

INDIA



Law and Practice

Contributed by:

Nohid Nooreyezzan, Ajay Singh Solanki and Bhuvana Veeraragavan
AZB & Partners

Contents

1. Incentivisation p.4

- 1.1 Market Practice (General) p.4
- 1.2 Market Practice (Public v Private Companies) p.4
- 1.3 Future Developments p.4
- 1.4 Common Plans p.5

2. Share Plans: Legal and Tax Issues p.5

- 2.1 Prospectus or Filings p.5
- 2.2 Promoting the Plan p.5
- 2.3 Funding the Plan p.5
- 2.4 Grant Process p.6
- 2.5 Exchange Controls p.7
- 2.6 Employee Tax and Social Security: Share Options/Awards/RSUs p.8
- 2.7 Employee Tax and Social Security: Restricted Shares p.9
- 2.8 Employer Tax: Withholding, Social Security and Corporate Tax p.9
- 2.9 Tax-Favourable Plans p.10

3. Share and Cash Plans: General p.10

- 3.1 Malus/Claw-back p.10
- 3.2 Employment/Labour Laws p.10
- 3.3 Post-Vesting or Post-Employment Holding Periods p.11
- 3.4 Data Protection p.11
- 3.5 Translation p.11

4. Remuneration Regulation, Corporate Governance and Disclosure p.11

- 4.1 Governance and Disclosure p.11
- 4.2 Remuneration Regulation and Reporting p.13

AZB & Partners was founded in 2004 with a clear purpose to provide reliable, practical and full-service advice to clients across all sectors. Having grown steadily since its inception, AZB & Partners has offices across Mumbai, Delhi, Bangalore, Chennai and Pune. The firm's greatest strength is an in-depth understanding of legal, regulatory and commercial environments in

India and elsewhere. The firm's clients include an array of domestic and international companies. These range from privately owned to publicly listed companies, including Fortune 500 entities, multinational companies (MNCs), investment banks, private equity firms and more across the world.

Authors



Nohid Nooreyezdian is a senior partner at AZB & Partners in the firm's employment, labour and benefits law practice, and has over 29 years of experience. She is well-versed in the evolving

nuances of Indian employment law and regularly counsels clients on various aspects of the law. In addition to her legal expertise, Nohid also holds a degree in social services and has developed a strong understanding of the laws relating to workplace harassment and gender issues. She has advised clients extensively on matters relating to sexual harassment, including drafting, and reviewing policies, assisting clients in responding to and redressing complaints, leading investigations, advising, and guiding clients on the sensitivities involved and conducting training workshops for employees and management. Nohid has also been closely involved in investigations pursuant to whistle-blower allegations and advising clients on the consequences of the same from an employment law perspective.



Ajay Singh Solanki is a partner at AZB & Partners in the firm's employment, labour and benefits law practice, and has over 16 years' experience. He has been advising a wide range

of high-profile multinational and domestic clients on complex Indian employment law issues. He has a specific inclination towards diversity, equality and inclusion issues and actively advises clients on diversity and equality laws. He currently serves as an Officer of the International Bar Association's (IBA) Diversity and Equality Law Committee. He has also served as a Diversity Officer on IBA's Diversity Council for two years and as the Co-Chair of the Disability Rights Working Group on IBA's Diversity & Equality Law Committee for three years. Ajay is an active participant at IBA conferences and was a speaker/panellist/moderator at the IBA Annual Conference, Rome (2018), Seoul (2019), Miami (2022) and Paris (2023) and the IBA Employment and Diversity Law Conference, Paris (2019), Madrid (2022) and Buenos Aires (2023).



Bhuvana Veeraragavan is a senior partner at AZB & Partners, and has over 15 years of experience. Bhuvana specialises in mergers and acquisitions, joint ventures, general corporate and private equity. She also supports the employment, labour and benefits, regulatory and securities and compliance and investigation/white-collar crime practices. Bhuvana advises domestic and international clients on structuring inbound and outbound acquisitions. She also advises on foreign investments into and out of India and associated regulatory approvals in diverse sectors, including financial services, IT/ITES, manufacturing units and real estate.

