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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.



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- ❖ MCA Extends Last Date for SBO Filing
- ❖ Amendments to Investor Education and Protection Fund Authority Rules

Corporate & SCRA

- ❖ The Ministry of Corporate Affairs ('MCA') by way of notification dated September 24, 2019 has extended the time limit for filing the e-form No. BEN-2 by reporting companies, pursuant to the Companies (Significant Beneficial Owners), 2018 Rules, from September 30, 2019 to December 31, 2019 without the payment of any additional fee. The notification clarifies that additional fee will be payable for filings made after December 31, 2019.
- ❖ The Investor Education and Protection Fund ('IEPF') has been established for promotion of investors' awareness and protection of interests of the investors. Section 125 of the Companies Act, 2013 ('Companies Act') prescribes (i) the amounts which companies are required to transfer to IEPF (such as unclaimed dividends), (ii) use of amounts lying with the IEPF and (iii) other related matters. The Central Government has also established the Investor Education and Protection Fund Authority ('IEPF Authority') for administration of the IEPF. The IEPF Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 ('IEPF Rules') govern matters relating to *inter-alia* the amounts to be transferred to and paid by the IEPF. The MCA notified certain amendments to the IEPF Rules on August 14, 2019. Summary of the key amendments is set out below:
 - Every company which is required to credit amounts to the IEPF or has deposited amounts or transferred shares to the IEPF is required to nominate a nodal officer, who must either be a director, chief financial officer or company secretary of the company, for the purposes of verification of claims and coordination with the IEPF Authority. In case a company fails to appoint a nodal officer, every director of the company will be deemed to be nodal officer and be liable for any failure to comply with the requirements of the IEPF Rules.
 - For any refund of amounts or shares to be made out of the IEPF, the company is required to verify the details in the Form No. IEPF-5 relating to the claims received by the company and send an online verification report to the IEPF Authority, along with all the documents submitted by such claimant, within 30 days of receipt of the claim; failing which the company will be liable for a penalty up to Rs. 2,500 on account of such delay. A failure to submit the verification report renders the company and the nodal officer liable for breach of the Companies Act.

Foreign Exchange

- ❖ Acceptance of Deposits by Issue of Commercial Papers
 - ❖ Regulation 6(3) of the Foreign Exchange Management (Deposit) Regulations, 2016 ('Deposit Regulations') permitted an Indian company to issue commercial papers ('CPS') to a non-resident Indian or a person of Indian origin or a foreign portfolio investor registered with the Securities and Exchange Board of India ('SEBI'), subject to the conditions specified therein. With a view to bring in consistency in statutory provisions/ regulations relating to CPS such as: (i) Section 45V(b) of the Reserve Bank of India Act, 1934 (which describes CPS as one of the money market instruments); and (ii) Section 2(c) of the Companies (Acceptance of Deposits), Rules 2014 (which excludes any amount received against issue of CPS from the definition of deposits), the Government of India by way of its notification dated July 16, 2019 has deleted Regulation 6(3) of the Deposit Regulations.
 - Accordingly, Indian companies are no longer permitted to accept deposits against issuance of CPS to a non-resident Indian or a person of Indian origin or a foreign portfolio investor registered with SEBI within the purview of the Deposit Regulations.
- ❖ Review of FDI Policy for Certain Sectors
 - ❖ The Ministry of Commerce and Industry (Department of Promotion of Industry and Internal Trade) has issued a press note on September 18, 2019 (Press Note 4 of 2019) amending the Foreign Direct Investment ('FDI') Policy ('FDI Policy') to reflect the changes approved by the Union Cabinet on August 28, 2019 in relation to FDI in coal mining, contract manufacturing, single brand retail trading and digital media. The changes will take effect once the Reserve Bank of India issues notifications to amend the Foreign Exchange Management (Transfer or Issue of Securities by a Person Resident Outside India) Regulations, 2017. A summary of the key changes is set out below:
 - Coal Mining: 100% FDI has now been allowed under the automatic route in entities that are engaged in the sale of coal and in coal mining activities including 'associated processing infrastructure'¹ subject to the provisions of Coal Mines (Special

¹ "Associated Processing Infrastructure" in this context would include coal washery, crushing, coal handling, and separation (magnetic and non-magnetic).



