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ESG: The Business Case for Responsible Governance

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Main stories

Welcome to this issue of *Insight*.

First off, I take this opportunity to wish you all a Happy New Year. As we enter 2021, we are optimistically looking forward to the impending end of the pandemic, with the roll out of various vaccines worldwide and the Indian economy bouncing back from the pandemic induced recession. With these positive developments, we hope to leave behind the many travails of 2020.

One of the significant takeaways from the Covid-19 pandemic is the renewed focus on responsible capitalism and Environmental, Social and Governance ("**ESG**"). Accordingly, in this issue of *Insight*, in the lead article, we explore the development in the regulatory framework on ESG practices and its implications.

We have also covered the consolidated Foreign Direct Investment ("**FDI**") Policy, 2020, and have highlighted the key changes and updates, which affect foreign investments into India.

Apart from the above, we have captured the key notifications and circulars issued by the Ministry of Corporate Affairs ("**MCA**"), in relation to the Companies Act, 2013 ("**Companies Act**"), as well as circulars and notifications issued by the Reserve Bank of India ("**RBI**") and Securities and Exchange Board of India ("**SEBI**") for the period under review, including the various compliance relaxations provided to companies, in the aftermath of the Covid-19 crisis.

Any feedback and suggestions would be valuable in our pursuit to constantly improve *Insight* and ensure its continued success among readers. Please feel free to send any feedback, suggestions or comments to cam.publications@cyrilshroff.com.
Our best wishes are with you.

Regards,
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ESG : THE BUSINESS CASE FOR RESPONSIBLE GOVERNANCE

Introduction

With responsible capitalism gaining renewed focus in the wake of Covid-19, and rising environmental and social consciousness amongst consumers, retail investors and employees, the adoption of conscious ESG practices has garnered further impetus.

The business case for adoption of ESG practices lies in its effectiveness to facilitate better management of risk factors, thereby providing avenues for creation of long-term fiscal and commercial value through access to capital, goodwill, and operational benefits. Its importance gets even further amplified by the ground realities in relation to investments, fund-raising and performance as detailed below:

- Investment in sustainable businesses had risen to approximately $30 trillion by 2019 itself. This figure is expected to grow multifold in the coming decades.[1]
- Many Indian ESG based funds have been launched in the last few years, such as SBI Magnum Equity ESG Fund, Quantum India ESG Equity Fund and Avendus India ESG Fund. These funds aim to invest in companies that meet their respective ESG criteria, with the objective of achieving long-term capital appreciation.
- News reports suggest that some Indian companies have also introduced ESG related strategies and initiatives. By way of exemplification, Dalmia Cement has committed to a carbon negative roadmap, Mahindra & Mahindra has an over $600 million green product portfolio across business such as electric vehicles and waste-to-energy initiative, and JSW has built a pipe conveyor belt for transportation of iron ore to cut pollution from truck transportation.[2]
- Further, recent studies suggest a likely correlation between adoption of ESG practices and financial performance of a company, since most Indian companies with good ESG practices have been either outperforming or delivering comparable performance to their counterparts, both in terms of market capitalisation growth and business performance.[3]

While companies and institutional investors are placing significant focus on ESG parameters, the biggest stumbling block has been the absence of concrete incentives, accountability and enforceability measures. Accordingly, the predominant focus of regulatory intervention, both in India and world over, has mostly been on overcoming this limitation.

Against this backdrop, this article explores the current regulatory framework in India and the implications of growing focus on ESG.

Formalisation of ESG framework globally

Different jurisdictions have adopted varying approaches towards regulation of ESG performance, such as in the case of the United Kingdom ("**UK**") and the European Union ("**EU**"), where the policy framework is at a relatively nascent stage and which will come into effect soon.

- _UK_: While the UK Stewardship Code 2010 evidenced a shift towards adopting sustainable business policies, it is the UK Stewardship Code 2020 that mandates explicit evidence of ESG parameters. Further, as a part of its 'Green Finance Strategy', the Financial Conduct Authority in the UK has proposed that companies with premier listing and certain other issuers (i.e., approximately 460 companies) make ESG disclosures in line with the recommendations of the Task Force on Climate-related Financial Disclosures.[4] These regulations are proposed to take complete effect by 2022.
- _EU_: EU's Sustainability Related Disclosures Regulations[5] mandates investment managers, investment funds and other institutional investors to disclose the ESG parameters in their governance practices. Further, organisations are classified on the basis of their efforts on ESG integration and reporting of the same to relevant authorities in terms of the Taxonomy Regulation on Sustainable Finance and the Non-Financial Reporting Directive. These measures are to completely come into place by 2022.

In contrast, the United States of America is yet to make an equivalent move in tandem with the UK and the EU in mandating disclosures of ESG compliance or related business strategies. Apart from the guidance note on principle-based disclosure, issued by the Securities Exchange Commission ("**SEC**"), on the

1 Witold Henisz et al, *Five Ways that ESG Creates Value - Getting your environmental, social, and governance (ESG) proposition right links to higher value creation. Here's why,* MCKINSEY QUARTERLY, November 2019, available at https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.ashx.

2 Suchetana Ray, *ESG: India Inc's new alpha mantra?,* THE ECONOMIC TIMES, January 26, 2020, available at https://economictimes.indiatimes.com/news/company/corporate-trends/esg-india-incs-new-alpha-mantra/articleshow/80455774.cms.

3 Aprajita Sharma, *BT Buzz: ESG funds rally up to 46% since March; should you invest?, Business Today,* July 29, 2020, available at https://www.businesstoday.in/bt-buzz/news/bt-buzz-esg-funds-rally-up-to-46pc-since-march-should-you-invest/story/411448.html; and Ajit R Sanghvi, T*op performing ESG companies in India & how are their stocks faring, The Economic Times,* December 24, 2020, available at https://economictimes.indiatimes.com/markets/stocks/news/top-performing-esg-companies-in-india-how-are-their-stocks-faring/articleshow/79935953.cms.

4 Financial Conduct Authority, UK, 'Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations', December 2020, available at https://www.fca.org.uk/publication/policy/ps20-17.pdf.

'Management's Discussion and Analysis of Financial Condition'[6], companies there are not mandated by law to make ESG related disclosures. This is likely to change with the recent transfer of power from the Trump Administration to the Biden Administration.

Having said that, the trend in the UK and the EU is leaning towards disclosure of ESG parameters being made mandatory to at least a certain subset of issuers and investors (i.e., listed companies and certain institutional investors). With rising environmental and social consciousness, this is a trend that is likely to be seen globally in short order.

Indian Regulatory Landscape

In India, while there has been some level of peer driven adoption of integrated reporting by listed companies, this has been rather limited and sporadic, both qualitatively and quantitatively.

In this context, we have considered the measures undertaken by MCA, and various regulators such as SEBI, Pension Fund Regulatory & Development Authority ("**PFRDA**") and Insurance Regulatory and Development Authority of India ("**IRDAI**") to address the emerging needs of the market and its stakeholders to better reflect ESG practices of a company.

- *CSR and Responsibility of the Board*
  - India was one of the first jurisdictions to make CSR disclosures mandatory, with a 'comply or explain approach', which was adopted under Section 135 of the Companies Act, which mandates the boards of certain companies[7] to ensure that at least 2 per cent of the average net profits of the company for the preceding three years are allocated towards CSR activities. The government has permitted CSR activities to range from education, to environmental sustainability, to research & development.[8] However, apart from imposing harsh penalties for non-compliance, the current CSR framework does little towards ensuring the adoption and implementation of CSR policies, thereby pigeonholing such initiatives as welfare activities, as opposed to including ESG perspectives in the manner of doing business itself.
  - Section 166 of the Companies Act, which pertains to duties of directors of a company, provides that such duties are not restricted only towards the interest of shareholders, but of 'stakeholders' such as community and environment as well, without any apparent hierarchy.[9] This makes the Indian corporate law framework structurally conducive towards incorporation of ESG practices.
- *Reporting measures initiated by MCA*
  - The reporting format currently in place was introduced by MCA in July 2011 through *'National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business'* ("**NVGs**"). The NVGs provide a framework for 'business responsibility report' ("**BRR**"), which enables Indian companies to demonstrate responsible business practices, concerning approximately thirty ESG-related aspects, such as business ethics, employee welfare, stakeholder welfare, environmental protection and consumer responsibility, etc. These also act as reference for companies seeking to reform their business practices in an ESG responsible, albeit 'distinctively Indian' manner. As of date, the top 1,000 listed companies in India (by market capitalisation) are mandatorily required to submit a BRR annually to the stock exchanges in the specified format.
  - The MCA also released National Guidelines on Responsible Business Conduct ("**NGRBC**") in March 2019. NGRBC is based on the adoption of Gandhian principle of trusteeship into the core responsibility of businesses to society, and articulate a set of nine principles that are to guide the Boards of Indian companies, and *inter alia* includes sustainable provision of goods/services, respecting interest of all its stakeholders, making efforts towards protection and restoration of environment, and supporting inclusive growth and equitable development .
  - Following the NGRBC principles, the MCA in August 2020 released a report, recommending a new reporting framework called the 'Business Responsibility and Sustainability Report' ("**BRSR**"), which would serve as a single source for all non-financial disclosures, including ESG parameters, and which is effectively an update to the existing Business Responsibility Reporting ("**BRR**") requirements. This includes the following overarching framework:

5 Regulation (EU) 2019/88, Sustainability Related Disclosures in the Financial Services Sector, the European Parliament and the Council of the European Union (27 Nov. 2019).
6 Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results, Securities and Exchange Commission Release Nos. 33–10751 (30 Jan. 2020); Available at https://www.sec. gov/rules/interp/2020/33-10751.pdf.
7 Section 135 of the Companies Act, 2013 is applicable to companies having net worth of ₹ 500 crore or more, or turnover of ₹ 1000 crore or more or a net profit of ₹ 500 crore or more during the immediately preceding financial year.
8 Schedule VII, Companies Act, 2013.
9 Section 166(2) of the Companies Act, 2013.

- The reporting can be done in two disclosure formats namely 'comprehensive format' and a 'lite version'. The comprehensive BSBR format contains three broad sections namely general disclosure, disclosure on management and processes, and principle-wise performance, whereas the lite version recommends a slightly pared down format to cater to companies unfamiliar with any form of sustainability reporting.
- The implementation of reporting requirement is suggested to be done in phases so that smaller companies have the time to adapt and learn from the larger ones.
- The reporting requirement may be extended by MCA to unlisted companies above a specified turnover and/or paid-up capital threshold; and smaller unlisted companies below this threshold may, to begin with, adopt a lite version of the format, on a voluntary basis.

