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AT-1 bonds - SEBI concerns and market implications

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Main stories

Welcome to this issue of *Insight*.

It's been more than a year since the nationwide lockdown was declared in March 2020. We are now facing the second wave of the Covid-19 pandemic. Over the past year, in order to catalyse the markets, regulators announced a slew of measures and packages, which have aided in the road towards recovery.

Over the year, businesses as well as regulators have acclimatised and adapted to the new normal. We have seen retail investors be more involved in the primary as well as the secondary markets. In our first lead article, we have analysed the SEBI circulars on AT-1 instruments, which were issued by the regulator to protect the interests of retail investors.

The pandemic has underscored the requirement of businesses and boards to continuously adapt to the new normal in an agile and innovative manner. In our second lead article, we have discussed the change brought about by the pandemic in the role of the boards, which has now become more demanding and challenging than before.

Apart from the above, we have also captured key developments relating to the notifications and orders issued by the Ministry of Corporate Affairs in relation to the Companies Act, 2013, as well as circulars and notifications issued by the RBI and SEBI for the period under review.

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

Regards,
CYRIL SHROFF

Managing Partner
Cyril Amarchand Mangaldas

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AT-1 BONDS – SEBI CONCERNS AND MARKET IMPLICATIONS

From a regulatory standpoint, there are certain points of inflection and certain points of divergence between the capital markets regulator (i.e. Securities and Exchange Board of India ("**SEBI**")) on the one hand and the financial sector regulator (i.e. the Reserve Bank of India ("**RBI**")) on the other. Both regulators are intent on protecting their respective stakeholders i.e. investors and depositors.

A recent example of this divergence relates to mutual fund investments in certain hybrid, high risk capital instruments i.e., non-cumulative preference shares, innovative perpetual debt instruments and perpetual debt instruments and prescription of valuation norms for Additional Tier - 1 ("**AT-1**") instruments and perpetual Tier 2 bonds (collectively, "**Perpetual Bonds**") issued by Banks.

In this context, we have analysed the emergence and characteristics of AT-1 instruments, the recent circulars issued by SEBI to *inter alia* restrict exposure of mutual funds to AT-1 bonds and the consequences and impact of these changes.

I. Emergence and characteristic features of AT-1 Bonds

Following the 2008 financial crisis and the need for governments to bail out failing banks and financial institutions, the Basel Committee on Banking Supervision issued a reform package, namely, Basel III: A global regulatory framework for more resilient banks and banking systems ("**Basel III Norms**"). Based on the Basel III Norms, the RBI issued the Master Circular on Basel III Capital Regulations ("**Basel III Master Circular**"), which allowed banks to raise capital by issuance of debt instruments issued as AT-1 capital (more typically referred to as AT-1 bonds). These bonds help with absorbing the financial and economic shocks of the bank without triggering bankruptcy.

As per the Basel III Norms and the Basel III Master Circular, AT-1 bonds are unsecured debt instruments, which are perpetual in nature i.e., these bonds do not have a maturity date for repayment of the principal amount. The banks issuing such AT-1 bonds may exercise a call option in relation to the same after a minimum of five years, such call option or repayment of the AT-1 bond being subject to prior RBI approval.

Issuance of AT-1 bonds are preferred by banks due to their characteristic loss absorbing features, which includes the discretion of the bank to cancel distribution or payments against the AT-1 bonds, conversion of these bonds to equity shares or the option to write off or write down (i.e., partial or complete reduction in claims, repayment amount or coupon payment) these AT-1 bonds at a pre-specified trigger point or a point of non-viability ("**PONV**") trigger, which is typically the earlier of (a) a decision taken by the RBI to write off or convert to equity the AT-1 bonds; and (b) the decision of any relevant authority to require an injection of capital from the public, in each case, the failure to undertake such action will result in the issuing bank becoming non-viable. From an investor's perspective, while there were risks associated with subscribing to these bonds, the yields were also significantly higher than typical bonds (approximately 9% per annum)[1], thereby making it an attractive investment proposition for those with a higher risk appetite.

Consequently, several debt mutual funds subscribed to these AT-1 bonds and as of February 2021, approximately INR 25,000 crore of AT-1 bonds issued by banks are held by mutual funds.[2]

II. Write off of Perpetual Bonds and impact on retail investors

The risks associated with Perpetual Bonds have been tested recently in the restructuring of banks whereby, banks have, in accordance with the applicable RBI restructuring scheme, written down in full, their Perpetual Bonds, citing the Basel III Master Circular, which recognised an event of restructuring of a bank as a PONV trigger for write down/ write off of the Perpetual Bonds.

However, the impact of such write off was faced not just by institutional investors, but also by retail investors participating in such Perpetual Bonds' market through their respective mutual funds.

III. SEBI's circulars and investor protection initiative

Against this backdrop and in view of the potential impact on retail investors, SEBI issued the following circulars.

1. *Restrictions on retail investors and corporates* – Circular dated October 06, 2020[3], which *inter alia* provided for:
   (a) the issuance of AT-1 bonds to be mandatorily done on the electronic book provider platforms of the stock exchanges, irrespective of the issue size;
   (b) onus being on the issuer bank and/ or the stock exchanges to ensure that only qualified institutional buyers ("**QIBs**") participate in the issuance of the AT-1 instruments; and

1 *AT1 Bonds: Higher Risk, Higher Yields*, MINT, September 22, 2016, available at https://www.livemint.com/Money/roKczQVvHc0SqXCceVVvPO/AT1-bonds-higher-risk-higher-yields.html.
2 *SEBI Norms may hit debt MFs' near term Returns*, MINT, March 18, 2021, available at https://www.livemint.com/mutual-fund/mf-news/sebi-norms-may-hit-debt-mfs-near-term-returns-11615484653168.html.
3 SEBI circular no. SEBI/HO/DDHS/CIR/P/2020/199 w.e.f October 12, 2020.

(c) the minimum allotment and trading lot size of each issue of AT-1 instruments to be INR 1 crore. The circular further clarified that issuers of such AT-1 instruments should ensure the inclusion of a PONV clause, which clarifies to the investor that the RBI has the right to write down the entire value of outstanding AT-1 instruments/ bonds if the issuing bank passes the PONV or requires a capital infusion from the public to remain a going concern. The clarification was stoked by practices of several public sector banks to offer retail investors, AT-1 bonds as alternatives to fixed deposits as a part of investment planning, without relaying the risks associated with the same.

2. *Limiting exposures of mutual funds* – Circular dated March 10, 2021 ("**March 10 Circular**")[4], wherein it:

   (a) Restricted mutual funds from:

      (i) investing more than 5% of its net asset value ("**NAV**") of the debt portfolio of its scheme in Perpetual Bonds;

      (ii) investing more than 10% of its NAV of the debt portfolio of its scheme in Perpetual Bonds issued by a single issuer; and

      (iii) owning more than 10% of the Perpetual Bonds issued by a single issuer, collectively under all its schemes.

   (b) Permitted any mutual fund having investments above the aforementioned limits to grandfather such investments. This was primarily to prevent a panic sale of such Perpetual Bonds in the secondary market.

   (c) Clarified that the maturity of all Perpetual Bonds will be treated as 100 years from the issue of the same, for purposes of valuation. Prior to this circular, for purposes of valuation, AT-1 bonds were treated as having a tenure that was coterminous with the exercise of the call option by the issuing bank, which was generally between five to seven years. With the revised pricing mechanism, AT-1 bonds would be considered to have a very long tenure with high bond yield and resultantly, will be priced lower, which would affect investor preference and NAVs of mutual funds investing in such Perpetual Bonds.

Further, news reports suggest that on April 12, 2021, SEBI imposed a penalty on certain employees of banks for alleged mis-selling of AT-1 bonds to fixed deposit customers.