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- Provisions) Act, 2015, the Mines and Minerals (Development and Regulation) Act, 1957, and other relevant legislations governing such entities.
- ii. Contract Manufacturing: 100% FDI under the automatic route has been permitted in contract manufacturing. Manufacturing activities may now be conducted by the investee entities themselves, or through contract manufacturing under a lawful contract, either on principal-to-principal or principal -to-agent basis.
 - iii. Single Brand Retail Trading ('SBRT'):
 - All procurements made from India by the SBRT entity for the 'single brand' will be counted towards the local sourcing requirement, whether the goods procured are sold in India or exported. Further, the current 5 years cap for exports has been removed.
 - 'Sourcing of goods from India for global operations' can be done directly by the entity undertaking SBRT or its group companies (resident or non-resident), or indirectly through a third party under a legally tenable agreement.
 - Entire sourcing from India for global operations will be considered towards the local sourcing requirement (and not only the incremental value).
 - Online retail trading may also be undertaken prior to opening of brick and mortar stores, provided that the entity opens brick and mortar stores within 2 years from the date of commencement of online retail.
 - iv. Digital Media: 26% FDI has now been allowed under the approval route in entities that are engaged in uploading / streaming of news & current affairs through digital media.

Capital Markets

❖ SEBI has amended the SEBI (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations') with effect from July 25, 2019. The key changes are as follows:

- i. An amendment has been made to the minimum standards for the Code of Conduct for Listed Companies to Regulate, Monitor and Report Trading by Designated Persons ('Code'), which clarifies that trading window restrictions under the Code will not apply to transactions for which the: (i) defences to trading (when in possession of unpublished price sensitive information) under Regulation 4(1) of the PIT Regulations are available (except the Chinese walls defence); and (ii) pledge of shares for a *bona fide* purpose (such as raising of funds), subject to obtaining pre-clearance from the compliance officer and compliance with applicable SEBI regulations.

Further, trading window restrictions will not apply to transactions undertaken in accordance with various SEBI regulations, such as in case of acquisition by conversion of warrants or debentures, subscribing to rights issue, further public issue, preferential allotment or tendering of shares in a buy-back offer, open offer or delisting offer.

- ii. With respect to disclosures to be made under the Code by designated persons regarding persons with whom they share a 'material financial relationship', SEBI has clarified that a 'material financial relationship' means a relationship in which the relevant person has received any payment (such as a loan or gift) from a designated person during the immediately preceding 12 months, equivalent to at least 25% of the annual income of such designated person (and not the payer's annual income, as was previously prescribed).

❖ SEBI has, through circular dated July 19, 2019, prescribed a standardized format for reporting violations of codes of conduct under the PIT Regulations. Under this format, SEBI requires reporting of details such as (i) the designation and functional role of the designated person involved; (ii) whether the designated person is a part of the promoter / promoter group; (iii) details of the violation and action taken (including reasons for such action); (iv) details of previous violations since the last financial year. SEBI has further directed all listed companies, fiduciaries and intermediaries to maintain a database of violations of the code of conduct and reiterated that the relevant organizations are empowered to, and must, take appropriate action in respect of such violations.

❖ SEBI has, by way of a circular dated July 17, 2019, modified its earlier circular dated July 18, 2017, which prescribed disclosure norms for divergence in asset classification and provisioning by banks. In line with the Reserve Bank of India ('RBI') notification dated April 1, 2019, SEBI has directed banks having specified listed securities to disclose to stock exchanges divergence

❖ Amendments to SEBI Insider Trading Regulations

❖ Standardized Reporting of Violations of Insider Trading Codes of Conduct

❖ Modification in Disclosure Norms for Divergence in Asset Classification and Provisioning by Banks



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❖ Guidelines for Enhanced Disclosures by Credit Rating Agencies

in their asset classification and provisioning, if either or both of the following conditions are satisfied: (i) additional provisioning for non performing assets ('NPA') assessed by RBI exceeds 10% of the reported profit before provisions and contingencies for the reference period; and (ii) additional gross NPAs identified by RBI exceed 15% of the published incremental gross NPAs for the reference period.