AZB & Partners

Peninsula Corporate Park
Ganpatrao Kadam Marg
Lower Parel West
Mumbai
Maharashtra
400013
India

Tel: + 91 224 072 9999
Fax: +91 224 072 9888
Email: mumbai@azbpartners.com
Web: www.azbpartners.com



AZB & PARTNERS
ADVOCATES & SOLICITORS

1. Incentivisation

1.1 Market Practice (General)

It is fairly common for Indian companies to offer their employees participation in stock-based or cash-based incentives plans. It is also common for foreign entities to offer employees of their Indian subsidiaries participation in the foreign entity's employee incentive plans.

The most common types of share-based plans are (i) employee stock option plans; (ii) employee stock purchase plans; and (iii) sweat equity. Stock appreciation rights plans and phantom stock plans which track the value of the shares on the basis of which the participant would receive monetary upside relating to the shares – ie, cash-settled (and not actual shares) – are also preferred by Indian companies in some cases. Foreign companies are also increasingly offering participation in their plans, making employees of their Indian subsidiaries eligible for restricted stock units, restricted shares and management incentives.

The most common cash incentive plans in India are those relating to (i) performance bonuses; (ii) retention bonuses; (iii) profit sharing; and (iv) referral bonuses.

1.2 Market Practice (Public v Private Companies)

While the nature of the offering under the plans issued by private companies and listed companies in India remains broadly similar, share-based incentives issued by private companies in India are relatively less regulated compared to those issued by listed companies.

The securities regulator in India has prescribed a separate set of regulations for issuance of share-based employee benefits by listed companies.

However, private companies are exempt from these regulations and are instead required to comply with a comparatively shorter set of rules prescribed under the Companies Act, 2013.

Cash-based incentives are usually governed solely by the contractual terms prescribed under the plan documents.

For listed companies, there are several disclosure requirements on the relevant stock exchange, including with respect to remuneration paid to employees under both share-based and cash-based incentive plans.

1.3 Future Developments

The Indian government has proposed consolidating 29 existing federal labour statutes into four labour codes in 2020, namely, the Code on Wages, the Industrial Relations Code, the Code on Social Security, and the Occupational Safety, Health, and Working Conditions Code. The codes are awaiting notification of effective dates to become a law.

Meanwhile, it is likely that in 2025, all the Indian states and union territories in India will have completed the process of framing state-specific rules corresponding to these codes, which will help streamline procedural aspects of labour regulations.

In this consolidation exercise, an important change is the introduction of a common definition of “wages” across the codes. Currently, there are multiple definitions of “wages” under different employment laws. The new definition under the codes makes a reference to “remuneration-in-kind”. The codes envisage that where an employee is given any remuneration-in-kind by the employer, the value of such remuneration-in-kind which does not exceed 15% of the

total wages payable to him/her will be deemed to form part of the wages of such employee. It is possible that the term “remuneration-in-kind” (not defined under the codes) may include share-based incentives.

Furthermore, the new definition explicitly excludes any bonus payable under existing laws that does not constitute part of the remuneration agreed upon in the terms of employment. However, cash-based incentives that are purely contractual in nature may still be classified as part of an employee’s wages.

Once these codes come into effect, employers may need to reassess how they calculate employee benefits that are determined based on wages, ensuring compliance with the new framework.

Additionally, amendments/developments to the Indian tax regime are generally introduced via the finance budget proposals, which are typically presented before the Indian Parliament during the month of February each year. The proposals are then reflected as amendments in tax laws. Amendments impacting the taxability of share/cash incentives may be proposed via the finance budget and consequently under the tax laws.

1.4 Common Plans

Indian companies typically prefer the roll-out of plain vanilla ESOP plans/schemes for their senior-level or mid-level employees. Start-ups generally use ESOPs as a way to incentivise employees when they are not in a position to pay high salaries. RSUs and restricted shares have generally been offered by foreign companies to employees of their Indian subsidiaries.

