordance with applicable law. Post the completion of the transaction and the open offer, the existing promoter and promoter group would no longer be associated with the Company; or
- **Scenario II**: The specific business of the Company is demerged into a new entity through a NCLT sanctioned scheme, and post the demerger, the resulting entity shall have mirror shareholding of the Company.

The Securities and Exchange Board of India ("**SEBI**") through its guidance clarified that, since IP was a promoter of the Delisted Company and happened to be promoter of the Company, the consequences of Regulation 24 shall be applicable on the Company. With regard to the proposed sale under scenario I, SEBI's view was that the sale would not absolve IP from compliance of Regulation 24. However, since IP would no longer be associated with the Company as a promoter, or a shareholder or in management and the Company would be functioning under a whole new management/shareholder, the restriction would not continue to apply to the Company. In case of a demerger in scenario II, SEBI's view was that the newly formed entity would attract the restrictions of Regulation 24 as it will mirror shareholding pattern of the Company.

(SEBI Informal Guidance No. SEBI/HO/CFD/DCR1/OW/P/2019/14501/1 dated June 11, 2019, released on November 5, 2019)



2. Informal Guidance on determination of a promoter not having any role in management as a 'designated person'

In an informal guidance sought by Apollo Tricoat Tubes Limited ("**ATTL**"), a company listed on the BSE Limited, SEBI' s views were sought on whether a person who is merely continuing to be named as promoter owing to the provision of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**SEBI LODR Regulations**") but not acting as a promoter of the company and exercises no control, has no role in the management and not holding any position in the company will be identified as a 'non-designated persons' for the purpose of regulation 9 (4) of the SEBI (Prevention of Insider Trading) Regulations, 2015 ("**PIT Regulations, 2015**"). In this regard, SEBI noted the following:

- The PIT Regulations, 2015 identify promoters as designated persons. Hence, a person identified as a promoter is required to comply with the code of conduct requirements as required by other designated persons.
- Mr. Saket Agarwal, by virtue of being named as a promoter and on account of continuing to hold greater than 10% of the total voting rights in ATTL shall be identified as a designated person for the purpose of compliance with ATTL's code of conduct. Resultantly, any trade by Mr. Saket Agarwal during trading window closure would tantamount to violation of clause 4 of the Schedule B of the PIT Regulations, 2015.

(SEBI Informal Guidance No. SEBI/HO/ISD/OW/P/2019/25981/2019 dated October 1, 2019)

3. Informal Guidance under SEBI (Share Based Employee Benefits) Regulations, 2014

This informal guidance was issued in context of a public listed company ("**Company X**") exploring options for issuing its equity shares ("**Equity Shares**") either by way of stock options or under any other permissible modes including acquisition from the open market to the employees of (i) one of its promoter holding 25.72% of the Equity Share capital of the Company X as on July 31, 2019 ("**Promoter Entity"**), and (ii) a registered trust, which is a philanthropic arm undertaking CSR activities for the group to which the Company X is part of ("**CSR Trust**"). The Company X has an employee stock option scheme ("**ESOP Scheme**") in terms of the SEBI (Share Based Employee Benefits) Regulations, 2014 ("**SEBI SBEB Regulations**"), which is applicable to all the permanent employees and directors (other than independent directors and promoters/promoter group) of the Company X and its subsidiary companies. The Promoter Entity and the CSR Trust is neither the holding company nor subsidiary of the Company X. In light of the above, the Company X sought clarification in relation to applicability of the SEBI SBEB Regulations in the scenarios stated below and SEBI submitted the following:

- **Scenario I**: If SEBI permits, the Company X may grant stock options to the employees of the Promoter Entity and the CSR Trust since the employees belong to the same group as the Company X. The costs associated with the grant/exercise of options by the concerned employees will be borne by the Promoter Entity and the CSR Trust for their respective employees.

  SEBI clarified that since the Promoter Entity and the CSR Trust are neither subsidiary nor holding companies of the Company X, employees of the Promoter Entity and the CSR Trust would not be covered under Regulation 2(1)(f) of SEBI SBEB Regulations.

- **Scenario II**: Request the employees welfare trust ("**Employee Trust**") of the Company X to acquire Equity Shares from the open market which will be kept in a separate demat account. The entire consideration for acquiring the Equity Shares shall be paid upfront by the Promoter Entity and the CSR Trust to the Employee Trust for their respective employees (excluding any person belonging to the promoter and promoter group of the Company X). The Promoter Entity and the CSR Trust shall ask the Employee Trust to release the acquired Equity Shares in favour of the identified employees over a period of time in accordance with the agreed terms by the Promoter Entity and the CSR Trust with their identified

employees. The boards of Promoter Entity and the CSR Trust shall decide the price and the manner in which the equity shares will be granted to such employees.

