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Volume XV | Issue II | November 09, 2022

Overseas Investment Regime in India - Key Changes

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Main stories

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

In the lead article of this issue of *Insight*, we have covered in some detail the key changes brought about by the overhaul of the existing overseas investment regime in India and analysed the background to these amendments and the ramifications that these may have on relevant stakeholders.

Apart from the above, we have also captured the key notifications and orders issued by the Ministry of Corporate Affairs ("**MCA**") in relation to the Companies Act, 2013 ("**Act**"), and the circulars and notifications issued by the Reserve Bank of India ("**RBI**") and the Securities and Exchange Board of India ("**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 among readers. Please feel free to send them to cam.publications@cyrilshroff.com.

Regards,

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India's leading law firm

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Overseas Investment Regime in India - Key Changes

A. Background

Regulations governing overseas investments from India have been in place since 2004 and were governed by the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 ("**ODI Regulations**"), and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 (collectively referred as "**Erstwhile Regulations**"). Since its inception, the RBI has made an effort to keep up with the dynamic business environment by issuing several frequently asked questions ("**FAQs**"), which clarified the position of law (and even introduced substantive requirements) in response to queries received, after consultation with the industry.

In view of the regulatory experience and inputs from the industry, and to iron out inconsistencies that had crept in over two decades of its implementation, a regulatory overhaul was overdue. Following the pandemic, the need for rationalisation and liberalisation of the Erstwhile Regulations was felt ever more strongly, and these factors prompted the Central Government to consider a more enabling regulatory framework.

On August 09, 2021, the RBI released the draft rules/ regulations on Overseas Investment for public comments ("**Draft Framework**"). Key changes that were proposed by the Draft Framework included: (a) proposed liberalisation of the ODI-FDI structures being investment by an Indian party in a foreign JV/ WOS, which had Indian subsidiaries/ step down subsidiaries (which was previously regulated through FAQs (FAQ No. 64) ("**ODI – FDI Structures**") by looking to eliminate approval requirements, while continuing to ensure tax compliance; (b) introduction of the Concept of Foreign Entity to replace the erstwhile concept of Joint Venture ("**JV**")/ Wholly Owned Subsidiary ("**WOS**") and (c) introduction of jurisdiction based controls, keeping in mind investment policy/ legislations driven by national security concerns, giving the Central Government more discretion.

More than a year after the Draft Framework was released on August 22, 2022, the Ministry of Finance (Department of Economic Affairs) released the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("**OI Rules**"), and the RBI issued the Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("**OI Regulations**"), and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("**OI Directions**") (collectively referred as "**New OI Regime**"), in supersession of the Erstwhile Regulations. Most of the key changes proposed under the Draft Framework (with a few modifications based on industry feedback) were carried through into the New OI Regime.

The power to regulate capital account transactions has been segregated between the Central Government and the RBI via the amendments made to the Foreign Exchange Management Act, 1999 ("**FEMA**"), by the Finance Act, 2015. Hence, regulations pertaining to non-debt instruments (equity) are issued by the Central Government, regulations pertaining to debt instruments are issued by the RBI, and operational matters are relegated to Authorised Dealer Bank ("**AD Banks**"), the triumvirate comprising the New OI Regime operates in the following manner:

- The OI Rules deal with overseas investment in equity by Indian residents and shall be administered by the RBI;
- The OI Regulations deal with overseas investment in debt by Indian entities and certain procedural matters (deferred payment, filing and reporting obligations, delay in reporting, etc.); and
- The OI Directions contain operational guidelines for AD Banks. In addition, AD Banks are required to come up with certain policies, including for documents to be sought from Indian entities for confirming compliance with the pricing guidelines, for ensuring bona fides of OI transactions, and the situations in which a valuation would not be required.

In this issue of *Insight*, as the lead article, we have attempted to provide a consolidated primer on the basis, rationale and key changes emanating from the New OI Regime in three areas: (i) equity investments abroad by Indian entities; (ii) financial commitment by way of debt and non-fund based commitment by Indian entities; and (iii) investments by private individuals.

B. Key Changes Introduced

I. Investment in Equity by Indian Entities:

1. *ODI v. OPI*

Under the Erstwhile Regulations, while 'portfolio investments' were carved out from the ambit of 'direct investments outside India', there was no clarity on what constituted 'portfolio investment'. Presently, same as the distinction between 'foreign direct investment ("**FDI**")' and 'foreign portfolio investment ("**FPI**")' under the FDI regime,

any investment in unlisted equity capital of foreign entity would qualify as 'overseas direct investment ("**ODI**")', while for overseas investment in listed foreign entity, a threshold of 10% has been specified below which investment would qualify as overseas portfolio investment ("**OPI**") (provided no 'control' by others means) and above which, it shall be reckoned as ODI.

While earlier only listed Indian entities could invest in overseas listed companies, the New OI Regime has permitted even unlisted entities to make OPI, subject to the following conditions: (a) the OPI shall not exceed 50% of such entity's net worth; and (b) OPI shall be made only by way of subscribing to rights issue/ bonus issue or capitalization of receivables, or swap of securities or merger, demerger, amalgamation or any scheme of arrangement.

2. ***Nature of Investments - 'Bona Fide Business Activity' & 'Limited Liability'***

Bona Fide Business Activity: While the Erstwhile Regulations did not define the term 'bona fide business activity', into which overseas investments were permissible, RBI's FAQ No.11 provided that overseas investment was permitted in a *"bona fide activity permitted as per the law of the host country"*. The New OI Regime has gone a step ahead and mandated that an activity to be considered *bona fide* should be *permissible under any law in force, both in India and the host country*.

This interpretative change necessitates clarity since legislative subjects in India fall under the legislative competence of either the Centre or the States (or both), and certain goods/ services prohibited in certain states are permitted in others (including liquor, gambling, etc.) and no criteria has been provided in the New OI Regime for determining which laws (central/ state) apply.

Limited Liability Entity: The New OI Regime has replaced the concepts of 'JV' and 'WOS' with the concept of 'foreign entity' having limited liability, in order to ensure that the liability of the Indian entity is clearly defined and the Indian entity is responsible only for value invested. Hence, OI in sole proprietorship and unregistered partnerships are not permitted. However, with a view to provide an enabling framework for investments in evolving sectors of strategic importance, this requirement of limited liability will not apply to a foreign entity with core activity in a strategic sector (which includes (i) energy; (ii) natural resources sectors such as oil, gas, coal, mineral ores; (iii) submarine cable system; (iv) start-ups; and (v) other sectors as deemed necessary by the Central Government).

3. ***ODI-FDI Structures under the Automatic Route***

Under the Erstwhile Regulations, ODI-FDI structures were restricted on account of potential round-tripping concerns. The New OI Regime has now permitted ODI-FDI structures, subject to the overall structure not resulting in more than two layers of subsidiaries. It is pertinent to note that the restriction of two layers of subsidiaries does not apply to (i) banks, (ii) systemically important NBFCs, (iii) insurance companies and (iv) government companies.

'Subsidiary' or 'step down subsidiary ("**SDS**")' of a foreign entity for the purposes of the New OI Regime is defined to mean an entity in which the foreign entity has 'control' (as specified below). While the New OI Regime is silent on which layer is counted as the first layer, the RBI has provided guidance by way of general instructions to Form FC in the Master Directions for Reporting on August 22, 2022, which states that the level of SDS shall be calculated treating the foreign entity as the parent. Having said that, certain ambiguities have arisen on the interpretation of 'layer' and whether the Indian entity or the ultimate investee company would also be reckoned for calculation of number of layers and hence, the RBI may need to provide clarity to AD Banks on the manner in which this provision is to be interpreted. Furthermore, necessary modifications may be needed to other laws and regulations, such as the regulations relating to Core Investment Companies, to harmonise the restrictions with the new relaxations provided.

In recent years, innovative structures have been used by Indian start-ups, with business often being housed in an overseas entity, but having Indian subsidiaries for providing services/ support functions. Indian entities looking to acquire or invest in such start-ups will find these provisions particularly beneficial.

4. ***Control***

The New OI Regime has for the first time defined 'control', which is broadly similar to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**"). However, it has also included the holding of voting rights equal to or more than 10% within the ambit of 'control', irrespective of whether an investor actually has the right to appoint majority of the directors or participate in management/ policy decisions. *This is likely to give rise to a situation where an Indian entity may have ODI investment in a foreign entity and be subject to compliance requirements for such ODI investment (such as limitation of number of subsidiaries), but actually have no ability to stop the investee foreign entity from investing into India through* multiple layers of SDSs.