Historically, for cash-based incentives, performance bonuses and retention bonuses have

been the most popular options amongst Indian companies.

2. Share Plans: Legal and Tax Issues

2.1 Prospectus or Filings

In India, the grant of employee stock options is exempt from the provisions governing the issuance of a prospectus when granting shares in an Indian entity. There is no guidance in the legislation on whether this exemption applies to foreign companies issuing share awards/options to employees of Indian subsidiaries.

In practice, we are not aware that any prospectus has been filed by a foreign parent company offering shares under an employee share plan to employees of its Indian subsidiary.

2.2 Promoting the Plan

There are no restrictions under applicable Indian laws on the promotion or communication of a share plan to employees.

2.3 Funding the Plan

There are no restrictions under Indian law applicable to private companies (local employer) on providing financial assistance for funding of the plan, provided the offering of the plan, grant of awards, and the recharge arrangement have been approved by a resolution of the board of the local employer entity (unless some special provisions are incorporated in the charter documents of the local employer stating otherwise).

In the case of a public company, a recharge agreement may count as financial assistance, in which case a special resolution of its shareholders would be needed and such financial assistance should not be given to any director or key

managerial personnel of such company. Such financial assistance to other employees should not exceed six months of their salary or wages. In the case of the issuance of shares of the foreign parent to employees of its Indian subsidiary, any costs recharged to the Indian subsidiary (ie, the local employer) by the foreign parent would need to be declared in the annual report filed by the Indian subsidiary.

From an Indian exchange control law perspective, if the local employer is to be recharged for the costs of the plan, then a confirmation that there is no Reserve Bank of India (RBI) approval requirement for the recharge, even if it is by way of book/accounting entry only, should be sought. This should be sought as a clarification through the authorised dealer bank of the local entity in India.

2.4 Grant Process

In the case of unlisted companies in India, the issuance/grant of employees' stock options is governed by the Companies Act, 2013 (the "2013 Act") and the Companies (Share Capital and Debentures) Rules, 2014 (the "SCD Rules"). For listed companies in India, the Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 (the "SEBI ESOP Regulations") govern employee stock option schemes, employee stock purchase schemes, stock appreciation rights schemes, general employee benefits schemes, and retirement benefit schemes. A minimum vesting period of one year is prescribed between the grant and the exercise of options in the case of both listed and unlisted companies.

SCD Rules

Under the SCD Rules, the issue of an employee stock option scheme should be approved by the shareholders by passing a special resolu-

tion. A description of the disclosures required to be made in the explanatory statement affixed to the notice for passing the resolution is detailed in **4.1 Governance and Disclosure**.

"Employee" under the 2013 Act for these purposes shall mean (i) permanent employees of the company who have been working in India or outside India; (ii) a director of the company, whether a whole-time director or not but excluding an independent director; or (iii) an employee of a subsidiary in India or outside India, or of a holding company of the company; however, it does not include an employee who is a promoter or a person belonging to the promoter group or a director who either himself/herself, through his/her relative, or through a body corporate, directly or indirectly, holds more than 10% of the outstanding equity shares of the company.

However, in the case of a start-up (for which a specific registration has to be obtained), these restrictions do not apply for a period of ten years from the date of its incorporation or registration. The company granting options to its employees pursuant to an employee stock option scheme shall have the freedom to determine the exercise price of the options in accordance with the applicable accounting principles.

- Shareholder approval by way of a separate resolution shall be obtained by the company in the case of: (i) the grant of options to employees of a subsidiary or holding company; or (ii) the grant of options to identified employees, during any one year, equal to or exceeding 1% of the issued capital (excluding outstanding warrants and conversions) of the company at the time of granting the options.
- The company may, by special resolution, vary the terms of the stock option scheme/plan not yet exercised by the employees, provided

such variation is not prejudicial to the interests of the option holders.

- The options granted to employees are not transferable to any other person and shall not be pledged, hypothecated, mortgaged, or otherwise encumbered or alienated in any other manner. The company shall maintain a Register of Employee Stock Options in Form No SH.6 and include particulars of the options granted.