SEBI clarified that such market acquisition by the Employee Trust established for the benefit of the employees of the Company X and its group companies would be covered under the ambit of SEBI SBEB Regulations and accordingly, the provisions of SEBI SBEB Regulations, wherever applicable, would be required to be complied with.

(SEBI Informal Guidance No. SEBI/HO/CFD/DCR2/OW/P/2019/026315/1 dated October 4, 2019, released on January 3, 2020)

4. Informal Guidance on a 'designated person' holding shares in different capacities

In an informal guidance sought by Arvind Ltd. ("**AL**") regarding Mr. P, who is a promoter and director of AL, and holding shares of AL under his PAN in (a) in his personal capacity as an individual, (b) in the capacity of trustee for the benefit of Mr. P's family, (c) in the capacity of trustee for the benefit of the beneficiaries other than Mr. P's family and (d) in the capacity of executor for various wills, SEBI noted the following:

- As per SEBI's Circular MRD/DoP/Cir-09/06 dated July 20, 2006 issued by MRD, a person holding shares in different capacities is required to hold such shares under the PAN of respective entity.
- With respect to query on whether Mr. P will be considered a designated person for the shares held by him under his personal capacity alone or for all the shares held under all the capacities, Regulation 9 (4) of the PIT Regulations, 2015, *inter alia*, specifies the persons to be identified as 'designated person' on the basis of role and function in the organization and access to UPSI. If Mr. P is specified as a 'designated person' by the board of directors of AL, the restrictions of contra-trade would be applicable to all shares held under the PAN of Mr. P irrespective of the capacities in which Mr. P holds shares in the company.
- If a trustee holds shares under his own PAN, restrictions of contra-trade will be applicable if such trustee is a 'designated person' in terms of regulation 9 (4) of the PIT Regulations, 2015.

(SEBI Informal Guidance No. SEBI/HO/ISD/OW/P/2019/31266/1 dated November 25, 2019)

5. Informal Guidance on investment by a Category II Alternative Investment Fund

In an informal guidance sought by Blacksoil Realty Trust ("**BRT**"), registered as a category II AIF with SEBI under SEBI (Alternative Investment Regulations, 2012 ("**AIF Regulations**"), SEBI has noted the following;

- Regulation 17 (a) read with Regulation 2(1)(o) of the AIF Regulations indicates that category II AIFs can invest in LLP.
- Regulation 3(4)(b) and Regulation 2(i) of the AIF Regulations indicate that category II AIFs include the funds which primarily invest in debt or debt related securities of listed or unlisted investee companies.
- From a reading of Regulations 15(1)(c), 2(1)(p) and 2(1)(h) of the AIF Regulations, it may be interpreted that for the purpose of computing 25% threshold of Regulation 15(1)(c) of the AIF Regulations, the fund should consider 25% of total commitment net of estimated expenditure for administration and management of the fund.
- There is no express bar for an AIF to borrow funds from its manager, subject to the compliance of other conditions mentioned in the AIF Regulations (including that of the conflict of interests), other applicable laws and provisions.
- Regulation 10 of the AIF Regulations has not provided for the upper/ maximum limit for investment made by the manager or sponsor. However, the quantum of investment made by the manager or sponsor must not be contrary to the continuous eligibility requirement of an AIF.

(*SEBI Informal Guidance No. SEBI/ HO/ IMD/OW /P/23462/ 2019 dated September 5, 2019 published on December 6, 2019*)

AMENDMENTS AND CIRCULARS

1. SEBI issues framework for issue of depository receipts

SEBI has issued a circular providing for a framework for issuance of depository receipts ("**Drs**"). A company incorporated in India and listed on a recognized stock exchange in India ("**Listed Company**") can issue equity shares and debt securities, which are in dematerialized form and rank *pari passu* with the securities issued and listed on a recognized stock exchange ("**Permissible Securities**") or their holders may transfer Permissible Securities, for the purpose of issue of DRs, subject to compliance with the requirements prescribed under the circular. These requirements include, *inter alia*, the following:

Eligibility:

- The Listed Company is in compliance with the SEBI LODR Regulations. The Listed Company eligible to issue Permissible Securities, for the purpose of issue of DRs, if (i) it, its promoters, promoter group or directors or selling shareholders are not debarred from accessing the capital market by SEBI; (ii) its promoters or directors are not (a) a promoter or director of any other company which is debarred from accessing the capital market by SEBI, or (b) fugitive economic offender; and (iii) it or its promoters or directors are not wilful defaulters.
- Existing holders is eligible to transfer Permissible Securities, for the purpose of issue of DRs, if (i) the Listed Company or the holder transferring Permissible Securities are not (a) debarred from accessing the capital market by SEBI, or (b) wilful defaulters; and (ii) the holder transferring Permissible Securities or any of the promoters or directors of the Listed Company are not fugitive economic offenders.
- In case of issue and listing of DRs pursuant to 'transfer by existing shareholders', (i) for initial issue, the Listed Company to provide an opportunity to its equity shareholders to tender their shares for participation in such listing of DRs; and (ii) subsequent issue to be subject to the limits approved pursuant to a special resolution in terms of the Companies (Issue of Global Depository Receipts) Rules, 2014.

Permissible Holder:

Permissible holder means a holder of DR, including its beneficial owner(s), who is not (a) a person resident in India; and (b) an NRI.

Permissible Jurisdictions and International Exchange(s):

Issue of Permissible Securities or transfer Permissible Securities of existing holders, for the purpose of issue of DRs, is allowed in only permissible jurisdictions and the DRs to be listed on any of the specified international exchange(s) of the permissible jurisdiction.

Pricing:

In case of (i) a simultaneous listing of Permissible Securities on recognised stock exchanges in India under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR Regulations**"), and DRs on the international exchange, the price of issue or transfer of Permissible Securities, for the purpose of issue of DRs by foreign depository, shall not be less than the price for the public offer/ preferential allotment/ qualified institutions placement to domestic investors under the applicable laws; and (ii) issue of Permissible Securities or 'transferred by the existing holders', for the purpose of issue of DRs by the foreign depository, the same shall be issued at a price, not less than the price applicable to a corresponding mode of issue of such Permissible Securities to domestic investors under the applicable laws.

Voting Rights:

The agreement entered among the Listed Company, the depository and the holder of DRs, to provide that the voting rights on Permissible Securities, if any, shall be exercised by the DR holder through the foreign depository pursuant to voting instruction only from such DR holder.

Obligations of the Listed Company:

- DRs are issued only with Permissible Securities as the underlying.
- Ensure compliance with extant laws relating to issuance of DRs, including, requirements prescribed in the circular, the Act, the FEMA, Prevention of Money-Laundering Act, 2002, and rules and regulations made thereunder.

- Listed Companies to, through an intermediary, file a copy of the initial document for initial issue of DRs with SEBI and the recognised stock exchanges. Post which, SEBI to forward its comments, if any, to the recognized stock exchanges within seven working days. If no comments are issued within such time, it shall be deemed that SEBI does not have comments to offer. Thereafter, recognized stock exchange to consider SEBI's comments while granting in-principle approval to the Listed Company and decide on the approval within 15 working days of receipt of application and required documents. Apart from the above, the final document for such initial issue shall also be filed with SEBI and recognized stock exchanges for record purpose.
- Public disclosures made by the Listed Company on international exchange(s) in compliance with the applicable law, to be also filed with the recognized stock exchange in India as soon as reasonably possible but not later than 24 hours from the date of filing.

In addition to the above, the circular also prescribes certain other obligations of the Listed Companies, Indian depository, foreign depository and domestic custodian.

(SEBI Circular No. SEBI/HO/MRD/DOP1/CIR/P/2019/106 dated October 10, 2019)

2. SEBI issues circular regarding compliances upon resignation of statutory auditor

SEBI has issued a circular laying down the conditions to be complied with upon resignation of the statutory auditor of a listed entity and their material subsidiaries with respect to the limited review/audit report as per the SEBI LODR Regulations. Some of the key highlights of this circular are as follows:

Conditions while appointing/re-appointing an auditor

- Listed entities and material subsidiaries shall ensure that an auditor issues the limited review/audit report, if they resign within 45 days from the end of a quarter.
- Auditors resigning after 45 days from the end of a quarter shall issue the limited review/audit reports for the quarter concerned as well as the next quarter.
- If the auditor has signed the limited review/audit report for the first three quarters of a financial year, then the auditor shall, before such resignation, issue the limited review/ audit report for the last quarter of such financial year as well as the audit report for such financial year.