IV. Reaction to the SEBI circulars

The March 10 Circular received mixed responses. Mutual funds were faced with the two-pronged issue of restricting their investments in AT-1 bonds within the prescribed limits on the one hand, and facing lower valuation of AT-1 bonds in the secondary sale market on the other. The Association of Mutual Funds in India ("**AMFI**") however, was in support of SEBI's position on minimising exposure of mutual funds to

4 SEBI circular no. SEBI/HO/IMD/DF4/CIR/P/2021/032 w.e.f. April 01, 2021.

AT-1 bonds while also affirming that most mutual funds are likely to fall within the thresholds of the said SEBI circular.[5]

Nevertheless, the Ministry of Finance ("**MoF**") requested SEBI to consider withdrawing the March 10 Circular in the interest of the financial health of public sector banks, given that in the eve of privatisation in the banking sector, a fall in investments in AT-1 capital of banks is not desirable as banks would then have to look towards government funding for absorbing any financial or economic stress.[6] This, according to the MoF, would be counterproductive to the objective of the Basel III Norms and issue of AT-1 instruments.

In response to representations of various stakeholders, SEBI in its circular dated March 22, 2021[7] ("**March 22 Circular**"), proposed a glide path for the staggered implementation of the valuation norms contemplated in the March 10 Circular. Accordingly, the deemed residual maturity of AT-1 bonds for valuation purposes of mutual funds will be: (a) 10 years up till March 31, 2022; (b) 20 years between April 01, 2022, and September 30, 2022; (c) 30 years between October 01, 2022, and March 31, 2023; and (d) 100 years from April 01, 2023, onwards.[8]

Further, the valuation of Perpetual Bonds by mutual funds are to also reflect any financial stress or adverse event, which restricts the issuer from exercising a call option for these Perpetual Bonds.

V. Key implications

1. *Excluding Retail Investors from AT-1 Bonds* – SEBI's approach in excluding retail investors from the AT-1 bonds' market is not typical. Instruments equivalent to the AT-1 bonds issued in India, are issued to retail investors in other jurisdictions, such as (a) US Markets - where 'Preferred Securities' contemplate separate terms for retail and institutional investors, with retail investors having a fixed rate and shorter intervals for interest payments;[9] (b) European Markets – where 'Contingent Convertible Capital Instruments' issued by European institutions are primarily in demand from retail investors and where institutional investors are hesitant to invest in these instruments on account of a lack of a clear credit rating of such instruments.[10]
2. *Reduced Market for AT-1 bonds* – The March 22 Circular, which provided a staggered implementation of the revised valuation norms, may have avoided immediate market volatility and resultant higher borrowing costs by ensuring that mutual funds are not driven to sell or redeem AT-1 bonds in a state of panic. However, the long-term issues contemplated by the MoF persist, such as, higher coupon rates for AT-1 bonds and a negative impact on AT-1 capital issuances, which is a consequence of a reduced market for such bonds.
3. *Possible incentives for building an AT-1 bond market* – A way forward for ensuring a stable market for AT-1 bonds is that mutual funds continue trading these AT-1 bonds in the secondary market at short intervals. The rationale is that even if a single AT-1 bond (or a category thereof) transaction takes place on a single day, the traded price of this AT-1 bond transaction will help in setting the value of similar AT-1 bonds, thereby ensuring the marketability of such bonds.[11] However, a secondary market for AT-1 bonds and hence, the marketability of AT-1 bonds, will additionally be dependent on external factors such as the number of investor participants in the market, the general trust in the financial health of the issuing banks and accounting for any other volatility on account of any financial shocks to the economy.

From the perspective of both investors and the banking sector, a complete clamp down on the criteria for investment in AT-1 bonds and resultant shrinkage of markets is not desirable. Given that retail investors and mutual funds are participants to the equity markets, excluding a certain set of investors from investing in AT-1 bonds is incongruous. While imposing a regulatory mandate on ensuring transparency in the trading as well as in the terms of the AT-1 bonds is a step in the right direction, both SEBI and RBI may consider providing a harmonious regulatory landscape for AT-1 instruments.

5 Association of Mutual Funds in India, *AMFI fully supports SEBI's objective of fair valuation*, Press release dated March 12, 2021, available at https://www.amfiindia.com/Themes/Theme1/downloads/AMFIPressRelease12thMarch2021.pdf.
6 *Perpetual Bond Valuation: Mutual Funds Vs SEBI Vs Finance Ministry*, BLOOMBERG QUINT, March 13, 2021, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiThan18cnvAhXr63MBHaJRDrAQFjAGegQIBhAD&url=https%3A%2F%2Fwww.bloombergquint.com%2Flaw-and-policy%2Fperpetual-bond-valuation-mutual-funds-vs-sebi-vs-finance-ministry&usg=AOvVaw2l_5avo9Z8oVdwtffKy0DZ.
7 SEBI circular no. EBI/HO/IMD/DF4/CIR/P/2021/034 dated March 22, 2021.
8 Similarly, the deemed residual maturity of perpetual Tier-2 bonds for valuation purposes of mutual funds will be: (a) the earlier of 10 years and the contractual maturity of the Tier-2 bonds for the period up to March 31, 2022; and (b) the contractual maturity of the Tier-2 bonds from April 01, 2022 onwards.
9 *Understanding Preferred Securities*, Market Intelligence by PIMCO, available at https://www.pimco.com.sg/en-sg/resources/education/understanding-preferred-securities/.
10 Stefan Avdijev, Anastasia Kartasheva, Bilyana Bogdanova, *CoCos: A Primer*, BIS Quarterly Review, September 2013, available at https://www.bis.org/publ/qtrpdf/r_qt1309f.pdf.
11 Aparna Iyer, *AT-1 Bonds just need to be traded often to survive after SEBI rules*, MINT, March 24, 2021, available at https://www.livemint.com/market/mark-to-market/at1-bonds-just-need-to-be-traded-often-to-survive-after-sebi-rules-11616516736343.html.

CHANGING ROLE OF THE BOARD IN THE NEW NORMAL

The Covid-19 pandemic has accelerated the move towards greater responsibility of the board of directors ("**Board**"). We look at some of the major ways in which the role of the Board in India is expected to change in the 'new normal' and also examine if this may herald a move towards responsible capitalism.

I. Move towards stakeholder-centric decision making

While the responsibility of the Board under the Companies Act, 1956, was owed only to the shareholders of the company, the Companies Act, 2013 ("**Companies Act**") codified the duty of directors to act on behalf of all stakeholders. This included the duty to (a) act in good faith to promote the company's objects for the benefit of its members as a whole; and (b) act in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment. While there has been mounting impetus on directors to abide by these duties in letter and in spirit, it has been put to test during the Covid-19 pandemic more than ever, particularly with directors facing a string of difficult decisions.

For instance, the question of dividend distribution, which has typically been a straightforward decision based on factors such as dividend policy, past practice, market/shareholder expectation, and company's financial performance, became a far more complex decision. For companies operating in sectors that were negatively impacted by the Covid-19 pandemic, the Board had to weigh in the public perception of monetary payments to shareholders while employees were being laid-off, the justification for complying with or going against government recommendations of dividend cuts (where applicable), and the reputational impact of cancelling or reducing dividend vis-à-vis the yesteryears' dividend. On the other hand, for companies operating in sectors that have seen an uptick, the Boards were seen pushing for higher dividends to ensure that their shares are not traded for other companies, especially overseas. In other words, various stakeholder related considerations drove decision-making, rather than shareholder value maximisation alone.