SEBI ESOP Regulations

- In the case of a listed company, shareholder approval by way of a special resolution is required, and any change in the terms of the scheme that is detrimental to the interest of the employees is not permitted.
- While the eligibility conditions for the grant process are the same as in the case of unlisted companies, the regulations additionally specify that an employee will be eligible to participate in the company as determined by the compensation committee of the company.

When a new issue of shares is made under any scheme, a listed company must list all the new shares immediately on all the recognised stock exchanges where the existing shares are listed subject to the company obtaining an in-principle approval from all the stock exchanges on which the company's shares are listed. As and when an exercise is made, the company must notify the stock exchange in accordance with the statement specified by the regulator.

2.5 Exchange Controls

In India, there are specific exchange control restrictions and reporting requirements under the Foreign Exchange Management Act, 1999 and applicable regulations thereunder, which govern the inflow and outflow of foreign exchange,

including the purchase of shares of a foreign entity or the payment of an option exercise price.

The Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules") govern the acquisition of shares and interests of an offshore/foreign entity by an individual resident in India pursuant to an employee share plan or benefits scheme offered by the overseas parent entity subject to the following conditionalities:

- The resident individual is an employee or a director of (i) an office in India or a branch of an overseas entity; (ii) a subsidiary in India of an overseas entity or (iii) of an Indian entity in which the overseas entity has direct or indirect equity holding.
- The employee share option plan or benefits scheme is offered by the issuing overseas entity globally on a uniform basis. While "uniform basis" is undefined, it is likely to mean that stock option plans in India should be the same as those in other jurisdictions.
- Any remittances out of or into India must be made through an authorised dealer (ie, a designated bank in India that is permitted to receive, remit and generally deal in foreign exchange).

Exchange Control Restrictions and Reporting Requirements

Below is a breakdown of the exchange control restrictions and reporting requirements for different scenarios.

Employees sending local currency out of India to pay for shares/option exercise price offered by overseas parent entity

- Cap: While there is no limit on the remittance towards the share plans, the remittance by an Indian employee made towards the acquisition of shares under an employee benefit plan

will be counted towards the individual's limit, which is currently at USD250,000 per financial year (April-March), under the Liberalised Remittance Scheme (LRS) issued by RBI.

- **Mode of Payment:** Upon exercise of the option, the Indian employee can make use of the following permissible modes of payments to make the payment to the overseas parent entity: (i) through ordinary banking channels, and (ii) funds held in an account maintained in accordance with foreign exchange control laws.
- **Reporting in Form OPI:** The local employer must submit a semi-annual return to RBI via their authorised dealer. This return, filed in physical form using Form OPI, details the amounts transferred into and out of India, specifying the beneficiaries. The form contains broad details of the remittance made/shares issued in the preceding six months, which need to be filed within 60 days of both 31 March and 30 September.
- The investment must be less than 10% and no control is being acquired by the individual.

Employees selling shares and sending currency to India

- (a) **Repatriation of Sale Proceeds:** If an employee sells the shares they received under a plan, they must repatriate the proceeds within 180 days of receipt (unless reinvested). It is recommended to include a declaration in the enrolment form in which the employee agrees to repatriate to India any funds received under the plan.
- (b) **Transfer in Certain Special Cases:** If the transfer is on account of a merger, amalgamation or demerger or on account of a buyback of foreign securities, such transfer or liquidation in the case of the liquidation of the foreign entity must have

the approval of the competent authority per the applicable laws in India or the laws of the host country or host jurisdiction, as the case may be.

- (c) If an Indian employee receives cash under any share option plan in Indian Rupees through payroll, there are no exchange control issues.