- *Reporting measures initiated by SEBI*
  - Top 1,000 listed companies in India (by market capitalisation) are mandatorily required to make disclosures on business responsibility and sustainability indicators as part of their annual report to the stock exchanges in the BRR format as recommended by MCA and adopted by SEBI.[10]
  - Following the recommendation of the BRSR reporting framework by MCA, SEBI released a consultation paper on the *'Format for Business Responsibility and Sustainability Reporting'* (the "**BRSR Paper**"), for public review and comments. The BRSR Paper proposes sweeping changes to the disclosures required to be made under existing BRR, key among which are:
    - To promote quality disclosures and address the challenges faced by companies during the introduction of BRR, detailed guidance notes have been included in relation to the BRSR and the BRSR Lite.
    - Inclusion of a mix of quantitative and qualitative data-based questions in the BRSRs to address the disparity in the quality of disclosures between companies as observed in BRR reporting. Further, BRSR is proposed to be e-filed and integrated with filings made on MCA21.
    - SEBI, in December 2019, introduced the stewardship code for Asset Management Companies ("**AMCs**"), Mutual Funds ("**MFs**") and all the categories of Alternative Investment Funds ("**AIFs**") investing in listed Indian companies.[11] The stewardship code follows the 'comply or explain' approach to protect the interests of their investors/ beneficiaries, and eligible institutional investors are required to formulate a stewardship responsibility policy, *inter alia* taking into account ESG opportunities or risks, and continuously monitoring ESG risks.

- *Stewardship Codes by PFRDA and IRDAI:* Stewardship codes have been introduced by IRDAI[12] and PFRDA[13], owing to the fiduciary responsibilities bestowed upon the insurance companies and pension funds, by virtue of being investors on behalf of the stakeholders such as policyholders or pensioners. These codes specified by PFRDA and IRDAI *inter alia* deal with their ESG policies, engagement with ESG factors of investee corporations as part of investment governance, voting patterns and rationale of their investment decisions.

Limitations of the Existing Framework

The extant legal framework concerning ESG practices enables companies and Boards to undertake meaningful steps towards environment and social reporting. However, commentators[14] suggest that it may need further development to address the following concerns:

- The reporting mechanism needs to be enhanced in a manner that it ensures reporting of the impact arising out of environmental and social risks in a comprehensive manner instead of being an exercise in rhetoric.
- To facilitate enforceability, hold companies accountable for non-compliance or erroneous reporting, and overcome greenwashing, there needs to be a regulatory nudge towards compliances. This will ensure that companies incorporate ESG as a part of their compliance culture, much like they do with corporate governance.
- The existing ESG framework only deals with past compliance and steps taken, without delving into prospective operational and financial actions/steps proposed by a company to address ESG risks. A move to include such 'forward-looking' disclosures would be beneficial for

10 See Regulation 34(2)(f) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2014
11 Circular on 'Stewardship Code for All Mutual Funds and All Categories of AIFs in relation to their Investments in Listed Equities' (December 24, 2019)
12 Circular on 'Including NPS Trust Under the Ambit of the Stewardship Code' (November 16, 2018)
13 Circular on 'Guidelines on Stewardship Code for Insurers in India' (March 22, 2017)
14 Umakanth Varottil, *Environment and Social Reporting by Indian Companies,* NSE QUARTERLY BRIEFING, January 2019, available at https://www1.nseindia.com/research/content/QB_January_2019.pdf; and Paridhi Srivastava, *A Sustainable and Inclusive Capitalist's Epoch: A Modern Economic and Investment Theory for the Benefit of Our Common Future?,* BUSINESS LAW REVIEW, Volume 41 (Issue 5), 2020.

investors to evaluate ESG compliance by a company over an extended period of time, and will also ensure formulation of ESG centric strategies at the Board level, either at their own behest or on account of influential stakeholders.

- ESG compliance should not be equated with CSR, since the latter is a mandatory requirement which deals with philanthropy, whereas the former deals with the manner in which business is undertaken in the interest of larger stakeholders in the society. Compliance with CSR obligations predominantly relates to the 'social' element from the trinity of ESG, with minor overlaps over the other two. Therefore, companies should be required to take extra steps to ensure ESG compliance. This would truly engender responsible capitalism.
- The government should promote sustainable development vigorously and facilitate integration of ESG practices into the corporate culture by way of *inter alia* awarding benefits to companies that comply with ESG norms and ESG reporting, such that compliance with ESG automatically translates into lower taxes, higher valuation and profits.

Implications on Investments and M&A transactions

ESG practices are highly reflective of a company's vision, purpose, culture and resilience and is witnessing a gradual shift from a 'good-to-have' set of practices to a mainstream requirement. In view of this, compliance with ESG is likely to be a factor in equity and capital market transactions as well, with focus areas likely to include the following:

- ESG focused due diligence would highlight ESG related litigation/ reputational risks, risk of shareholder actions, related regulatory actions, etc. The implementation of the new disclosure regime will assist in identification of key focus areas for such diligences.
- ESG related disclosures will form the primary basis for allocation of ESG scores to companies. These scores are then expected to become one of the key metrics in attraction of funds from international/Indian institutional investors that have an ESG focus.
- ESG related disclosures will help in identification of various risk factors, which not only will impact commercial considerations, but also require appropriate allocation in the transaction documents. This will also impact any capital raising, including through public issues such as IPOs and QIPs.
- Non-compliance with ESG reporting norms, once they become mandatory, would also be a risk factor to be considered by Boards and investors alike.

The regulatory framework governing ESG practices is continuously evolving, and must be closely monitored by all stakeholders, including the Boards and investors, since the developments would be relevant from a commercial as well as legal perspective. Implementation of measures discussed in this article is likely to effect investor sentiment such that they will be more likely to make investment into ESG compliant businesses, marking a move away from unsustainable business practices.

CONSOLIDATED FDI POLICY 2020

Since the last exercise of consolidation in relation to the prevailing FDI policy, which was undertaken in 2017 ("**FDI Policy 2017**"), the government has issued the updated FDI Policy, effective from October 15, 2020 ("**FDI Policy 2020**"), to consolidate the changes in the policy framework introduced since 2017. In addition to the consolidation exercise, the FDI Policy has been harmonised with the prevailing Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("**NDI Rules**"). The FDI Policy 2020, however, clarifies that all actions undertaken under the relevant circulars, press releases and press notes, which have not been rescinded and precede the FDI Policy 2020 will be deemed to be valid and effective, to the extent that these are not inconsistent with the FDI Policy 2020.

Some of the key changes introduced in the FDI Policy 2020 have been summarised below.

1. Eligible Investors

The FDI Policy 2020 incorporates restrictions on FDI from entities or citizens of neighbouring countries sharing land border with India, allowing such investments to be made only through the government route. Government approval would also be required for any transfer of ownership of existing or future FDI, resulting in the beneficial ownership being held by entities or citizens of neighbouring countries sharing land border with India.

(Press Note 3 (2020 Series))

2. Foreign Investment into/ downstream investment by eligible Indian entities

Under the FDI Policy 2017, foreign investment in an Indian company, engaged in the activity of investing in the capital of other Indian companies ("**Investing Company**"), was under Government approval route. This position has now changed under the FDI Policy 2020. The foreign investment in Investing Companies (except for core investment companies), registered as non-banking financial companies ("**NBFCs**") with the RBI, are now under 100% automatic route.

(Press Note 1 (2018 Series))

3. Competent Authority

Proposals for foreign investment under government route are considered by the respective administrative ministry/department. In addition to the administrative ministry/department set out for various sectors under Government approval route in the FDI Policy 2017, the FDI Policy 2020 has set out the following additional sectors / activities and their respective administrative ministry / department:

Activity / Sector	Administrative Ministry / Department
Applications involving investments from an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country - as required in terms of Press Note 3 of 2020 read with NDI Rules	Concerned Administrative Ministry/ Department as identified by the Department for Promotion of Industry and Internal Trade
Cases pertaining to sectors/activities under Government approval route requiring security clearance as per the extant NDI Rules, FDI Policy and security guidelines, as amended from time to time	Nodal Administrative Ministries/Departments

(Press Note 1 (2018 Series))

4. Audit of Indian investee company

The FDI Policy 2020 specifies that if the foreign investor has the right to specify the auditor to be engaged by the Indian investee company, then audit of such investee companies should be carried out as joint audit, wherein one of the auditors is not part of the same network of audit firms as specified by the foreign investor.

(Press Note 1 (2018 Series))

5. Provisions relating to issue of shares

(a) The timeline for issue of capital instruments from the date of inward remittance of the consideration has been reduced to 60 days as opposed to 180 days earlier. Further, upon the failure to issue capital instruments within the 60-day time period, investee entity is provided 15 days from the 60th day from remittance to refund the consideration.

(b) Form FC-TRS (for the transfer of shares of the investee entity from a non-resident to a resident and *vice versa*) is now required to be filed within 60 days from the earlier of (i) transfer of the capital instruments, or (ii) the receipt/ remittance of funds. Further, as per the FDI Policy 2020,

the onus of submission of Form FC-TRS extends to non-residents holding capital instruments on a non-repatriable basis and non-residents acquiring/ transferring capital instruments on recognised stock exchanges.

(c) The FDI Policy 2020 further qualifies that for sectors under the automatic route, issue of shares against import of capital goods/ machinery/ equipment (excluding second-hand machinery) and pre-operative/pre-incorporation expenses (including payments of rent) are permitted.

(Press Note 1 (2018 Series))

6. Foreign Portfolio Investment

In line with the NDI Rules, under the FDI Policy 2020, with effect from April 1, 2020, FDI by foreign portfolio investors ("**FPI**") will be permitted as per the sectoral caps of the FDI policy 2020 and will be subject to any guidelines prescribed for the banking sector under the Banking Regulation Act, 1949, and Reserve Bank of India Act, 1934. Further, investee entities, which had decreased their aggregate limits of FDI to 24%, 49% or 74% by March 31, 2020, as per the NDI Rules, may increase this limit to 49%, 74% or the relevant sectoral cap, only once after decreasing the limit in the aforementioned manner, by passing a resolution and a special resolution by the board of directors and the shareholders, respectively.

7. Reporting of FDI

Reporting of FDI under the current regime is required to be carried out in accordance with the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019. Accordingly, all reporting is to be done solely through the Single Master Form ("**SMF**"), available on the platform provided by the Foreign Investment Reporting and Management System, which, with effect from September 1, 2018, has replaced the erstwhile format prescribed in the FDI Policy 2017 for forms such as FC-GPR (issue of shares of an Indian entity to non-resident), FC-TRS (transfer of shares of an Indian entity from a non-resident to a resident and *vice versa*), LLP-I (FDI in a limited liability partnership), LLP-II (divestment or transfer of capital contribution in a limited liability partnership) and CN (issue or transfer of convertible notes). Accordingly, the said forms are required to be filed through the SMF portal available on the RBI website, as per the procedure and format further set out in the SMF user manual.

