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fig bulletin

a quarterly newsletter by cam financial institutions group

January to March, 2021

Index

It gives me immense pleasure to share with you the inaugural issue of '*Financial Institutions Group (**FIG**) Bulletin*', the quarterly newsletter produced by our FIG practice.

The structure and operation of the Indian financial market has undergone a dynamic and marked change in recent times, driven by a revolution in the digital payments space, which has been pivotal to the government's drive in establishing a cash-less economy. Central to this paradigm shift was the 2016 demonetisation, which spurred innovation and advancements in technology from businesses, while increasing confidence in non-traditional payment modes among customers.

With the rapid growth of this space, driven by technological innovation, the Reserve Bank of India (**RBI**), as a regulator, has been devoting serious consideration and resources to keep up with the rapidly evolving retail payments landscape.

The RBI is piecing together a robust regulatory regime, focussed on balancing between developing new payment systems, monitoring market participants, protecting customer interests, along with bridging the digital divide, and most crucially, developing robust data protection norms. Recent key milestones in this growth story include the introduction of the pan-India umbrella entity (**PUE**), and a detailed regulatory regime for payment aggregators and payment gateways, coupled with industry-wide data localisation requirements.

With this inaugural newsletter, we aim to share our insights into the RBI's regulatory framework on PUE for retail payments, authored by **Mr. S Ganesh Kumar**, former Executive Director, Reserve Bank of India, and **Mr. B. Sriram**, former Managing Director, the State Bank of India and later the IDBI Bank, now senior advisors with us; the new RBI 'payment aggregator' licensing regime, the data localisation norms made applicable to payment service providers (**PSOs**) and banks, opportunities for the FIG sector at the IFSC GIFT City, basis recent relaxations, and other regulatory developments in this space.

We hope you enjoy reading this newsletter. Please feel free to send your comments, feedback and suggestions to cam.publications@cyrilshroff.com.

Regards,
Cyril Shroff

Managing Partner
Cyril Amarchand Mangaldas

India's leading law firm

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MESSAGES FROM OUR FIG CO-HEADS

It gives us great pleasure to share with you the inaugural issue of '**FIG Bulletin**', the quarterly newsletter produced by our Financial Institutions Group.

Despite, or perhaps due to, these torrid times, we are seeing a watershed moment for the digital economy in India, continuing to build on the Government's vision for a cashless economy. The push for digitizing businesses and transactional activity continues at breakneck speed. With growing market innovation, there is significant regulatory movement in an attempt to set the house in order to have a comprehensive framework that focusses not just on ease of business but also protection of consumers.

The newsletter brings to the reader an immersive insight into some of the key and current topics on the sector - how the PUE will change the landscape for digital retail payments, how local and global players will be affected by the data localization regime, developments on the fintech and blockchain front, and show our robust involvement in this space.

Through the FIG Bulletin, we also highlight key areas of engagement of our FIG practice not just in conventional money matters, but also in the digital payments and fintech space in the last quarter. We also set out our thought leadership by way of our firm's views on the recent report of the RBI on private bank licensing guidelines. The reader will also get a glimpse into the potential opportunities in the IFSC and at the GIFT City, based on the recent regulatory developments.

We hope you find this newsletter to be an insightful and engaging read. Please share any feedback or comments about the newsletter with us on cam.publications@cyrilshroff.com.

Regards,

B. Sriram
Senior Advisor

Santosh Janakiram
Partner

REVOLUTIONISING RETAIL PAYMENTS: THE PAN-INDIA UMBRELLA ENTITY

Introduction:

The push for digital payments in India had modest beginnings, in the form of national electronic fund transfer, real time gross settlement and electronic clearing service, all of which were established nearly a decade ago. The 2016 demonetisation exercise brought about a major disruption in the retail payments space, forcing the market to go digital and innovate the virtual space. Half a decade later, the digital payments ecosystem has grown in leaps and bounds, both in terms of market share and regulatory innovation.

The development of unified payments interface (**UPI**) and BHIM based payments and app-based payments' options provided a fillip to several payments systems, along with the entry of non-bank and fintech players, and a steady growth in consumer confidence in digital payments. Between 2015 and 2020, digital payments have grown at a compounded annual growth rate of 55.1%, growing in volume from INR 593.61 crore in 2016-17 to INR 3,434.56 crore in 2019-20, as per RBI data available on the National Payments Corporation of India (**NPCI**) website.

The RBI has played a pivotal role as a regulator and facilitator. It has also acted as a catalyst for the development of the digital payments space and is continuously attempting to keep up with and monitor the space effectively to serve the needs of consumers. Currently, the NPCI is the single body that facilitates and operates the various methods of retail payment in India, such as UPI, BHIM, National Automated Clearing House, RuPay, etc.

However, keeping in mind the number of entrants and the volume of transactions, the RBI released a 'policy paper' in January 2019 for public comments, for the purpose of analysing the advantages and disadvantages of authorising new retail payments systems. Subsequently, the RBI introduced the 'Framework for Authorisation of pan-India Umbrella Entity for Retail Payments' (**PUE Framework**) on August 18, 2020, for which the deadline for licence applications concluded on March 31, 2021.

The PUE is expected to compete with the NPCI and provide alternatives to the existing payment and settlement methods offered by it, which may then be adopted by banks and non-bank fintech players to offer retail payment solutions to a digitally curious population. The PUE is also expected to dilute the systemic risk of digital payments that currently falls squarely on NPCI.

The PUE Framework:

The PUE Framework creates a regulatory regime for establishing retail payment rails, in addition to other regulatory guidance issued by the RBI under the Payment and Settlement Systems Act, 2007 (**PSSA**).

The PUE would primarily be responsible for: (i) setting up, managing and operating new payment system(s) in the retail space, including ATMs, white label POS, Aadhaar based payments and remittance services; (ii) operating clearing and settlement systems for participants; and (iii) monitoring and managing systemic risks in the retail payments ecosystem, domestically and internationally.

Though competing entities, the PUE framework stipulates that payment systems established by PUEs be interoperable with the NPCI systems, to the extent possible to allow for a cooperative model of building the digital payments space.

Market Impact:

The Government's drive to create a cashless economy requires a thriving digital payments infrastructure that can enable a state-of-the-art infrastructure and withstand shocks to the payments system, instances of which have increased of late. Another added benefit of moving to digital transactions has been the increased transparency and ability to record and track money movement, which is difficult for authorities in the case of cash transactions.

Creating a single point of dependency for processing digital transactions is not ideal and can lead to systemic risks. The RBI is cognisant of the need for sharing the burden of the burgeoning digital payments space, both in terms of infrastructure as well as innovation. Case in point being the 30% market share cap on volume of UPI transactions for third party application providers (**TPAP**) in November 5, 2020 (**Volume Cap Circular**), and the standard operating procedure circular issued pursuant thereto on March 25, 2021, providing a period of two years for existing TPAPs exceeding the volume limits, to comply with the volume caps as stipulated under Volume Cap Circular.