2.6 Employee Tax and Social Security: Share Options/Awards/RSUs

Social Security

In India, social security requirements are primarily governed by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees' State Insurance Act, 1948. As the value of the ESOPs granted to employees is based on the value of the share at a future date, it does not fall within the meaning of "wages" under the currently applicable law and therefore its value does not need to be considered when making social security contributions. However, employers must take care not to include this component as part of the cost to company (CTC) of the employee as this may then potentially require them to consider the monetary value when making social security contributions. Please refer to **1.3 Future Developments** for proposed changes under the labour codes.

Taxability at the Time of Allotment/Transfer of Shares to Employees

Per Indian income tax law, the grant or vesting or exercise of an option/award/RSU is not subject to income tax. The taxable event arises at the time of allotment or transfer of shares or securities/payment of cash to an Indian employee as part of the relevant incentive plan, in the hands of such employee.

Where an option/award/RSU is settled in shares or securities, the taxable value is the fair market

value of such shares or securities (computed per the prescribed income-tax/valuation rules) on the exercise date (ie, the date on which the relevant employee exercises his/her right to receive shares or securities (per the relevant rule, a valuation report of a date not preceding more than 180 days from the exercise date would also be acceptable)) minus the exercise price (if any) payable by the relevant employee.

Where an option/award/RSU is settled in cash, the taxable value is the cash amounts payable to the relevant employee.

Taxability at the Time of Sale of Shares or Securities by Employees

Any capital gains arising at the time of the sale or transfer of the resulting shares or securities by an employee is subject to capital gains tax in the hands of such employee. The taxable value is the difference between the fair market value of the shares or securities (computed per the prescribed income tax rules at the time of exercise of an option/award/RSU) and the consideration received by the employee on the sale of such shares.

2.7 Employee Tax and Social Security: Restricted Shares

Taxability at the Time of Allotment/Transfer of Restricted Shares to Employees

Depending on the nature of such restrictions, if it can be argued that restricted shares are not tradable, a position may be taken that such shares may not qualify as “securities” under Indian tax law and any grant or vesting or allotment of such restricted shares to Indian employees should not be subject to income tax. However, this position remains untested in Indian courts, and the possibility of Indian tax authorities challenging it and arguing that restricted shares allotted to employees qualify as securities cannot be ruled out.

Further, if restrictions on shares are lifted and such shares qualify as securities, the income tax implications discussed in **2.6 Employee Tax and Social Security: Share Options/Awards/RSUs** (under “Taxability at the Time of Allotment/Transfer of Shares to Employees”) would also apply to their allotment or transfer to Indian employees.

Taxability at the Time of Sale of Shares or Securities by Employees

If restricted shares qualify as securities, the income tax implications discussed in **2.6 Employee Tax and Social Security: Share Options/Awards/RSUs** (under “Taxability at the Time of Allotment/Transfer of Shares to Employees”) would also apply to their sale or transfer by Indian employees.

Social Security

Please see **2.6 Employee Tax and Social Security: Share Options/Awards/RSUs**.

2.8 Employer Tax: Withholding, Social Security and Corporate Tax

Tax Withholding Obligation of the Local Employer

The local employer is under an obligation to withhold the applicable taxes at the time of allotment or transfer of shares or securities or payment of cash to employees, as the case may be. Where an option/award/RSU/restricted share is settled in shares or securities, the taxable value is the fair market value of such shares or securities (computed per the prescribed income tax rules) on the exercise date (ie, the date on which the relevant employee exercises his/her right to receive shares or securities (per the relevant rule, a valuation report of a date not preceding more than 180 days from the exercise date would also be acceptable)) minus the exercise price (if any) payable by the relevant employee. Further, where an option/award/RSU is settled in cash,

the taxable value is the cash amount payable to the relevant employee.

Corporate Tax Deduction

The local employer can claim a corporate tax deduction for the costs of the incentive plan reimbursed to the parent company, provided that such costs qualify as “revenue expenditure”, are paid on an arm’s length basis (subject to the applicability of transfer pricing regulations), and are subject to tax withholding, if applicable.