While it is still to be seen whether Covid-19 is truly an inflection point and whether this stakeholder centric trend will continue in the new normal, with its own set of challenges such as climate change and social movements, one thing is certain that primacy of 'shareholders' over other stakeholder groups in all circumstances is no longer set in stone, and Boards will have to take a more proactive role in the future to ensure the following:

- identification of stakeholders (other than shareholders) such as consumers, employees, contract labour, and the community in which the company operates, etc., that have a material impact on or could be materially impacted by the company's business. The Board should also monitor the company's performance towards and impact on these identified stakeholders;
- balancing the interests of the stakeholders based on the circumstances and nature of their interests, as conflicts are bound to arise (e.g., discontinuing energy inefficient plant v. lost employment);
- interest of other stakeholders to be given priority, in a manner consistent with obligations of the company to each respective group and long-term goals/ purpose of the company; and
- adoption of conscientious environmental, social and governance ("**ESG**") practices, as they are becoming highly reflective of a company's vision, culture, and resilience and emerging as one of the key metrics in investment and M&A decisions. Further, by providing access to capital, goodwill, and operational benefits, good ESG practices also facilitate better risk management and creation of long-term value.

II. More involvement with CSR activities

Covid-19 has encouraged meaningful engagement with the community, by way of addressing the social issues/ challenges, which are important for the creation of long-term business value and imbibes a culture of true corporate citizenship. In the wake of the pandemic, the expectation that companies engage with society has also been amplified, forcing companies to reorient their focus towards actual delivery of 'value' and 'impact' as part of corporate social responsibility ("**CSR**").

The Ministry of Corporate Affairs ("**MCA**") issued various circulars/ amendments over the last year, to not only address Covid-19 specific issues such as classifying contributions towards Covid-19 related activities as eligible CSR expenditure[12] and allowing set-off of excess CSR expenditure against the CSR contribution required for future years,[13] but also for the over-all improvement of the CSR framework by

[12] MCA Circular No. 10/2020 dated March 23, 2020; Companies (Corporate Social Responsibility Policy) Amendment Rules 2020; and MCA Notification No. G.S.R.525(E) dated August 24, 2020.

[13] Companies (Amendment) Act, 2020.

inter alia making CSR policy more comprehensive, mandating registration of implementation agencies, permitting engagement of international organisations for implementation and increasing oversight over CSR fund utilisation.[14] One such framework related amendment is Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, which introduced various key changes as detailed on page 7 of this Issue. Pursuant to these changes, the Board and/ or its committee is now *inter alia* responsible to ensure that (a) CSR projects are implemented in accordance with project timelines, with alterations if required; (b) an annual action plan is formulated, including details such as the list of approved projects, manner of execution, implementation schedule, and impact assessment, if any; and (c) CSR funds are utilised only for the designated purposes.

Further, the recent trend of corporate decision-making, against the backdrop of global events and demands for environmentally sustainable practices has shown that Boards, in the new normal, will also be expected to ensure that (a) social issues are factored in while developing business strategy and allocating resources; and (b) risk management systems afford due consideration to social risks.

III. Enhanced focus on employees' interest and safety

Of the various issues brought to the fore by Covid-19, physical and financial safety of employees and workers, and drawbacks of the traditional pay-for-performance paradigm are few of the notable ones. The crisis also forced the central and state government to reconsider the prevailing norms concerning employees' occupational safety, physical health and financial well-being. The Government issued various circulars/ directives over the last financial year, *inter alia* recommending public and private institutions to refrain from termination or wage reduction during specified periods and ensuring adequate workplace safety.

Therefore, in the new normal, the Boards would be expected to *inter alia* ensure:

- supervision over compensation policies across the organisation, and not just top-executives;
- alignment of compensation plans with the corporate and public engagement strategy, which are not only considered fair and equitable within the organisation but are also well-suited to withstand future uncertainties;

- existence of adequate systems and plans for addressing physical and mental safety / well-being of employees, right from the top management to the rank-and-file employees; and
- timely implementation of provisions under the new labour codes, upon their coming into effect.

IV. Growing focus on independent directors and non-executive directors

Independent directors ("**IDs**") play a key role in improving the Board's decision-making quality by (a) objectively analysing the company's performance to ensure good corporate conduct and governance; and (b) linking interest of management with that of minority shareholders and other stakeholders. Similarly, non-executive directors ("**NEDs**") also play their part by overseeing implementation of corporate strategy, in accordance with shareholders' interest and taking into consideration applicable social and environmental challenges. By design, IDs and NEDs have become increasingly important in decision making in matters involving a company's various stakeholders.

The MCA, being cognizant of the specialised roles of IDs and NEDs, has also taken measures to encourage eligible persons to take up ID and NED roles. Through its various circulars/ notifications, the MCA has:

- prohibited initiation of civil or criminal proceedings against IDs and NEDs, for non-compliances with the

[14] Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021.

Companies Act provisions, in the absence of sufficient evidence to suggest that the non-compliance occurred with their consent, connivance or lack of diligence;[15]

- allowed minimum guaranteed income to IDs and NEDs, irrespective of the company's net profits;[16] and
- eased qualification norms for IDs.[17]

For its part, SEBI, too, has released a consultation paper, concerning review of regulatory provisions related to IDs, in order to strengthen the status of IDs in listed companies.[18] Crucially, it has made the following key recommendations:

- greater role of minority shareholders in appointment/ removal of IDs;
- requiring that IDs be appointed only at shareholders' meetings, and doing away with the practice of appointing additional IDs at Board meetings, with subsequent ratification by shareholders; and
- increasing the sitting fees or replacing profit-linked incentives with long-term vested ESOPs.

It is expected that these changes will enable IDs and NEDs to enjoy enhanced independence, thereby bolstering effectiveness in performance of their oversight role and work towards aligning the company's interests with those of other stakeholders (in addition to shareholders), in accordance with the broad social & environmental landscape. Additionally, pursuant to the changes, Boards are also expected to attract/ retain superior talent for the roles of IDs and NEDs, improving the overall decision making of the Board.

It is clear that the Board's role in the new normal has become more demanding, and directors are being expected to invest significantly more time in fulfilling their responsibilities. While the Board's responsibility has increased, Boards have met the challenges head-on by innovating, not just in terms of business models, but also in ways of working. In the new normal, as the business models and the ways of thinking and doing business continue to be challenged, experiences of Covid-19 have set the baseline for the level of engagement, participation and innovation expected from the Board.

15 MCA General Circular No. 1/2020, dated March 02, 2020.
16 Companies (Amendment) Act, 2020; and Notification No. S.O. 1256(E) dated March 18, 2021, issued by the MCA.
17 Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2020.
18 Consultation paper on review of regulatory provisions related to Independent Directors dated March 01, 2021, issued by SEBI.