5. ***ODI in Financial Services***

The New OI Regime has liberalised the provisions with respect to ODI in the financial services space. Previously, only Indian entities engaged in financial services could make ODI in a foreign entity engaged in financial services. However, now under the New OI Regime:

- Indian entities engaged in financial services in India can make ODI in a foreign entity engaged directly or indirectly, in financial services business, subject to the Indian entity having (a) been profitable for three preceding financial years; (b) being regulated by a financial services regulator in India; and (c) obtained requisite approvals from regulators in India and the host country;
- In addition, entities not engaged in the financial services sector have been permitted to make ODI in foreign entities engaged in financial service activities, except banking and insurance (unless general insurance is supporting core activity), subject to such Indian entity meeting the profitability condition.

While the liberalisation is certainly laudable in the context of rapid growth of the fintech sector, the requirement for overseas 'financial services business' to be registered with or regulated by financial services regulators may not be conducive to overseas investment in emerging sectors wherein the regulatory framework is not yet formalised.

6. ***ODI in Start-ups***

The New OI Regime has introduced provisions for ODI in foreign start-ups, which are recognised by the host country's or host jurisdiction's legal system. Additionally, such ODI investments in recognised 'start-ups' can be only made from internal accruals and in case of resident individual their own personal funds. While the intent is laudable – not many jurisdictions have a system of recognising 'start-ups', and it remains to be seen whether this provision will work in effect.

7. ***Restructuring***

Under the erstwhile regime, an unlisted Indian entity could restructure the balance sheet of the overseas entity involving write-off of up to 25%, pursuant to an RBI approval, and in case of a listed Indian entity, the same was permitted under the automatic route, up to 25% of the equity investment. In a significant liberalization, as per the New OI Regime, a person resident in India who has made ODI in a foreign entity, which has been incurring losses for the previous two years (as per the audited balance sheets), may restructure the balance sheet of such foreign entity, subject to the following (i) compliance with reporting and documentation and (ii) the diminution in the total value of the outstanding dues to the India person after such restructuring not exceeding its proportionate amount of accumulated losses.

8. ***Other Key Procedural Changes***

The New OI Regime has also introduced certain provisions with a view to relax the procedural requirements for overseas investments, key among which are:

- ***NoC Requirement:*** Overseas investment/ divestment by Indian parties who may (i) have a non performing account; (ii) be classified as a wilful defaulter by any bank; or (iii) be under investigation by any financial services regulator or investigative/ enforcement agencies, is now permitted, subject to receipt of NoC from the lender bank or regulatory body or investigative agency (as relevant), as opposed to RBI approval under the Erstwhile Regulations. If NoC is not received within 60 days, the authority/ regulator concerned is deemed to have no-objection to such investment.
- ***Pricing:*** Pricing guidelines have been simplified to provide that issuance or transfer of equity capital of a foreign entity to a person resident in India, would need to be at arm's length, on the basis of valuation as per any internationally accepted pricing methodology, instead of the erstwhile requirement of obtaining a valuation report either from a Category I Merchant Banker registered with the Security Exchange Board of India ("**SEBI**") or by a chartered accountant. While AD Banks have been empowered to formulate a board approved policy in relation to the documents to be sought from Indian entities for confirming compliance with the pricing guidelines, it is likely that these guidelines issued by the AD Banks would be in consonance with each other.
- ***Deferred Consideration:*** Consideration for acquisition of shares of a foreign entity can now be paid on a deferred basis. However, no time period is specified within which payment must be completed.
- ***Total Financial Commitment:*** While the total financial commitment limit (up to which an Indian entity may make ODI investments) has been maintained at 400% of the net worth of the Indian entity, utilisation of the net worth of the parent/ subsidiary has been disallowed. The definition of 'net worth' has been harmonised with the Companies Act, 2013, and now includes all reserves, securities premium and debt and credit balance of P&L account.

II. Changes Impacting Resident Individuals

1. ***Limits and Restrictions on ODI and OPI***

The New OI Regime has brought further clarity on the difference between ODI and OPI, in case of resident individuals as they are permitted to undertake overseas investment (ODI and OPI), subject to the overall ceiling under the Liberalised Remittance Scheme.

- Overseas Portfolio Investment

The New OI Regime defines ODI to include any investment in equity capital of unlisted foreign entities, irrespective of the quantum of stake acquired. However, there is a carve-out in case of individuals acquiring less than 10% shares (and without control) of unlisted foreign entities to treat such investment as OPI instead of ODI if done by way of acquisition of qualification shares, sweat equity shares or shares pursuant to employee benefit. Accordingly, the applicable restrictions such as number of layers, investment in financial services would not be applicable to such investments. Given that the permissible modes of investment in respect of which the relaxation for OPI classification has been introduced are employee-specific, and by nature, non-controlling, the intent of the regulator seems to ease the compliance burden on Indian employees of foreign companies in respect of such investments. All others modes of overseas investment in unlisted foreign entities and listed foreign entities beyond the specified threshold (such as cash remittance, capitalisation of receivables, swap of securities on merger, rights issue/ bonus issue, gift or inheritance) require compliance with restrictions applicable to ODI.

Further, resident individuals can reinvest proceeds from the sale of original OPI and are not required to repatriate the proceeds back to India.

- Overseas Direct Investment

Resident individuals are not permitted to make ODI in foreign entities that are non-operating. Further, ODI cannot be made in foreign entities (i) engaged in the financial services sector; or (ii) have a subsidiary or SDS where the resident individual has control in the foreign entity, except in each case where ODI is on account of inheritance, sweat equity, qualification shares or shares/ interest under employee benefit schemes.

2. ***Clarification around Employee Stock Options and Employee Benefit Scheme***

Often, overseas companies, including start-ups, provide lucrative stock-based compensation to attract and train the best global talent.

The New OI Regime permits resident individuals to acquire, without limit, shares or interest under employee stock options ("**ESOP**") or employee benefits scheme ("**EBS**") or sweat equity shares offered by the overseas entity, provided that such ESOPs/ EBS are offered by the foreign entity globally on a uniform basis. The OI Directions further clarify that there is no limit on the amount of remittance made towards acquisition of shares/ interest under employee stock options or employee benefits scheme or sweat equity shares, however, such remittances shall be reckoned towards the Liberalized Remittance Scheme limit of the person concerned.

3. ***Gifts by Resident Individuals***

Previously, any Indian resident individual could receive foreign security by way of a gift from a non-resident. Under the New OI Regime, resident individuals can acquire foreign securities as a gift only from: (i) a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010 (including reporting obligations in case of gifts beyond prescribed limits); and (ii) a resident individual who is a relative. Further, it is clarified in the OI Rules that a resident individual cannot transfer an overseas investment to a person resident outside India by way of a gift.

III. Debt/ Non-Fund Based Commitments

1. ***Loans and Security***

Under the Erstwhile Regulations, Indian entities could lend to a foreign entity in which they had any amount of equity participation (which would have included investments less than 10%) and did not need to be in control. In an amendment that will affect such loans and guarantees going forward, the New OI Regime permits Indian entities to lend to or invest in debt securities issued by foreign entities or extend non-fund based commitment (e.g. guarantees) to a foreign entity, including any level of SDS of such foreign entity, subject to the following conditions:

(i) The Indian entity is eligible to make ODI;

(ii) The India entity has in fact made ODI in the foreign entity; and

(iii) The Indian entity has acquired control in such foreign entity at the time of making such financial commitment.

Additionally, (a) the RBI has mandated that such lending be backed by a loan agreement and the rate of interest for such lending be at an arm's length; and (b) resident individuals are not permitted to provide any fund/ non-fund based lending to foreign entities in which they hold equity capital.

2. ***Creation of Security by Pledge***

The OI Regulations now permit creation of security by pledge over equity of the foreign entity in which the Indian Party has made ODI or its SDS outside India, in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself, in addition to the erstwhile position which limited pledges in favour of AD Banks, public financial institutions in India or overseas banks only.

Further, as per the New OI Regime, the value of the pledge/ charge or the amount of loan, whichever is lower, will explicitly be covered in the "total financial commitment", since (i) the definition of financial investment includes non-fund-based facilities; and (ii) the general language of the Overseas Investment Regulations reads "financial commitment by way of pledge or charge".