Other conditions relating to resignation

- Auditor has to approach the chairman of the audit committee in case of any concern with the management of listed entity/material subsidiary such as non-availability of information or non-cooperation by the management that may hamper the audit process. The audit committee shall receive such concern directly and immediately without waiting for the quarterly audit committee meetings.
- In case the auditor proposes to resign, all concerns with respect to the proposed resignation, along with relevant documents shall be brought to the notice of the audit committee.
- Auditor shall inform the audit committee of the details of information/explanation sought and not provided by the management where the proposed resignation is due to non-receipt of information/explanation from the company. Post deliberation, the audit committee/board of directors to communicate its views to the management and the auditor, on receipt of information from the auditor relating to the proposal to resign.
- If the listed entity or its material subsidiary does not provide the required information, the auditor shall provide an appropriate disclaimer in the audit report in accordance with the Standards of Auditing as specified by Institute of Chartered Accountants of India / The National Financial Reporting Authority.

Obligations of the listed entity/material subsidiary

- The listed entity/material subsidiary to include conditions mentioned above in the terms of appointment of the statutory auditor at the time of appointing/re-appointing the auditor. If already appointed, the terms of appointment to be modified for giving effect to the above. The practicing company secretary to certify compliance by a listed entity with the above conditions in the annual secretarial compliance report.

The listed entity/its material subsidiary to obtain information from the auditor, upon resignation, in the prescribed format and the listed entities shall disclose reasons for resignation of the auditor as soon as possible but not later than 24 hours of receipt of such reasons.

- The audit committee upon resignation of the auditor, will deliberate upon the concerns raised by the auditor regarding the resignation as soon as possible, and not later than the date of the next audit committee meeting and communicate its views to the management. The listed entity shall ensure the disclosure of the audit committee's views to the stock exchanges as soon as possible within 24 hours after the date of such audit committee meeting.
- The above provisions shall not be applicable in cases where the auditor is disqualified due to operation of any condition mentioned in Section 141 of the Act.

(SEBI Circular No. CIR/CFD/CMD1/114/2019 dated October 18, 2019)

3. Operational guidelines for foreign portfolio investors, designated depository participants and eligible foreign investors

SEBI has issued operational guidelines for FPIs and Designated Depository Participants (DDPs) ("**Operational Guidelines**") to facilitate implementation of SEBI (Foreign Portfolio Investors) Regulations, 2019.

The existing circulars, FAQs, operating guidelines, other guidance issued by SEBI shall stand withdrawn with the issue of these Operating Guidelines. With respect to the directions or other guidance issued by SEBI, as specifically applicable to FPIs, shall continue to remain in force.

(SEBI Operational guidelines for foreign portfolio investors, designated depository participants and eligible foreign investors issued on November 5, 2019)

4. Issuance of FAQs on PIT - Regulations, 2015

SEBI has issued FAQs on the PIT - Regulations, 2015, clarifying, *inter alia*, on issues related to requirement of pre-clearance for exercise of employee stock options, trading in American Depository Receipts ("**ADRs**") and Global Depository Receipts ("**GDRs**") by employees of Indian companies and information to be collected by a company in case a designated person resigns.

(SEBI FAQs on PIT - Regulations, 2015 issued on November 4, 2019)

5. Reporting of changes in terms of investment

SEBI has partially modified the SEBI Circular on Valuation of Money Market and Debt Securities (Circular No. SEBI/HO/IMD/DF4/CIR/P/2019/102 dated September 24, 2019). Paragraph 9 of the aforementioned circular specifies conditions to be adhered to by mutual funds, while making any change to terms of an investment. One such condition, laid down in Paragraph 9.1.1, mandates immediate reporting of any changes to the terms of investment, which may have an impact on valuation, to the valuation agencies. This paragraph has been modified to read as follows:

"*Any changes to the terms of investment, including extension in the maturity of a money market or debt security, shall be reported to valuation agencies and SEBI registered Credit Rating Agencies (CRAs) immediately, along-with reasons for such changes.*"

(SEBI circular SEBI/HO/IMD/DF4/CIR/P/2019/126 dated November 6, 2019)

6. SEBI enhances due diligence for dematerialization of physical securities

SEBI through notification bearing number SEBI/LAD-NRO/GN/2018/24 had previously amended the SEBI LODR Regulations, prohibiting the transfer of securities held in physical mode with effect from April 1, 2019. Thereafter, certain standardised norms for the documentation and procedure in this respect were stated pursuant to SEBI circular bearing reference number SEBI/HO/MIRSD/DOS3/CIR/P/2018/139 dated November 6, 2018.