❖ To further strengthen the disclosures made by Credit Rating Agencies ('CRAs') and enhance the rating standards, SEBI by way of circular dated June 13, 2019, has issued certain guidelines regarding enhanced disclosure requirements for CRAs. Some of the key guidelines are:

- i. Computation of Cumulative Default Rates ('CDRs') will be calculated issuer wise using the Marginal Default Rate ('MDR') approach, using monthly static pools. Accordingly, CRAs should annually disclose (on a consolidated basis for all financial instruments rated by a CRA), the average 1 year, 2 year and 3 year CDRs for the past 10 financial years (long run average default rates) and 24, 36 and 48 most recent cohorts (short run average default rates).
- ii. CRAs in consultation with SEBI are required to form a Standard Operating Procedure in respect of tracking and timely recognition of default which are required to be displayed on each CRA's website.
- iii. CRAs in consultation with SEBI are required to prepare and disclose standardized and uniform Probability of Default benchmarks for each rating category on their website, for 1 year, 2 year and 3 year CDRs, both for short-run and long-run.
- iv. CRAs are required to assign the suffix 'CE' (Credit Enhancement) to the rating of instruments having an explicit credit enhancement.
- v. CRAs are required to have a specific section on 'Rating Sensitivities' in the Press release which should explain the broad level of operating and/or financial change that could trigger a rating change (upward and downward).

Furthermore, the SEBI (Credit Rating Agencies) Regulations, 1999 were amended on September 23, 2019 to include certain changes in its Regulation 14 governing contracts between CRAs and their clients. The clients are now required to cooperate with the CRAs when the latter is carrying out periodic reviews of the ratings during the tenure of the rated instrument. Further, the clients are now required to provide explicit consent to the CRAs to obtain from them and other entities specified therein complete details about their existing and future borrowings along with information regarding repayment and delay or default of any nature.

❖ Factors for SEBI Granting Confidentiality in Settlement Applications

❖ SEBI has issued a circular setting out the criteria to assure confidentiality under the SEBI (Settlement Proceedings Regulations, 2018 ('Settlement Regulations')). A person who may have committed a violation of securities laws (other than those detailed in Tables VII to IX of Schedule II of the Settlement Regulations), may make full disclosure of such violation and also provide substantial assistance in examination/ investigation/ inspection/ inquiry/ audit/ any other proceedings ('Examination Proceedings') that is initiated/ is ongoing/ yet to be initiated by SEBI against any person for violation of the securities laws, for the purpose of seeking grant of confidentiality.

For the purposes of approving the request for confidentiality, SEBI may assess the information/ assistance/ cooperation rendered during the Examination Proceedings including, *inter alia*, the assistance provided by the applicant and the gravity of the subject matter in question. Further, SEBI has also set out factors which would adversely affect the applicant's claim for confidentiality, which include, *inter alia*, past history of securities laws violations by the applicant, extent of involvement of the applicant in the violation of securities laws (assessed in the context of the individual's knowledge and position of responsibility at the relevant time), the degree to which the applicant tolerated illegal activity, plausibility of the reasons for the applicant to delay reporting of the violations of the securities laws and efforts undertaken by the applicant to remediate/ mitigate/ indemnify the harm caused by the violations.

❖ Materiality Threshold for Related Party Payments for Brand Use / Royalty

❖ SEBI has amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, pursuant to which SEBI has increased the materiality threshold (triggering shareholder approval requirement) for a related party transaction involving payments made to a related party with respect to brand usage or royalty from 2% to 5% of the annual consolidated turnover of the listed entity as per the last audited financial statements.

❖ Amendments to the SEBI ICDR Regulations

❖ SEBI on September 23, 2019 has notified amendments to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 in order to include Part V in Chapter X. This chapter deals with migration of companies listed on the Innovators Growth Platform ('IGP') to the general category of the main board. For giving effect to the same, the company is required to fulfil the conditions of the stock exchanges, if any, and fulfil the following conditions as per the new chapter:

- i. Such company should have been listed on the IGP for a minimum period of 1 year and should have at least 200 shareholders at the time of application for the migration.