(A.P (DIR Series) Circular No.30 dated June 07, 2018)

8. Pledge of Shares

In relation to pledge of securities or units of Indian entities for purposes of securing external commercial borrowings, the FDI Policy 2020 has been harmonised to be brought in line with the NDI Rules.

9. Sectoral Changes

(a) Coal and Lignite

In order to attract international players to create an efficient and competitive coal market, the FDI Policy 2020 permits 100% FDI under automatic route for coal mining activities, including associated processing infrastructure, such as coal washery, crushing coal handling and separation (magnetic and non-magnetic).

(Press Note 4 (2019 Series))

(b) Manufacturing

Under the FDI Policy 2017, though 100% FDI under the automatic route was allowed in the manufacturing sector, the concept of contract manufacturing was not recognised therein. The FDI Policy 2020 clarifies that the manufacturing activities may be either self-manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract. This move is in furtherance of the objective of Make in India and to give the necessary boost to the manufacturing sector in India.

(Press Note 4 (2019 Series))

(c) Defence

The FDI Policy 2020 has increased the FDI limit under automatic route in the defence sector from the erstwhile limit of 49% under the FDI Policy 2017 to 74%, subject to the following revised conditions:

(i) In a company requiring new industrial licence, 74% FDI is allowed under automatic route;

(ii) In a company not seeking industrial licence or which already has approval for FDI in defence – FDI beyond 49% will require government approval. Further, infusion of fresh foreign investment up to 49% in such a company will need a mandatory submission of a declaration to the Ministry of Defence in case of (i) change in equity/shareholding pattern; or (ii) transfer of stake by existing investor to new foreign investor for FDI up to 49%, within 30 days of such change.

(iii) The government reserves the right to review any foreign investment in the defence sector that affects or may affect national security.

(Press Note 4 (2020 Series))

Following the FDI Policy, on December 8, 2020, suitable amendments were introduced to the NDI Rules to reflect the abovementioned revised position in relation to FDI in the defence sector. The amendment stated that multilateral banks or funds, of which India is a member, will not be treated as entities of any particular country nor shall any country be treated as the beneficial owner of the investments of such banks or funds in India.

(Notification No. S.O. 4441 (E) dated December 8, 2020)

(d) Broadcasting Content Services

The FDI limit of 26% under Government approval route has been introduced in the segment that covers digital news (uploading or streaming of news and current affairs through digital media). This brings it at par with the investment cap on newspaper and periodical publications and the publication of Indian editions of foreign magazines, dealing with news and current affairs, which are also subject to the government approval route.

(Press Note 4 (2020 Series))

Following the FDI Policy 2020, on October 16, 2020, the Central Government clarified that FDI of up to 26% under the government approval route is permitted for the following types of investee companies located/ registered in India, which will also have the onus of compliance with the FDI Policy, 2020 (and relevant notifications under the FEMA):

(i) digital media entity streaming / uploading news and current affairs on websites, apps or other platforms, who are required to align their FDI to the 26% threshold with the approval of the Central Government within one year from the date of this clarification;

(ii) news agencies gathering, writing and distributing/ transmitting news, directly or indirectly, to digital media entities and/ or news aggregators; and

(iii) news aggregators, which by using software or web application, aggregate news content from various sources such as news websites, blogs, podcasts, video blogs, user submitted links, etc., in one location.

Separately, the chief executive officer and the majority of directors on the board of such an investee company are required to be Indian citizens and such investee company is also required to ensure that prior security clearance is obtained for all foreign personnel likely to be deployed in India by the investee company, in any functioning capacity, including by way of appointment, contract or consultancy, for more than 60 days in a year. If such security clearance is denied or withdrawn for any reason, the investee entity is to ensure that such personnel resigns, or his/ her services are terminated upon receipt of such directive from the Government.

(DPIIT File No. 5(4)/2019-FDIPolicy dated October 16, 2020)

(e) Aviation

(i) The FDI Policy 2020 has clarified that FDI in the Civil Aviation sector will be subject to the Aircraft Rules, 1937.

(ii) Under the FDI Policy 2017, FDI by foreign airlines into M/s. Air India Limited ("**Air India**") was prohibited. Press Note 1 of 2018 permitted direct and indirect foreign investment in Air India of up to 49%, provided the substantial ownership and effective control over Air India continues to vest with Indian nationals as per the requirement under the Aircraft Rules, 1937. The discrepancy arose from the fact that under the FDI Policy 2017, NRIs who are Indian nationals were permitted FDI through the automatic route of up to 100% in Scheduled Air Transport Service/ Domestic Scheduled Passenger Airlines, but their investment in Air India was limited to 49%. In order to bring foreign investment in Air India at par with other scheduled airline operators and in line with the proposed divestment of Air India in order make it privately owned, the Union Cabinet permitted 100% investment by NRIs into Air India, under the automatic route. The FDI Policy 2020 reflects these changes.

(Press Note 1 (2018 Series); Press Note 2 (2020 Series))

(f) Real Estate Broking Services

Under the FDI Policy 2017, FDI is prohibited in the real estate business. However, the FDI Policy 2020 has clarified that real estate broking services does not amount to a real estate business and therefore 100% FDI under the automatic route is permitted in the former.

(Press Note 1 (2018 Series))

(g) E-Commerce Entities

(i) The FDI Policy 2017 prohibited e-commerce entities adopting the marketplace model of business ("**E-Commerce Marketplace Entities**") from exercising any ownership over the inventory of goods sold. The FDI Policy 2020, in line with Press Note 2 of 2018, additionally prohibits such E-Commerce Marketplace Entities from exercising any control over inventory. An E-Commerce Marketplace Entity will be considered to exercise control over any inventory of any vendor if more than 25% of the purchases of the vendor are from the E-Commerce Marketplace Entity or its group companies.

(ii) Under the FDI Policy 2017, E-Commerce Marketplace Entities were restricted from effecting more than 25% of its sales value through the marketplace, from a single vendor or its group companies. However, the FDI Policy 2020, in light of the restriction introduced in relation to control of E-Commerce Marketplace Entities over inventory as set out in (i) above, has done away with this restriction.

(iii) The FDI Policy 2020 additionally restricts entities, in which the E-Commerce Marketplace Entity or its group entities have equity participation or exercise control over the inventory, from selling their products on platforms operated by the said E-Commerce Marketplace Entity.

(iv) E-Commerce Marketplace Entities are additionally required to:

a. Provide services (such as logistics, warehousing, marketing, payments or financing) to the vendors on its platform, either through itself or through entities under common control or with direct or indirect equity participation of the said E-Commerce Marketplace Entity, on an arms' length basis and in a non-competitive manner.

b. refrain from mandating any seller to sell its products exclusively on its platform.

c. obtain/ maintain a report of the statutory auditor by September 30th of every year, for the preceding financial year, to confirm compliance with e-commerce guidelines.

(Press Note 2 (2018 Series))

(h) Single Brand Product Retail Trading

(i) <u>Liberalisation</u> - The FDI Policy 2017 permitted 49% FDI in Single Brand Product Retail Trading ("**SBRT**") through the automatic route, beyond which FDI of up to 100% was permitted through the government route. The FDI Policy 2020 reflects the liberalised limit of 100% FDI through the automatic route. Accordingly, the provision for applications for government approvals for FDI beyond 49% or for addition of product/ product categories to be sold under such brand in case of FDI beyond 49% has been deleted.

(ii) Local Sourcing – While the FDI Policy 2020 has retained the mandatory local sourcing requirement of 30% by value of the goods (applicable for investments exceeding 51%), all procurements made from India (regardless of whether such goods are sold locally or exported) will be considered for the 30% threshold and the SBRT entity is permitted to set off goods procured for its global operations (i.e. goods (by value and in ₹ terms), sourced from India for global operations for the relevant single brand in a particular financial year, either directly by the SBRT entity/ its group companies, or indirectly (through third parties)), against the 30% threshold.

(iii) Retail Trading through E-commerce – While the FDI Policy 2017 allowed SBRT entities operating through the brick-and-mortar stores to also operate through e-commerce, the FDI Policy 2020 allows an SBRT entity to undertake retail trading through e-commerce even prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within two years from date of start of online retail.

(Press Note 1 (2018 Series); Press Note 4 (2019 Series))

(i) Intermediaries and Insurance Intermediaries

(i) FDI in insurance intermediaries, including insurance brokers, re-insurance brokers, third party administrators, insurance consultants, corporate agents, surveyors, loss assessors and any other intermediaries notified by the IRDAI, has been liberalised from the earlier cap of 49% to 100%, under the automatic route. Foreign investment in such insurance intermediaries will be governed by Rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015, and the FDI proposals will be subject to verification by the IRDAI. The sectoral cap for insurance companies remains at 49% under the automatic route.

(ii) The condition of being Indian owned and controlled, applicable to insurance companies will not be applicable to insurance intermediaries. The composition of the board of directors and key managerial personnel of such insurance intermediaries will be governed by the relevant regulators governing such intermediaries.

(iii) Those insurance intermediaries in which foreign investors have a majority shareholding are required to:

a. be incorporated as limited companies under the Companies Act, 2013;

b. ensure that at least one among the chairman of the board of directors, chief executive officer, principal officer or managing director is a resident Indian citizen;

c. take prior permission of the IRDAI for repatriating dividend;

d. bring in the latest technological, managerial and other skills;

e. not make payments to the foreign group, promoter, subsidiary, interconnected or associate entities beyond what is necessary or permitted by IRDAI; and

f. make disclosures in the formats to be specified by IRDAI of all payments made to its group, promoter, subsidiary, interconnected or associate entities.

(Press Note 1 (2020 Series))

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COVID-19 Related Updates

A. Circulars and Notifications

1. *Scheme extending relaxation of minimum residency requirements for directors*

   The MCA, *vide* its circular dated March 24, 2020, had specified that non-compliance with the requirement of minimum residency in India for a period of at least 182 days, by at least one director of every company, under Section 149 of the Companies Act, shall not be treated as a violation for the financial year 2019-20. This relaxation has now been extended for the financial year 2020-21.

   (MCA General Circular No. 36/2020 dated October 20, 2020)

2. *Extension of relaxations for conducting extra-ordinary general meetings through VC or postal ballot*

   The MCA, *vide* its circular dated June 15, 2020, and another circular dated September 28, 2020, had allowed companies to hold an extra-ordinary general meeting through video conferencing ("**VC**") or transact items through postal ballot until December 31, 2020, in accordance with the framework provided in MCA general circulars dated April 8, 2020, and April 13, 2020 *(covered in Volume XIII Issue 1 of Insight)*. This relaxation has now been extended till June 30, 2021.