Further, the Erstwhile Regulations required that the loan/ facility availed by the overseas JV/ WOS shall only be used for its "core business activities overseas", and not be used for "investing back in India in any manner" – this has now been omitted, in view of the RBI's liberalised stance on ODI-FDI structures.

3. ***Issuance of Corporate Guarantee***

Previously, an Indian company could issue a guarantee on behalf of the first level operating SDS without RBI approval and guarantees on behalf of any subsequent level of operating SDSs, required RBI approval. The New OI regime has dispensed with the requirement of RBI approval for issuance of corporate guarantees to or on behalf of subsequent level of SDSs, and only provides that the subsidiaries and subsequent SDSs should be under the indirect 'control' of the Indian entity.

Further, corporate or performance guarantees may also be given by a group company of the Indian entity in India, being a holding or subsidiary company, or a promoter group company. Such guarantees can be provided by the holding or the subsidiary company and the same will be reckoned against the total financial commitment limit of the holding or subsidiary company.

The New OI Regime clarifies that where a guarantee is given by a group company of an Indian entity, it is counted towards the 'total financial commitment' of that entity, and not the Indian entity. However, any fund-based exposure to or from the Indian entity, on account of such guarantee, shall be deducted from the net worth of the group company for computing its financial commitment limit.

The New OI Regime has tried to simplify the framework by reducing the compliance burden and providing an enabling framework for overseas investments. Well intentioned as it is, the regime presently has certain grey areas in respect of which it is expected that the RBI and AD Banks will continue to have to engage significantly with the industry on such granularities, and perhaps even offer some further clarifications on the same, either through FAQs or guidance to AD Banks.

Readers requiring further details on specific areas may consider our detailed webinar held on September 22, 2022, which was moderated by Mr. Cyril Shroff and our blogs titled - New ODI Regime: What RBI needs to clarify? and Unlocking Offshore Opportunities for Indian HNIs and Family Offices under the new Overseas Investment Regime or may reach out for specific advice. Updates and amendments to related laws such as Liberalized Remittance Scheme and acquisition of immoveable property overseas are covered separately in the Foreign Exchange and RBI Updates in this issue of Insight.

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A. Amendments

1. ***Amendment to the Companies (Accounts) Rules, 2014***

Certain clarificatory amendments have been made to Rule 3 of the Companies (Accounts) Rules, 2014 ("**Accounts Rules**"), which pertain to accessibility and storage of books of account of companies in India. Set out below are the amendments:

- the amendments clarify that the books of account are to be accessible in India *at all times*.
- the back-ups of the books of account are to be maintained in servers located in India *on a daily basis* (as opposed to the previous requirement of periodic basis). Further, in relation to the annual requirement of furnishing details of service providers (assisting in maintaining the books/ back-ups) to the Registrar of Companies ("**ROC**"), if the service provider is located outside India, the name and address of the person in control of the books of account of the company present in India is to be furnished to the ROC.

(MCA Notification No. CG-DL-E-12082022-238055 dated August 05,2022)

2. ***Amendments to Company Rules Pertaining to Physical Verification of Registered Offices***

Section 12(9) of the Act empowers the ROC to conduct physical verification of the registered office of a company if it has reasonable cause to believe that the company is not carrying out any business or operations. Presently, the following amendments have been made to the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**"), and the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ("**Removal of Names Rules**"), to include provisions relating to physical verification of the registered offices of companies.

- A new Rule 25B has been inserted in to the Incorporation Rules, which now empowers the ROC to visit the registered office of a company, cross verify documents filed by the company on MCA 21, capture a photograph of the registered office and record his findings as per a prescribed format.
- Forms STK-1, STK-5 and STK-5A in the Register of Companies Rules have been amended to include an additional ground for the strike off of names of companies, which includes the ROC concluding basis its physical verification that the company does not carry out any business or operations.

(MCA Notification No. CG-DL-E-20082022-238217 dated August 18, 2022 and CG-DL-E-26082022-238410 dated August 24, 2022)

3. ***Amendments to increase the qualifying thresholds for small companies***

Previously, as per the Companies (Specification of Definition Details) Rules, 2014 ("**Definition Rules**"), read with the Act, a small company is defined as any company, other than a public company whose paid up capital does not exceed INR 2

Crore or whose turnover does not exceed INR 20 Crores. The qualifying thresholds of paid up capital and turnover of small companies have been increased to INR 4 Crore and INR 40 Crore, respectively.

(MCA Notification No. CG-DL-E-15092022-238857 dated September 15, 2022)

4. ***Amendment to the Companies (Corporate Social Responsibility) Rules, 2014***

Set out below are some of the recent amendments to the Companies (Corporate Social Responsibility) Rules, 2014 ("**CSR Rules**"):

- Companies having any unspent amounts in their Unspent Corporate Social Responsibility Account are now also required to constitute a CSR Committee and comply with the relevant provisions of Section 135 of the Act, in relation to Corporate Social Responsibility ("**CSR**"), such as *inter alia*, having in place a Corporate Social Responsibility Policy and ensuring that the company spends from its average net profits in every financial year amounts as stipulated in the Act towards CSR, at least 2% of the average net profits for the preceding three years.
- For companies undertaking impact assessment of their CSR projects in terms of the Act, the revised cap for booking expenditure towards CSR for a financial year, is the *higher* of 2% of the total CSR expenditure of the financial year and INR 50,00,000 (as opposed to the erstwhile cap of the lesser of 5% of the total CSR expenditure of the financial year and INR 50,00,000).
- The format for the annual report on CSR Activities to be included in the report of the board of directors has been specified in the amendments.

(MCA Notification No. CG-DL-E-21092022-238956 dated September 20, 2022)

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FOREIGN EXCHANGE AND RBI UPDATES

A. Notifications/Circulars

1. ***Foreign Contribution (Regulation) Amendment Rules, 2022***

Certain amendments have been notified to the Foreign Contribution (Regulation) Rules, 2011 ("**Rules**"), which *inter alia*, include the following:

- *Intimation of receiving foreign contribution from relatives*: the limit of foreign contribution received by any person in a financial year from any of his relatives, the details of which are required to be intimated to the central government, has been increased from INR 1 lakh to INR 10 lakhs. The timeline for such reporting has also been relaxed from 30 days to three months.
- *Declaration of receipt of foreign contribution on website*: Earlier, a person receiving foreign contribution during any quarter of a financial year had to disclose the same on the official website or on the website as specified by the central government. This provision has now been omitted.

(Gazette Notification No. G.S.R. 506(E), July 1, 2022)

2. ***Finance Ministry constitutes Financial Services Institutions Bureau***

The Central Government has decided to constitute a Financial Services Institutions Bureau ("**FSIB**") for the purpose of recommending persons for appointment as whole-time directors and non-executive chairpersons on the boards of financial services institutions and for advising on certain other matters relating to personnel management in these institutions. The policy contains resolutions pertaining to composition, nomination of its members, and its management, funding, and methodology for making recommendations. Some of the key resolutions are discussed below:

- *Functions*: Following are some of the major functions of FSIB:

(i) To recommend persons for appointment as whole-time directors ("**WTDs**") and non-executive chairpersons ("**NECs**") on the boards of directors in public sector banks, financial institutions and public sector insurers (hereinafter referred to as "**PSBs**", "**FIs**" and "**PSIs**", respectively);

(ii) To advise the government on matters relating to appointments, transfer or extension of term of office and termination of services of the said directors and on the desired management structure at the board level for PSBs, FIs and PSIs;

(iii) To advise the Government on formulation and enforcement of code of conduct and ethics for whole-time directors in PSBs, FIs and PSIs;

(iv) To develop an appropriate methodology to recommend high-calibre persons for appointment as WTDs and NECs. Till the time such methodology is developed, the methodology followed hitherto by the Banks Board Bureau ("**BBB**") will apply;

(v) To carry out such process and draw up a panel for consideration of competent authority for any other bank, financial institution or insurer for which the government makes a reference, in consultation with the regulator concerned, with that bank, financial institution or insurer.

- *No Conflict of interest*: To avoid conflict of interest, the part-time members shall be either retired or, if working, be required to discontinue work. Moreover, such members cannot have commercial relationship with any commercial entity that has commercial relationship with

any PSB or FI or PSI, and the central government can consult the regulator concerned in this regard.