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- ii. The company, its promoters, promoter group and directors should not be debarred by SEBI from accessing the capital markets. The promoters or directors should not be holding the same position in any other company, which at the time of the application is debarred by SEBI from accessing the capital markets in any other company. Further, the company, its promoters and its directors should not be willful defaulters and the promoters and directors of the company should not be fugitive economic offenders.
- iii. The company should have a net worth of at least Rs. 1 crore and net tangible assets of at least Rs. 3 crore, calculated on a consolidated basis, in each of the preceding 3 full years, of which, in case of net tangible assets, not more than 50% should be held in monetary assets.
- iv. The company should have an average operating profit of at least Rs. 15 crore, calculated on a consolidated basis, during the preceding 3 years, with operating profit in each of the preceding 3 years.
- v. In case of name change of the company in the preceding year, at least 50% of the revenue calculated on a consolidated basis, should be generated from the activity indicated by its new name.
- vi. In the event the company does not satisfy the aforementioned conditions (iii) to (v), then the company is required to have 75% of its capital to be held by qualified institutional buyers at the time of applying to trade under the regular category.
- vii. The promoters of the company should hold at least 20% of the total capital, and any shortfall thereto can be met by an alternate investment fund, foreign venture capital investor, scheduled commercial bank, any public financial institution or an insurance company to the extent of 10% without being identified as a promoter.
- viii. The aforementioned holding of 20% will be locked in for a period of 3 years and further any excess of 20% will be locked in for a period of 1 year. Wherever contributions made were locked in for 6 months at the time of listing on the IGP, such period would be deducted from the lock-in applicable to the migration to the main board. Furthermore, the condition of lock-in would not apply to a company which has been listed on the IGP for a minimum period of 3 years or more.

SEBI has also brought about changes corresponding to the new SEBI (Foreign Portfolio Investors) Regulations, 2019.

❖ SEBI by way of its circular dated November 1, 2018, had introduced the use of Unified Payments Interface ('UPI') as a payment mechanism with Application Supported by Block Amount ('ASBA') for applications in public issues by retail individual investors through intermediaries, such as syndicate members, registered stock brokers, registrar and transfer agent and depository participants, with effect from January 1, 2019. Implementation of the same was to be carried out in a phased manner to ensure gradual transition to UPI with ASBA. Accordingly, Phase II of the aforesaid circular has become effective from July 1, 2019.

SEBI by way of its circular dated July 26, 2019 has clarified that with regard to applications by retail individual investors through intermediaries, the existing process of investor submitting bid-cum-application form with any intermediary along with bank account details, and movement of such application forms from intermediaries to Self Certified Syndicate Banks ('SCSBs') for blocking of funds has been discontinued and the UPI mechanism will be the only permissible mode for such applications. SEBI has further clarified that applications through UPI in initial public offerings can be made only through SCSBs / mobile applications whose name appears on the SEBI website. Applications made using an incorrect UPI handle or using a bank account of a SCSB or a bank which is not mentioned in the aforesaid list is liable to be rejected.

❖ SEBI, on July 18, 2019, has issued a consultation paper on Policy Proposals with respect to Resignation of Statutory Auditors from Listed Entities. The paper proposes conditions to enhance responsible behaviour of auditors and ensure completion of ongoing obligations by resigning auditors. Following are the key proposals:

- i. For listed entities, auditor will be required to sign the audit report of a financial year before resignation, in case the auditor has signed the audit report for all quarters except the last quarter in that financial year. In all other cases, the auditor to provide a limited review or audit report for the quarter in which the auditor resigns; and
- ii. For material unlisted subsidiaries of listed entities, auditor to issue limited review or audit report for the previous quarter/ financial year, as applicable, before resignation.

In addition, the consultation paper *inter alia* proposes certain procedures for strengthening the role of the audit committee and also prescribes a format for the resignation letter by a statutory auditor.