SEBI has now issued a circular directing the depositories and the listed companies/registrar and transfer agents ("**RTAs**") to implement a due diligence process to augment the integrity of the system in processing of dematerialization request in respect of the remaining physical shares ("**Physical Shares**"). Some of the key directions are as follows:

- Listed companies or their RTAs shall provide a static database (including name, folio numbers, certificate numbers, distinctive numbers and PAN) of their members holding Physical Shares as on March 31, 2019, to the Depositories, latest by December 31, 2019 ("**Cut-off Date**").
- Depositories to put in place systems to validate any dematerialization request received after the Cut-off Date.
- In case of a mismatch between the name in the share certificate vis-à-vis the beneficial owner of the demat account, the depository system shall generate an alert and subsequently, additional documents (such as Aadhaar card or passport) shall be sought for explaining the difference in name. However, where such mismatch is completely inconsistent, the applicant may approach the listed company/RTA for establishing his title/ownership.

(SEBI Circular No. SEBI/HO/MIRSD/RTAMB/CIR/P/2019/122 dated November 5, 2019)

7. SEBI extends phase II of UPI mechanism

SEBI had issued a circular bearing reference number SEBI /HO/CFD/DIL2/CIR/P/2018/138 dated November 1, 2018, introducing Unified Payments Interface ("**UPI**") as a payment mechanism with Application Supported by Blocked Amounts ("**ASBA**") for applications in public issues by retail individual investors through certain intermediaries in a phased manner with effect from January 1, 2019.

Thereafter, SEBI by its circular bearing reference number SEBI/HO/CFD/DIL2/CIR/P/2019/76 dated June 28, 2019, implemented Phase II from July 1, 2019 for three months or floating of five main board public issues, whichever is later. In Phase II of the UPI mechanism, for applications by retail individual investors through intermediaries, the existing process of physical movement of forms from intermediaries to self-certified syndicate banks for blocking of funds was discontinued and only the UPI mechanism with existing timeline of T+6 days was mandated.

Pursuant to the circular bearing reference number SEBI/HO/CFD/DCR2/CIR/P/2019/133 dated November 8, 2019, SEBI has extended the timeline for implementation of Phase II of UPI Mechanism till March 31, 2020.

(SEBI Circular No. SEBI/HO/CFD/DCR2/CIR/P/2019/133 dated November 8, 2019)

8. SEBI prescribes stricter disclosure norms for listed entities on loan defaults

Further to the requirement of disclosing material events by listed companies to the stock exchanges, SEBI has issued a circular prescribing stricter disclosures for listed entities on loan defaults. Some of the key highlights are as follows:

- All listed entities which have listed its specified securities (equity and convertible securities), non-convertible debts ("**NCDs**"), non-convertible redeemable preference shares ("**NCRPS**"), will be required to disclose defaults in payment of interest/instalment obligations on loans, including revolving facilities like cash credit from banks/financial institutions and unlisted debt securities.
- Default' to mean non-payment of the interest or principal amount in full on the date when the debt has become due and payable (pre-agreed payment date), provided that for revolving facilities like cash credit, an entity would be considered to be in 'default' if the outstanding balance remains continuously in excess of the sanctioned limit or drawing power, whichever is lower, for more than 30 days.
- Listed entities shall make disclosure of any default on loans, including revolving facilities like cash credit, from banks/financial institutions, which continues beyond 30 days, promptly, but not later than 24 hours from the 30th day of such default. Further, disclosure of defaults for unlisted debt securities i.e. NCDs and

NCRPS shall be made promptly but not later than 24 hours from the occurrence of the default.

- SEBI has also provided the formats for the disclosure by listed entities for each instance of default and disclosure required on quarterly basis with effect from January 1, 2020.
- Disclosures pertaining to default of listed NCDs/listed NCRPS/listed commercial paper will continue to be made as per the regulations and circulars issued by SEBI in this regard.

(SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/P/2019/140 dated November 21, 2019)

9. SEBI issues guidelines in respect of a preferential issue of units and institutional placement of units by listed REITs and InvITs

SEBI has laid down guidelines in respect of a preferential issue of units and institutional placement of units by listed REITs and InvITs. Some of the key highlights of the guidelines are as follows:

- A listed InvIT/REIT may make a preferential issue of units or an institutional placement of units subject to certain conditions, including:
  - A resolution of the existing unitholders approving the issue of units in accordance with the respective regulations has been passed.
  - For a preferential issue of units by a REIT or an InvIT, units of the same class as the units proposed to be issued have been listed on an exchange for a period of at least six months prior to the date of issuance of notice to extant unitholders for convening the meeting to pass the resolution mentioned above. For an institutional placement of units by a REIT or an InvIT, the minimum listing period will be 12 months.
  - The relevant REIT or InvIT is in compliance with the conditions for continuous listing and disclosure obligations provided in the relevant SEBI regulations and circulars.
  - None of the respective promoters or partners or directors of the sponsor or investment manager or trustee of the relevant REIT or InvIT is a fugitive economic offender declared under section 12 of the Fugitive Economic Offenders Act, 2018.
- The guidelines also prescribe certain procedural aspects to be ensured whilst undertaking an issuance of units, including:
  - Any offer or allotment through private placement shall not be made to more than 200 investors (excluding institutional investors) in a financial year.
  - Full consideration for the units proposed to be issued should be paid by applicants prior to the allotment of the units through banking channels, except where the units are proposed to be allotted for consideration other than cash. This application money should be kept by the trustee in a separate bank account in the name of the relevant REIT or InvIT until the listing of units, and should only be utilised for adjustment against allotment of units or refunds to applicants.
  - The minimum allotment and trading lot for units issued through a preferential issue or an institutional placement shall be equivalent to the minimum allotment and trading lot as applicable to the previously listed units of the same class.
  - If the relevant REIT or InvIT fails to list the units within the specified time, the money received from allottees needs to be refunded within 20 days from the date of the allotment. If such money is not refunded within this period, the relevant REIT, its manager and any director or partner of the manager who is an officer in default, or the relevant InvIT, its investment manager and any director or partner of the investment manager who is an officer in default, shall be jointly and severally liable to repay this money along with an annual interest rate of 15% per annum.
  - The relevant REIT or InvIT needs to file an allotment report with SEBI within seven days of allotment of the units, providing details of the allottees and allotment made. In case of an institutional placement, the placement document

issued in relation to the institutional placement should also be filed with the allotment report.

- Additional conditions that apply to a preferential issue of units issue of units by an InvIT or a REIT include the following:
  - *Pricing*: The guidelines prescribe that for frequently traded units, the minimum issue price should be the higher of the average of the weekly high and low of the volume weighted average price of the listed units of the relevant InvIT or REIT during: (i) the twenty six weeks preceding the relevant date; and (ii) the two weeks preceding the relevant date. In case of infrequently traded units, the issue price determined by the relevant REIT or InvIT should take the Net Asset Value ("**NAV**") of the InvIT into account, which should be based on a full valuation of all existing assets of the relevant REIT or InvIT.
  - The REIT or InvIT is required to make disclosures in the explanatory statement annexed to the notice for the general meeting at which the preferential issue is proposed to be approved, including in relation to the NAV of the relevant InvIT or REIT, the maximum number of units proposed to be issued, extant unitholding pattern, the time frame within which the preferential issue is proposed to be completed and the objects of the preferential issue.
  - Units allotted to sponsors shall be locked-in for a period of three years from the date of trading approval granted for the units. However, it has been clarified that the lock-in provisions shall not operate in relation to units that exceed the minimum sponsors' unitholding requirements provided under the relevant SEBI regulations. Instead, such units shall be locked-in for one year from the date of trading approval. Previous lock-in of units shall be considered whilst determining the applicable lock-in periods under a preferential issue, and units previously locked-in but free of lock-in at the time of the preferential issue shall not be put under fresh lock-in.

- Additional conditions that apply to an institutional placement of units by an InvIT or a REIT include the following:
  - *Pricing*: The guidelines prescribe that for frequently traded units, the minimum issue price should be the average of the weekly high and low of the volume weighted average price of the listed units of the relevant InvIT or REIT during the two weeks preceding the relevant date. The relevant InvIT or REIT is also empowered to offer a discount of up to five per cent to this price. In case of infrequently traded units, the issue price determined by the relevant REIT or InvIT should take the NAV of the InvIT into account, which should be based on a full valuation of all existing assets of the relevant REIT or InvIT.
  - The relevant REIT or InvIT is required to appoint one or more merchant bankers, registered with the SEBI, as lead managers to the issue.
  - The lead managers are required to exercise due diligence and furnish a due diligence certificate whilst seeking in-principle approval from the stock exchanges for the listing of units.
  - The units allotted through the institutional placement are not permitted to be sold by allottees for a period of one year from the date of allotment except on a recognised stock exchange.
  - Allotment pursuant to an institutional placement should be completed within 365 days from the date of the unitholders' resolution approving the institutional placement. If the relevant InvIT or REIT fails to allot the units within the specified time, the monies received shall be refunded within twenty days from the date of the closure of the institutional placement, and if any such money is not repaid within the prescribed period, the relevant REIT, its manager and any director or partner of the manager who is an officer in default, or the relevant InvIT, its investment manager and any director or partner of the investment manager who is an officer in default, shall be jointly and severally liable to repay that money with interest at the rate of fifteen percent

per annum on and from the expiry of the prescribed period.