(Notification no. F. No. 14/1/2022-BO-I. dated July 01, 2022)

3. ***Prior approval in case of takeover/ acquisition of control of non-bank PSOs and sale/ transfer of payment system activity of non-bank PSO***

- Non-bank Payment System Operators ("**Non-Bank PSOs**") (authorised to operate any payment system) will now require prior RBI approval in the following cases:
  - (i) Takeover or acquisition of control, which may or may not result in change of management of such Non-Bank PSOs.
  - (ii) Sale or transfer of payment activity to an entity which is not authorised to undertake similar activity.
- The Non-Bank PSOs will be required to inform the RBI within 15 calendar days of the following:
  - (i) Change in management or directors of such Non-Bank PSOs.
  - (ii) Sale or transfer of payment activity to an entity which is not authorised by the RBI to undertake similar activity.

(Notification no. RBI/ 2022-23/ 80 CO.DPSS.POLC.No.S-590/ 02-14-006/2022-23 dated July 04, 2022)

4. ***External Commercial Borrowings (ECB) Policy – Liberalisation Measures***

The RBI, in consultation with the Central Government, has decided to grant the following relaxations under Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations, which would be available for External Commercial Borrowing ("**ECBs**") to be raised till December 31, 2022:

- increasing the automatic route limit from USD 750 million or its equivalent to USD 1.5 billion or its equivalent.
- to increase the all-in-cost ceiling for ECBs by 100 bps only for eligible borrowers of investment grade rating from Indian credit rating agencies. Other eligible borrowers may raise ECB within the existing all-in-cost ceiling, as hitherto.

(Notification no. RBI/2022-23/98 A.P. (DIR Series) Circular No. 11 dated August 01, 2022 and Notification No. FEMA.3(R)(3)/2022-RB dated July 28, 2022)

5. ***Late Submission Fee for reporting delays under Foreign Exchange Management Act, 1999***

- In order to introduce uniformity in the imposition of Late Submission Fee ("**LSF**") across reporting, in relation to foreign investment, ECBs and overseas investment related transactions as per the extant foreign exchange regulations, the RBI has introduced a new formula for calculating LSF *(discussed below)*, which will come into effect immediately for delay in filings on or after September 30, 2022.
  - (i) Form ODI Part-II/ APR, FCGPR (B), FLA Returns, Form OPI, evidence of investment or any other return, which does not capture flows or any other periodical reporting – **INR 7500**
  - (ii) FC-GPR, FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return, which captures flows or returns, reporting of non-fund transactions or any other transactional reporting – **INR [7500 + (0.025% x A x n)]**; where
    - a. "n" is the number of years of delay in submission rounded-upward to the nearest month and expressed up to two decimal points.
    - b. "A" is the amount involved in the delayed reporting.
- Maximum LSF amount will be limited to 100% of the amount involved ('A') and will be rounded upwards to the nearest hundred.
- The facility to opt for LSF will be available up to three years from the due date of reporting/ submission and for delayed reporting/ submissions under the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004 (and earlier regulations), the option to opt for LSF will be available up to three years from the notification of the Foreign Exchange Management (Overseas Investment) Regulations, 2022.
- Where a person responsible for any submission or filing under the provisions of FEMA, neither makes such submission/ filing within the specified time nor makes such submission/ filing along with LSF, such person will be liable for penal action under FEMA.

(Notification no. RBI/2022-23/122 A.P. (DIR Series) Circular No.16 dated September 30, 2022)

B. Master Directions

1. ***Amendments to Master Direction - Liberalised Remittance Scheme (LRS)***

   - The RBI has updated the Master Direction on Liberalised Remittance Scheme ("**LRS**") to align it with the New OI Regime (as set out in detail above in the Lead Article for this issue). The key amendments are:

     (i) *Remittance for purchase of property*: Prior to the amendments, clubbing of remittances was not permitted by other family members for capital account transactions such as opening a bank account/ investment/ purchase of property, if they were not the co-owners/ co-partners of the overseas bank account/ investment/ property. The reference to 'property' and 'purchase of property' have now been deleted from this provision. Instead, a new provision has been added, stating that remittances for purchase of property is to be in accordance with the Master Direction.

     (ii) *Permissible capital account transactions*: Permissible capital account transactions under LRS now read as *'acquisition of immovable property abroad, Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI), in accordance with the New OI Regime'*. Further, a resident individual who has made overseas direct investment in equity shares, compulsorily convertible preference shares of a joint venture or wholly owned subsidiary outside India, within the LRS limit, is now required to comply with the New OI Regime.

     (iii) *Repatriation of funds*: Previously, the resident individual was not required to repatriate the funds or income generated out of investments made under the LRS. However, per the amendments to the Master Direction, the foreign exchange realised/ unspent/ unused and not reinvested, is to be repatriated and surrendered to an authorised person within a period of 180 days from the date of such receipt/ realisation/ purchase/ acquisition or date of return to India.

     (RBI/FED/2017-18/3
     FED Master Direction No. 7/2015-16)

2. ***Amendments to Master Direction – Acquisition or Transfer of Immovable Property under the Foreign Exchange Management Act, 1999***

   The acquisition or transfer of immovable property outside India by a person resident in India shall be governed by the relevant provisions under the New OI Regime. Prior to the New OI Regime, such acquisition or transfer was governed by the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 ("**Erstwhile Regulations**"). Following are the key changes introduced by the New OI Regime.

   - *Acquisition of immovable property on lease*: Under the Erstwhile Regulations, only two kinds of properties were exempted from RBI permission: (i) property held by a person resident in India, who is a national of a foreign state and (ii) property acquired by a person resident in India on or before July 8, 1947, and it continued to be held by him with the permission of the RBI. A person resident in India is now eligible to acquire immovable property

outside India on a lease not exceeding five years, without the permission of the RBI.

- *Acquisition of immovable property with relative*: Under the Erstwhile Regulations, a person resident in India was permitted to acquire immovable property outside India jointly with a relative who is a person resident outside India, provided there was no outflow of funds from India. However, per the New OI Regime, the proviso that restricted the outflow of funds from India has been done away with.
- *Acquisition of immovable property from sale proceeds*: Per the New OI Regime, a person resident in India can acquire immovable property outside India out of the income or sale proceeds of assets (other than ODI) acquired overseas under the provisions of FEMA.
- *Acquisition of immovable property by purchase from remittance sent under LRS*: Per the New OI Regime, a person resident in India can acquire immovable property outside India by way of purchase out of the remittances sent under the LRS instituted by RBI.
- *Transfer/ charge on immovable property acquired outside India*: Per the New OI Regime, a person resident in India who has acquired any immovable property outside India, in accordance with the foreign exchange provisions in force at the time of such acquisition, can (a) transfer such property by way of gift to a person resident in India, who is eligible to acquire such property under these rules or by way of sale or (b) create a charge on such property in accordance with the Act or rules or regulations or directions issued by the RBI from time to time.

(RBI/FED/2015-16/7
FED Master Direction No. 12/2015-16)

insight
Volume XV | Issue II | November 09, 2022

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ahead of the curve

A. Amendments

1. ***Amendment to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulation, 2018***

SEBI has, *vide* notification dated July 25, 2022, amended the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulation, 2018 ("**SEBI ICDR Regulations**") and introduced chapter X-A on Social Stock Exchange ("**Chapter**"). A Social Stock Exchange is a separate segment of a recognised stock exchange, which allows 'not for profit organisations' to register and/ or list their securities on a social stock exchange. The Chapter consists of the following key provisions:

- *Definitions*: The Chapter provides for the definitions of "draft fund raising document", "final fund raising document", "For Profit Social Enterprise", "fund raising document", "Not for Profit Organization", "Social Auditor", "Social Audit Firm", "Social Enterprise" and "Social Stock Exchange.
- *Applicability*: The provisions of the Chapter will apply to: (a) a not for profit organization seeking registration on a social stock exchange; (b) a not for profit organization seeking to get registered and raise funds through a social stock exchange; and (c) a for profit social enterprise seeking to be identified as a social enterprise under the provisions of the Chapter.
- *Access to Social Stock Exchange*: A Social Stock Exchange will be accessible only to institutional investors and non-institutional investors; however, SEBI may permit other class(es) of investors, as it deems fit, for the purpose of accessing Social Stock Exchange.
- *Eligibility for identification as a Social Enterprise*: The Chapter provides a list of eligibility criteria that have to be fulfilled by a not for profit organization or a for profit social enterprise to be identified as a social enterprise.
- *Fund raising by Social Enterprises*: Under the Chapter, a not for profit organization may raise fund through: (a) issuance of zero coupon zero principal instruments to institutional and/ or non-institutional investors; (b) donations through mutual fund schemes as specified by SEBI; (c) any other means specified by SEBI. A for profit social enterprise may raise funds through: (a) issuance of equity shares on a recognized stock exchange, SME platform, innovators growth platform, or equity shares issued to an alternative investment fund, including a social impact fund; (b) issuance of debt securities; and (c) any other means specified by SEBI. The Chapter also provides for certain conditions which will render a social enterprise ineligible from raising funds.
- *Zero Coupon Zero Principal Instruments ("Instruments")*: The Chapter provides regulations on eligibility for issuance of Instruments, conditions of issuance of Instruments, procedure for public as well as private issuance of Instruments by not for profit organization, events of termination of listing of Instruments from Social Stock Exchange.
- The Chapter also includes regulations on the contents of a fund-raising document, the Social Stock Exchange Governing Council and requirements of registration for a not for profit organization, among others.

(Notification No. SEBI/LAD-NRO/GN/2022/90 dated July 25, 2022)

2. ***Amendment to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulation, 2015***

SEBI has, *vide* the notification dated July 25, 2022, amended the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulation, 2015 ("**SEBI Listing Regulations**"), and introduced a chapter on "Obligations of Social Enterprises". Some of the key amendments are set out below:

- *Definition of designated securities*: The term "Zero Coupon Zero Principal Instruments" has been included as one of the designated securities.
- *Obligations of Social Enterprises*: A new chapter IX-A on "Obligations of Social Enterprises" ("**Chapter**") has been inserted, which provides for disclosures to be made by Social Enterprises for the securities listed on the social stock exchange and other obligations to that effect. The main provisions of the chapter are as follows:
- *Applicability*: The provisions of the Chapter will apply to (a) For Profit Social Enterprise whose designated securities are listed on the applicable segment of the stock exchange; and (b) Not for Profit Organization that is registered on the Social Stock Exchange.
- *Disclosures*:
  - (i) A Profit Social Enterprise, whose designated securities are listed on the stock exchange(s) shall comply with the disclosure requirements contained in the SEBI Listing Regulations, with respect to issuers whose specified securities are listed on a recognised stock exchange (main board) or the SME Exchange or the Innovators Growth Platform, as the case may be.
  - (ii) A Not for Profit Organization registered on the Social Stock Exchange(s), including a Not for Profit Organization whose designated securities are listed on the Social Stock Exchange(s), shall be required to make annual disclosures to the Social Stock Exchange(s) on matters specified by SEBI, within 60 days from the end of the financial year or within such period as may be specified by SEBI. Additionally, the Social Stock Exchange(s) may specify matters that shall be disclosed by the Not for Profit Organization on an annual basis.
- Further, a Social Enterprise which is either registered with or has raised funds through a Social Stock Exchange or a stock exchange, shall be required to submit an annual impact report to the Social Stock Exchange or the stock exchange in the format specified by SEBI.
- The Chapter also provides regulations with respect to (a) intimations and disclosures of events or information to Social Stock Exchange(s) or stock exchange(s) by Social Enterprise; and (b) statement of utilization of funds.

(Notification No. SEBI/LAD-NRO/GN/2022/88 dated July 25, 2022)

3. ***Amendment to Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018***

In order to align the requirements under the RBI Directions for Central Counterparties, 2019 ("**RBI CCP Directions**"), SEBI has amended the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 ("**SECC Regulations**"), to include, *inter alia*, change in governing board of a recognized limited purpose clearing corporation, which shall comprise of nominee director (shareholder director under the SECC Regulations), managing director, the independent directors (public interest director under the SECC Regulations) and other directors as may be notified by the RBI/ SEBI from time to time, setting up of dispute resolution mechanism, completion of appointment of managing directors within 30 days of the approval from the RBI and submission of the compliance certificate.

Further, a limited purpose clearing corporation ("**LPCC**") is required to ensure compliance with the provisions of SECC Regulations as well as the directions issued by the RBI and in the event of conflict, compliance requirements shall be applicable on the LPCC after consultation with the RBI.

Further, an LPCC shall first seek prior approval from the SEBI and then the RBI, in the event such approval is required from both the RBI and the SEBI.

(Notification No. SEBI/LAD-NRO/GN/2022/93 dated August 12, 2022)

B. Circulars

1. ***Revision of investor grievance redressal mechanism***

SEBI *vide* its circular dated July 4, 2022 ("**Circular**"), has revised the investor grievance redressal mechanism. The key provisions of the Circular are as follows:

- *Online redressal system*: All recognised stock exchanges, including commodity derivatives exchanges/ depositories, have been advised to design and implement an online web-based complaints redressal system of their own, which will facilitate investors to file and escalate complaints for redressal through grievance redressal committee ("**GRC**"), arbitration, appellate arbitration, etc., within six months from the issuance of the Circular.
- *Hybrid mode of conducting GRC and arbitration/ appellate arbitration*: Stock exchanges will continue with the hybrid mode (i.e., online and offline) of conducting GRC and arbitration/ appellate arbitration process. Further, depositories are required to follow the hybrid mode (i.e., online and offline) of conducting GRC and arbitration/ appellate arbitration process.

Further, SEBI has amended circular no. SEBI/ HO/ DMS/ CIR/ P/ 2017/ 15, dated February 23, 2017, pursuant to which, a client who claims or counter claims up to INR 20 lakh and has filed arbitration reference will be exempted from submitting the deposit.

(SEBI Circular No. SEBI/HO/MRD1/ICC1/CIR/P/2022/94 dated July 4, 2022)

2. ***Levy of Goods & Services Tax (GST) on the fees payable to SEBI***

The SEBI has informed that the fees and other charges payable to SEBI by all market participants (i.e., market infrastructure institutions, companies who have listed/ are intending to list their securities, other intermediaries and persons who are dealing in the securities market) will be subject to GST, at the rate of 18%, with effect from July 18, 2022.

(Circular No.: SEBI/HO/GSD/TAD/CIR/P/2022/0097 dated July 18, 2022)

3. ***Single operational circular for listing obligations and disclosure requirements for non-convertible securities, securitised debt instruments and/ or commercial papers***

SEBI has issued a single operational circular ("**Single Operational Circular**") to enable users access to all applicable circulars covering the operational and procedural aspects prescribed under the SEBI Listing Regulation for non-convertible securities, securitised debt instruments and/ or commercial papers. In addition to the existing provisions, the Single Operational Circular provides formats for (a) statement indicating utilization and statement indicating deviation / variation in the use of proceeds of issue of listed non-convertible securities ("**NCS**"), (b) review of rating obtained by the listed entity with respect to its NCS from credit rating agencies, and (c) submissions to be made by listed entity to the stock exchanges for interest/ dividend/ principal under provisions of the SEBI Listing Regulations.

(SEBI Circular No. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/0000000103 dated July 29, 2022)

4. ***Enhanced guidelines for debenture trustees and listed issuer companies on security creation and initial due diligence***

Pursuant to feedback received from certain stakeholders, SEBI has revised certain aspects of the circular bearing reference no. SEBI/HO/MIRSD/CRADT/CIR/P/2020/218 dated November 3, 2020 ("**Circular**") and has laid down the revised requirements relating to encumbrance, creation of security and due diligence by the debenture trustees ("**DTs**"). The key requirements are as follows:

- *Manner of change in security/ creation of additional security/ conversion of unsecured to secured in case of already listed non-convertible debt securities ("NCDs")*

  The Circular recognises that (i) change in security; (ii) creation of additional security in case of already secured debt securities; or (iii) creation of security in case of unsecured debt securities, will amount to structural changes in the terms of listed debentures under Regulation 59 of the SEBI Listing Regulations. Accordingly, in order to harmonise the process of security creation in case of listed NCDs, SEBI has issued additional directions for entering into amended debenture trustee agreements, prior to initiation of due diligence and issuance of a no-objection certificate by the DT for proceeding with the proposed changes in the structure of or creation of security.