Based on publicly available information, we understand that six consortiums have applied for PUE licence as of the deadline date. These consortiums include industrial corporate houses, e-commerce and tech firms, firms in the payment business and banks. The diversity in the types of entities now involved in providing digital financial services is expected to shake things up and disrupt the market positively.

Advances in financial and digital literacy, improvements in network connectivity, and a healthy push by the government has helped bridge the digital divide and allowed for rapid growth in Indians accessing the UPI interface. This competition will, in turn, develop the online retail payments space by the possible use of new technology like blockchain, faster settlement timelines, and simplified customer grievance redressal, among other demonstrated benefits.

Future Prospects:

Across the board, we expect to see net positive outcomes for all stakeholders involved in the process of rolling out the PUE. This would also help the government in achieving its goal of a formal cash-less economy, along with providing a fillip to India's economic growth, and ensuring other objectives such as ease of doing business, transparency and improved governance are met. The RBI benefits from a PUE by sharing the burden of any systemic

risks, in addition to benefiting from greater accountability and serious entities with secure access to capital and new and cutting-edge technology entering the space. As stated earlier, market players get to participate in interoperable, secure and universally accessible payment systems, while customers get the benefit of competitive pricing, ease of use and secure systems to transact.

While this a welcome step in ensuring the continued growth story of the Indian digital payment ecosystem, certain teething issues, while not expressly addressed under the PUE Framework, but which can be anticipated in the course of its implementation, may include:

Infrastructure Neutrality: This would be a key concern for any player in the retail payment ecosystem. The shareholding of NPCI, while initially commencing with six public sector banks (**PSB**), two private banks and two foreign banks, was diversified in 2016 to include additional 13 PSBs, 15 private banks, one foreign bank and induct 10 multi-state co-operative banks and seven regional rural banks.

Notwithstanding the 2016 broad-basing exercise, the Committee on Digital Payments *vide* its December 2016 report, further noted that the ownership structure of NPCI may be conflicted with its pivotal role in the digital payments ecosystem, and also called for exploring ways in which the shareholding could be diffused, and ownership could be demutualised from the payment system participants. Suggestions included atleast 51% held by the public, with no individual or person acting in concert, holding more than 5%. The PUE Framework does stipulate that no single promoter/ promoter group (defined to mean any entity holding more than 25% shareholding) shall have more than 40% investment in the capital of the PUE.

It would be interesting to see if the RBI prescribes any roadmap towards broad basing the shareholding of an authorised PUE entity. This would necessarily have to strike a fine balance between ensuring smooth governance and pace of implementation, not bogged down by multiple stakeholder interests, at the same time ensuring prevention of dominant players. The number of PUE authorisations that the RBI may grant would also be closely scrutinised and the RBI may also adopt a different approach between applicants set up as a Section 8 company *(non-profit organisation)* and entities set up as a for profit entity. The other key aspect would be the pricing of certification and membership fees that authorised PUE entities may charge system participants.

Standard Setting/ Interoperability: In cases where system participants are also shareholders of the PUE, it would also be interesting to observe limitations, if any, that the RBI may impose, with regards to standard setting. This would necessarily have to strike a balance between innovation and growth, while at the same time ensuring interoperability with existing NPCI payment rails.

The PUE Framework does not specify the standards to be utilised towards the infrastructure, with a mere mention of the system expected to be interoperable, to the extent possible, with the systems operated by NPCI. With the growing adoption of new technology, such as distributed ledger technology, it would be interesting to observe the extent of RBIs intent to ensure interoperability/ considering the growing pace of new technologies being developed and as to how interoperability would be achieved.

Transaction Volume Restrictions: The PUE Framework does not have a volume cap in terms of the volume of transactions processed, akin to those prescribed for UPI transactions, processed by the NPCI. Large players would have a new avenue to ensure adherence to volume restrictions, set out under the Volume Cap Circular, depending on the time period within which the RBI processes the PUE applications.

Merchant Discount Rates (MDR): With the Government waiving MDR (subject to transaction limits) on transactions processed through RuPay and BHIM-UPI, and the Ministry of Electronics and Information Technology (**MEITY**) contemplating reimbursement of MDR to banks/ payment players, for higher penetration of digital payments, it would be interesting to see if the same would be extended to PUEs. An authorised PUE entity's approach towards microtransactions may also be a key. Interplay between NPCI and PUEs and role of RBI and MEITY, in terms of oversight and restrictions, towards penetration and innovation of digital payments, will have to be seen.

Conclusion:

As the RBI deliberates on PUE licencing, we will be closely monitoring developments and possible teething issues that arise once operational. There will be a need for the regulator to be on its toes to meet the scale and speed of innovation that each licenced PUEs will infuse into the digital payments ecosystem. The different layers of players in the digital payments universe and their interaction with the PUE(s) will also be an area of interest Irrespective of the road which the regulator chooses, PUE is a welcome inflexion point for the financial services industry in a cashless, digital age.

REGIME FOR PAYMENT AGGREGATORS AND GATEWAYS (PA/ PGs)

Introduction:

Given the popularity of online payment transactions in recent years, accelerated by the pandemic, the role of intermediaries, which facilitate such online payment transactions, have become pivotal. These intermediaries act as a conduit between the merchants and customers, ensuring the collection and settlement of online payments and forming a key link in the payment infrastructure. Given the absence of specific guidelines regulating the operations and governance of such intermediaries, the RBI realised the need to review and upgrade the existing set of guidelines to cater to the changing needs and the growing role and position of such intermediaries.

To facilitate this, the RBI placed a discussion paper titled 'Discussion Paper on Guidelines for Payment Gateways (**PG**) and Payment Aggregators (**PA**)', dated September 17, 2019 (**Discussion Paper**), in the public domain for receiving public comments and seeking consultation with the stakeholders on comprehensive guidelines, covering payments related activities of PG providers and PAs[1].

The Discussion Paper recognised the vital role of PAs and PGs, with respect to their role as a bridge between merchants and customers in online payment transactions, and specifically differentiated between those intermediaries that provide technology infrastructure to facilitate online payment processing, without handling of funds, and those that facilitate merchants to receive payments from customers, where such entities may handle funds.

It also discussed the possible avenues for the RBI regulating such intermediaries: (a) continuing with the indirect regulation approach by way of the then applicable instructions, with added clarifications on their applicability to payment intermediaries; (b) limited regulation with a phased licencing/ registration framework and off-site monitoring; or (c) full and direct regulatory RBI supervision, including mandatory requirements regarding, *inter alia*, authorisation, capital, governance, security, and risk management.

Based on the feedback received and taking into account the vital role of such intermediaries in the online payments space and also keeping in mind their role vis-à-vis handling funds, the RBI, vide 'Guidelines on Regulation of PA and PG', dated March 17, 2020, decided to regulate in entirety the activities of PAs. It also further provided base-line technology related recommendations to PGs (**PA/ PG Guidelines of March 17, 2020**)[2] under the PSSA.