❖ Implementation of Phase II of Unified Payments Interface with Application Supported by Block Amount

❖ Proposed Norms for Resignation of Statutory Auditors



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❖ Amendments to the External Commercial Borrowings (ECB) Policy – Rationalisation of End-Use Provisions

Banking and Finance

❖ With a view to further liberalize the External Commercial Borrowings ('ECB') framework, RBI has, pursuant to the circular dated July 30, 2019 ('ECB Circular'), introduced certain relaxations with respect to the end use for which Indian eligible borrowers are permitted to raise ECBs. Previously, ECB proceeds were not permitted to be utilized towards working capital, general corporate purposes and repayment of Rupee loans, except for when the ECB was availed from a 'foreign equity holder' (i.e., recognized lenders having either a minimum of 25% (twenty five percent) direct or 51% (fifty one percent) indirect equity holding in the borrowing entity, or a group company with a common overseas parent.) Further, on-lending for any of the aforementioned activities was also expressly prohibited.

Per the ECB Circular, eligible borrowers are now permitted to avail ECBs for the following purposes from all recognized lenders (excluding foreign branches / overseas subsidiaries of Indian banks), subject to the following conditions:

- i. ECBs for repayment / refinancing of rupee loans availed domestically for capital expenditure, subject to minimum average maturity period ('MAMP') of 7 (seven) years;
- ii. ECBs to non-banking financial companies ('NBFCs') for on-lending for repayment / refinancing of domestic rupee loans for capital expenditure, subject to MAMP of 7 (seven) years;
- iii. ECBs for repayment / refinancing of rupee loans availed domestically for purposes other than for capital expenditure, subject to MAMP of 10 (ten) years;
- iv. ECBs to NBFCs for on-lending for the aforesaid end-uses (i.e., repayment / refinancing of domestic rupee loans for purposes other than for capital expenditure), subject to MAMP of 10 (ten) years;
- v. ECBs for working capital purposes and general corporate purposes, subject to MAMP of 10 (ten) years;
- vi. ECBs to NBFCs for on-lending for working capital purposes and general corporate purposes, subject to MAMP of 10 (ten) years; and
- vii. ECBs for repayment of rupee loans availed domestically for capital expenditure in the manufacturing and infrastructure sectors, subject to being classified as SMA-2 or NPA, under any one-time settlement with lenders.

In addition to the above, the ECB Circular also permits domestic banks to assign rupee loans availed domestically for capital expenditure in manufacturing and infrastructure sectors to eligible ECB lenders (excluding foreign branches / overseas subsidiaries of Indian banks), subject to the resultant ECB complying with all-in-cost, MAMP and other relevant norms set out in the ECB framework. Under the erstwhile ECB framework, this was not permitted without approval from RBI.

On August 8, 2019, RBI has also updated the corresponding 'Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligations' dated March 26, 2019.

❖ RBI Permits ARCS to Acquire Financial Assets from Other ARCS

❖ RBI has published a circular allowing Asset Reconstruction Companies ('ARCS') to acquire financial assets from other ARCS. RBI, citing the changes made to the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, permitted the above, subject to the following conditions: (i) the transaction is settled on cash basis; (ii) price discovery for such transaction will not be prejudicial to the interest of security receipt holders; (iii) the selling ARC will utilize the proceeds so received for the redemption of underlying security receipts; and (iv) the date of redemption of underlying security receipts and total period of realisation will not extend beyond eight years from the date of acquisition of the financial asset by the first ARC.

❖ Bank Credit to NBFCs for On-Lending Eligible for Classification as 'Priority Sector'

❖ RBI by way of its circular dated August 13, 2019 addressed to all scheduled commercial banks has decided that bank credit to registered NBFC (other than micro finance institutions ('MFI')) for on-lending will be eligible for classification as 'priority sector' subject to the following conditions:

- i. Agriculture: On-lending by NBFCs for term lending component under 'agriculture' will be allowed up to Rs 10,00,000 per borrower;
- ii. Micro & Small enterprises ('MSME'): On-lending by NBFCs under 'MSME' will be allowed up to Rs 20,00,000 per borrower; and
- iii. Housing: The existing limit for on-lending by housing finance companies ('HFCs') is increased to Rs 20,00,000 per borrower.