A. Amendments

1. ***Amendments to the Companies (Corporate Social Responsibility Policy) Rules, 2014***

   Set out below are some of the key amendments introduced by the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021:

   - The definition of 'corporate social responsibility' has been modified, pursuant to which, CSR activities now include within its ambit, among other things (i) research & development of new vaccines, medication, and medical devices related to Covid-19 in the firm's normal course of business for financial years 2020-21, 2021-22, 2022-23, subject to the conditions specified; and (ii) overseas training of Indian sports personnel, representing any State or Union territory at a national level or India at international level. However, the following have been expressly excluded from the revised definition of CSR:
     - (a) activities undertaken in pursuance of normal course of business of the company, subject to exceptions;
     - (b) any activity undertaken by the company outside India, subject to exceptions;
     - (c) contribution to political parties;
     - (d) activities benefitting employees of the company, as defined under the Code on Wages, 2019;
     - (e) activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services; and
     - (f) activities carried out for fulfilment of any other statutory obligations under any law in force in India.
   - The CSR policy of a company is now required to be more comprehensive, and *inter alia* specify the approach and direction given by the Board, based on the recommendations of the CSR committee of the company, and the guiding principles for selection, implementation and monitoring of activities, as well as formulation of the annual action plan.
   - If the CSR activities are proposed to be undertaken through (i) a company established under Section 8 of the Companies Act, or (ii) a registered public trust, or (iii) a registered society, which either have an established track record of at least three years in undertaking similar activities or are established by the company itself (singly or along with any other company), then such implementing entities (i.e., companies/ registered societies/ public trusts) must be registered under Section 12A and 80G of the Income-tax Act, 1961.
   - A company can now engage with 'international organisations' for the purpose of designing, monitoring and evaluation of CSR projects or programmes as per its CSR policy, as well as for capacity building of their own personnel for CSR. For the aforesaid purpose, 'International organisations' has been defined to mean an organisation notified by the Central Government as an international organisation under Section 3 of the United Nations (Privileges and Immunities) Act, 1947, to which the provisions of the Schedule to the said statute applies.
   - All the implementing entities (trust / society / not-for profit company / Government entity) intending to undertake CSR activities on behalf of the funding companies are required to register themselves with the Registrar of Companies by filing Form CSR-1 electronically with effect from April 01, 2021. This requirement is not applicable for projects or programmes approved prior to April 01, 2021.

- Board of the company is responsible for ensuring that CSR funds disbursed by the company are utilised for the designated purposes approved by it, and the chief financial officer (or any other person responsible for financial management) is required to certify such utilisation. Board of the company also has the responsibility to monitor implementation of CSR projects in accordance with project timelines, and can make modifications, if deemed necessary, for smooth implementation of the project within the overall permissible time period.
- The CSR committee of the company is now mandatorily required to prepare an action plan, which should necessarily include a list of approved projects and programmes, manner of execution, implementation schedule and monitoring, modalities of utilisation of funds, reporting mechanism, and impact assessment, if any. The Board has the authority to alter such plan at any time during the financial year, as per the recommendation of its CSR Committee, and based on reasonable justification.
- Any surplus generated from CSR activities cannot be considered business profit and is required to either be (i) brought back into the same project, (ii) transferred to the unspent CSR account, or (iii) transferred to a fund specified in Schedule VII of the Companies Act within a period of six months from the expiry of the financial year. Further, in relation to CSR expenditure, companies are now also permitted to:

  (a) spend the CSR amount for creation or acquisition of capital asset, to be held by either (i) beneficiaries of the CSR project; (ii) a public authority; or (iii) a company incorporated under Section 8 of the Companies Act or a registered public trust, registered society with a charitable objective; and/ or

  (b) set off CSR expenditure above the required 2% expenditure in any financial year, against the required CSR expenditure for up to three financial years, if a company spends an amount in excess to their CSR requirements.
- A new format of the CSR report has been specified, which is required to be presented in the annual board report. Companies undertaking CSR activities, and spending above a specified threshold, are required to conduct an impact assessment through an independent agency and annex the findings to the said CSR report.
- Since there have been queries in relation to the implementation of the new Companies (Corporate Social Responsibility Policy) Rules, 2014 and the above changes, industry members have made several representations to the MCA and it is expected that the MCA would be issuing clarifications soon.

(MCA Notification No. G.S.R. 40(E), dated January 22, 2021)

2. *<u>Amendments to the Companies (Share Capital and Debentures) Rules, 2014</u>*

   As per Section 62(1)(a)(i) of the Companies Act, where a company proposes to increase its subscribed share capital by issue of further shares to its existing shareholders (i.e., rights issue), then the offer must be made by way of sending a letter of offer, specifying the number of shares offered and limiting a time not being less than 15 days <u>or such lesser number of days as may be prescribed</u> and not exceeding 30 days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined. By way of Companies (Share Capital and Debentures) Amendment Rules, 2021, the MCA has inserted a new Rule 12A, which reduces the minimum period, within which the offer shall be made for acceptance, to 'not less than seven days each from the date of offer'. This amendment has come into force from April 01, 2021.

   (MCA Notification No. G.S.R. 92(E) dated February 11, 2021)

3. *<u>Amendments to Companies (Specification of Definition details) Rules, 2014</u>*

   Set out below are the key amendments made to the Companies (Specification of Definition details) Rules, 2014 ("**Definition Rules**"), with effect from April 01, 2021:

   - A new Rule 2(t) has been inserted in Definition Rules, to specify that paid-up capital and turnover of the <u>small company</u> shall not exceed INR 2 crore and INR 20 crore, respectively. The threshold for 'small company' as provided under Section 2(85) of the Companies Act earlier was INR 50 lakh and INR 2 crore for paid-up capital and turnover, respectively.
   - A new Rule 2A has been introduced in Definition Rules, to classify certain classes of companies, whose equity shares are not listed on any recognised stock exchanges, as '<u>companies not to be considered as listed companies</u>' under the Companies Act. These companies include:

     (a) public companies, which have not listed their equity shares, but have listed their non-convertible debt securities and/or non-convertible redeemable preference shares, issued on a private placement basis in terms of SEBI regulations.

(b) private companies with listed non-convertible debt securities on a private placement basis; and

(c) public companies, which have not listed their equity shares on recognised stock exchanges, but have listed equity shares in specified foreign jurisdictions.

(MCA Notification No. G.S.R. 92(E) dated February 01, 2021; MCA Notification No. G.S.R. 123(E) dated February 19, 2021)

4. *Amendments to Schedule V of the Companies Act, 2013*

Pursuant to notification of the amendment to Section 197 of the Companies Act, which pertains to overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits, certain consequent amendments have been introduced to Schedule V of the Companies Act. Set out below are the key amendments to Part II of Schedule V:

- Under Section I, which pertains to a company having profits in a financial year, payment of remuneration in excess of the limits specified in Section 197 of the Companies Act is now prohibited not only for managerial person(s), but even director(s) or other director. Similar change has also been made to Section II regarding remuneration payable by companies having no profits or inadequate profits, and Section III regarding remuneration payable by companies having no profit or inadequate profit in certain special circumstances.
- In Section II, the limits of yearly remuneration payable to other director have been introduced in Table A (limits of yearly remuneration payable by a company having no profits or inadequate profits). An explanation has been added to clarify that the term "or other director" shall mean an NED or an ID.

(MCA Notification No. S.O. 1256(E), dated March 18, 2021)

5. *Enhanced disclosure requirements in financial statements*

The MCA has made various amendments to Schedule III of the Companies Act, to enhance the disclosures required from a company in its financial statements. Schedule III provides the format of financial statements for companies complying with accounting standards (AS) and Ind AS. Set out below are few of the key amendments therein:

- With effect from April 01, 2021, shareholding of the promoters during the financial year under review along with changes, if any, is required to be disclosed in the prescribed format.
- The trade payables schedule, in addition to the dues towards MSMEs and others, is also required to record disputed dues. Similarly, the trade receivables schedule is required to record both undisputed and disputed trade receivables, with each categorised into good and doubtful trade receivables.
- Where a company has traded or invested in crypto currency or virtual currency during the financial year, various specified details are required to be disclosed.
- Where the company has not complied with the number of layers prescribed under Section 2(87) of Companies Act, read with Companies (Restriction on number of layers) Rules, 2017, the name and corporate identification

number of the companies beyond the specified layers and the relationship/ extent of holding of the company in such downstream companies is required to be disclosed.

(MCA Notification No. G.S.R. 207(E), dated March 24, 2021)

B. Circulars and Notifications

1. *Carrying out awareness campaigns/ public outreach on Covid-19 vaccination programme is an eligible CSR activity*

   Vide its circular dated March 23, 2020, MCA had classified spending of funds for Covid-19 as an eligible CSR activity. In furtherance of this, MCA has now clarified that spending of CSR funds for carrying out awareness campaigns/ programmes or public outreach campaigns on Covid-19 vaccination programme is also an eligible CSR activity, since it relates to promotion of health care, including preventive health care and sanitisation, promoting education, and disaster management.