- *Encumbrance on securities for issuance of listed debt securities*: Creation of encumbrance on securities for securing non-convertible debt securities shall be through the depository system in accordance with the applicable laws.
- *Due diligence certificate in case of shelf prospectus/ memorandum*: In case security details have not been finalised at the time of filing of draft shelf prospectus/ placement memorandum filed by an issuer company, then the DT may furnish a due diligence certificate confirming that it has carried out due diligence for the clauses other than that related to security creation and at the time of the issuance of the tranche memorandum/ prospectus, shall issue a due diligence certificate.
- *Empanelment of External Agencies by DT*: For the purpose of empanelment of external agencies for carrying out due diligence and continuous monitoring, DTs will have to (i) adopt an empanelment criterion/ policy as approved by their board of directors and shall disclose the same on their website, and (ii) formulate a policy on mitigating conflict of interest and shall disclose the same on their website.

(SEBI Circular No. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/106 dated August 4, 2022)

5. ***Introduction of framework for restricted trading by designated persons during the closure of trading window by freezing PAN at security level***

In an effort to rationalise the compliance requirement, SEBI has, *vide* circular dated August 5, 2022 ("**Circular**"), introduced a system to restrict trading by the designated persons ("**DPs**") of listed companies during the trading window closure period. The process for implementation of the system includes the following key provisions:

- The designated depository ("**DD**") shall enable access to the listed company on the portal and shall auto-populate updated PAN details and names of the DPs and their demat account numbers, DP IDs or client IDs, as applicable, and the listed company shall confirm these details.
- The DD shall provide a facility to the listed company to specify the trading window closure period. The Circular provides that with respect to financial results, the listed company shall specify the first day immediately after the end of every quarter for which financial results are to be announced as the 'commencement date', and the date on which 48 hours ends post disclosure of financial results as the 'closure end date'. These details are required to be provided at least two trading days prior to the commencement date.
- The DD shall provide the abovementioned details to the stock exchanges and depositories at least one trading day prior to the commencement date.
- Upon identification of demat accounts from the PAN of the DPs, the depositories shall restrict off-market transactions and creation of pledge on the equity shares of the listed company with the reason code 'Trading Window Closure Period'.
- Further, the Circular allows for exemptions from trading restrictions for certain DPs in accordance with the SEBI PIT Regulations. The restriction on trading will be removed within two trading days from the date of receipt of request from the listed company and will be re-introduced automatically post lapse of the exemption period or completion of the transaction by the DP.

The Circular came into force with effect from the quarter ended September 30, 2022. Further, the restrictions on trading provided in the Circular will initially be for on-market transactions, off-market transfers, and creation of pledge in equity shares and equity derivates contracts (futures and options) of such listed companies.

(SEBI Circular No. SEBI/HO/ISD/ISD-SEC-4/P/CIR/2022/107 dated August 5, 2022)

6. ***Guidelines for overseas investment by AIFs and VCFs***

SEBI has specified certain guidelines for investments by Alternative Investment Funds ("**AIFs**") and Venture Capital Funds ("**VCFs**") in the securities of companies incorporated outside India. Set out below are the key guidelines:

- AIFs/ VCFs will be required to file an application with SEBI for allocation of a limit for overseas investments as per a prescribed format.
- There is no longer a requirement for the overseas investee company to have an Indian Connection.
- AIFs/ VCFs may only invest in overseas investee companies that are:
  (a) incorporated in countries whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to the bilateral Memorandum of Understanding with SEBI; and

(b) not incorporated in countries identified in the public statement of Financial Action Task Force (FATF) as: (i) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with FATF to address the deficiencies.

- If an AIF/ VCF liquidates investment made in an overseas investee company previously, the sale proceeds received from such liquidation, to the extent of investment made in the said overseas investee company, will be available to all AIFs/ VCFs (including the selling AIF/ VCF) for reinvestment.
- AIFs/ VCFs may transfer/ sell the investment in an overseas investee company only to entities eligible to make overseas investments, as per the extant guidelines issued under the Foreign Exchange Management Act, 1999.
- AIFs/ VCFs will furnish the sale/ divestment details of overseas investments to SEBI as per the prescribed formats, within three working days of the divestment, for updating the overall limit available for overseas investment by AIFs/ VCFs.
- All the overseas investments sold/ divested by AIFs/ VCFs till date, shall also be reported to SEBI in a prescribed format within 30 days from the date of the circular.

(Circular No.: SEBI/HO/AFD-1/PoD/CIR/P/2022/108 dated August 17, 2022)

7. ***Block Mechanism in demat account of clients undertaking sale transactions***

SEBI had previously introduced block mechanism in the demat account of clients undertaking sale transactions, for ease of operation in Early Pay-in mechanism (i.e., transactions in which settlement obligations are fulfilled with the clearing house earlier than the designated due date, failing which the relevant shares to be transferred are returned to the seller's account). SEBI has now made the block mechanism mandatory for all Early Pay-in transactions.

(Circular No.: SEBI/HO/MIRSD/DoP/P/CIR/2022/109 dated August 18, 2022)

8. ***Amended guidelines on preferential issue of units and institutional placement of units by listed InvITs and REITs***

SEBI had, *vide* circulars each dated November 27, 2019, issued guidelines for preferential issue and institutional placement of units by Infrastructure Investment Trust ("**InvITs**") and Real Estate Investment Trust ("**REITs**") – ("**Guidelines**"), amended from time to time. SEBI has introduced further amendments to the Guidelines for listed InvITs and REITs vide circulars dated August 26, 2022 and September 28, 2022. The key amendments are set out below:

- The InvIT/ REIT will have to make an application to the stock exchanges to list units, and the units shall be listed within two working days from the date of allotment (from the earlier time period of seven days).
- The time period for refund of money, in case of failure of REITs or InvIT concerned to list the units within the

specified time, has been reduced to four working days (from the date of the allotment) from the earlier requirement of 20 days. Further, the REIT or InvIT, manager of the REIT or investment manager of the InvIT, and its director or partner who is an officer in default, would be jointly and severally liable to repay that money with an annual interest rate of 15% from the expiry of the fourth working day.

- The pricing formula for allotment of units under preferential issue, where the units of the InvIT or REIT are frequently traded, would be the volume-weighted average price ("**VWAP**") of weekly highs and lows for 90 trading days or 10 trading days, whichever is higher, quoted on a recognised stock exchange preceding the relevant date i.e. 30 days prior to the date on which the meeting of unitholders is held to consider the preferential issue. Earlier, the pricing formula in a preferential allotment was the VWAP of the last two weeks or the last 26 weeks, whichever is higher.
- The preferential issue of units to institutional investors not exceeding five in number will have to be made at a price not less than the 10 trading days' VWAP of the related units quoted on a recognized stock exchange preceding the relevant date, rather than the earlier requirement of not less than the average of the weekly high and low of NSE.
- The VWAP of the related units quoted on a recognised stock exchange during the two weeks preceding the relevant date.
- Preferential issue of units will not be made to any person who has sold or transferred any units of the issuer during the 90 trading days preceding the relevant date. Earlier, the limit was six months.
- The condition for a REIT or InvIT to be listed for a minimum period of 12 months prior to an institutional placement has been removed.
- Earlier, no allotment was to be made, either directly or indirectly, to any institutional investor who was a sponsor(s) or manager/ investment manager, or a person related to, or related party or associate of, the sponsor(s) or the manager/ investment manager, as applicable. However, pursuant to the September 28, 2022, circulars, allotment of units can now be made to the sponsor for the unsubscribed portion in an institutional placement, subject to:

  (i) at least 90% of the issue size being subscribed;

  (ii) objects of the issue being acquisition of assets from that sponsor;

  (iii) units allotted to the sponsor being locked in for a period of three years from the date of trading approval; and

  (iv) unitholders approval having been taken for the allotment of the unsubscribed portion to the sponsor.

(SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/0115 dated August 26, 2022, SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/0116 dated August 26, 2022, SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/130 dated September 28, 2022 and SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/129 dated September 28, 2022)

9. *Performance/ return claimed by unregulated platforms offering algorithmic strategies for trading*

SEBI had previously cautioned investors against dealing with unregulated platforms that are offering investor algorithmic trading services and facilities. To further safeguard investors, it has decided that stock brokers who provide services relating to algorithm trading shall not, whether directly or indirectly, refer to the past or expected future return/ performance of the algorithm or associate with a platform making such reference in relation to the performance of any such algorithm. Stockbrokers are also required to delete any such reference or dissociate themselves from the platforms providing such reference in relation to an algorithm within seven days from the date of this circular.