Social Security

As the value of the share options/awards/RSUs/restricted shares granted to employees is based on the value of the share at a future date, it does not fall within the meaning of “wages” under the currently applicable law and therefore its value does not need to be considered when making social security contributions. However, employers must take care not to include this component as part of the CTC of the employee as this may potentially require them to consider the monetary value when making social security contributions. Please refer to **1.3 Future Developments** for proposed changes under the labour codes.

2.9 Tax-Favourable Plans

There are no forms of plan available in India that allow for a more favourable tax position for Indian employees or the Indian employer.

3. Share and Cash Plans: General

3.1 Malus/Claw-back

It is possible to apply malus and/or claw-back to share or cash awards (including bonuses) in India. Malus and claw-back provisions are becoming fairly common in larger companies and those with global operations, especially in sectors like information technology, finan-

cial services and banks. The adoption of these provisions is driven by the growing emphasis on executive accountability, corporate governance, and shareholder protection. For certain specific sectors such as banking services, RBI has prescribed guidelines for banking companies on executive compensation which include reference to malus and claw-back clauses. The Companies Act, 2013 also contemplates the recovery of remuneration from certain specified executive personnel in the event of fraud or non-compliance.

From an enforceability perspective, a contractual stipulation regarding claw-back in the share or cash plan which has been voluntarily consented to by the employee should be enforceable from an Indian contract law perspective.

In a cross-border situation, RBI approval would be needed to enforce claw-back if it involves the transfer of cash out of India for no consideration. However, approval would not be needed if the employee repays cash to the Indian employer and that cash remains in India (and no set-off is applied).

3.2 Employment/Labour Laws

From an employment law perspective, as stated in **2.6 Employee Tax and Social Security: Share Options/Awards/RSUs**, employers must refrain from including reference to share plans as part of an employee’s CTC as this may have potential repercussions on the amount of employment cessation-related payments, social security contributions and gratuity payable to employees.

It is advisable to include language in the share plan expressly stating that participation in the plan is not a guarantee of continued employment with the company. Additionally, it is advisable for an employer to include language on

consent of the employee to deduct/adjust the exercise price from the salary of the employee if that is required for administrative purposes.

An employer is not required to consult with the trade union in which its employees are members prior to implementing a share plan.

3.3 Post-Vesting or Post-Employment Holding Periods

In the case of an employee stock purchase scheme, the SEBI ESOP Regulations provide for a minimum lock-in period of one year upon allotment of shares. Per applicable law, sweat equity shares have a lock-in period of three years post-allotment. Other stock awards are not subject to any post-vesting or post-employment holding periods under law. However, if any such holding period needs to be mentioned, it can be contractually prescribed in the plan documentation.

3.4 Data Protection

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules, 2011 (the “Sensitive Personal Information Rules”) define “personal information” to mean any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person. Further, the Sensitive Personal Information Rules, inter alia, require the body corporate collecting the data to obtain prior consent from persons providing “sensitive personal information” through letter, fax or email for collection, usage and/or transmission of such information. Sensitive personal data or information has been defined to mean information relating to:

- passwords;

- financial information such as bank account or credit card or debit card or other payment instrument details;
- physical, physiological and mental health conditions;
- sexual orientation;
- medical records and history; and
- biometric information.

Employee consent would be required only if any sensitive personal data or information of the employee is being collected, processed or transferred as part of the implementation of the share or cash plan.

Looking ahead, India is poised to implement a new data privacy law, the Digital Personal Data Protection Act, 2023 (the “DPDP Act”). While the Act’s effective date is still pending notification, draft rules (the Digital Personal Data Protection Rules, 2025) under the DPDP Act were recently released by the government and are currently open for public comment until 18 February 2025.

3.5 Translation

There is no requirement to translate cash or share plan documents into the local language provided that the employees are able to read and understand the documents in the language provided.