- An institutional placement should not be made, either directly or indirectly, to any institutional investor who is a sponsor or investment manager, or is a person related to, or related party or associate of, the sponsor or the investment manager.

(SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2019/142 Dated November 27, 2019, and SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2019/143 Dated November 27, 2019)

10. SEBI provides a list of permissible jurisdictions and international exchanges for the purpose of issue of depository receipts

In furtherance of its circular dated October 10, 2019 ("**Circular**") providing for a framework for issuance of depository receipts (Drs), which, *inter alia,* provided that a listed company shall be permitted to issue permissible securities or transfer permissible securities of existing holders, for the purpose of issue of DRs, only in permissible jurisdictions and the said DRs shall be listed on any of the specified international exchanges of the permissible jurisdiction.

The Circular also provides that 'permissible jurisdiction' shall mean jurisdictions as may be notified by the Central Government from time to time, and 'international exchanges' shall mean exchanges as may be notified by SEBI from time to time.

The Central Government *vide* notification dated November 28, 2019 notified the list of permissible jurisdiction. Accordingly, SEBI has provided a list of permissible jurisdictions and international exchanges for the purpose of issue of DRs i.e. United States of America – NASDAQ, New York Stock Exchange; Japan - Tokyo Stock Exchange; South Korea - Korea Exchange Inc.; United Kingdom excluding British Overseas Territories- London Stock Exchange; France - Euronext Paris; Germany - Frankfurt Stock Exchange; Canada - Toronto Stock Exchange; and International Financial Services Centre in India - India International Exchange, NSE International Exchange.

(SEBI Circular no. SEBI/HO/MRD2/DCAP/CIR/P/2019/146 Dated November 28, 2019)

11. SEBI amends the ICDR Regulations in relation to filing of offer documents with SEBI and offer documents filed for a rights issue

SEBI has notified the SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2019 and issued the circular bearing reference number CFD / DIL1 / CIR / P / 2019 / 0000000154 dated December 11, 2019, whereby it has directed the lead manager to file draft offer documents, letters of offer and offer documents for issues of size up to Rs. 750 crores (instead of earlier Rs. 500 crores) with the concerned regional office of the SEBI under the jurisdiction of which the registered office of the issuer company is located.

In addition, SEBI has notified the SEBI (Issue of Capital and Disclosure Requirements) (Sixth Amendment) Regulations, 2019, whereby following key changes in respect to the filing of draft letter of offer, letter of offer and abridged letter of offer have been made:

- Issuer will have to disclose the process of credit of rights entitlements in the demat account and renunciation thereof in the letter of offer and the abridged letter of offer.
- Applicant to the rights issue will be able to make applications only through the ASBA facility, which will be provided by the issuer in the manner specified by SEBI. However, payment through any other electronic banking mode will be permitted in respect of an application made for any reserved portion outside the issue period.
- Rights entitlements will have to be credited to the demat account of the shareholders before the date of opening of the issue. Further, the allotment of specified securities will have to be made in the dematerialised form only.

- The issue related advertisement along with an intimation to the stock exchanges for dissemination on their websites, to be made at least two days (instead of earlier three days) before the date of opening of the issue.
- No withdrawal of application will be permitted after the issue closing date.