Only fresh loans sanctioned by NBFCs out of bank borrowings, on or after the date of issue of the circular, are eligible for the aforementioned classification by banks. Loans given by HFCs under the existing on-lending guidelines will continue to be classified under 'priority sector' by banks.

Bank credit to NBFCs for on-lending will be allowed up to a limit of five percent of each bank's total priority sector lending on an ongoing basis. The circular will have immediate effect and above instructions will be reviewed after March 31, 2020. However, loans disbursed under the on-lending model will continue to be classified under 'priority sector' till the date of repayment/maturity.

❖ RBI on September 12, 2019 increased the limit for a bank's exposure to a single Non-Banking Financial Company (excluding gold loan companies) under the 'Large Exposures Framework' to 20% of that bank's eligible capital base from the existing limit of 15% of that bank's eligible capital base.



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❖ Revision of Limit for a Bank's Exposure to a Single NBFC under the Large Exposures Framework

Infrastructure

❖ Five power distribution companies of Uttar Pradesh had entered into a power purchase agreement dated November 21, 2008 ('PPA') with Prayagraj Power Generation Company Limited ('PPGCL') to purchase power from its thermal power project in Uttar Pradesh. The tariff under the PPA was determined based on a competitive bidding process undertaken by Uttar Pradesh Power Corporation Limited ('UPPCL'). Upon the application of UPPCL, the tariff adopted under the PPA through a transparent bidding process was approved by the Uttar Pradesh Electricity Regulatory Commission ('UPERC') pursuant to Section 63 of the Electricity Act, 2003 ('Electricity Act').

PPGCL had raised loans from a consortium of lenders led by State Bank of India ('SBI') and such loans were secured by a pledge of 88.51% of the equity shares of PPGCL held by Jaiprakash Power Ventures Limited. PPGCL failed to discharge its debt obligations due to which the lenders enforced the pledge and, thereafter, SBI issued a tender for sale of pledged shares in order to resolve the financial and operational stress of PPGCL. Resurgent Power Ventures, Singapore ('Resurgent Singapore') was selected as a successful bidder for acquisition of 75.01% of equity share capital of PPGCL, which acquisition is to be effected by Renascent Power Ventures Private Limited ('Renascent India'), an Indian subsidiary of Resurgent Singapore. As the PPA contained certain restrictions in relation to change in shareholding of PPGCL, the lenders sought consent of the PPA counterparties for the transfer of 75.01% equity shareholding to Renascent India. However, the PPA counterparties asked the lenders to seek such consent from the UPERC.

Upon the petition filed by the SBI to the UPERC for the approval of sale of 75.01% shares, the UPERC observed that it has no objection in transfer of shares but the tariff should be reduced by Rs. 0.14 per unit on the ground that the debt burden of PPGCL was substantially reducing due to lenders writing off a part of debt owed by PPGCL to them and that the benefit accruing to Renascent India due to such debt reduction should be shared with the consumers by reducing the tariff. Renascent India being aggrieved by the order passed by the UPERC, filed an appeal before the Appellate Tribunal of Electricity ('APTEL'). On this appeal of Renascent India, the APTEL, by its order dated September 27, 2019, held that that UPERC is not justified in reducing the fixed charges (forming part of the tariff) because the tariff was adopted by the UPERC under Section 63 of the Electricity Act through a transparent competitive process and in accordance with the Case-II bidding guidelines issued by the Central Government. Additionally, APTEL observed that the petition from which the impugned order has emerged was in relation to the transfer of shares and not for adoption of the tariff.