   (MCA General Circular No. 01/2021, dated January 13, 2021)

2. *Clarification on holding of AGM during calendar year 2021, through VC or OAVM*

   MCA had issued a circular dated May 05, 2020 ("**AGM Circular**"), allowing companies to conduct their annual general meeting ("**AGM**") through video conferencing ("**VC**") or other audio-visual means ("**OAVM**"), during the calendar year 2020, subject to the fulfilment of certain requirements specified therein. MCA has now decided to allow companies whose AGMs were due to be held in the calendar year 2020 or became due in the year 2021, to conduct them on or before December 31, 2021 in accordance with the requirements in AGM Circular. However, MCA has also clarified that this circular should not be construed as conferring any extension of time for holding of AGMs under the Companies Act, and failure of any company to adhere to the relevant timelines remains subject to legal action thereunder.

   (MCA General Circular No. 02/2021, dated January 13, 2021)

C. Reports

1. *Report on decriminalization of the Limited Liability Partnership Act, 2008*

   Pursuant to the Government of India's policy to decriminalize non-compliances of minor, technical or procedural nature, MCA has released the Company Law Committee Report on decriminalization of the Limited Liability Partnership Act, 2008 ("**LLP Act**"). The report proposes amendments concerning decriminalization and addresses the need for certain other amendments aimed at improving the ease of living for the corporates and other stakeholders. Some of the key recommendations are set out as below:

   - Decriminalization has been recommended for 12 offences, which offences are proposed to be shifted to in-house adjudication mechanism. These include offences such as those concerning failure to (i) maintain accounts, (ii) timely filing of annual returns and statements, (iii) timely appointment of designated partners upon vacancy, (iv) maintain/ keep a registered office, or (v) mention specified details on relevant limited liability partnership ("**LLP**") documents, etc. Additionally, one offence i.e., non-compliance of any order passed by a tribunal, has been recommended for omission.
   - Maintenance of status quo is recommended for certain specified compoundable and non-compoundable offences that are serious in nature and relate to public interest.
   - Introduction of a few new concepts into the LLP Act, namely 'Small LLP' and 'Issuance of Non-convertible Debentures' by LLPs'.

     (a) *Small LLP* – Creation of a new class of LLP, which is subject to lesser compliances, lesser fee, or additional fee, etc., in order to reduce compliance cost, and also to subject such class of LLPs to lesser penalties in the event of default. 'Small LLPs' can be determined based on turnover or contribution, with flexibility to alter such criteria in the future, if required.

     (b) *Non-convertible debentures by LLP* – To make LLPs more lucrative for the debt market, it has been recommended to permit issuance of non-convertible debentures by LLPs, to facilitate raising of capital and financing operations of LLPs.

   (Company Law Committee Report on the decriminalization of Limited Liability Partnership Act, 2008, released on January 18, 2021)

FOREIGN EXCHANGE AND RBI UPDATES

A. Circulars and Notifications

1. *Introduction of legal entity identifier for large value transactions in centralised payment systems*

   - The legal entity identifier ("**LEI**") is a 20-digit number used to uniquely identify parties to financial transactions worldwide and was conceived as a key measure to improve the quality and accuracy of financial data systems for better risk management post the global financial crisis. The RBI has introduced LEI in a phased manner. It has now introduced it for all payment transactions of value INR 50 crore and above, undertaken by entities (non-individuals) using RBI-run centralised payment systems *viz.* real time gross settlement and national electronic funds transfer.
   - The entities can obtain LEI either from any of the local operating units accredited by the Global Legal Entity Identifier Foundation, the body tasked to support implementation and use of LEI or from Legal Entity Identifier India Limited, which is also recognised as an issuer of LEI by the RBI under the Payment and Settlement Systems Act, 2007.

   (RBI/2020-21/82 DPSS.CO.OD No.901/06.24.001/2020-21 dated January 05, 2021)

2. *Investment in NBFCs from FATF non-compliant jurisdictions*

   The RBI has clarified its stance that investments in non-banking financial companies ("**NBFCs**") from jurisdictions identified by Financial Action Task Force ("**FATF**") as being non-compliant shall not be treated at par with that from the compliant jurisdictions.

   The investors in existing NBFCs holding their investments prior to the classification of the source or intermediate jurisdiction/s as FATF non-compliant, may continue with the investments or bring in additional investments as per extant regulations.

   However, new investors from or through non-compliant FATF jurisdictions, whether in existing NBFCs or in companies seeking certification of registration to operate as NBFCs, would not be allowed to directly or indirectly acquire significant influence in the NBFC i.e. fresh investors from such jurisdiction in aggregate should hold less than the threshold of 20% of the voting power (including potential voting power, which could arise from instruments that are convertible into equity, other instruments with contingent voting rights, contractual arrangements, etc., that grant investors voting rights (including contingent voting rights) in the future).

   (RBI/2020-2021/97 DOR.CO.LIC.CC No.119/03.10.001/2020-21 dated February 12, 2021)

3. *Remittances to International Financial Services Centres in India under the Liberalised Remittance Scheme*

   The extant guidelines on Liberalised Remittance Scheme ("**LRS**") have been revised to permit resident individuals to make remittances to International Financial Services Centres ("**IFSCs**") set up in India. The resident individuals may be allowed to make remittance under LRS to IFSCs in India, subject to the following conditions:

   - remittance to be made only for making investments in IFSCs in securities, other than those issued by entities/ companies resident (outside IFSC) in India;

- resident individuals may open a non-interest bearing Foreign Currency Account ("**FCA**") in IFSCs for making such investments under LRS; and
- no settlement of any domestic transactions with other residents through these FCAs held in IFSC.

It has been clarified that any person resident in India (outside IFSC), entering into any transaction with a person/ entity in IFSC shall only be governed by regulations/ directions and rules issued/ notified by the RBI and the Government of India, respectively, under the Foreign Exchange Management Act, 1999 ("**FEMA**").

(RBI/2020-21/99 February 16, 2021 A.P. (DIR Series) Circular No. 11 dated February 16, 2021)

4. *Relaxation of conditions of investment by foreign portfolio investor in defaulted bonds*

In line with the exemptions available to foreign portfolio investors ("**FPI**") for making investments in security receipts and debt instruments issued by asset reconstruction companies and debt instruments issued by an entity under the corporate insolvency resolution process ("**CIRP**") as per the resolution plan approved by the National Company Law Tribunal ("**NCLT**") under the Insolvency and Bankruptcy Code, 2016 ("**Insolvency Code**"), FPI investments in defaulted non-convertible debentures/ bonds (either fully or partly, in the repayment of principal on maturity or principal instalment in the case of amortising bond) will also be exempted from the short-term investment limit and the minimum residual maturity requirements prescribed under the extant regulatory regime.

(RBI/2020-21/105 A.P. (DIR Series) Circular No. 12 dated February 26, 2021)

B. Press Notes

1. *Review of the FDI Policy on downstream investments made by non-resident Indians*

As per the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, investments by non-resident Indians ("**NRIs**") on non-repatriation basis are deemed to be domestic investments at par with investments made by residents. Accordingly, the Department of Promotion of Industry & Internal Trade has amended the FDI policy to clarify that an investment made by an Indian entity, which is owned and controlled by NRIs on a non-repatriation basis would not be considered for calculation of indirect foreign investment. The clarification will be effective from the date of the FEMA notification.