(Circular No.: SEBI/HO/MIRSD/DOP/P/CIR/2022/117 September 2, 2022)

10. *Detailed framework for Social Stock Exchange*

SEBI has, *vide* circular dated September 19, 2022, notified a detailed framework for a social stock exchange ("**SSE**"). Some of the key provisions of the framework include:

- *Minimum requirements for registration*: A not for profit organisation ("**NPO**") desirous of registration on the SSE shall be required to fulfil certain criteria, which includes *inter alia* (i) valid registration as either a charitable trust registered under the public trust statute of the relevant state, the Societies Registration Act, 1860, or the Indian

Trusts Act, 1882, or a company incorporated under Section 8 of the Companies Act, 2013, (ii) valid registration certificates under the Income Tax Act, 1961, for exemptions or deductions for investors and with no notice or ongoing scrutiny by income tax departments, (iii) minimum age of three years of the NPO, and (iv) an annual spending of at least INR 50 lakh and funding of at least INR 10 lakh in the past financial year.

- *Initial disclosure requirements for NPOs raising funds on the SSE*: For NPOs seeking to raise funds through the issuance of Zero Coupon Zero Principal Instruments on the SSE, the SSE shall mandate the structure of the fund raising document and shall host the disclosure requirements in such documents on its website.
- *Annual disclosures by NPOs on the SSE*: NPOs that have either raised funds on the SSE or are registered with the SSE shall be required to make certain annual disclosures within 60 days from the end of each financial year, in accordance with Regulation 91C of the SEBI Listing Regulations. These disclosure requirements include, among others, general aspects, including organizational goals, outreach and details of top donors and programmes and governance aspects, including governance structure.
- *Disclosure of annual impact report by social enterprises using SSE*: Social enterprises that have registered or raised funds using SSE shall be required to provide duly audited annual impact reports ("**AIR**") to the SSE within 90 days from the end of each financial year.
- *Statement of utilisation of funds*: Listed NPOs shall be required to submit a statement of utilisation of funds to the SSE within 45 days from the end of each quarter, in accordance with Regulation 91F of the SEBI Listing Regulations.

(SEBI Circular No. SEBI/HO/CFD/PoD-1/P/CIR/2022/120 dated September 19, 2022)

11. *Issuance and listing of commercial papers by listed REITs and InvITs*

In terms of the RBI Commercial Paper Directions, 2017, dated August 10, 2017, entities such as co-operative societies/ unions, government entities, trusts, limited liability partnerships and other body corporates, having presence in India and having a net worth of INR 100 crore or higher are eligible to issue commercial papers, subject to adhering to the conditions specified therein. Pursuant to these circulars, SEBI has permitted REITs and InvITs, having net worth of INR 100 crore or higher, to issue and list commercial papers subject to adherence to: (a) the guidelines prescribed by the RBI for issuances of commercial papers; (b) the conditions of listing norms prescribed by SEBI under SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021, and circulars issued thereunder and (c) the overall debt limits permitted under the SEBI (Real Estate Investment Trusts) Regulations, 2014 (for REITs)/ SEBI (Infrastructure Investment Trusts) Regulations, 2014 (for InvITs).

(SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/ 122 dated September 22, 2022 and SEBI Circular No. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/123 dated September 22, 2022)

C. Consultation Papers

1. *Consultation Paper on applicability of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, to mutual fund units*

By way of consultation paper dated July 8, 2022 ("**Consultation Paper**"), SEBI has sought public comments in relation to the applicability of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 ("**SEBI PIT Regulations**"), to mutual fund units ("**MF Units**"), with the objective to harmonise the regulations governing trading in securities, while in possession of unpublished price sensitive information ("**UPSI**").

SEBI had observed that in certain instances, certain intermediaries and personnel such as registrar and transfer agent or key personnel of a mutual fund had redeemed their MF units, while being in possession of/ privy to certain sensitive information, which was not yet communicated to the unitholders of such schemes and since the SEBI PIT Regulations specifically excluded MF units from its purview and hence, a need was felt to harmonise the provisions in SEBI PIT Regulations to ensure strict compliance, prohibit insider trading and enforce strict actions against personnel and intermediaries in possession of UPSI pertaining to a scheme of mutual fund and misuse such information.

The changes proposed to be introduced to the SEBI PIT Regulations include *inter alia*:

- omission of words 'except units of a mutual fund' from the definition of securities;
- inclusion of words 'redeeming and switching' and 'redeem and switch' in the definition of trading;

- insertion of chapter IIA titled *'Restrictions on communication in relation to, and trading by insiders in, the units of mutual funds'*;
- limited applicability of SEBI PIT Regulations to MF units, only the provisions of chapter IIA, IIIA and V are applicable to dealing in MF units;
- insertion of definition of systematic transactions as those transactions which are automatically triggered for execution on a periodical basis; and
- adoption of a policy for determination of 'legitimate purposes' by the board of an asset management company with trustees' approval.
- additionally, the Consultation Paper has proposed to include the definitions of (a) insider; (b) connected persons; (c) generally available information; (d) UPSI; and (e) designated persons, on the basis of personnel and intermediary, who have access to UPSI of MF units to proposed Chapter IIA of SEBI PIT Regulations.
- The Consultation Paper also empowers the compliance officer of the asset management committee to determine the closure period during which designated persons or class of designated persons are reasonably expected to have possession of UPSI, their immediate relatives and any other person for whom such person takes trading decisions cannot transact in MF units.

Public comments on the consultation paper were invited till July 29, 2022.

(Consultation paper on Applicability of SEBI (Prohibition of Insider Trading), Regulations, 2015 to Mutual Fund (MF) units dated July 8, 2022)

2. ***Consultation paper on the regulatory framework for online bond trading platforms***

By way of consultation paper dated July 21, 2022 ("**Consultation Paper**"), SEBI has invited public comments on the proposed framework to regulate online bond trading platforms ("**Bond Platforms**"). Bond Platforms have emerged to cater to non-QIB investors, especially non-institutional investors who wish to invest in bonds through private placement and have to mandatorily go through the Electronic Book Provider Platform. The regulatory framework proposed by SEBI attempts to ensure that the business potential of the Bond Platform is retained while services are efficiently offered to non-institutional investors. The key features of the regulatory framework proposed by SEBI is set out below:

- *Mandatory registration for Bond Platform as a stock broker*: The Bond Platform has to be mandatorily registered as a stock broker with the SEBI (debt-segment) or be run by SEBI registered brokers, which will make the Bond Platform a SEBI registered intermediary and it would come under the purview of the SEBI (Stock Brokers) Regulation, 1992. Therefore, standard KYC requirements and net worth and deposit requirements, applicable to stock brokers, will become applicable to the Bond Platform.
- *Restriction on eligibility of securities*: Only listed debt securities will be eligible to be traded on the Bond Platform.
- *Lock-in period*: To ensure that the issuance on a Bond Platform does not qualify as a deemed public issue, SEBI has proposed a six months lock-in period for bonds issued

on a private placement basis and offered for sale on the Bond Platform.

- *Acceptable channels of transaction*: The transactions will have to be routed through the trading platforms on the debt segment of Exchanges so as to mitigate settlement risk and ensure a T+2 settlement. Alternatively, the transactions which are executed on the Bond Platform can be routed through the request for quote platform of Stock Exchanges where the transactions will be cleared and settled on a delivery versus payment (DVP-1) basis.

Public comments on the consultation paper were invited till August 12, 2022.