The RBI, recently on March 31, 2021, provided certain clarifications on the said PA/ PG Guidelines of March 17, 2020, and also provided an extension of time-lines for non-bank PAs by six months, i.e., till December 31, 2021, to enable payment system providers and participants to put in place workable solutions in relation to non-storage of customer card credentials (**March 31 Clarification**) (PA/ PG Guidelines of March 17, 2020, and March 31 Clarification are hereinafter collectively referred to as **PA/ PG Guidelines**.)

The PA/ PG Guidelines seek to address critical gaps in the country's payments architecture, in terms of regulatory oversight, including bankruptcy protection of pooled funds, data storage and privacy, security and audit framework, settlement cycle, liability framework, consumer protection, as an improvement to the earlier Intermediaries Circular issued by the RBI on November 24, 2009.

Whilst the interpretation of 'PA' and 'PG' is still evolving, from both qua registration and compliances prescribed, it

1 https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=943.
2 https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT17460E0944781414C47951B6D79AE4B211C.PDF

appears that any technology platform collecting funds from customers for settlement to merchants may come within the purview of PA/ PG Guidelines and need to apply for an RBI authorisation prior to June 30, 2021. Existing PA entities have been permitted to continue their services till the pendency of the application for authorisation.

Key Players:

PA: PAs are defined as *"entities that facilitate e-commerce sites and merchants to accept various payment instruments from the customers for completion of their payment obligations without the need for merchants to create a separate payment integration system of their own. PAs facilitate merchants to connect with acquirers. <u>In the process, they receive payments from customers, pool and transfer them on to the merchants after a time period</u>"*.

PG: PGs are entities that provide technology infrastructure to route and facilitate processing of an online payment transaction, without any involvement in handling of funds.

Licencing & Authorisation:

In terms of the PA/ PG Guidelines, non-bank entities offering PA services are required to obtain authorisation from the RBI under the PSSA. The authorisation criteria are based on the role of the intermediary in handling of funds.

In terms of the extant guidelines as on date, entities seeking authorisation as PA, must apply for authorisation with the RBI in the prescribed form on or before **June 30, 2021**. Additionally, PAs have also been directed to adopt technology-related recommendations as prescribed in the PA/ PG Guidelines.

Further, the PA/ PG Guidelines clarify that e-commerce marketplaces providing PA services shall not be able to continue this activity beyond the June 30, 2021, deadline. If they desire to pursue this activity, it must be separated from the marketplace business and they must apply for authorisation on or before June 30, 2021.

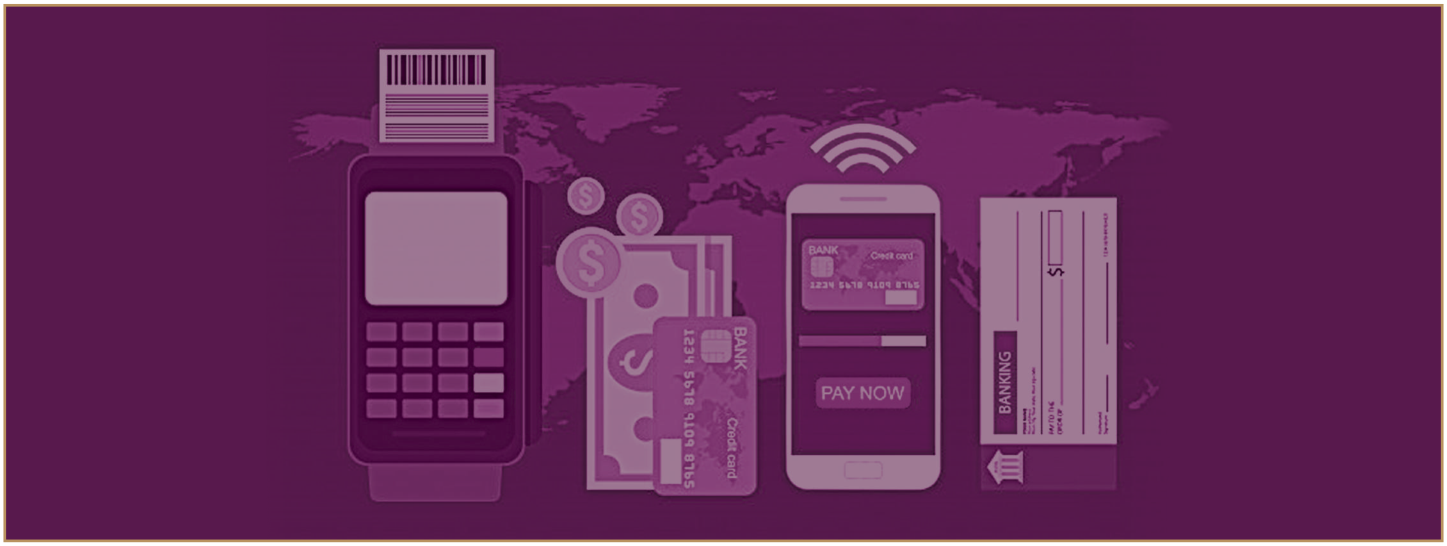
Therefore, to the extent an intermediary is playing an active role as a participant in the fund flow for (a) pooling funds from the customers into an account, and (b) providing instruction to the relevant banks to debit the funds from such accounts to settle the transactions with the merchants; such intermediary will need to apply for a PA registration with the RBI within the specified timelines.

The March 31 Clarification specifies that the PA/ PG Guidelines will not apply to 'delivery v. payment' transactions, i.e. delivery of goods/ services immediately/ simultaneously on the completion of payment by the customer. Having said that, the aspects of the transaction, wherein advance payment is made for the goods that will be delivered in a deferred manner, shall continue to be regulated under the regime of PA/ PG Guidelines.

'Nodals' to 'Escrows':

The PA/ PG Guidelines require PAs to move away from the earlier 'nodal account' model to a maximum of two escrow accounts with scheduled commercial banks. However, it has been clarified via the March 31 Clarification that till the existing entities obtain PA authorisation, the applicant may: (a) continue to maintain their nodal accounts until June 30, 2021, or (b) move towards an escrow account from an earlier date as well. To afford bankruptcy protection, the said escrow accounts are to be considered "designated payment system" under Section 23A of the PSSA, which *inter alia*, recognises the first and paramount charge of customers on the balances under such accounts, effectively insulating them.

Further, no interest shall be payable by a bank on balances maintained in such escrow account, except in cases when the PA enters into an agreement with the bank with whom the escrow account is maintained, to transfer 'core portion' of the amount, in the escrow account, to a separate account on which interest is payable. Further, the March 31 Clarification clarifies that if the bank can satisfactorily establish that the nodal account of an entity has been migrated to escrow account, in compliance with the new instructions, it can allow the balances under existing nodal



accounts of PAs to be considered for calculation of such 'core portion'.