(Press Note No. 1 (2021 Series) dated March 19, 2021)

A. Amendments

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

SEBI has amended Clause 16(l) under Point A of Schedule III - Part A (*Disclosure of Events or Information: Specified Securities*) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Listing Regulations**"), pursuant to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2021, which lists down the events that a listed entity has to disclose without the application of the guidelines for materiality specified under Regulation 30(4) of the Listing Regulations.

Prior to the amendment, a listed entity under CIRP under the Insolvency Code, as amended, was required to disclose the salient features (not involving commercial secrets) of the resolution plan approved by the NCLT, in the form as may be specified. SEBI has now amended this disclosure requirement and has provided the specific features and details that are required to be disclosed. This includes *inter alia*: (i) pre and post net-worth of the company; (ii) details of the assets of the company post CIRP; (iii) details of funds infused in the company, creditors paid-off; (iv) additional liability on the incoming investors due to the transaction, source of such funding, etc.; (v) names of the new promoters, key managerial persons, if any and their past experience in the business or employment, and in case where promoters are companies, history of such company and names of natural persons in control; and (vi) brief description of business strategy. Further, SEBI has also now stipulated that the following should be disclosed by the listed entity in relation to its CIRP under the Insolvency Code: (i) proposed steps to be taken by the incoming investor/acquirer for achieving the minimum public shareholding ("**MPS**"); (ii) quarterly disclosure of the status of achieving the MPS; and (iii) details as to the delisting plans, if any approved in the resolution plan.

(SEBI Circular No. SEBI/LAD-NRO/GN/2021/02 dated January 08, 2021)

2. *Amendments to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018*

SEBI has amended Regulations 112, 115 and 167 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR Regulations**"), pursuant to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2021. Regulation 112(b) of the ICDR Regulations has been substituted to clarify that the requirement of minimum promoters' contribution is not applicable where the equity shares of the issuer are frequently traded on a stock exchange for a period of at least three years immediately preceding the reference date. However, the issuer is required to redress at least 95% of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date, and the issuer is required to be in compliance with the Listing Regulations for a minimum period of three years immediately preceding the reference date, subject to certain conditions. Further, the *proviso* to Regulation 115(c) of the ICDR Regulations has been omitted, which was in relation to the lock-in of equity shares having superior voting rights held by the promoter(s). Further, a *proviso* has been included under Regulation 167(4) of the ICDR Regulations, indicating that the lock-in provision will not be applicable to the specified securities to achieve the 10% public shareholding requirement.

(SEBI Circular No. SEBI/LAD-NRO/GN/2021/03 dated January 08, 2021)

B. Circulars and Notifications

1. *Relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, due to the Covid-19 pandemic*

SEBI *vide* circular dated May 12, 2020, had relaxed compliance with certain provisions of the Listing Regulations, related to the conduct of general meetings through VC or OAVM pursuant to similar relaxations granted by the MCA. The MCA subsequently extended the applicability of relaxations till June 30, 2021 (EGM) and December 31, 2021 (AGM), as applicable. SEBI has now extended the relaxations in respect of sending physical copies of annual report to shareholders and requirement of proxy for general meetings held through electronic mode, till December 31, 2021.

(SEBI Circular No. SEBI/HO/CFD/CMD2/CIR/P/2021/11 dated January 15, 2021)

2. *Extension of the time for one-time relaxation from enforcement of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, with respect to rights issue*

SEBI *vide* circular dated May 06, 2020, had granted a one-time relaxation from strict enforcement of certain provisions of ICDR Regulations, pertaining to rights issue opening up to July 31, 2020. These relaxations were further extended up to December 31, 2020. SEBI thereafter extended the use of alternate non-cash mechanism to Application Supported by Blocked Amount ("**ASBA**") facility to accept applications from the shareholders in relation to rights issue, as provided in this circular, up to March 31, 2021.

(SEBI Circular No. SEBI/HO/CFD/DIL1/CIR/P/2021/13 dated January 19, 2021)

3. *Extension of facility for conducting meetings of unitholders of REITs and InvITs through VC or through OAVM*

SEBI, *vide* circular dated June 22, 2020, read with circular dated October 08, 2020, had permitted real estate investment trusts ("**REITs**") and infrastructure investment trusts ("**InvITs**") to conduct annual meetings and other meetings of unitholders through VC or OAVM up to December 31, 2020. Pursuant to the recent MCA relaxations in relation to conducting of general meetings in 2021 through VC and

OAVM, SEBI has now extended the facility to conduct annual meetings of unitholders, through VC or OAVM for REITs and InvITs till December 31, 2021. Further, the conduct of meetings other than annual meeting of unitholders through VC or OAVM has been extended till June 30, 2021.

(SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2021/21 dated February 26, 2021)

4. *Code of conduct & institutional mechanism for prevention of fraud or market abuse*

SEBI has now made the code of conduct and institutional mechanism for prevention of fraud or market abuse applicable to stock exchanges, clearing corporations and depositories (collectively, the "**MIIs**"), on the lines of Regulations 9(1) to 9(4) of the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("**PIT Regulations**"). The MIIs are now required to *inter alia*:

- formulate a code of conduct to regulate, monitor and report trading by their designated persons and immediate relatives of designated persons;
- identify and designate a compliance officer to administer the aforesaid code of conduct and specify the designated persons who are to be covered by the code of conduct on the basis of their role and function in the organisation; and
- put in place an institutional mechanism for prevention of fraud or market abuse covering these aspects.

(SEBI Circular No. SEBI/HO/CFD/DIL1/CIR/P/2021/13 dated January 19, 2021)

5. *Guidelines for votes cast by mutual funds*

SEBI has prescribed certain additional guidelines for votes cast by mutual funds in order to ensure that mutual funds and asset management companies diligently exercise their voting rights in the best interests of the unitholders. Pursuant to this circular, mutual funds, including their passive investment schemes like Index Funds, Exchange Traded Funds, etc., will be required to cast votes compulsorily in respect of *inter alia* the following resolutions:

- corporate governance matters, any changes to capital structure and related party transactions;
- stock option plans, other management compensation issues and appointment and removal of directors; and
- any other issue that may affect the interest of the shareholders in general and interest of the unit-holders in particular.

For all remaining resolutions, mutual funds will be compulsorily required to cast their votes with effect from April 01, 2022. However, in case the mutual fund has no economic interest on the day of voting, it may be exempted from compulsorily casting its votes.

While the votes are to be cast at the mutual fund level, in case any fund manager of any specific scheme has strong views against the views of the fund manager/(s) of the other schemes, the voting at scheme level will be allowed, subject to recording of detailed rationale for the same.

Fund Managers/ Decision makers will be required to submit a declaration on a quarterly basis to trustees that the votes cast by them have not been influenced by any factor other than the best interest of the unit holders.

(SEBI Circular No. SEBI/HO/IMD/DF4/CIR/P/2021/29 dated March 05, 2021)

6. *Streamlining the process of IPOs with UPI in ASBA and redressal of investor grievances*

In an attempt to streamline the initial public offer ("**IPO**") process, SEBI, by way of a circular dated March 16, 2021, has put in place measures for uniform policy and reconciliation process among the intermediaries involved in an IPO. This circular is applicable for the issues opening on/after May 01, 2021, and the following provisions, among others, of the circular shall become a part of the offer documents in an IPO:

- Self-Certified Syndicate Banks ("**SCSBs**") shall identify a nodal officer for the IPO responsible for processing applications received through Unified Payment Interface ("**UPI**"), along with submission of certificate within seven working days in the format provided by SEBI;
- The facility of re-initiation of UPI bids shall be provided to syndicate members once per bid/batch and as deemed fit by stock exchanges after bid closure time;
- The Registrar to the Issue shall submit details in relation to cancelled/withdrawn/deleted applications to the SCSBs within 60 minutes of bid closure time from issue opening date till the issue closing date. Further, SCSBs shall be required to unblock such applications by closing hours of the bank day and submit confirmation to lead managers and the Registrar and Transfer Agent on a daily basis; and
- The SCSBs are now required to ensure unblocking of non-allotted/partial-allotted applications by closing hours of bank day on the day after finalisation of the basis of allotment. Moreover, SCSBs shall be required to compensate the investor on receipt of complaint, basis the compensation structure provided by SEBI. Further, if there is any delay in resolving the grievance beyond the date of receipt of complaint from investor, for each day's delay, the compensation is to be paid in the manner prescribed under the circular.