(Consultation Paper on Online Bond Trading Platform – Proposed Regulatory Framework dated July 21, 2022)

3. ***Consultation paper on green and blue bonds as a mode of sustainable finance***

By way of consultation paper dated August 4, 2022 ("**Consultation Paper**"), SEBI has invited public comments on the proposed regulatory framework to (a) amplify the definition of green debt securities; (b) introduce the concept of blue bonds; and (c) reduce the compliance cost for issuers of green debt securities while not creating any perverse incentives that may lead to 'greenwashing'. The key features of the regulatory framework proposed by SEBI is set out below:

- *Definition of Green Debt Securities ("GDS")*: The definition of GDS may be amended to include (a) pollution prevention and control (including reduction of air emissions, greenhouse gas control, soil remediation, waste prevention/ minimisation, waste reduction, waste recycling and energy/ emission efficient waste to energy); and (b) circular economy adapted products, production technologies and processes (such as the design and introduction of reusable, recyclable and refurbished materials, components and products, circular tools and services) and/ or certified eco-efficient products, as eligible categories for issuance of GDS, along with, among others, the existing categories of renewable and sustainable energy, including wind, solar, bioenergy, other sources of energy, which use clean technology, clean transportation, including mass/ public transportation and climate change adaptation.
- *Disclosure requirements*: SEBI has proposed to include various disclosures, in addition to the existing disclosure requirements, to align the current framework on GDS with Green Bond Principles (GBP) published by the International Capital Market Association which include, among others:

(i) Disclosure for intended types of temporary placement for the balance of unallocated net proceeds;

(ii) Disclosure for utilisation of proceeds from each issue of GDS made by an issuer which shall be tracked and disclosed separately (bond by bond approach) or on an aggregated basis for multiple green bonds (portfolio approach);

(iii) Disclosure for taxonomies, green standards or certifications, if referenced in the project selection;

(iv) Disclosure of information on processes by which the issuer identifies and manages perceived social and environmental risks associated with the project(s) proposed to be financed/ refinanced;

(v) Disclosures on Impact Reporting wherein information pertaining to reporting of the environmental impact of the projects financed by the green debt securities will be disclosed in the offer document and/or as a continuous disclosure.

The Consultation paper also proposes to amend the revised operational circular bearing number SEBI/ HO/ DDHS/P/CIR/ 2021/ 613, issued by SEBI on the issue and listing of non-convertible securities, securitised debt instruments, security receipts, municipal debt securities and commercial paper.

Public comments on the consultation paper were invited till August 31, 2022.

(Consultation Paper on Green and Blue Bonds as a mode of Sustainable Finance dated August 4, 2022)

D. Informal Guidance

1. ***Informal Guidance in relation to the provisions of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015***

   An informal guidance was sought from SEBI in relation to (i) whether the pending qualified institutional placement issue of up to INR 2,000 crore ("**QIP**"), its pricing and probable impact on share capital of the issuer company can be considered as published price sensitive information ("**UPSI**"); and (ii) whether individual promoters, which include the chairman and managing director, and executive director and chief executive officer of the issuer company or any member of the promoter group, can purchase shares of the issuer company from the open market during the pendency of the QIP.

   Against this backdrop, SEBI provided the following informal guidance:

   - In relation to point (i) above, as per Regulation 2(1)(n) of SEBI PIT Regulations UPSI has been defined as including but not restricted to, information relating to financial results, dividends and change in capital structure. Accordingly, since QIP will increase the paid-up capital of the issuer company, which would lead to change in its capital structure, it would constitute UPSI under Regulation 2(1)(n) of SEBI PIT Regulations and therefore, pending the QIP issue, its pricing and probable impact on share capital of the issuer company will be considered as UPSI.
   - In relation to point (ii) above, referring to the definitions of 'insider' and 'connected person' under the SEBI PIT Regulations, SEBI clarified that individual promoters, which include the chairman and managing director and executive director and chief executive officer of the issuer company, are connected persons and hence will be deemed to be insiders. Further, based on facts and circumstances of each case, a member of the promoter group may be deemed to be connected person or may be in possession of UPSI or have access to UPSI and hence will be deemed to be insiders too. SEBI further clarified that Regulation 3 of SEBI PIT Regulations prohibits communication of UPSI to any person, including other persons unless such communication is being made for a legitimate purpose or in discharge of legal obligations or performance of duties. Accordingly, any insider when in possession of UPSI shall not trade in securities that are listed or proposed to be listed on the stock exchanges, as per Regulation 4(1) of SEBI PIT Regulations unless the insider can demonstrate his innocence, which includes setting up of trading plan in accordance with Regulation 5 of the SEBI PIT Regulations.

   (SEBI Informal Guidance No. ISD/OW/2022/16109/1 dated April 13, 2022)

E. Board Meeting

1. ***SEBI board meeting held on September 30, 2022***

   SEBI, in its board meeting held on September 30, 2022, approved *inter alia* the following key proposals in relation to introduction of new frameworks and changes to the extant SEBI regulations:

   - *Introduction of a regulatory framework to facilitate online bond platform providers and reduction in the face value of listed privately placed debt securities*: SEBI approved the proposal for (a) registration of online bond platform providers with SEBI as stock brokers under the debt segment of the stock exchanges, (b) issuance of a procedural circular detailing the specifics of the operations of such providers; and (c) reduction in the face value of listed privately placed debt securities.
   - *Disclosure of key performance indicators ("KPIs") and price per share of issuer*: SEBI has mandated issuers undertaking an initial public offer of equity shares ("**IPO**") to make disclosures on KPIs, as well as details of the pricing per share of the issuer based on past transactions and past fund raisings done by the issuer in the offer document and the price band advertisement. Further, the issuers will be required to disclose the weighted average cost of acquisition based on past primary or secondary transactions of shares of the issuer ("**WACA**"). Additionally, a committee of independent directors shall recommend that the price band for the IPO is justified, based on qualitative factors or KPIs vis-à-vis the WACA as described above.
   - *Amendment to the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 ("SEBI Mutual Funds Regulations")*: SEBI Mutual Funds Regulations have been amended to facilitate faster payment of redemption and dividend to unitholders by AMCs from the existing period of 10 working days and 15 days, respectively, to the proposed period of three working days and seven working days, respectively, or to such periods as may be specified by SEBI from time to time.
   - *Introduction of pre-filing of offer document*: SEBI has decided, along with the existing mechanism of processing offer documents, to introduce pre-filing of the offer document as an optional alternative mechanism for

issuers undertaking an IPO on the main board of the stock exchanges, allowing issuers to carry out limited interaction, without having to make any sensitive information public. The offer document incorporating SEBI's initial observations would then be available to investors for a period of at least 21 days.

- *Flexibility in approval process for appointment and/ or removal of independent directors*: SEBI has decided to amend the SEBI Listing Regulations to permit an alternative method for appointment and removal of independent directors appointed for the first term. Under the alternative mechanism, if the existing requirement of a special resolution for appointment of an independent director does not get the requisite majority, the listed entity may test the (a) threshold for ordinary resolution, and (b) threshold for majority of minority shareholders. If the resolution for appointment or removal crosses these two thresholds in the same voting process, then such a resolution would be deemed to have been approved by the shareholders.
- *Amendments to Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 ("SEBI REIT Regulations"), to allow reduction in minimum holding by sponsors*: Reduction of the minimum holding requirement of units by a REIT from 25% to 15% by sponsor(s) and sponsor group(s) of the total outstanding units of REITs on a post-initial offer under the SEBI REIT Regulation, which is in line with the requirements specified for sponsor(s) in the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014.
- Approval of proposals relating to discontinuation of a separate regulatory framework for unlisted InvITs.
- *Framework for offer for sale ("OFS") through stock exchange mechanism*: Approval of modifications with respect to the existing framework for OFS through the stock exchange mechanism, including (a) removing the requirement of minimum 10% shareholding for non-promoter shareholders seeking to offer shares through the OFS; (b) reducing the existing cooling off period of 12 weeks for OFS to a range of two weeks to 12 weeks based on the liquidity of securities; (c) permitting retail investors to bid for the unsubscribed portion of the non-retail segment; and (d) making OFS available to unit holders/ sellers of listed REITs and InvITs to offer their holdings.
- *Monitoring of utilisation of issue proceeds*: SEBI has decided to introduce monitoring of utilisation of issue proceeds raised through preferential issues and qualified institutions placements under the SEBI ICDR Regulations through credit rating agencies as monitoring agencies, for an issue size exceeding INR 100 crore.
- Amendment to the SEBI PIT Regulations for inclusion of trading in units of mutual funds, including *inter alia* (a) definitions of relevant terms such as 'unpublished price sensitive information' and 'generally available information' for mutual funds; and (b) separate code of conduct for designated persons; and (c) reporting and monitoring requirements with respect to transactions in mutual fund units by designated persons.

(SEBI Press Release no. 29/2022 dated September 30, 2022)

insight
Volume XV | Issue II | November 09, 2022

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