Separately, the March 31 Clarification, which grants flexibility in that settlement timelines, i.e. the ability to have different settlement timelines, based on agreements with merchants, coupled with the ability to earn interest on the 'Core Portion' is a welcome step in opening of new monetisation avenues for PAs.

Card Data Storage:

The revised regime would impact the ability of merchants and PAs to save customer card credentials/ other related data in their databases. As discussed above, the RBI has pursuant to the March 31 Clarification, extended the timeline for non-bank PAs till December 31, 2021, to enable system providers and participants to put in place workable solutions for non-storage of customer card credentials on the database/ servers of PAs or merchants.

Solutions may include 'tokenisation' within the ambit of the March 17, 2020, PA/ PG Guidelines, read with RBI's circular on 'Tokenisation – Card transactions' dated January 8, 2019. Further, the March 31 Clarification clarifies that merchants, apart from storing the limited data for the purpose of transaction tracking (in-compliance with applicable standards), shall not be allowed to store payment data, irrespective of them being PCI-DSS compliant or otherwise.

Given the ongoing debate around the introduction of the Personal Data Protection Bill (**PDP Bill**), the Indian version of European Union's General Data Protection Regulation equivalent, in the Indian Parliament, it would be interesting to see the impact that the new PDP Bill (when passed into law) has on data/ privacy rules issued by sectoral regulators like the RBI.

Data Localisation:

The PAs need to comply with the data storage requirements applicable to 'payment system operators' (**PSOs**) upon authorisation. The RBI has prescribed data localisation requirements through its notification dated April 6, 2018 (**Data Localisation Circular**), directing all PSOs to ensure that data related to payment systems operated by them is stored only inside India. This data includes the full end-to-end transaction details/ information collected/ carried/ processed as part of the message/ payment instruction.

The FAQs issued by the RBI on June 26, 2019, in relation to the Data Localisation Circular, clarified that in the event the payment transaction is processed abroad, the relevant data should be deleted from the systems abroad and brought back to India not later than one business day or 24 hours, whichever is earlier.

Other Requirements:

(i) the memorandum of association of the applicant must cover the proposed activity of operating as a PA;

(ii) an existing new PA must achieve a net-worth of INR 15 crore by March 31, 2021, and INR 25 crore by the end of the third financial year, i.e., on or before March 31, 2023, while a new PA is to have a net-worth of INR 150 million (approx. USD 2 million) at the time of application and attain a net-worth of INR 250 million (approx. USD 4 million) by the end of the third financial year of the grant of authorisation. Along with the application, the PA is required to submit a certificate from a chartered accountant to evidence compliance with the applicable net-worth requirement (in the prescribed format);

(iii) the PA is required to be professionally managed and the promoters/ promoter group of the applicant must satisfy the 'fit and proper' criteria prescribed by the RBI. The directors of the applicant are also required to submit a declaration of their 'fit and proper' status in the prescribed format; and

(iv) the applicant must also comply with the applicable regulatory framework and prescribed safeguards in relation to AML and ensure necessary compliance *inter alia* in relation to settlement and escrow accounts, customer grievance redressal, dispute management, fraud prevention, security and risk management, periodic reporting to RBI, merchant onboarding and merchant monitoring.

Conclusion:

Given the ever-growing payment ecosystem in India, the PA/ PG Guidelines appear to be a logical step in the process of the RBI directly regulating and consolidating the space for payment aggregators. The guidelines, aimed at addressing systemic and consumer risks and concerns, would ensure a healthy pace of growth in digital payments in the country. It will be interesting to see how PAs innovate and respond in terms of their infrastructure building and cyber hygiene norms, once operations begin post authorisation.

LOCALISATION OF PAYMENTS DATA

Introduction:

India has witnessed considerable expansion in the digital payments ecosystem in the last few years because of the remarkable rise in the number of payments systems, players and platforms. During this phase of expansion, the RBI observed that only a small number of PSOs and their outsourcing partners stored the payments system data either partly or completely in India, thereby restricting RBI's control over such data.

Hence, to ensure safety and to extend its supervisory reach on the payments system data, generated in India, the RBI, vide the Data Localisation Circular, mandated authorised payment systems and scheduled commercial banks, amongst others, to store all data relating to payment systems operated by them only in India, within six months of the issuance of the Data Localisation Circular (the ambit included full end-to-end transaction details/ information collected/ carried/ processed as a part of the message/ payment instruction) and exempted storage of a copy of the data in a foreign country if a transaction has a foreign leg to it.

The RBI has provided clarification on certain implementation issues raised by payments system operators *vide* FAQs on storage of payment system data, dated June 26, 2019 (**Data Localisation FAQs**). The RBI clarified that the ambit of payments data included customer data (name, mobile number, email, Aadhaar number, PAN number, etc.), payment sensitive data (customer and beneficiary account details), payment credentials (OTP, pin, passwords, etc.) and transaction data (originating & destination system information, transaction reference, time stamp, amount, etc.).

Additionally, the Data Localisation FAQs clarified that the payments data should be stored in India and can be processed abroad if the payment service operators desired so. However, such processing is mandated to be carried out within one business day or within 24 hours from the processing of the payment (whichever is earlier).

Recently, RBI notified a new requirement under the Data Localisation Circular, by way of a letter dated March 26, 2021, addressed to the authorised PSOs (**March 26 Letter**).

In accordance with the March 26 Letter, payment system providers (authorised/ approved by the RBI), in addition to submitting a Board-approved system audit report (conducted by CERT-in empaneled auditor), are also now required to submit a compliance certificate to the RBI at half-yearly intervals. The compliance certificate must be submitted by April 30, and October 31, for the period ending March 31 and September 30 every year, respectively.

On April 23, 2021, the RBI imposed restrictions on certain foreign banks (American Express Banking Corp. and Diners Club International Ltd.) from on boarding new customers from May 1, 2021, due to their noncompliance with the directions passed by the RBI on data localisation. This is the first instance of the RBI penalising a bank for non-compliance with the guidelines on data localisation.

Storage of Payment Data Abroad:

Storing of data abroad beyond one business day or 24 hours from payment processing, even for ancillary reasons such as investigation(s) of charge back transactions or reporting purposes may not be entertained by the RBI.

PA/PGs and Data Localisation:

PAs were not regulated prior to the PA/ PG Guidelines. The RBI, *vide* the PA/ PG Guidelines, has mandated payment aggregators to comply with the data storage requirements applicable to PSOs under the Data Localisation Circular. Non-bank entities offering payment aggregator services, are required to ensure compliance with the Data Localisation Circular by June 30, 2021 (deadline to apply for authorisation from RBI).

Further, given the time since the introduction of the Data Localisation Circular, it is possible that requests by non-

bank payment aggregator applicants for extension/ exemption to the Data Localisation Circular may not be viewed favourably by the RBI. In this regard, a better approach may be to demonstrate to the RBI the progress made to ensure compliance with the Data Localisation Circular over a period of time.