(SEBI Circular No. SEBI/HO/CFD/DIL2/CIR/P/2021/2480/1/M dated March 16, 2021)

7. *Prior approval for change in control of an intermediary: transfer of shareholdings among immediate relatives and transmission of shareholdings*

SEBI has issued the following clarifications in relation to the requirement of seeking prior SEBI approval for change in control of an intermediary due to transfer of its shareholding among immediate relatives and transmission of its shareholding:

- *If the intermediary is an unlisted body corporate* – Transfer of shareholding among immediate relatives (as defined under Regulation 2(l) of SEBI (Substantial Acquisition of Shares and Takeovers Regulations, 2011 ("**Takeover Regulations**")) and transmission of shareholding will not be construed as change in control.
- *If the intermediary is a proprietary concern* – In case of transfer/ bequeathing of the business/ capital by way of transmission/ succession to another person, the transferee/ legal heir is required to obtain prior approval and a fresh registration.
- *If the intermediary is a partnership firm* –
  (a) Transfer of ownership interest: In case of a registered partnership firm with more than two partners, *inter se* transfer amongst the partners will not be construed as change in control. If the firm comprises of two

partners, it will stand dissolved upon the death of one of the partners. However, induction of a new partner will be construed as change in control, and prior approval and fresh registration will be required.

(b) Transmission of ownership interest: Bequeathing of partnership right to a legal heir by way of transmission will not be considered as change in control.

- Incoming entities/ shareholders who will have controlling interest in the intermediary will need to satisfy the fit and proper person criteria stipulated in the SEBI (Intermediaries) Regulations, 2008.

(SEBI Circular No. SEBI/HO/MIRSD/DOR/CIR/P/2021/42 dated March 25, 2021)

8. *Transfer of business by SEBI registered intermediaries to other legal entity*

In relation to transfer of a SEBI regulated business from a SEBI registered intermediary ("**Transferor**") to another legal entity ("**Transferee**"), and applications made to SEBI in this behalf, SEBI has issued the following clarifications:

- The Transferee shall obtain fresh registration from SEBI in the same capacity before the transfer of business if it is not registered with SEBI in the same capacity.
- SEBI will issue new registration number to the Transferee if the business is transferred through a regulatory process (merger/ amalgamation/ corporate restructuring by order of primary regulator/ Government/ NCLT, etc.) or non-regulatory process (private agreement / memorandum of understanding pursuant to commercial dealing / private arrangement), irrespective of whether the Transferor continues to exist or not after the transfer.
- Prior approval and fresh registration of SEBI will be required in case of change of control, pursuant to both regulatory process and non-regulatory process. In such case, the same registration number will be retained. If the Transferor ceases to exist or in case of complete transfer of business, the Transferor is required to surrender its certificate of registration.

(SEBI Circular No. SEBI/HO/MIRSD/DOR/CIR/P/2021/46 dated March 26, 2021)

9. *Reduction of timeline for refund of application money in public issues*

SEBI, by way of a circular dated March 31, 2021, has reduced the timelines for refund of money to four days in case of (i) non-receipt of minimum subscription, and (ii) the issuer failing to obtain listing or trading permission from the stock exchanges. Earlier, in case of non-receipt of minimum subscription, the issuer was mandated to refund all the application money within 15 days from the closure of the issue. Also, in case of failure of the issuer to obtain listing or trading permission from the stock exchanges, where the securities were to be listed, it was supposed to refund the entire money received within seven days of receipt of intimation from the stock exchanges rejecting the application.

Further, the timeline of fifteen days as stipulated in Regulations 45(2), 86(2), 141(2), 202(2)(b) and 202(3)(a) and (b) of the ICDR Regulations and the timeline of seven days and eight days as stipulated in Regulation 53(2), 94(2), 149(2), 208(2), 272(2) of the ICDR Regulations shall be read as 'four days'.

(SEBI Circular No. SEBI/HO/CFD/DIL1/CIR/P/2021/47 dated March 31, 2021)

C. Consultation Papers

1. *Consultation paper on introduction of provisions relating to appointment or re-appointment of persons who fail to get elected as whole-time directors or managing directors at the general meeting of a listed entity*

According to Section 161(1) the Companies Act, the Board cannot appoint a person who fails to get elected as a director at a general meeting as an additional director. However, SEBI observed that the Companies Act does not explicitly prohibit the Board from re-appointing a person as a managing director ("**MD**") or whole-time director ("**WTD**"), whose appointment to such posts was rejected by the shareholders at the general meeting. Therefore, the Board of a listed entity can continue to appoint such persons as WTD/ MD even after subsequent rejections by the shareholders. SEBI observed that such appointments are against the will of the shareholders and the spirit of corporate governance under the Listing Regulations.

In light of this, SEBI has now issued a consultation paper, proposing certain amendments to the Listing Regulations in relation to the appointment of WTD or MD. Key suggestions stipulated in the consultation paper are as follows:

- Following conditions are to be satisfied for appointment of a person as an MD or WTD whose appointment or re-appointment as an MD or WTD has been rejected by the shareholders:
  (a) The Nomination and Remuneration Committee ("**NRC**") of the company has recommended such appointment with detailed justification as to why such appointment, despite rejection by shareholders, is recommended; and
  (b) The Board has considered and approved the appointment after recording reasons for such appointment despite rejection by shareholders earlier.
- After such an appointment, the listed entity should take the following steps:
  (a) Disclose the reasons for such appointment to the stock exchanges within 24 hours, along with the recommendations of the NRC;
  (b) Obtain shareholders' approval in the immediate next general meeting or within three months from the date of appointment by the Board, whichever is earlier; and
  (c) In the explanatory statement in the notice to the shareholders to consider such an appointment, include a detailed explanation and recommendation from the NRC and the Board as to why such appointment is placed before the shareholders despite the rejection of the candidature earlier by the shareholders.

In the event that the shareholders reject the candidature of the person again, such person cannot be considered for appointment as a director, or continue as a director of that particular listed entity, for a period of two years from the date of rejection by the shareholders.

The comments were to be submitted by February 26, 2021.

(SEBI Consultation Paper on Introduction of provisions relating to appointment or re appointment of persons who fail to get elected as Whole-time directors or Managing Directors at the general meeting of a listed entity dated January 27, 2021 and February 12, 2021)

2. *Consultation paper on review of regulatory provisions related to independent directors*

SEBI has issued a consultation paper, proposing amendments to certain provisions of the Listing Regulations pertaining to the appointment and role of IDs. Key suggestions stipulated in the consultation paper are as follows:

- ***Definition of IDs:*** SEBI has proposed that, in addition to the existing categories of persons who cannot be appointed as IDs, key managerial personnel ("**KMPs**") or employees of promoter group companies, cannot be appointed as IDs in the company as well, unless there has been a cooling-off period of three years. The said restriction shall also extend to relatives of such KMPs for the same period. Further, currently, if a person is ineligible to be appointed as an ID due to a material pecuniary relationship between such person or his / her relative and the listed entity / its holding company / subsidiary / associate company, the cooling off period is two years. SEBI has proposed that the same be increased to three years, in order to ensure uniformity in the cooling off period.