   (MCA General Circular No. 39/2020 dated December 31, 2020)

B. Amendments

1. *Extension of relaxation for conducting board meetings through VC*

   Under the Companies Act, certain actions such as the approval of the annual financial statements, Board's report, prospectus and matters relating to amalgamation, merger, demerger, acquisition or takeover, etc., can only be given at physical board meetings. However, in view of the Covid-19 pandemic, the Companies (Meetings of Board and its Powers) Rules, 2014 ("**Board Rules**"), was amended at various occasions to allow companies to hold such board meetings through VC or other audio-visual means till December 31, 2020. The Board Rules have now been amended to further extend the timeline till June 30, 2021.

   (MCA Notification No. G.S.R. 806 (E) dated December 30, 2020)

Other Updates

A. Amendments

1. *Relaxation in requirement of a special resolution in relation to offer of securities to QIBs*

   Companies (Prospectus and Allotment of Securities) Rules, 2014, has been amended to allow a company, seeking to make offer or invitation of securities to qualified institutional buyers ("**QIBs**"), to pass a special resolution only once a year for all allotments to such qualified institutional buyer during the year.

   (MCA Notification no. G.S.R. 548 (E) dated September 7, 2020)

2. *Postponement of the effective date for Companies (Auditor's Report) Order, 2020*

The MCA, vide its circular dated March 24, 2020, had specified that Companies (Auditor's Report) Order, 2020, shall be made applicable from the financial year 2020-21. However, the same shall now be applicable from the financial year 2021-22 instead.

(MCA Order No. S.O. 4588(E) dated December 17, 2020)

3. *Amendments to Companies (Compromises, Arrangements, Amalgamation) Rules, 2016*

   The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, has been amended to include the following new provisions:

   - The definition of 'corporate action' has been included as Rule 2(1)(e), and includes any action taken by the company in relation to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer.
   - Rule 26A, which pertains to the purchase of minority shareholding held in dematerialised form, has been inserted. As per the new rule, the company is required to *inter alia* (a) verify within a prescribed timeline the details of minority shareholders holding shares in dematerialised form; (b) send a notice to minority shareholders in relation to the cut-off date on which the shares of minority shareholders shall be debited from their account and credited to the designated demat account of the company, unless the shares are credited in the account of the acquirer already; and (c) disburse the price of the shares so transferred, upon receiving the intimation of successful transfer of shares from the depository.

(MCA Notification No. G.S.R. 773(E) dated December 17, 2020)

FOREIGN EXCHANGE AND RBI UPDATES

A. Press Releases

1. *Enabling Framework for Regulatory Sandbox*

On the basis of the proposal of establishing Regulatory Sandboxes ("**RS**") by the inter-regulatory working group set up in July 2016 to review the granular aspects of financial technology ("**FinTech**"), the RBI had on August 13, 2019, released the final *Enabling Framework for Regulatory Sandbox*. The RBI has adopted a phased-out manner of opening up RS, wherein entities meeting the relevant eligibility criteria could make applications for forming a part of the RS. The first cohort under the RS was announced on November 4, 2019, with the theme of 'Retail Payments', which ultimately commenced on November 17, 2020, on account of Covid-19. Subsequently, the RBI has *vide* a press release dated December 16, 2020, announced and opened the second cohort under RS with 'Cross Border Payments' as its theme, and has additionally decided to have 'MSME Lending' as the theme for the third cohort (which is yet to be announced and opened). With the introduction of the second cohort, the RBI has modified the eligibility criteria of the applicants to include limited liability partnerships and partnership firms. Further, the net worth criteria of the applicants has been reduced from ₹ 25 lakhs to ₹ 10 lakhs.

(Press Release No. 2020-2021/787 dated December 16, 2020 and Department of Payment & Settlement Systems, Central Office/ FinTech Division dated December 16, 2020)

2. *RBI cautions against unauthorised digital lending platforms and mobile applications*

The RBI has cautioned against unauthorised digital lending platforms and mobile apps, promising hassle-free loans, which charge excessive rates of interest, hidden charges, adopt unacceptable and high-handed recovery methods and misuse agreements to access data on the mobile phones of their customers. The RBI clarified that legitimate public lending activities are undertaken by non-banking financial companies, registered with the RBI, and other entities regulated by statutory legislations of state governments such as money lending legislations. The RBI has requested the customers to verify the antecedents of the company/ firm offering loans online or through mobile apps and not share copies of know your customer ("**KYC**") documents with unidentified persons, unverified/unauthorised apps. Customers are requested to report such apps/bank account information associated with the apps to concerned law enforcement agencies either offline or through the online 'Sachet' portal.

Subsequently, the RBI has constituted the working group on 'digital lending including lending through online platforms and mobile apps' to study all aspects of digital lending in both the regulated and unregulated spheres, to put in place suitable regulations, targeting issues in relation to customer protection, data governance, data privacy and security standards.

(Press Release No. 2020-2021/819 dated December 23, 2020 and Press Release No. 2020-2021/934 dated January 13, 2021)

B. Notifications and Circulars

1. *Revised regulatory framework for Housing Finance Companies*

The RBI had issued a draft regulatory framework for Housing Finance companies ("**HFCs**"), which has now been revised ("**Framework**") and will supersede the relevant regulations of the National Housing Bank ("**NHB**") in relation to HFCs. However, HFCs will be required to comply with those instructions of the NHB, which are not covered by the Framework. The main highlights of the Framework of HFCs are as follows:

- An HFC is defined as a company incorporated under the Companies Act, which:

- is an NBFC whose financial assets (in the business of providing housing finance) constitute at least 60% of its total assets (netted off by intangible assets); and
- of the total assets (net off by intangible assets), not less than 50% is by way of housing finance to individuals.

Existing registered HFCs not fulfilling the criteria set out above may undertake the transmission as per the timelines set out in the Framework.

- Housing finance (*stated above*) means financing/ loans extended for the purchase/ construction/ reconstruction/ renovation/ repairs of residential dwelling units, as listed in the Framework. All housing loans which do not fall under the categories specified under the Framework will be non-housing loans. Integrated housing projects, comprising some commercial spaces (i.e., shopping complexes, schools, etc.), may be treated as residential housing, provided that the commercial area in the residential housing project does not exceed 10% of the total floor space index of the project.
- With respect to the Net Owned Fund ("**NOF**") Requirement, the RBI has specified ₹ 20 crore as the minimum net owned funds required for a company to commence housing finance as its principal business. If the HFC does not fulfil the NOF requirement, it can continue to carry on this business if it achieves net owned fund of ₹ 15 crore by March 31, 2022, and ₹ 20 crore by March 31, 2023.
- The Master Direction on Monitoring of Frauds in NBFCs, 2016, and the Master Direction on Information Technology Framework for the NBFC sector dated June 8, 2017, will apply to all HFCs. Further, the definition of public deposit under the Master Directions on Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016, will be applicable to HFCs under the Framework.

(RBI/2020-21/60 DOR.NBFC (HFC).CC.No.118/03.10.136/2020-21 dated October 22, 2020)

2. *Discontinuation of certain Returns/Reports under FEMA*

With a view to improve the ease of doing business and reduce the cost of compliance, the existing forms and reports prescribed under FEMA and the Master Direction on Reporting under FEMA, dated January 1, 2016, were reviewed by the RBI and accordingly, the submission of 17 returns/reports as listed in the Annexure to Circular No. 5, RBI/2020-21/66 A.P. (DIR Series) dated November 13, 2020, have been discontinued.

(RBI/2020-21/66 A.P. (DIR Series) Circular No. 05 dated November 13, 2020)

C. Amendments

1. *Master Direction on Compounding of Contraventions under FEMA*

Salient features of the amendments to the Master Direction on Compounding of Contraventions under FEMA are set out below:

- The NDI Rules and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 ("**Reporting Regulations**"), superseded the erstwhile Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017. Accordingly, the RBI has listed certain contraventions under the NDI Rules and Reporting Regulations, which can be compounded by the Regional/ Sub Offices of RBI.
- Further, *vide* its circulars dated June 28, 2010, and July 31, 2012, on compounding of contraventions under FEMA, RBI had classified contraventions as 'technical' or 'material' or 'sensitive/ serious in nature'. On review, the RBI has decided to discontinue the classification of a contravention as 'technical' that was dealt with by way of an administrative/ cautionary advice and regularise such contraventions by imposing minimal compounding amount as per the compounding matrix in the Master Directions on compounding of contraventions under FEMA, dated January 1, 2016.
- RBI also partially modified paragraph 3(1) of its circular dated May 26, 2016, with respect to public disclosure of compounding orders. Accordingly, in respect of the compounding orders passed on or after March 01, 2020, a summary information, instead of the compounding orders, shall be published on the bank's website in the format given in the said circular.

(RBI/2020-21/67 A.P. (DIR Series) Circular No. 06 dated November17, 2020)

D. Reports

1. *Report of the Internal Working Group to review extant ownership guidelines and corporate structure for Indian private sector banks*

The RBI had set up an internal working group for the review of the extant guidelines of ownership and licencing of private sector banks in relation to ownership, control and corporate structure, with an objective of aligning the norms of banks set up under different licencing regimes in order to leverage competition by providing entry to new players and a level playing field for all private sector banks. The recommendations of the internal working group *inter alia*, include the following:

- Banks to be promoted by large corporates/ industrial houses only after necessary amendments to the Banking Regulation Act, 1949 (in relation to lending and exposures between banks and non-financial group entities), and development of necessary supervisory mechanism.
- Large NBFCs (i.e., with asset size between ₹ 5,000 crore to ₹ 10,000 crore and a good track record of minimum 10 years) to be converted to and regulated as banks.
- Promoter shareholding cap to be up to 26% in the long run (i.e., 15 years), with initial capital of 40% being locked in for five years.
- RBI may permit two types of bank to be set up, i.e., banks set up by promoters and banks set up by non-promoters. While promoters' stake in the long run may be increased from 15% to 26% of the shareholding, non-promoters' shareholding to be uniformly capped at 15% for all types of shareholders.
- Licencing guidelines to be harmonised for all private banks while ensuring that the transition does not result in imposing more restrictive conditions than under the current licences of existing banks.
- The Non-operative Financial Holding Company ("**NOFHC**") structure is desirable, but not mandatory, especially for banks that are financial conglomerates, wherein activities such as insurance, pension, asset management, etc., are undertaken by the group. Banks currently under NOFHC structure may be allowed to exit from such a structure if they do not have other group entities in their fold. While banks licenced before 2013 may move to an NOFHC structure at their discretion, once the NOFHC structure attains a tax-neutral status, all banks licenced before 2013 will have to move to the NOFHC structure within five years from announcement of tax-neutrality.
- The minimum shareholding of promoters in the bank during the lock-in period to be clear of any encumbrances, and the pledge of such shares thereafter will be permitted.