PDP Bill:

The impact of the data localisation norms, yet to be proposed *vide* the highly debated PDP Bill, on the data localisation norms promulgated by the RBI *vide* the Data Localisation Circular, can be ascertained only in due course of time.

Conclusion:

The Data Localisation Circular and the Data Localisation FAQs, as also the updates, have clearly articulated the regulator's policy thought process on the matter at hand. Having said that, it does bestow significant supervisory powers on the RBI with respect to the payments data generated in India, and has also added a significant amount of expenditure to be borne by PSOs based outside India/ having data storage facilities outside India. Going forward, the RBI will have to traverse a balancing act between the need for robust regulatory oversight over payments data, data privacy and protection and ease of doing business and encouraging India's growing digital economy.

DEVELOPMENTS IN IFSC – GIFT CITY

Introduction:

The past few years have seen significant developments in the international financial services sector, with the advent of reg-tech, fin-tech and high value innovative financial products and services. India has jumped onto this bandwagon, with the Gujarat International Finance Tech City (GIFT City) emerging as a flagship hub for high value financial and fintech services, riding on the heels of targeted policy initiatives taken by the Central Government.

The International Financial Services Centres Authority Act was passed by the government in 2019, by virtue of which, the International Financial Services Centres Authority (IFSC Authority) was set up as the country's first nodal and unified regulatory agency, overseeing financial activities within notified International Financial Services Centres (IFSC) in India. GIFT City has been notified as India's first (and currently only) IFSC, which also serves as the headquarters of the IFSC Authority.

During the presentation of the Union Budget, 2021-22, the Hon'ble Finance Minister stated that GIFT City IFSC is proposed to be developed as a world class fintech hub. This seems indicative of the central government's efforts to recalibrate GIFT City and develop it as a viable finance and fintech alternative to the traditional and regional financial hubs such as Singapore and Dubai. With the setting up of IFSC Authority, notification of GIFT City as the country's first IFSC, and enactment of far sighted policies and regulatory measures, GIFT City is well poised to emerge as a prominent and exciting hub for innovation and development in the financial institutions and fintech space in the coming years.

Fintech Pivot:

Indian Government has been cognizant of the far-reaching developments taking place in the fintech sector and has consequently been making efforts to position GIFT City as a hub for fintech based businesses, start-ups, ecosystems and innovation. IFSC Authority has increased collaborative and cooperation efforts with international and domestic bodies to foster effective market supervision, promote stronger ties and collaboration among regulators and cement the trust and dependence of the global financial community in the IFSC regime.

The IFSC Authority recently became an associate member of the International Organization of Securities Commissions – an international organisation of the world's securities regulators and also the global standard-setter for the securities sector.

Following the same trajectory, IFSC Authority and the Federation of Indian Chambers of Commerce and Industry (FICCI) have also entered into a memorandum of understanding, entailing cooperation and collaboration between the IFSC Authority and FICCI for development of GIFT City IFSC as a world class fintech hub. One of the key cooperation areas identified is the development of fintech accelerators.

Regulatory & Innovation Sandbox:

In keeping with the fintech pivot, IFSC Authority has released a Framework for Regulatory Sandbox on October 19, 2020. The sandbox will enable eligible entities, i.e., Indian and foreign enterprises operating in the capital markets, banking, insurance and pensions segments in GIFT City IFSC, to experiment with innovative fintech solutions in a real time environment, with a limited set of customers and for a specified timeframe, along with adequate safeguards for consumer protection. The regulatory sandbox, therefore, acts as a testing ground for experimenting with ideas in a controlled environment, which, if successful, may thereafter be introduced in the general marketplace.

On March 15, 2021, the Hon'ble Finance Minister, while commenting on the prospective regulatory treatment of the evolving digital currency ecosystem, indicated that a blanket ban on cryptocurrency may not be on the cards. She further stated that the government was mulling the setting up of a window to allow people 'to do certain experiments', adding that GIFT City IFSC, being a regulatory island, is a probable and likely jurisdiction for allowing such experimentations.

Consultation Papers:

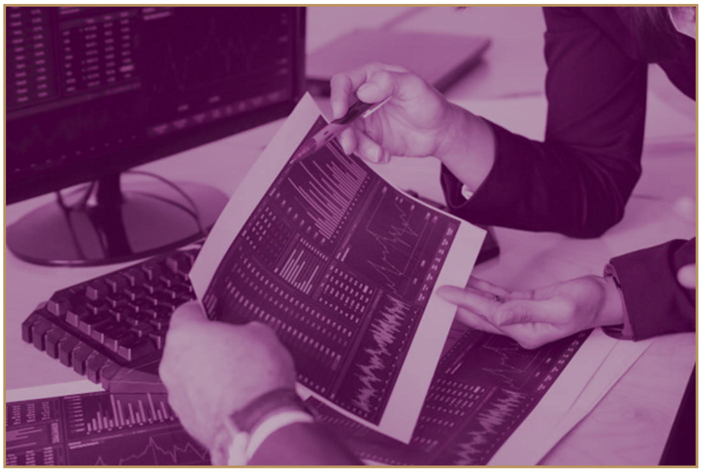
As global capital markets are witnessing burgeoning innovations and disruptive reforms vis-a-vis its fundamental structures, regulators and policymakers are bringing in key measures to provide effective and transparent governance models. IFSC Authority, in its endeavor to develop a comprehensive and consistent regulatory framework, based on global best practices, has proposed to enact an all-encompassing unified regulatory framework to enable issuers' access to global capital.

To this effect, and with a view to increase the ease of doing business, the IFSC Authority has released a Consultation Paper on Proposed International Financial Services Centre Authority (Issuance and Listing of Securities) Regulations, 2021.

The proposed regulations aim to support the financing of innovative business models, especially those in the areas of Environment, Social and Governance (ESG), fintech, corporate restructurings, including issuance and listing of securities by Start-ups, Small and Medium Enterprises (SMEs) and Special Purpose Acquisition Company (SPACs), as well as enabling issuance and listing of debt securities, including those focusing on ESG and Smart-Cities, including green bonds, social bonds, sustainable bonds and sustainability linked bonds.

Market Infrastructure Institutions

The IFSC Authority has recently notified the IFSC Authority (Market Infrastructure Institutions) Regulations, 2021 (MII Regulations), with the objective of regulating market infrastructure institutions (MII), such as stock exchanges, clearing corporations and depositories, operating from IFSCs.



The MII Regulations provide a unified and simplified regulatory regime to be adhered to by MIIs within the IFSC. As per the MII Regulations, no stock exchange, clearing corporation or depository activity shall be carried out from IFSC without obtaining prior sanction from the IFSC Authority. The MII Regulations prescribe shareholding limits for such MIIs, minimum net worth requirements, governance standards and general obligations to be followed while conducting operations.