(SEBI Notification No. SEBI/LAD-NRO/GN/2019/42 dated December 6, 2019 read with SEBI Circular No. CFD/DIL1/CIR/P/2019/0000000154 dated December 11, 2019 and *SEBI Notification No. SEBI/LAD-NRO/GN/2019/47 dated December 26, 2019)*

12. SEBI issues a format for statement of deviation or variation in the use of funds raised through public issues, qualified institutions placement ("QIPs"), preferential issues and rights issues

SEBI has issued a circular laying down the format for statement of deviation, pursuant to review by the audit committee, to be submitted by the listed entities to stock exchanges on a quarterly basis under Regulation 32 of the SEBI LODR Regulations. The format shall be applicable for funds raised by the listed entities through public issue, rights issue, preferential issue and QIPs. Some of the key highlights of the circular are as follows:

- Disclosures will have to be made on quarterly basis along with the declaration of financial results within 45 days of end of each quarter or 60 days from the end of the last quarter of the financial year, until such funds are fully utilised or the purpose for which these proceeds were raised has been achieved. The first such submission shall be made by the listed entities for the quarter ended on December 31, 2019.
- Listed entities are required to submit the statement of deviation report along with the comments of the audit committee to the stock exchange on the quarterly basis. In case the listed entity is not required to have an audit committee under the SEBI LODR Regulations, the report needs to be placed before the board of directors.

(SEBI Circular No. CIR/CFD/CMD1/162/2019 Dated December 24, 2019

13. SEBI issues guidelines in relation to filing of draft placement memorandum for private placement of units of InvITs that are proposed to be listed

SEBI has issued a circular specifying requirements for InvITs proposing to issue units through a private placement. Requirements of the circular take effect from January 15, 2020. The circular prescribes the following procedure to be followed prior to filing of a placement memorandum with SEBI as per Regulation 14(2)(e) of the SEBI (Infrastructure Investment Trusts) Regulations, 2014 ("**InvIT Regulations**"):

- A draft placement memorandum shall be filed with SEBI and the stock exchange(s) through a merchant banker not less than thirty days prior to opening of the issue.
- The draft placement memorandum shall contain disclosures as specified in Schedule III of the InvIT Regulations and the merchant banker is required to submit a due diligence certificate (in the same form as that required whilst filing a draft offer document for a public issue of units by an InvIT) along with the draft placement memorandum.
- SEBI may issue observations on the draft placement memorandum within fifteen working days from the later of the following dates:
  - o the date of receipt of the draft placement memorandum by SEBI;
  - o the date of receipt of satisfactory reply from the issuer and/or merchant banker to the issue, where SEBI has sought any clarification or additional information from them;
  - o the date of receipt of clarification or information from any regulator or agency, where SEBI has sought any clarification or information from such regulator or agency; and
  - o the date of receipt of a copy of in-principle approval letter issued by the stock exchange(s).
- The merchant banker is required to ensure that all observations issued by SEBI are suitably incorporated prior to filing the placement memorandum in terms of Regulation 14(2)(e) of InvIT Regulations. The merchant banker is required to furnish a due diligence

certificate (in the same form as that required whilst filing an offer document for a public issue of units by an InvIT) along with the placement memorandum.

(SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2019/161 dated December 24, 2019)

14. SEBI amends the SEBI LODR Regulations in respect of applicability of disclosure in the annual report and the intimation for the record date

SEBI has notified the SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2019 and the key highlights of the notification are as follows:

- The requirement to disclose the business responsibility report describing the initiatives taken by them from an environmental, social and governance perspective in the annual report, in the prescribed format by earlier top 500 listed entities has now increased to top 1,000 listed entities based on market capitalization (calculated as on March 31 of every financial year). Accordingly, listed entities other than the top 1,000 listed companies (from earlier top 500 listed entities) based on market capitalization and listed entities which have listed their specified securities on SME Exchange, may include such business responsibility reports on a voluntary basis in the format as specified.
- In respect of the intimation of the record date for the purposes set forth in Regulation 42 of the SEBI LODR Regulations, the listed entities are required to give notice in advance of at least seven working days (excluding the date of intimation and the record date) to stock exchanges of record date specifying the purpose of the record date. However, in case of rights issues, the listed entity shall now be required to give notice in advance of at least three working days (excluding the date of intimation and the record date).

(SEBI Notification No. SEBI/LAD-NRO/GN/2019/45 dated December 26, 2019)

LIST OF CONTRIBUTORS

CYRIL SHROFF
Managing Partner

YASH ASHAR
Partner (Head-Markets)

RAMGOVIND KURUPPATH
Partner

DEVAKI MANKAD
Partner

ARCHIT BHATNAGAR
Senior Associate

DISCLAIMER:

cyril amarchand mangaldas
peninsula chambers, peninsula corporate park, gk marg, lower parel, mumbai - 400 013 (india)
tel: +91 22 2496 4455 | fax:+91 22 2496 3666
www.cyrilshroff.com
other offices: new delhi | bengaluru | hyderabad | chennai | ahmedabad

to subscribe to our blog, please visit www.cyrilamarchandblogs.com