(Report of the Internal Working Group to Review Extant Ownership Guidelines and Corporate Structure for Indian Private Sector Banks, October 2020)

COVID-19 Related Updates

A. Circulars and Notifications

1. <u>*Review of provisions regarding valuation of debt and money market instruments due to Covid-19*</u>

   In line with the relaxation provided to credit rating agencies, in recognition of default for restructuring by lenders/ investors solely due to Covid-19 pandemic related stress, SEBI has now allowed discretion to valuation agencies engaged by asset management companies/ Association of Mutual Funds in India, to not consider the restructuring of the dues as a default for the purpose of valuation of money market or debt securities held by mutual funds if it views the proposed restructuring as arising solely due to Covid-19 pandemic, based on its assessment of the restructuring proposal.

   (SEBI Circular SEBI/HO/IMD/DF4/CIR/P/2020/192 dated October 01, 2020)

2. <u>*SEBI further extends timelines for compliance with regulatory requirements*</u>

   IIn view of the COVID-19 pandemic, SEBI had earlier provided relaxations in timelines for compliance with regulatory requirements by trading members / clearing members / depository participants. SEBI has now extended the timeline for submission of net worth certificate and conducting internal and systems audit for the half year ended September 30, 2020 to December 31, 2020 and conducting cyber security and cyber resilience audit for the half year ended September 30, 2020 to January 31, 2021. Further, the regulatory requirements by depository participants for submission of half yearly internal audit reports for the half year ended September 30, 2020 and systems audit on annual basis for fiscal year 2020 has been extended to December 31, 2020. In case of KYC application form and supporting documents of the clients to be uploaded on the system of KRA within 10 working days, the period of exclusion shall be from March 23, 2020, till December 31, 2020, and a 15-day time period after December 31, 2020, is allowed to depository/ depository participants to clear the back log.

   (SEBI Circular No. SEBI/HO/MIRSD/DOP/CIR/P/2020/235 dated December 1, 2020)

Other Updates

A. Amendments

1. <u>*Amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015*</u>

   SEBI has amended Regulation 54, 56 and Schedule III of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Listing Regulations**"). Regulation 54(1) of the Listing Regulations has been amended to clarify that for listed non-convertible debt securities ("**Debt Securities**"), the listed entity is required to maintain 100% asset cover or asset cover as per the terms of the offer document, information memorandum and/or debenture trust deed, sufficient to discharge the principal amount at all times for the Debt Securities issued. Further, Regulation 54(3) of the Listing Regulations, which exempted certain regulated financial sector entities from Regulation 54(1) of the Listing Regulations, has now been omitted. Regulation 56(1) has also been amended to require listed entities to forward promptly to the debenture trustee (i) intimation, *inter alia*, of all covenants of the issue, and (ii) half-yearly certificate regarding maintenance of 100% asset cover or asset cover as per the terms of the offer document, information memorandum and/ or debenture trust deed, including compliance with all the covenants by the statutory auditor, along with the half-yearly financial results, except in the case of bonds secured by a government guarantee. In addition, Schedule III - Part A (A) of the Listing Regulations has been amended to insert a new sub-clause for disclosures required to be made to the stock exchanges by listed entities in relation to forensic audit.

(SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2020, Notification no. SEBI/ LAD-NRO/GN/2020/33 dated October 8, 2020)

2. *Amendments to the SEBI (Issue and Listing of Debt Securities) Regulations, 2008*

SEBI has amended the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("**SEBI Debt Regulations**"), key highlights of which are set forth as below:

- The debenture trust deed shall contain matters as prescribed under Section 71 of the Companies Act and Form SH-12 of the Companies (Share Capital and Debentures) Rules, 2014, and the trust deed shall consist of two parts wherein Part A shall contain statutory / standard information pertaining to the debt issue and Part B shall contain details specific to the particular debt issue;
- The roll-over of debt securities shall require a notice of 15 days to be given to the holders of debt securities, which earlier was required to be a 21 days' notice;
- An undertaking by the issuer shall be included in the information memorandum that the assets on which charge is created are free from any encumbrances and in cases where the assets are already charged to secure a debt, permission or consent to create a second or pari-passu charge on the assets of the issuer has been obtained from the earlier creditors;
- The issuer shall create a recovery expense fund and inform the debenture trustee to the issue;
- The summary term sheet included in the offer document shall include details and purpose of recovery expense fund, covenants of the debt issue, event of default (including manner of voting/ conditions of joining inter creditor agreement), conditions for breach of covenants, description regarding security and risk factors pertaining to the issue;
- While the debt securities are secured to the tune of 100% of the principal and interest amount or as per the terms of offer document/ information memorandum, it shall be the duty of the debenture trustee to monitor that security for the issue is maintained; and
- The reference of Companies Act, 1956 in the SEBI Debt Regulations, has been replaced with the Companies Act.

(SEBI (Issue and Listing of Debt Securities) (Amendment) Regulations, 2020, Notification No. SEBI/ LAD-NRO/GN/2020/35 dated October 8, 2020)

3. *Clarification in relation to the meaning of 'original information' under PIT Regulations*

SEBI has amended the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("**PIT Regulations**") by *inter alia*, introducing an explanation to the definition of 'original information' to clarify that the information submitted by an informant shall be considered to be timely only if as on the date of receipt of the duly completed voluntary information disclosure form (format of which is specified under the PIT Regulations) by SEBI, a period of not more than three years has elapsed since the date on which the first alleged trade constituting violation of insider trading laws was executed.

(SEBI (Prohibition of Insider Trading) (Second Amendment) Regulation, 2020, Notification no. SEBI/LAD-NRO/GN/2020/38 dated October 29, 2020)

B. Notifications and Circulars

1. *Framework for monitoring of foreign holding in depository receipts*

SEBI had previously issued a circular on October 10, 2019 ("**DR Framework Circular**"), wherein it prescribed a framework for the issue of Depository Receipts ("**DRs**") by listed companies. The aforesaid circular, *inter alia*, requires the Indian depositories to develop a system to monitor foreign holding, including by way of DRs, as per the limits prescribed under FEMA and applicable SEBI regulations.

SEBI has now notified certain operational guidelines for the monitoring of foreign holding in depository receipts, and some of the key highlights are as follows:

- Every listed company is required to appoint one Indian depository as its 'designated depository' for monitoring the limits on foreign holdings through Drs.
- The designated depository in co-ordination with domestic custodian, other depositories and foreign

depository (if required) will have to compute, monitor and disseminate the DRs' information.

- It provides the process to be followed for re-issuance of depository receipts, which will require, inter alia, the foreign investor to request SEBI registered Broker, with requisite quantity of securities (based on available headroom) required for re-issuance of depository receipts. Such request will be forwarded to the domestic custodian and depending on available headroom, the domestic custodian shall grant approval (which will be valid for a period of 3 trading days).
- Monitoring of investor group limits
  - FPI is required to report to their designated depository participants the details of (a) other FPIs forming part of the same investor group, and (b) subscribers to offshore derivative instruments ("**ODI**") and/or DR holders having common ownership, directly or indirectly, of more than 50% or on the basis of common control.
  - The investor group may appoint one FPI to act as a nodal entity for reporting of the aforesaid grouping information to its designated depository participants in the prescribed format. Further, the nodal entity is also required to disclose to its domestic custodian (by 10th of every month), the holdings of the ODI subscribers and/or DR holders in underlying Indian securities, including securities held in the DR account upon conversion.
  - Further, the FPI that do not belong to the same investor group are also required to make a reporting to their domestic custodian (by 10th of every month), in respect of their holdings as ODI subscribers and/or DR holders in the prescribed format.
  - The designated depository participant and the custodian of nodal entity are required to report the FPI grouping information and details of aforesaid investment holdings in the underlying Indian security to the concerned Indian depository (by 17th of the month).

If investment holding breaches the prescribed limits, the Indian depository / custodian, as the case may be, is required to advise the concerned investor / investor group, to divest the excess holding within five trading days.

(SEBI Circular No. SEBI/HO/MRD/DCAP/CIR/P/2020/190 dated October 1, 2020)

2. <u>*Standardisation of timeline for listing of securities issued on a private placement basis*</u>

SEBI has standardised the timelines for listing of debt securities, non-convertible redeemable preference shares, securitised debt instruments, security receipts and municipal debt securities issued on a private placement basis under the applicable SEBI regulations. The key highlights are set forth below:

- *Timelines*
  - The receipt of funds and allotment of securities will have to completed within two trading days of the closure of the issue.
  - Listing application to the stock exchanges and its permission for listing will have to be completed within four trading days of the closure of the issue.
- *Delay in listing of securities:* In case of delay in listing of securities beyond the timelines stipulated above, the issuer will be required to pay to the investor penal interest of 1% per annum over the coupon rate for the period of delay. Further, the issuer will be permitted to utilize the issue proceeds of its subsequent two privately placed issuances of securities only after receiving final listing approval from stock exchange(s).
- *ISINs of debt securities*: Depositories will be required to activate the ISINs of debt securities issued on private placement basis only after the stock exchange(s) have accorded their approval for listing of such securities and shall allot such new debt securities under a new temporary ISIN, which shall be kept frozen. Thereafter, the debt securities in the new temporary ISIN shall be debited

upon receipt of listing approval from stock exchange(s) for such new debt securities, and the same shall be credited in the pre-existing ISIN of the existing debt securities, before they become available for trading.

(SEBI Circular No. SEBI/HO/DDHS/CIR/P/2020/198 dated October 5, 2020)

3. <u>*Listed debt security issuers to contribute towards 'Recovery Expense Fund'*</u>

SEBI now requires an issuer of a listed debt security to create a 'Recovery Expense Fund' ("**REF**") in order to enable the debenture trustees to take prompt action for enforcement of security in case of 'default' in the listed debt security. Some of the key highlights of this circular are as follows:

- *Manner of creation and operation of REF:* An issuer proposing to list its debt securities will be required to deposit an amount of 0.01% of the issue size, subject to maximum of 25 lakh with the designated stock exchange. The issuer will have to deposit cash or cash equivalent, including bank guarantees, towards contribution to REF at the time of making the application for listing of the debt securities.
- *Corporate restructuring:* The designated stock exchange will have to ensure that the requisite amount is maintained in the REF in the event of change in status of the issuer on account of corporate restructuring, before issuing the 'observation letter' in that regard.
- *Manner of utilisation of REF:* In the event of a default by the issuer, the debenture trustee or lead debenture trustee will have to obtain the consent of the holders of debt securities for enforcement of security and shall inform the same to the designated stock exchange. The designated stock exchange is to release the amount lying in the REF to the debenture trustee / lead debenture trustee within five working days of receipt of such intimation.
- *Refund of REF to the issuer:* The balance in the REF will have to be refunded to the issuer on repayment to holders of debt securities on their maturity or at the time of the exercise of call or put option, and for which the debenture trustee will have to issue a no objection certificate to the stock exchange.