Conclusion:

With the IFSC Authority's forward looking policy reforms, backed by the Central Government's vision to provide impetus to the financial services sector by developing a world-class fintech hub at the IFSC GIFT City, the stage is set for global and domestic innovators to collaborate, experiment and create solutions in the Fintech space, with access to world-class infrastructure, regional business intelligence, and market access at the GIFT City IFSC.

COMMENTS ON IWG REPORT

Introduction:

The RBI constituted an internal working group (**IWG**) to comprehensively review the RBI framework on ownership, governance, and corporate structure in private sector banks. This note sets out the firm's observations and suggestions in respect of the 'Report of the Internal Working Group to Review Extant Ownership Guidelines and Corporate Structure for Indian Private Sector Banks' released by the RBI on November 20, 2020 (**Report**), with comments invited by January 15, 2021.

Few thoughts and suggestions are as follows:

1. **The IWG does not prescribe any core investment company (CIC) related restrictions for conversion of a non-banking financial company (NBFC) to a bank.**

   (i) ***Observation:*** IWG recommends various safeguards and eligibility criteria for conversion of NBFCs into banks. However, it does not prescribe any restrictions relating to existence of multiple CICs within a group.

   (ii) ***Suggestion:*** We suggest that the RBI should consider all applicants seeking a banking license *on par*, despite the existence of multiple CICs within an applicant's group structure, so long as such applicant's group structure is compliant with RBI's August 13, 2020, CIC circular. Additionally, the non-operating financial holding company (**NOFHC**) would **not** be deemed to be a CIC, hence would be excluded for the purposes of computing the number of layers of CICs within the promoter group.

2. **Requirement to set up a wholly-owned NOFHC between the promoting entity and the bank.**

   (i) ***Observation:*** The requirement to set up a wholly-owned NOFHC between the promoting entity and the bank, may impose significant restructuring obligations for such groups. Additionally, it is pertinent to note that the 2016 bank licensing guidelines had relaxed the ownership requirement in NOFHCs to 51%.

   (ii) ***Suggestion***: The RBI may consider exempting large corporate/ industrial houses from setting up a new wholly-owned NOFHC and permitting the applicant NBFC's existing holding company to be designated as the NOFHC if the promoting entity holds at least 51% in such holding company. Additionally, the RBI may also permit such minimum holding in the NBFC to be cumulatively held by the promoting entity, along with the promoter group entities.

3. **IWG has not defined the term 'corporate/ industrial houses' in its Report.**

   (i) ***Observation:*** The following group entities may be covered within the term's ambit, considering the definition of "promoter group" contained in the 2013/ 2016 bank licensing guidelines: (a) promoter entity's subsidiaries; (b) entities in which the promoter entity holds 10%; (c) entities which hold 10% in the promoter entity; (d) companies in which entities holding 20% in the promoter entity hold at least 20%; and (e) joint ventures, associates and related parties of the promoter entity.

   (ii) ***Suggestion:*** The RBI may consider limiting the ambit of "promoter group" to include only the proposed bank's promoter entity; and entities held below such promoter entity, to ensure that the non-financial services businesses held by large 'corporate/ industrial houses' do not fall within the ambit of "promoter group". The final guidelines should define the wider implications on / obligations of / on-going compliances by "promoter group" entities and restrict the implications / obligations / on-going compliances to only the promoting entity.

4. **"Diversified ownership" as an eligibility criterion for large corporate/ industrial houses being able to promote a bank.**

   (i) ***Observation:*** IWG does not elaborate on the "diversified ownership" test in its Report, and the term was not defined in any of the bank licensing guidelines either. Further, the "diversified ownership" requirement has remained untested.

   (ii) ***Suggestion:*** The RBI may consider clarifying that the 'diversified ownership' requirement would be deemed to have been met where: (a) the shares of the promoting entity of the bank are listed on a recognised stock exchange; and (b) the minimum public shareholding norms prescribed by SEBI are fulfilled by such promoting entity. RBI may consider not applying the 'diversified ownership' test to a large corporate / industrial house, where the NBFC proposed to be converted into a bank is itself listed and is in compliance with the SEBI-prescribed minimum public shareholding norms.

5. **Limiting the non-financial business of a group to 40% of its total assets / income.**

   (i) ***Observation:*** The IWG has referred to the 40% eligibility restriction multiple times in its Report. However, IWG has not included this as an eligibility restriction in case of NBFCs owned by large corporate / industrial houses converting into banks.

   (ii) ***Suggestion:*** The intent of the IWG was to not apply such a restriction where NBFCs owned by large corporate / industrial houses are seeking conversion into banks, as such restrictions will render potential applicants as ineligible.

6. **'Conflict of interest' related considerations and grand fathering of existing exposures between promoter group entities.**

   (i) ***Observation:*** There is a high possibility of existence of exposures between the NBFC / financial services entities and other promoter group entities of large corporate / industrial house.

   (ii) ***Suggestion:*** The RBI may include the following clarifications in the final bank licensing guidelines:

      (a) exposure norms for regulated financial services entities held under the NOFHC will be as prescribed by their respective sectoral regulators;

(b) treasury investments by promoter group entities in products of non-bank entities held under NOFHC will continue to be permitted; and

any existing 'connected lending' / 'exposures' between the financial services and non-financial services entities of the Group will be grandfathered – further, the RBI should include a definition and prescribe limits for permissible 'connected lending'/ 'exposures', and also prescribe exclusions.

7. **Corporate governance norms would be as prescribed in the 2013 bank licensing guidelines.**

   (i) ***Observation:*** The 2013 bank licensing guidelines, *inter alia*, prescribed the following in respect of governance of a bank: (a) ownership and management in the bank should be distinct and separate from that in the NOFHC; (b) NOFHC and the bank are permitted to have common directors; and (c) at least 50% of the directors of NOFHC should be totally independent of the promoter/ promoter group entities and their major customers/ suppliers.

   (ii) ***Suggestion:*** The RBI may consider allowing appointment of an individual promoter of a group as the non-executive Chairman of the proposed bank. Additionally, it may consider allowing promoter/ promoter group entities to directly hold shares in entities under the NOFHC, *other than the bank*.

8. **Setting up of banks by non-promoters.**

   (i) ***Observation:*** Whilst the preferred approach of the RBI is to have a wider shareholding in banks, the extant regime does not permit setting up of banks that do not have an identified promoter.

   (ii) ***Suggestion:*** RBI may consider allowing *"two types of new banks to be set up – one by promoters and another by non-promoters"*. RBI may introduce appropriate shareholding and voting restrictions in such a 'non-promoter' bank, with there being no majority shareholder.

9. **Reduction of Promoter Group holding to 49%, prior to applying for conversion from an NBFC to a bank.**

   (i) ***Observation:*** The above requirement would impose a significant divestment obligation only on the promoters of large corporate / industrial houses even before applying to the RBI, and not in other cases.