4. Remuneration Regulation, Corporate Governance and Disclosure

4.1 Governance and Disclosure

An Indian company intending to implement a share-based plan (involving shares of the Indian entity) must secure shareholder approval via a special resolution. This requires sending a notice and explanatory statement to all shareholders,

detailing various aspects of the plan. These disclosures include, but are not limited to:

- a brief description of the scheme.
- the total number of options to be offered and granted;
- identification of classes of employees entitled to participate;
- eligibility criteria for employees;
- the exercise price;
- the vesting period;
- the exercise price formula;
- the lock-in period;
- the maximum number of options to be granted per employee and in aggregate;
- whether the company intends to establish a trust to implement the share plan;
- methodology for valuing the options; and
- the conditions under which options vested in employees may lapse – eg, in the case of termination of employment for misconduct.

In addition to the above, in the case of a listed company (whose shares are listed on a recognised stock exchange in India) the following disclosures apply:

- When a new issue of shares is made under any scheme, a listed company must list all the new shares immediately on all the recognised stock exchanges where the existing shares are listed, subject to obtaining an in-principle approval from all the stock exchanges on which the company's shares are listed. Additionally, when an exercise is made, the company must notify the stock exchange in accordance with the statement specified by the regulator.
- If a share scheme is implemented through a trust structure, the company must maintain proper books of accounts, records and documents and the financial position of each

scheme and in particular give a true and fair view of the state of affairs of each scheme.

- When the holding company issues options, shares, or other benefits to the employees of its subsidiary, the cost incurred by the holding company for issuing such benefits shall be disclosed in the “notes to accounts” of the financial statements of the subsidiary company. If the subsidiary reimburses the cost incurred by the holding company in granting options, shares, stock appreciation rights or benefits to the employees of the subsidiary, both the subsidiary as well as the holding company shall disclose the payment or receipt in the “notes to accounts” to their financial statements.
- A listed company must set up a compensation committee under the applicable rules for superintending and administering the plan. The compensation committee shall, inter alia, formulate the detailed terms and conditions of the schemes, which shall include the provisions as specified in the applicable regulations.
- The trust shall be required to make disclosures and comply with the other requirements applicable to insiders or promoters under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 or any modification or re-enactment thereto.
- The Board of Directors in their report shall disclose any material change in the scheme and whether the scheme is in compliance with the applicable regulations. Further, the following details, inter alia, shall be disclosed on the company's website, and a link thereto shall be provided:
 - (a) relevant disclosures in terms of the accounting standards prescribed under the 2013 Act;
 - (b) the date of the shareholders' approval and total number of options approved

- under the scheme/plan;
- (c) vesting requirements and exercise price or pricing formula;
- (d) the maximum term of options granted;
- (e) sources of share (primary, secondary or combination);
- (f) employee details (name of employee, designation, number of options granted during the year, exercise price);
- (g) a description of the method and significant assumptions used during the year to estimate the fair value of options; and
- (h) details related to trust.
- The company should also disclose the statement of risks, information about the company, salient features of the scheme/plan to the prospective option grantees.
- Any company implementing any of the share-based schemes shall follow the relevant requirements, including the disclosure requirements of the Accounting Standards prescribed by the central government in terms of the 2013 Act (including any “guidance note on accounting for employee share-based payments” issued in that regard from time to time).
- The Board of Directors shall, at each annual general meeting, place before the shareholders a certificate from the secretarial auditors of the company that the scheme(s) has been implemented in accordance with these regulations and in accordance with the resolution of the company in the general meeting.

In addition, a company that intends to offer employee share plans to non-residents must comply with the applicable exchange control laws requiring certain reporting requirements (please refer to **2.5 Exchange Controls**).

4.2 Remuneration Regulation and Reporting

In India, the regulations and reporting requirements in relation to executive remuneration extend to managing directors, key managerial persons, and managers and are governed by the provisions of the 2013 Act, and, in some cases, by the Security and Exchange Board of India Act and regulations thereunder.

Per the 2013 Act, “remuneration” is defined as any money or its equivalent given or passed to any person for services rendered by him/her, and includes perquisites. Further, every company is required to file an annual return with the Registrar of Companies, disclosing details of the remuneration of its directors and key managerial personnel. Below are the key considerations in determining the remuneration.