These provisions come into force with effect from January 1, 2021, and all the applications for listing of debt securities made on or after January 1, 2021, are required to comply with the condition of creation of the REF. Further, the SEBI has given an additional time period of 90 days to the existing issuers whose debt securities are already listed on stock exchange(s), to comply with these requirements for creation of the REF.

(SEBI Circular No. SEBI/HO/MIRSD/CRADT/CIR/P/2020/207 dated October 22, 2020)

4. <u>*SEBI relaxes the requirement of freezing promoter group shareholding in case of failure of the listed entity to redress investor complaints*</u>

SEBI had laid down the procedure for handling SCORES complaints by stock exchanges, as well as standard operating procedure for actions to be taken against listed companies for failure to redress investor grievances, *vide* its circular dated August 13, 2020. In case the listed entity fails to redress grievances and/or pay fines within the stipulated time frame, the designated stock exchange could intimate the depositories to freeze the entire shareholding of the promoters and promoter group in the listed entity, as well as freeze other securities held in the demat accounts of the promoter and promoter group. SEBI has now clarified that the term 'promoter and promoter group' should be read as 'promoter(s)'.

(SEBI Circular No. SEBI/HO/OIAE/IGRD/CIR/P/2020/208 dated October 22, 2020)

5. <u>*Amendment and consolidation of SEBI circular on scheme of arrangement by listed entities and relaxation under Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957*</u>

In order to streamline the processing of draft schemes filed with the stock exchanges and *inter alia* ensure that the stock exchanges refer draft schemes to SEBI, only upon being fully convinced that the listed entity is in compliance with SEBI Act, 1992, and the rules, regulations and circulars issued thereunder, SEBI has introduced the following amendments to the SEBI Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017, which lays down the framework for schemes of arrangement by listed entities ("**Scheme Circular**") *vide* circular dated November 03, 2020, ("**November Scheme Circular**"):

- *Increased scope of the audit committee review:* Under the Scheme Circular, listed companies were only required to submit a report of the audit committee recommending the draft scheme, taking into consideration, *inter alia*, the valuation report. The November Scheme Circular additionally requires the audit committee to comment on the following:

    - need for the merger / demerger / amalgamation / arrangement,
    - rationale of the scheme,
    - synergies of business of the entities involved in the scheme,
    - impact of the scheme on the shareholders, and
    - cost benefit analysis of the scheme.

- *Independent directors' report:* The November Scheme Circular introduces a requirement for listed companies to submit to the stock exchanges, a report from the committee of independent directors recommending the draft scheme, taking into consideration, *inter alia*, that the scheme is not detrimental to the shareholders of the listed entity.

- *Valuation report to be obtained by a registered valuer:* The November Scheme Circular requires listed companies to obtain a valuation report from a registered valuer, instead of the earlier requirement under the Scheme Circular to obtain valuation report from a chartered accountant. This has facilitated harmonisation of the Scheme Circular with provisions under the Companies Act concerning valuation report in respect of the scheme of arrangement.

- *Clarification in relation to approval of shareholders to the scheme*: A scheme of arrangement, which involves transfer of whole or substantially the whole of the undertaking of listed entity and the consideration for which transfer is not in the form of listed equity shares, can be acted upon only if the majority of public shareholders vote in favour of such scheme. Under the Scheme Circular, the expression "substantially the whole of the undertaking" in any financial year meant 20% or more of value of the company in terms of consolidated net worth or consolidated total income during previous financial year, in terms of Section 180(1)(a)(i) of the Companies Act, which defines an undertaking to mean, "*an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year*". Under the November Scheme Circular, the reference to Section 180(1)(a)(i) in the Scheme Circular has been changed to Section 180(1)(a)(ii) of the Companies Act, which defines the phrase "substantially the whole of the undertaking" to mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.

- *Processing of draft scheme by SEBI and stock exchanges*: The November Scheme Circular provides that the stock exchanges shall provide the no-objection letter to SEBI on the draft scheme in co-ordination with each other, and that SEBI shall issue the comment letter upon receipt of the 'No-Objection' letter from stock exchanges, having nationwide trading terminals.

- *Relaxations under Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957:* The November Scheme Circular has repealed the provisions relating to listing of equity shares with differential voting rights as to voting, dividend or otherwise, without making an initial public offer of such equity shares.
- *Requirements to be fulfilled by listed entity for listing of equity shares:* For companies proposing to list, pursuant to a scheme of arrangement, the November Circular requires disclosure of certain additional details in the public advertisement and the information document.

Further, on December 22, 2020, SEBI has published a master circular on (i) scheme of arrangement by listed entities and (ii) relaxation under Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957, which is a compilation of all the relevant and updated circulars issued by SEBI that deal with schemes of arrangement of listed entities and which are operational as on date of this circular.

(SEBI Circular SEBI/HO/CFD/DIL1/CIR/P/2020/215 dated November 03, 2020 and Master Circular SEBI/HO/CFD/DIL1/CIR/P/2020/249 dated December 22, 2020)

6. *Introduction of guidelines for rights issue of units by an unlisted InvITs*

SEBI has issued guidelines that enable private unlisted InvITs that have undertaken private placement of units in accordance with Chapter VIA of the SEBI (Infrastructure investment Trusts) Regulations, 2014, as amended (the "**SEBI InvIT Regulations**") to undertake fund raising through a rights issue of units. The key provisions of the circular are set out below:

- *Eligibility:* An unlisted InvIT shall make a rights issue only if it meets the following conditions:
  (a) A resolution approving the rights issue of units and determining the record date has been passed by the board of directors of the investment manager;
  (b) Units of the same class proposed to be allotted are already issued by the InvIT;
  (c) None of the promoters/partners/directors of the sponsor(s), investment managers or trustee of the InvIT should be a fugitive economic offender;
  (d) None of the promoters/partners/directors of the sponsor(s), investment managers or trustees of the InvIT should be debarred from accessing the securities market by SEBI; and
  (e) None of the promoters/partners/directors are promoters/directors/persons in control of a company or sponsor(s), investment manager or trustee of any other InvIT, which is debarred from accessing the capital market by SEBI.
- *Underwriting:* InvITs may appoint underwriters as per the SEBI (Underwriters) Regulations, 1993.
- *Letter of Offer:* The investment manager, on behalf of the InvIT, shall file a letter of offer at least five days before the opening of the issue and shall ensure that the disclosures made in the letter of offer are true, correct and adequate and that they are in accordance with the InvIT Regulations.
- *Application:* The investment manager shall prepare the application form and make arrangements for its distribution, along with the letter of offer, to all unit holders as on the record date, at least five days before the opening of the issue.
- *Pricing:* The investment manager shall decide the issue price before determining the record date, which shall be disclosed in the letter of offer.
- *Timelines:* The rights issue shall be opened within three months from the record date and the issue shall be kept open for at least three working days and not for more than 15 working days.
- *Manner of Issuance:* Units of the InvIT and rights entitlement shall be issued in dematerialised form only. The rights entitlement shall also include the right to renounce the units offered to them in favour of any other person, which shall be disclosed in the letter of offer and notice sent to the unitholders.
- *Allotment:* The minimum allotment to any investor shall be ₹ 1 crore and shall be made in the following manner:
  - Full allotment to eligible unitholders who have applied for their rights entitlement in full or part and also to renouncees, who have applied for the units renounced in their favour, in full or in part, as adjusted for fractional entitlement;
  - In the event that there is an unsubscribed portion after making allotments in accordance with Paragraph (a) above, the allotment shall be made to eligible unitholders who have applied for units to the extent of their rights entitlement and have also applied for additional units shall be made on an equitable basis as far as possible;

- In the event there is an unsubscribed portion after making allotments in accordance with Paragraph (a) and (b) above, allotment shall be made to renouncees who have applied for the units renounced in their favour and have also applied for additional units, which shall be made on a proportionate basis.
- In the event units are to be allotted to the underwriter to the issue, at the discretion of the board of directors of the investment manager, it shall be disclosed in the letter of offer.

- *Restriction on further capital issues:* The InvIT shall not make any further issue of units from the date of filing of the letter of offer and the allotment of units.
- *Allotment Report:* The InvIT shall file an allotment report providing details of the allottees and allotment made within 15 days of the issue closing date.

(SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2020/223 dated November 04, 2020)

7. *Clarifications on the investor grievance redressal mechanism*

SEBI has issued clarifications to circulars bearing reference nos. CIR/MRD/DSA/24/2010 dated August 11, 2010, CIR/MRD/DSA/2/2011 dated February 9, 2011, and CIR/MRD/ICC/30/2013 dated September 26, 2013. This circular shall come into effect from January 1, 2021. Certain clarifications set out in the circular are as follows:

- Stock exchanges to ensure that investor complaints are resolved within 15 working days from the date of receipt of the complaint or date of receipt of receipt of addition information sought (which, in turn, is to be sought within seven working days from the date of receipt of the complaint). The stock exchanges are also to maintain a record of the complaints addressed and the reasons for non-redressal if the complaint is not resolved within the stipulated time frame.
- Service-related complaints shall be resolved by the stock exchanges at its end. In the event the complainant is not satisfied with the resolution, the complaint may be referred to the Investor Grievance Redressal Committee ("**IGRC**").
- Complaints related to trade, settlement and deficiency in services, resulting in financial loss, may be referred to the IGRC, after recording the reasons in writing, if they are not resolved amicably by stock exchanges. Stock exchanges shall be required to provide documents and necessary assistance to the IGRC.
- The IGRC shall amicably resolve investor complaints within 15 working days through the conciliation process. In cases where additional information is sought from the stock exchange, the IGRC shall resolve complaints within 30 working days.
- The IGRC shall decide the claim value admissible to the complainant and stock exchanges shall block the admissible claim value from the deposit of the complainant in case the claim is admissible to the complainant.
- Complainants that are not satisfied with the recommendation of the IGRC shall avail of the arbitration mechanism provided by stock exchanges within six months from the date of such recommendation.
- Complainants are required to refer their complaints to the IGRC and/or the arbitration mechanism provided by stock exchanges before resorting to other remedies available under any law.

(SEBI Circular No. SEBI/HO/MIRSD/DOC/CIR/P/2020/226 dated November 6, 2020)

8. *Amendment to guidelines for preferential issue and institutional placement of units by listed infrastructure investment trusts*

SEBI had issued circular dated November 27, 2019, providing guidelines for preferential issue and institutional placement of units by listed InvITs, as amended ("**Guidelines**"). SEBI has now further amended the Guidelines to clarify that where any person belonging to sponsor(s) has sold/transferred their units of the issuer during the six months preceding the relevant date, the sponsor(s) shall be ineligible for allotment of units on preferential basis.

(SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2020/232 dated November 17, 2020)

9. *Introduction of UPI mechanism for the application process of public issues of debentures, non-convertible redeemable preference shares, securitised debt instruments and municipal debt securities*

SEBI has vide its circular dated November 23, 2020 ("**UPI Circular**"), introduced the UPI mechanism as an additional mode for making online applications for public issues of various securities such as debentures, non-convertible redeemable preference shares, securitised debt instruments and municipal debt securities. The UPI Circular mandates the adding on of the UPI mechanism as an optional application feature for those debt public issues, which open for subscription on or after January 1, 2021. Some of the key highlights of UPI Circular are as follows:

- In case of public issue of relevant securities, investors may now submit the application form with a SCSB or the intermediaries (syndicate members, registered stockbrokers, registrar and transfer agent and depository participants) and use their bank account linked UPI ID for the purpose of blocking of funds, if the application value is ₹ 2 lakh or less.
- All entities involved in the process will have to co-ordinate with one another to ensure completion of listing of securities and commencement of trading by T+6 days.

Further, the UPI Circular also provides for (i) modes of application in public issue of relevant securities, (ii) process for investor application submitted with UPI as mode of payment, (iii) post issue closure activities, and (iv) role of issuer, registrar, stock exchange, intermediaries and collecting bank. This circular is applicable to public issue of relevant securities, opening on or after January 1, 2021.

(SEBI Circular No. SEBI/HO/DDHS/CIR/P/2020/233 dated November 23, 2020)

10. *SEBI rationalises e-voting process for demat account holders of listed entities*

SEBI has decided to enable e-voting to all holders of dematerialised shares by way of a single login credential through the demat accounts/ websites of depositories/ depository participants to enhance convenience of participating in the e-voting process. The e-voting process is proposed to be implemented in a phased manner.

Phase I: The first phase will be implemented within six months from the date of the circular where the holders of dematerialised shares can (a) register directly with the depository and access the e-voting page of various e-voting service providers ("**ESP**") through the websites of the depositories without further authentication by ESPs; or (b) access ESP portals directly from their demat accounts with depository participants.

Phase II: The second phase shall be implemented within 12 months from the completion of the process in Phase I, where the depository shall validate the demat account holder through a one-time password. In this phase, the depositories shall allow login through registered mobile number / email-based OTP verification as an alternate to login, using the credentials and a second factor authentication to be introduced before the holders of dematerialised shares can access websites of depositories through their demat accounts with depository participants.

This facility is to be made available to all individual shareholders holding the securities in demat mode and ESPs may continue to provide the facility of e-voting as per the existing process to all physical shareholders and shareholders other than individuals i.e., institutions or corporate shareholders.

(SEBI Circular No. SEBI/HO/CFD/CMD/CIR/P/2020/242 dated December 9, 2020)

11. *Clarifications to the circular setting out framework for the issue of depository receipts*

SEBI had, vide DR Framework Circular, barred the non-resident Indian ("**NRI**") from buying DRs. The DR Framework Circular has been amended to permit NRIs to hold DRs issued by a company pursuant to (a) share based employee benefit schemes in terms of SEBI (Share Based Employee Benefits) Regulations 2014, (b) bonus issue, or (c) rights issue. Further, a new provision has been introduced, which puts the onus of identification of NRI holders, who are issued DRs in terms of employee benefit scheme, with the listed company. The listed company will have to provide the information of such NRI DR holders to the designated depository for the purpose of monitoring of limits.

(SEBI Circular No. SEBI/HO/MRD2/DCAP/CIR/P/2020/243 dated December 18, 2020)

C. Consultation Papers

1. *Consultation paper on the applicability and role of the risk management committee*

   SEBI has issued a consultation paper towards the proposed amendments in Listing Regulations, regarding the applicability and role of risk management committee ("**RMC**"). Few key suggestions stipulated in the consultation paper are as follows:

   - The requirement of constitution of RMC has been proposed to be extended from the top 500 to the top 1,000 listed entities, on the basis of market capitalisation;
   - RMC will have to meet at least twice in a year in contrast to the existing requirement of meeting once a year;
   - Quorum for a meeting of the RMC will have to be two members or one third of the members of the RMC, whichever is greater; with at least one member of the board of directors in attendance; and
   - RMC will have powers to seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise.

   Further, the paper also prescribes the rules and responsibilities of RMC, which *inter-alia* includes, (a) formulating a detailed risk management policy, (b) monitoring and overseeing the implementation of risk management policy, and (c) reviewing the risk management policy on an annual basis.

   (SEBI Consultation Paper on Applicability and role of the Risk Management Committee dated November 10, 2020)

2. *Report on disclosures pertaining to analyst meets, investor meets and conference calls*

   In light of the issues concerning information asymmetry between various classes of investors, arising out of limited disclosures in respect of analyst meets/ institutional investors meet/ conference calls, SEBI has released a report of the sub-group of Primary Markets Advisory Committee *inter alia* delineating various recommendations pertaining to such disclosures, as set out below, to complement the existing provision of the Listing Regulations:

   - Making available the audio/ video recordings of the post earning conference call/ quarterly call on the website of the listed entity and respective stock exchanges before the next trading day or within 24 hours from the occurrence of event or information (as required under Regulation 30 of Listing Regulations), whichever is earlier;
   - Making available the written transcripts of such calls on the website of the listed entity and respective stock exchanges within five working days after the earning call;
   - The audio/video recordings and the written transcripts to be retained on the listed company's websites for a period of at least eight years, in addition to the details disseminated on respective stock exchanges;
   - Listed companies should be required to disclose the number of one-to-one meetings conducted with select

investors, as part of its corporate governance report submitted to stock exchanges on a quarterly basis, along with affirmation that no unpublished price sensitive information was shared by any official of the company in such meetings; and

- Listed companies may decide as to whether conference calls are open to everyone to attend (as is market practice in other jurisdictions) or limit such calls to their existing shareholders.

(SEBI Report on Disclosures Pertaining to Analyst Meets, Investor Meets and Conference Calls dated November 20, 2020)

3. Review of requirement of minimum public offer for large issuers in terms of Securities Contracts (Regulation) Rules, 1957

SEBI has issued a consultation paper on the requirements of minimum public offer for large issuers in terms of Securities Contracts (Regulation) Rules, 1957. Pursuant to the consultation paper, SEBI has proposed:

- Reducing the minimum offer to public (through an offer document), for issuer companies having post issue paid up capital calculated at offer price ("**MCap**") of above ₹ 10,000 crore, from existing 10% of MCap to ₹1,000 crore plus 5% of MCap exceeding ₹10,000 crore; and
- Relaxing the timelines for achieving the minimum public shareholding of 25% for issuer companies having MCap of above ₹10,000 crore i.e. while issuer companies having MCap of above ₹10,000 crore up to ₹1,00,000 crore will be required to achieve 10% minimum public shareholding within 18 months and 25% within three years from the date of listing, issuer companies having MCap of above ₹1,00,000 crore will be required to achieve minimum public shareholding of 10% within two years and 25% within five years from the date of listing.

(SEBI Consultation Paper on Review of requirement of minimum public offer for large issuers in terms of Securities Contracts (Regulation) Rules, 1957 dated November 20, 2020)

4. SEBI issues a consultation paper for review of the SEBI (Delisting of Equity Shares) Regulations, 2009

SEBI has issued a consultation paper to review the SEBI (Delisting of Equity Shares) Regulations, 2009 ("**Delisting Regulations**"), to further streamline and strengthen the delisting process in India. Some of the key proposals put forth in the consultation paper are as follows:

- *Promoter's or acquirer's intention to voluntarily delist the company and its disclosure*: Instead of the company disclosing to the stock exchanges the promoter's or acquirer's proposal to voluntarily delist the company, the promoter or acquirer shall make a public announcement of their intention to voluntary delist to the stock exchanges, and on the same day as when their intention is communicated to the company. This announcement shall contain reasons for delisting and should be in compliance with the Delisting Regulations.
- *Approval by board of directors*: The board of directors shall convene a meeting within 21 working days from the date of receipt of delisting proposal, to consider and approve the proposal. The board approval, if granted, should be communicated to the stock exchanges, along with the merchant banker's due-diligence report and the audit report.
- *Role of board of directors/independent directors*: The committee of independent directors may be required to provide their recommendations on the delisting proposal, and their voting pattern to be disclosed.
- *Indicative price*: Promoters or acquirers may specify an indicative price, which cannot be less than the floor price calculated under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Regulations**").
- *Escrow account:* Promoters or acquirers shall open an escrow account, within seven working days of the shareholders' approval and deposit an amount equivalent to 25% of the total consideration, calculated on the basis of the floor price/indicative price.
- *Exit to remaining shareholders:* Promoters or acquirers shall take additional steps to provide exit to remaining shareholders, including filing the quarterly progress report to the stock exchanges, sending quarterly follow-up communications to the remaining shareholders and publishing quarterly advertisements, inviting the remaining shareholders to avail the exit opportunity during the one year exit window.
- *Gap before relisting:* The cooling off period or gap for relisting after delisting may be reduced from five years to three years.
- *Delisting after buyback and preferential allotment:* Voluntary delisting may not be permitted after buyback and preferential allotment, unless a period of six months has elapsed from the completion of the last buy-back or preferential allotment, as applicable.

- *Parallel delisting of depository receipts issued overseas*: After delisting shares in the home jurisdiction, companies shall delist all their depository receipts issued overseas. This is subject to consultation with the Government of India.

(SEBI Consultation Paper on Review of the SEBI (Delisting of Equity Shares) Regulations, 2009 dated November 20, 2020)

5. *SEBI proposes to relax rules for re-classification of promoter or promoter group as public shareholder*

SEBI has released a consultation paper on re-classification of promoter or promoter group entities and disclosure of the promoter group entities in the shareholding pattern. The key proposals include, *inter alia*, the following:

- The eligibility threshold of voting rights for seeking re-classification by promoter or persons related to promoter is proposed to be relaxed from 10% to 15%.
- The time gap between the date of board meeting and the shareholders meeting considering the request of the promoters is proposed to be brought down from at least three months to at least one month.
- The exemption granted to companies, from certain provisions of the Listing Regulations, under Insolvency and Bankruptcy Code, 2016, is proposed to be extended to re-classification pursuant to an order or direction of the government or regulator and/or as a consequence of operation of law, provided that such promoters seeking re-classification shall not remain in control of the listed entity.
- Norms for re-classification, in cases of re-classification, pursuant to an open offer in accordance with the provisions of Takeover Regulations, is proposed to be eased, provided the intent of the existing promoters to re-classify has been disclosed in the letter of offer and the promoters and the listed entity comply with Regulation 31 of the Listing Regulations. Further, exemption may be granted wherein the listed entity intends to re-classify erstwhile promoter(s) or promoter group entities, but such persons are not traceable or are not co-operative, subject to certain conditions.
- The names of entities that fall under the promoter and promoter group category shall be disclosed even in case of Nil shareholding. Further, the listed entities will have

to obtain a declaration on a quarterly basis, from their promoters or the entities or persons that form part of the 'promoter group'.