   (ii) ***Suggestion:*** The RBI, in the final guidelines, should: (a) maintain parity on the dilution timeframe and require large corporate/ industrial houses to achieve the 26% threshold in 15 years; and (b) not impose any dilution requirement on the Promoter Group at the pre-application stage.

10. **Reporting mechanism for pledging of shares by promoters of listed private sector banks.**

   (i) ***Observation:*** SEBI has prescribed a detailed mechanism for promoters of listed entities to disclose encumbrances on their shareholding under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Code**).

   (ii) ***Suggestion:*** The reporting mechanism to be introduced by RBI should be aligned with the reporting mechanism prescribed by SEBI under the Takeover Code, to the extent possible. Alternatively, it may grant exemptions to listed private sector banks in respect of its reporting mechanism to reduce their compliance burden.

Conclusion:

The Report paves the way for a much-needed discussion on key issues that could galvanise transactional interest in a sector that is battling on two fronts – stability in the face of global economic slowdowns and disruption in the form of strides in digital lending innovation. We believe a robust licencing regime could unlock significant transactional activity in this space.

AHEAD OF THE CURVE
RECENT REGULATORY UPDATES

Introduction:

1. Constitution of Regulatory Review Authority:

The RBI, *vide* its press release dated April 15, 2021, contemplates setting up of a regulations review authority (**RRA**) (with the appointment of the deputy governor as the RRA), for a period of one year from May 1, 2021 (subject to extension if any by the RBI), to review the regulatory prescriptions internally as well as by seeking suggestions from the RBI regulated entities and other stakeholders on their simplification and ease of implementation.

The key functions of the RRA, include: (i) Making regulatory and supervisory instructions more effective by removing redundancies and duplications, if any; (ii) Reducing compliance burden on regulated entities by streamlining the reporting mechanism; revoking obsolete instructions if necessary and obviating paper-based submission of returns wherever possible; (iii) Obtaining feedback from regulated entities on simplification of procedures and enhancement of ease of compliance; (iv) Examining and suggesting the changes required in dissemination process of RBI circulars/ instructions (this would entail suggestions on the areas where the manner of issuing circulars, their updation and website linkages); and (v) Identifing any other issue germane to the subject matter.

The RRA set up by the RBI in April 1999 for reviewing the regulations, circulars, and reporting systems paved the way for the issuance of master circulars and reduced reporting burden on regulated entities. Based on the feedback from the public, banks and financial institutions, the recommendations of the RRA enabled streamlining and increasing the effectiveness of several procedures as well as simplifying regulatory prescriptions.

Given the evolving regulatory landscape, especially in the regulation of NBFCs, payment intermediaries, cyber security and data protection, the constitution of the RRA 2.0 is a welcome step that will have a positive impact on the ease of doing business.

2. Cryptocurrency in India:

During 2016-18, Indian regulators were reluctant to regulate *'virtual currencies'* such as cryptocurrencies. Regulators were probably not able to decide whether it was a *'currency'* or *'security'*.

As some of the world's best known institutions are moving towards acceptance of cryptocurrency and on the back of a recent record listing of a crypto exchange on NASDAQ, Indian crypto evangelists would be closely monitoring the promulgation of *'The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021'* (**Bill**). Though a copy of the new Bill is not in the public domain, based on available public information, the Bill seeks to: (i) create a facilitative framework for the creation of the official digital currency to be issued by the RBI; (ii) prohibit all private cryptocurrencies in India. However, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses.

While the said Bill, as compared to its 2019 edition titled *'Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019'*, conspicuously omits the words *'banning of'*, it would be interesting to see the approach to be adopted towards cryptocurrency, i.e. whether a soft-touch approach of regulating entities or an outright ban.

Regulators have been progressively tightening the screws on the use of virtual and cryptocurrencies for a while now. The RBI issued a circular on April 6, 2018, with an intent to prohibit banks and entities regulated by it from providing services in relation to virtual currencies. The Supreme Court's decision in March

2020 to strike down the RBI Circular of 2018 was short-lived, as the 2021 Bill was promulgated to outlaw private cryptocurrencies in India.

Whilst a copy of the new Bill is not yet released publicly, it was placed as part of the recently concluded Indian Parliament session's agenda. However, it could not be introduced before the Parliament.

Basis reports, we understand that the Bill proposes to prohibit all private cryptocurrencies in India, albeit permitting few exceptions to promote the underlying technology of cryptocurrency and its uses (i.e. blockchain/ DLT). There are reports that the RBI is looking to issue our own CBDC.

Hence, unlike say Singapore, which under its Payment Services Act, 2019, requires registration of crypto exchanges with MAS, involving detailed KYC/ CFT/ AML obligations and exchange/ issuer due diligence, currently, India does not require local registration/ licence with our FSA equivalent for undertaking cryptocurrency business in India.

Basis media reports, one understands that our Ministry of Corporate Affairs (**MCA**) is tracking companies investing in cryptocurrencies and through its March 24, 2021 (with effect from April 1, 2021) notification, requires all companies to disclose details of their investments/ trading activities in cryptocurrencies during the FY to Registrar of Companies.

In addition to themes such as decentralised finance (**DeFi**), crypto-lending, cross-border trading, we are seeing new crypto use-cases attracting interest of global banks (especially their wealth and private bank arms). Hopefully, the Government will once and for all decide if crypto dealings are possible in India, and set up a regulatory paradigm (maybe, in line with the SG model involving licensing), more so, to obviate the current crypto related uncertainty in India. It is also important to ensure that any regulation on crypto, passed by the Government, is in line with international practices to ensure India does not fall behind players in the crypto market.

3. Processing E-Mandates for Recurring Online Transactions:

The RBI through its March 31, 2021, circular, has extended the timeline for stakeholders to migrate to the process of e-mandates on recurring online transactions by six months till September 30, 2021. The regulator noted that the progress of onboarding existing as well as new mandates of customers as per the framework has not been satisfactory and in order to prevent possible large-scale customer inconvenience and default, the deadline has been extended.

In August 2019, the RBI had issued a framework for processing of e-mandates on recurring online transactions (**E-Mandate Framework**). Initially applicable to cards and wallets, the framework was extended in January 2020 to cover UPI transactions as well.

The E-Mandate Framework put in place various safety and security measures for recurring card payments, including the requirement of additional factor of authentication (**AFA**) for registration, pre-transaction and post-transaction notification to the cardholder by the bank/ merchant, online facility for customers to withdraw any e-mandate subject to AFA validation, and a dispute resolution and grievance redressal mechanism for cardholders.

The extension is a welcome step for PSOs and PAs working with digital service and platform providers that provide email and cloud services and regular media subscriptions, among many others. However, what remains to be seen is what action the RBI may take against entities for non-compliance with implementation of the E-Mandate Framework and whether the RBI will penalise such entities if they are non-compliant in nature.