- ***Appointment/ reappointment/ removal process of IDs***: SEBI has proposed to introduce a 'dual approval' process for the appointment/ reappointment/ removal of IDs. The following approvals will be required:

  (a) Shareholders (ordinary resolution in case of appointment/ removal in the first term and special resolution in case of re-appointment/ removal in the second term); and

  (b) 'majority of the minority' (simple majority) shareholders, wherein, minority would mean the shareholders other than the promoter and promoter group.

  In case either of the approval thresholds are not met, the listed entity may either propose a new candidate for appointment/ re-appointment or propose the same person as an ID for a second vote of all shareholders (in case of appointment/ reappointment)/ propose removal of the existing ID again through a second vote (without a separate requirement of approval by 'majority of the minority'), after a cooling-off period of 90 days, but within a period of 120 days.

- ***Enhancing and bringing in more transparency in the role of the NRC***: SEBI has proposed a process for selection and shortlisting of candidates for the role of an ID. Further, SEBI has proposed that the notice to the shareholders for appointment of director shall include the following disclosures:

  (a) Skills and capabilities required for the appointment of the ID and how the proposed individual meets the requirement of the role; and

  (b) Channels used for searching appropriate candidates. If the candidate was a 'recommendation from a person', the category of such person (*viz.* promoters, institutional shareholders, directors (NEDs, IDs, etc)) to be disclosed.

  SEBI has also proposed that the composition of the NRC may be modified to include 2/3rd IDs instead of majority of IDs.

- ***Prior approval of shareholders for appointment of IDs***: SEBI has proposed that IDs shall be appointed on the Board only with prior approval of shareholders at a general meeting. Further, if a casual vacancy arises due to resignation, removal, death or failure to get re-appointed, etc., the approval of shareholders will have to be taken within a time period of three months.

- ***Resignation of IDs***: SEBI has proposed the following:

  (a) The entire resignation letter of an ID should be disclosed along with a list of his/ her present directorships and membership in Board committees;

  (b) If an ID resigns from the Board of a company stating reasons such as pre-occupation, other commitments or personal reasons, there will be a mandatory cooling-off period of one year before the ID can join another Board; and

  (c) there should be a cooling-off period of one year before a director can transition from an ID to a WTD.

- ***Composition of the Audit Committee***: SEBI has proposed that the audit committee should comprise of 2/3rd IDs and 1/3rd NEDs who are not related to the promoter, including nominee directors, if any.

- ***Review of remuneration***: SEBI has also sought views as to whether there is a need for reviewing the remuneration structure for IDs. If so, whether ESOPs with a long vesting period of five years, should be permitted for IDs, in place of profit linked commission; and what should be the maximum limit of remuneration through ESOPs.

  The comments were to be submitted by April 01, 2021.

(SEBI Consultation Paper on Review of Regulatory Provisions related to Independent Directors dated March 01, 2021)

D. Press Releases

1. *SEBI Board Meeting dated February 17, 2021*

   SEBI has *inter alia* decided to recommend changes to the Securities Contracts (Regulation) Rules, 1957, for issuers with post issue market capital exceeding INR 1,00,000 crore. For such issuers, the requirement of minimum public offer will be reduced from 10% of post issue market capital to INR 10,000 crores + 5% of the incremental amount beyond INR 1,00,000 crore. These issuers shall be required to achieve at least 10% public shareholding in two years and at least 25% public shareholding within five years from the date of listing.

   (Minutes of SEBI Board Meeting dated February 17, 2021)

2. *SEBI Board Meeting dated March 25, 2021*

   Certain key decisions undertaken by SEBI in its board meeting are set below:

   - ***Review of framework of Innovators Growth platform ("IGP") under ICDR Regulations*** – SEBI, with an objective to make the IGP platform more accessible to companies in view of the evolving start-up ecosystem, has approved the following proposals with respect to the framework of IGP under the ICDR Regulations:

     (a) eligibility requirement for issuer to have 25% of pre-issue capital held by eligible investors has been reduced to one year from two year period;

     (b) the term 'Accredited Investor' for the purpose of IGP has been renamed as 'Innovators Growth Platform Investors'. Further, the pre-issue shareholding of such investors for meeting eligibility has been increased to 25% from 10%;

     (c) the issuer companies have been allowed to allocate up to 60% of the issue size, on a discretionary basis, prior to issue opening to eligible investors with a lock in of 30 days on such shares;

     (d) stipulation for triggering open offer under Takeover Regulations has been relaxed from existing 25% to 49% for companies listed under IGP framework. However, any change in control, directly or indirectly, over the target company will trigger an open offer; and

     (e) requirement of a holding of 75% of the capital by QIBs for the migration from IGP to main board for a company not satisfying the conditions of profitability, net assets, net worth, etc., has been reduced to 50%.

   - ***Reclassification of promoter and promoter group entities*** – Further, SEBI has approved the proposal to rationalise the existing framework pertaining to reclassification of promoter and promoter group entities. It has been decided to reduce the time gap between the date of Board meeting and shareholders meeting for consideration of reclassification request, to a minimum of one month and a maximum of three months from the existing requirement of minimum period of three months and maximum six months. Additionally, SEBI has provided an exemption from, *inter alia*, (a) the requirement of seeking shareholders' approval in cases where the promoter seeking reclassification holds less than 1% shareholding, subject to the promoter not being in control; and (b) few procedural requirements related to reclassification.

   - ***Listing Regulations*** – SEBI has approved several amendments to Listing Regulations. Some of the key amendments are:

     (a) requirement for formulation of dividend distribution policy and constitution of the risk management committee by the existing top 500 listed entities has been extended to the top 1,000 listed entities on the basis of market capitalisation. It has further approved certain changes with respect to composition, quorum and role of the risk management committee;

     (b) the provisions of the Listing Regulations which are applicable to listed entities based on (i) the market capitalisation criteria, will continue to apply even if such entities subsequently fall below the specified thresholds; and (ii) paid-up capital and net-worth, will continue to apply to such entities, unless the paid-up capital or net-worth falls and continues to remain below the threshold for a period of three consecutive financial years;

     (c) if the Board meeting is held for more than one day, the financial results to be disclosed by listed entities within 30 minutes of the end of the Board meeting for the day on which the financial results are considered. The requirement to publish newspaper advertisements for the notice to Board meetings where financial results are to be discussed and for quarterly statement on deviation or variation in use of funds, has been dispensed with;

     (d) the requirement to seek stock exchange approval for change of name of a listed entity has been dispensed with; and

     (e) the timelines for submission of periodic reports namely, statement of investor complaints, corporate governance report and shareholding pattern will be harmonised to 21 days from the end of each quarter. Similarly, frequency of submission of compliance certificates, relating to share transfer facility and issuance of share certificates within 30 days of lodgement for transfer, sub-division, etc., has been revised from half-year to annual.

   (Minutes of SEBI Board Meeting dated March 25, 2021, PR No. 15/2021)

cyril amarchand mangaldas
ahead of the curve

List of Contributors

Cyril Shroff
Managing Partner

Yash J Ashar
Partner (Head - Markets)

Ramgovind Kuruppath
Partner

Devaki Mankad
Partner

Aashima Johur
Principal Associate Designate

Shiv Bhargava
Senior Associate

Archit Bhatnagar
Senior Associate

Megha Krishnamurthi
Senior Associate

Cyril Amarchand Mangaldas
Advocates & Solicitors

100 years of legacy | **750**+ Lawyers | **Over 130** Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai – 400 013, India
T +91 22 2496 4455 **F** +91 22 2496 3666 **E** cam.mumbai@cyrilshroff.com **W** www.cyrilshroff.com

Presence in Mumbai | New Delhi | Bengaluru | Ahemdabad | Hyderabad | Chennai | Singapore