Ceiling on Remuneration in Case of Public Companies

- In the case of publicly listed companies, the Nomination and Remuneration Committee (NRC) constituted under the 2013 Act shall formulate the criteria for determining the qualifications, positive attributes and independence of a director and recommend to the board a policy relating to remuneration for directors, key managerial personnel and other employees. While formulating the policy, the NRC has to ensure that: (i) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully; (ii) the relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and (iii) remuneration for directors, key managerial personnel and senior management involves a balance between fixed and incentive pay, reflecting short- and long-term performance

objectives appropriate to the working of the company and its goals.

- The 2013 Act prescribes limits on the remuneration payable by a public company to its directors, prescribing that the total managerial remuneration payable by a public company to its directors, managing and whole-time director (WTD), and its manager in any financial year shall not exceed 11% of the net profits of that company for that financial year except that the remuneration of the directors shall not be deducted from the gross profits. In respect of the limits on executive remuneration prescribed under the 2013 Act for a public company (as detailed above), the shareholders of a company may elect to increase such limits by way of a special resolution.
- Except with the approval of the public company in a general meeting by a special resolution, in the case of a managing director, WTD, or manager, the total remuneration payable to any one such person should not exceed 5% of the net profits of the public company, and if there is more than one such person, the remuneration paid to all such persons should not exceed 10% of the net profits.
- In respect of directors of the public company that are neither a managing director nor a WTD, the remuneration paid to all such directors must not exceed 1% of the net profits of the company if there is a managing director, WTD or manager, and should not exceed 3% of the net profits of that company in any other case.
- Any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the board's report.

Every listed company is required to disclose particulars of remuneration of its directors in the report of its board of directors, detailing the following (among others):

- the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;
- the percentage increase in remuneration of each director, chief financial officer, chief executive officer, company secretary or manager, if any, in the financial year;
- the percentage increase in the median remuneration of employees in the financial year;
- the total number of permanent employees; and
- affirmation that the remuneration is per the remuneration policy of the company.

Guidelines on Executive Remuneration in Banks

- On 4 November 2019, RBI published revised guidelines on compensation of whole-time directors, chief executive officers, material risk takers and control function staff applicable to all private sector banks (including local area banks, small finance banks and payments banks) and foreign banks operating in India and for pay cycles with effect from 1 April 2020. Banks are required to make disclosure of remuneration of WTD/chief executive officers (CEO)/material risk takers on an annual basis at the minimum, in their annual financial statements.
- The new guidelines propose the following key changes: (i) at least 50% of compensation must be performance-based; (ii) share-linked instruments, such as employee stock options, will be included as part of the variable pay; (iii) the variable pay component will be capped at 300% of fixed pay; (iv) if the variable pay is up to 200% of fixed pay, at least 50% must

be paid in non-cash form, and if the variable pay exceeds 200%, a minimum of 67% must be in non-cash form; (v) senior executives will be required to defer a portion of their variable pay, regardless of the amount; (vi) claw-back provisions will be mandatory for deferred compensation; and (vii) both qualitative and quantitative criteria will be used to identify individuals who take on significant risks.

- Foreign banks operating in India must submit an annual declaration to RBI from their headquarters, certifying that their compensation practices in India, including those for CEOs, align with the principles and standards set by the Financial Stability Board (FSB). RBI's approval is required before any remuneration is paid to the CEOs or WTD of the foreign bank's branch in India. In making its decision, RBI will evaluate whether the proposed compensation adheres to the FSB guidelines, among other factors.

Guidelines on remuneration for senior executives also exist for other regulated sectors like the insurance sector.

Claw-Back of Remuneration

The 2013 Act provides for the recovery of remuneration from certain specified executive personnel in the event of fraud or non-compliance. In case a company is required to restate its financial statements due to fraud or non-compliance with any requirement under the 2013 Act and the rules made thereunder, the company is required to recover from any past or present managing director/WTD/manager/CEO (by whatever name they may be called) who, during the period for which the financial statements are required to be restated, received the remuneration (including stock options) in excess of what would have been payable to him/her based on the restated financial statements.