4. Standing External Advisory Committee (SEAC) constituted for licensing of New and Small Finance Banks

The RBI constituted a committee on March 22, 2021, headed by former Deputy Governor Mrs. Shyamala Gopinath to evaluate applications for 'universal banks' (**UB**) and small finance banks (**SFB**). The guidelines for 'on-tap' licensing of UBs in 2016 and the guidelines for SFBs in 2019 also provided a Standing External Advisory Committee (**SEAC**), comprising eminent persons with experience in banking, financial sector and other relevant areas be constituted for a period of three years to screen applicants.

The constitution of the SEAC is significant as it comes against the background of RBI's Internal Working Group's (**IWG**) report of November 2020, that reviewed the existing guidelines on ownership and corporate structure of Indian private sector banks. Notably, the IWG recommended the amendment of the Banking Regulation Act, 1949, to allow large corporate and industrial houses to own banks.

These developments could galvanise transactional interest in a sector that is battling on two fronts – stability in the face of global economic slowdowns and disruption in the form of strides in digital lending innovation.

5. SEBI Circular on transfer of business by SEBI registered intermediaries to other legal entity

SEBI released a circular on March 26, 2021, giving certain clarifications in relation to transfer of business by SEBI registered intermediaries (transferor) to other legal entities (transferee). Salient developments in this regard include:

(i) The transferee must obtain a fresh registration from SEBI in the same capacity before the transfer of business, if it is not registered with SEBI in the same capacity. A new registration number, different from the transferor's registration number, shall be issued to the transferee where the business is transferred by a regulatory process (by order of a regulator or the government) or a non-regulatory process (by a private arrangement), irrespective of whether the transferor continues or ceases to exist after the said transfer.

(ii) Where there is a change in control, pursuant to both a regulatory and non-regulatory process, it is necessary to obtain a prior approval and a fresh registration. In such a case, while granting fresh registration to the same legal entity, the same registration number shall be retained.

(iii) Where the transferor ceases to exist or a complete transfer of business, the certificate of registration of such transferor must be surrendered. In the case of partial transfer of business by the transferor, it can continue to hold the certificate of registration.

These directions are pertinent to note in respect of any internal or external corporate restructuring activity to be undertaken by SEBI registered intermediaries.

6. Corporate Governance in Banks

The RBI released a notification on April 26, 2021, to tighten corporate governance norms applicable to all private sector banks, nationalised banks (to the extent applicable), and wholly-owned subsidiaries of foreign banks. The notification prescribes the following norms in relation to the composition and tenure of the board of directors (**Board**) of such banks:

(a) *Chair and meetings of the Board:* The Chair of the Board will be an independent director. The quorum for Board meetings is to be one-third of the total strength of the Board or three directors, whichever is higher. At least half of the attending directors must be independent directors.

(b) *Committees of the Board:*

(i) Audit Committee (**AC**) – An AC is to be constituted with only non-executive directors (**NED**). Two-thirds of the members of the AC are

to be independent directors. All members should have understanding of financial statements, and at least one member should have requisite professional expertise/ qualification in financial accounting or financial management (e.g., experience in application of accounting standards and practices, including internal controls around it).

(ii) Risk Management Committee (**RMC**) – RMC must have a majority of NEDs. At least half of the members of the RMC shall be independent directors, of which at least one member shall have professional expertise/ qualification in risk management. Meetings are to be held at least once every quarter.

(iii) Nomination and Remuneration Committee (**NRC**) – NRC shall to be constituted with only NEDs. At least half of the members attending the meeting of the NRC shall be independent directors, of which one shall be a member of the RMC.

(c) *Directions for NEDs:* NEDs, including the chair of the Board, shall have an upper age limit of seventy years. NEDs may hold tenure continuously or otherwise for not more than eight years, following which they shall be eligible for reappointment only after a gap of three years. Further, a limit of INR twenty lakh per annum has been prescribed for the remuneration of NEDs.

(d) *Tenure of Managing Directors (**MD**)/Chief Executive Officers (**CEO**):* The post of a MD or CEO or whole-time director may be held by an individual for not more than fifteen years, with a cooling-off period of three years, during which the individual may not be associated with the bank or its group companies, directly or indirectly. The RBI has also prescribed an upper age limit of seventy years for MD/CEO and whole-time directors.

This notification formalises views of the RBI, basis feedback received on its discussion paper on 'Governance in Commercial Banks in India' issued in June 2020. This is an important development and will trigger KMP changes at Indian commercial banks. The emphasis on independent and expertise-based Board constitution to manage banks and meet systemic risks seem apparent.

Banks have been permitted time till October 1, 2021, to comply with these directions and allow for existing chairs, MDs, CEOs to complete their terms. A Master Direction on Governance to consolidate the corporate governance framework for banks is set to be issued in due course, as well.

CAM's FIG / Technology Practice: 'Thought Leadership'

- FIG Papers (No. 1): RBI Working Group on Digital Lending – Policy Suggestions: Digital lending activities to be regulated? (here).
- FIG Papers (No. 2): RBI's Revised Regulatory Framework for NBFCs: NBFCs to be classified into four types - base layer, middle layer, upper lawyer and a top layer? (here).
- FIG Papers (No. 3, Series – 1): Indian Mutual Funds – M&A Wave: relaxations introduced by SEBI in the mutual fund space (here).
- FIG Papers (No. 4, Series – 2): Indian Mutual Funds – New M&A Rules!: revamp of norms governing mutual funds space (here).
- FIG Papers (No. 5, Series – 1): RBI Payment Regulations – 2009 to 2021: Bank 'nodals' to PA/ PG licenses: regulation and norms governing payment aggregators in India (here).
- Investor's Guide to Indian Fintech landscape published on Conventus Leadership: Legislative and regulatory framework applicable to fintech space in India (here).
- FIG Papers (No. 6, Series 2): RBI Payment Regulations – 2009 to 2021: Bank 'nodals' to PA/PG licenses (here).
- Investor's Guide to Indian Fintech landscape published on Conventus Leadership: Legislative and regulatory framework applicable to fintech space in India – Partner Q&A (here).

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cyril amarchand mangaldas
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LIST OF CONTRIBUTORS

B. Sriram
Sr. Advisor and Co-Head - Financial Institutional Group

S Ganesh Kumar
Consultant

Santosh Janakiram
Partner, Head – Projects and Co-Head - Financial Institutional Group

Anu Tiwari
Partner

Rohan Banerjee
Partner

Anindita Bhowmik
Partner

Tanya Nayyar
Principal Associate

Ritu Sajnani
Principal Associate-Designate

Bharath Sridhar
Senior Associate

Uttkarsh Bhatnagar
Senior Associate

Karthik Koragal
Associate

Aditya Sarkar
Associate

Janak Panicker
Associate

Cyril Amarchand Mangaldas
Advocates & Solicitors

100 years of legacy | **750+** Lawyers | **Over 150** 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 | Ahmedabad | Hyderabad | Chennai | GIFT City | Singapore