- A time period of one month has been proposed for listed companies to place the re-classification request before the board of directors of the listed entity.

(SEBI Consultation Paper on Re-classification of promoter/ promoter group entities and disclosure of the promoter group entities in the shareholding pattern dated November 23, 2020)

6. *Consultation paper for review of non-convertible debentures along with warrants as a stapled product and as a segregated product offered through a qualified institutional placement*

SEBI issued a consultation paper on the review of 'non-convertible debentures ("**NCDs**") along with warrants' as a stapled or segregated product offering, through the qualified institutional placement ("**QIP**") route under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**SEBI ICDR Regulations**"). Under the SEBI ICDR Regulations, 'NCDs along with warrants' are currently included in the definition of 'eligible securities' offered through the QIP route. The key proposals include, *inter alia*, the following:

- Discontinuing the segregated offering of 'NCDs along with warrants' to Qualified Institutional Buyers ("**QIBs**") through the QIP mechanism under the SEBI ICDR Regulations;
- Establishing a minimum threshold for the warrant portion of the stapled offering of 'NCDs along with warrants' to QIBs under the SEBI ICDR Regulations, with the ability to segregate the instruments after the issuance/allotment; and
- Allowing the issuance of 'naked warrants' to QIBs through the QIP mechanism under the SEBI ICDR Regulations, with guidelines on upfront payment, pricing and tenure of warrants.

(SEBI Consultation Paper on Review of the NCDs along with warrants under QIP dated December 2, 2020)

7. *Consultation paper on review of framework of innovators growth platform under the SEBI ICDR Regulations*

SEBI received certain feedback and suggestions for revisiting the innovators growth platform ("**IGP**") norms since IGP has not been able to get any traction and no listing by issuers have so far taken place on the IGP platform. In this regard, SEBI issued a consultation paper and kep proposals are set out below:

- *Eligibility criteria* – reducing the period of holding of 25% of pre-issue capital by eligible investors from two years to one year.
- *Lock in* – in line with certain existing categories of investors, exempting Category-II AIF from post-issue six months lock-in requirements, provided shares are held for a period of one year from the date of purchase.
- *Discretionary allotment to anchor investors* – allocation of up to 60% of the issue size on a discretionary basis, prior to issue opening. Such discretionary allotment may be allowed to all eligible investors as defined under the IGP framework.
- *Accredited investors ("**AI(s)**")* – increasing the pre-issue capital required for meeting eligibility condition norms by AIs from 10% to the entire 25%. However, pre-issue capital held by promoters/ promoter groups, even if they are registered as AIs shall not be considered for the minimum 25% eligibility requirement.
- Reducing the net worth requirement of family trusts for investing in companies aspiring to list under IGP from ₹500 crore to ₹25 crore has also been proposed. In addition, family trusts may be included as a part of AIs and consequently deleted as a separate sub-category under the list of prescribed eligible investors.
- *Differential voting rights ("**DVR**") and superior voting right ("**SR**") equity shares* – allowing issuer companies seeking listing under IGP to issue DVRs or SRs to promoters/ founders.
- *Continuing rights* – allowing special rights (aligned with the DVR framework) for investors holding in excess of 10% of capital, subject to certain conditions.
- *Takeover requirements* – increasing the threshold for triggering open offer from existing 25% to 49%. However, it may be stipulated that any change in control, irrespective of value of acquisition will trigger open offer.
- The threshold for disclosure of the aggregate shareholding is proposed to increase from the present 5% to 10% and whenever there is subsequent change of ± 5% (instead of present ± 2%) in the shareholding of the issuer.
- *Migration to main board* – reducing the eligibility requirement to have 75% of the issuer's total issued capital held by QIBs (as on date of application for migration to main board) to 40% for an issuer, which does

not satisfy the requirements of profitability, net worth, net assets, etc.

(Consultation paper on review of framework of innovators growth platform under the SEBI ICDR Regulations dated December 14, 2020)

D. Press Release

1. *SEBI Board Meeting*

Set out below are certain key decisions undertaken by SEBI in its board meeting dated December 16, 2020:

- *Recalibration of minimum public shareholding norms for listed companies going through the corporate insolvency resolution process:* SEBI has decided that companies that continue to remain listed as a result of the resolution plan under the IBC will be mandated to have at least 5% public shareholding at the time of their admission to dealing on the stock exchange. To achieve public shareholding of 10% and 25%, companies will be provided 12 months and 36 months from the date of admission to dealings on stock exchange, respectively. The lock-in on equity shares allotted to the resolution applicant under the resolution plan will not be applicable to the extent of achieving 10% public shareholding within 12 months. Further, such companies will be required to make additional disclosures including:
    - specific details of the resolution plan, including details of assets post the insolvency resolution process; and
    - proposed steps to be taken by the incoming investor to achieve the minimum public shareholding.
- *Minimum promoters' contribution and lock-in requirements for issuers making a further public offer*: SEBI has decided to do away with the requirement of minimum promoters' contribution and the subsequent lock-in requirements for issuers making a further public offer. To be eligible for exemption, issuers have to meet the following conditions:
    - the equity shares of the issuer have been frequently traded on a stock exchange for a period of at least three years;
    - the issuer has been in compliance with the Listing Regulations for a period of at least three years; and
    - the issuer has redressed at least 95% of complaints received from investors.
- *Amendments to SEBI (Mutual Fund) Regulations, 1996* ("***MF Regulations***"): SEBI approved various amendments to the MF Regulations, which include inter alia amendments to the eligibility criteria for sponsoring a mutual fund, manner of computation of net-worth of an asset management company, and segregation and ring-fencing of assets and liabilities of mutual fund schemes.
- *Amendment to SEBI (Alternative Investment Funds) Regulations 2012 ("**AIF Regulations**")*: SEBI approved amendment to the AIF Regulations to provide certain exemptions to alternative investment funds ("**AIFs**") in respect of investment committee members in terms of Regulation 20(6) of AIF Regulations, conditional upon capital commitment of at least ₹ 70 crore from each investor accompanied by a suitable waiver.
- *Amendments to the SEBI (Investment Advisers) Regulations, 2013 ("**IA Regulations**"):* SEBI approved amendments to the IA Regulations under which (i) Investment Advisers ("**IAs**") would require obtaining membership of a body recognised by SEBI for administration and supervision of IAs; and (ii) structure of fees payable by IAs would be modified while ensuring that the total cost borne by IAs towards fees remains same as that payable by IAs under the present IA Regulations.
- *Amendments to SEBI (Intermediaries) Regulations, 2008* ("***Intermediaries Regulations***"): SEBI approved certain amendments to the Intermediaries Regulations, with an objective to rationalise the processes and to avoid the duplicity of proceedings before the designated authority and the designated member.

(Minutes of SEBI Board Meeting dated December 16, 2020, PR No.61/2020)

E. Informal Guidance

1. *Informal Guidance on financial statements and board minutes of overseas subsidiaries*

Pursuant to an informal guidance, SEBI advised if the laws of incorporation of the foreign subsidiary require board meetings to be conducted, it would be sufficient if the minutes of such board meetings are placed before the board of the listed company. However, if the laws of incorporation of the foreign subsidiary does not require board meetings to be conducted, it is sufficient if there is periodic reporting of all significant transactions and arrangements entered into by the subsidiary.

(SEBI informal guidance no. SEBI / HO / CFD / CMD2 / OW / P / 2020 / 0000017800/1 dated October 22, 2020)

2. *Informal guidance on the interpretation of various provisions in relation to the offer of sale through stock exchange mechanism*

Guidance from SEBI was sought on (a) whether a book running lead manager ("**BRLM**") can share the bidding data available on the website of stock exchanges with the investors during the bidding period; (b) whether such data can be shared with investors, as and when requested by the investors, during the bidding period; (c) whether a selling broker can share information available on the website of stock exchanges in an offer for sale ("**OFS**") with the investors (upon request made by the investors or otherwise); and (d) whether a BRLM can share information, other than the bidding data, available in the public domain in an initial public offering, rights offering, further public offering, qualified institutions placement and offer for sale of securities, upon investor's request.

SEBI clarified that the bidding data is displayed on the website of the stock exchanges and is extraneous to the information disclosed in the offer documents. Further, while the publicly available information may not create information asymmetry among investors, any effort to present the bidding data (standalone or aggregate) may cause prejudice in the mind of some investors, which is not the intent of the relevant SEBI regulations. Hence, a BRLM cannot share the bidding data with the investors or on the request made by the investors during the bidding period. SEBI further clarified that, in an OFS, adequate provisions are made for disclosing the information relating to the bidding data, which is available to the investors. Therefore, the selling brokers may direct the investors to the publicly available sources to avoid any misinformation to the investors. Similarly, there being nothing in the relevant regulations which prohibits BRLM from directing the investors to the channels where the publicly available information can be accessed, the seller broker / BRLM may direct the investors to the publicly available sources in order to avoid any kind of mis-information under the various modes of issuances.

(SEBI informal guidance no. CFD/DIL-1/OW/2020/17828/1 dated October 23, 2020

3. *Informal guidance on the interpretation of Regulation 17(6)(e) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015*

SEBI clarified, in context of Regulation 17(6)(e) of the Listing Regulations (compensation payable to executive directors who are promoters or promoter group), that if not explicitly excluded, remuneration would include salary, fees, commission, stock options, etc., or any money or its equivalent in whatever manner given to any person for the services rendered and that any listed entity is required to comply with the provisions of the Listing Regulations, in addition to the provisions of the Companies Act. Accordingly, Regulation 17(6)(e) of the Listing Regulations would be applicable in case the remuneration paid to such directors is beyond the specified limits and the relevant company will be required to take approval of the shareholders by passing a special resolution, notwithstanding the adherence with the applicable limit of ordinary resolution as specified under Schedule V, Part II, Section II of Listing Regulations. Further, SEBI clarified that clause (ii) of regulation 17(6)(e) of the Listing Regulations prescribes only a percentage limit and no absolute limit has been specified. In this regard, the relevant company will be required to pass a special resolution under clause (ii) of Regulation 17(6)(e) of the Listing Regulations in case the aggregate remuneration payable to all executive promoter directors exceeds 5% of the net profits, subject to such approval being valid only till the expiry of the term of such directors.

(SEBI informal guidance no. SEBI / HO / CFD / CMD1 / OW / P / 2020 / 19620 / 1 dated November 18, 2020)

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