❖ Renascent Power Ventures Private Limited v. Uttar Pradesh Electricity Regulatory Commission

Insurance

❖ The Department of Financial Services, Ministry of Finance, Government of India by way of a notification dated September 2, 2019 has amended the Indian Insurance Companies (Foreign Investment) Rules, 2015, pursuant to which the 49% foreign equity investment cap applicable to insurance intermediaries has been removed. Accordingly, 100% foreign equity investment is now permitted under the automatic route, subject to verification by the Insurance Regulatory & Development Authority of India ('IRDAI'). However, in case of entities whose primary business is outside the insurance area and is allowed by IRDAI to function as insurance intermediaries, the foreign equity investment caps applicable to the sector in which such entities operates will continue to apply, subject to the condition that the revenues of such entities from the primary (non-insurance related) business must remain above 50% of their total revenues in any financial year. The Government will now have to issue corresponding notifications under the applicable

❖ Amendments to the Indian Insurance Companies (Foreign Investment) Rules, 2015



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foreign exchange laws to operationalize these amendments. Amendments will also be required to the Guidelines dated November 20, 2015 by IRDAI on 'Indian Owned and Controlled', as applicable to insurance intermediaries.

Further, an insurance intermediary having majority shareholding by foreign investors are *inter alia* required to comply with the following:

- i. it should be incorporated as a limited company under the provisions of the Companies Act;
- ii. at least one from among the Chairman of the board of directors, chief executive officer, principal officer or managing director of the insurance intermediary is required to be a resident Indian citizen;
- iii. repatriation of dividend will require prior approval of IRDAI;
- iv. payments to foreign group or promoter or subsidiary or interconnected or associate entities are not permitted beyond what is necessary or permitted by IRDAI; and
- v. composition of the board of directors and key management persons will be as specified by the concerned regulators.

Telecommunications

❖ Directions on Intimation of Details of Arrangement(s) with UL (VNO) Access Service Category 'B' Licensees

❖ The Department of Telecommunications ('DoT') by way of notification dated July 29, 2019 issued directions to all unified license holders ('ULs') with access service authorization as well as all unified access service licensees/ basic service licensees. The direction mandates that all ULs intimate the deputy director general (compliance), DoT ('DDG'), in the concerned licensed service area, of the details of Unified License (Virtual Network Operator) ('UL(VNO)') Category 'B' licensees whom they have entered into agreements with, within 15 days of the date of the agreement. Such details must include: (i) name of UL(VNO) Category 'B' licensee(s); (ii) district(s) for which agreement is entered into; (iii) agreement number; (iv) date of agreement; and (v) the period of agreement. The direction also requires ULs to intimate the DDG about any amendment to such arrangements within 15 days of the said amendment.

Further, the details of such UL(VNO) Category 'B' licensee(s), providing services after parting with the main ULs along with their status (being active/inactive) is required to be intimated to the DDG on January 1 and July 2 of each year. Lastly, the directions require that prior to entering into agreements with UL(VNO) Category 'B' licensee(s), ULs must ensure that security requirements as per the license agreement and requirements of law enforcement agencies are fully complied with.

Taxation

❖ Consolidated Circular for Assessment of Start-Ups

❖ In order to provide hassle-free tax environment to the start-ups, a series of announcements had been made by the Finance Minister in her Budget Speech of 2019 and also on August 23, 2019. To give effect to these announcements, the Central Board of Direct Taxes ('CBDT') issued various circulars/clarifications in the matter from time to time, which have been consolidated into a single circular dated August 30, 2019, highlighting the following:

- i. Simplification of process of assessment of start-ups: Circular No. 16 of 2019 dated August 7, 2019 provided for the simplified procedure pending assessment of start-ups. The circular covered (a) cases under "limited scrutiny", (b) cases where multiple issues including issue of Section 56(2)(viib) of the Income-tax Act, 1961 ('IT Act') were involved or (c) cases where Form No. 2 was not filed by the start-up entity. Detailed process of obtaining mandatory approval of the supervisory authorities for conducting enquiry was also specified in by this circular. The circular also provided that all cases involving "limited scrutiny" should be completed preferably by September 30, 2019 and the other cases of start-ups should be prioritized and completed preferably by October 31, 2019.
- ii. Procedure for addition made u/s 56(2)(viib) in the past assessment: By way of clarification issued on August 9, 2019, it was provided that the provisions of Section 56(2)(viib) of the IT Act would also not be applicable in respect of assessment made before February 19, 2019 if a recognized start-up had filed declaration in Form No. 2. On this basis, the pending appeals before Commissioner of Income Tax (Appeals) are required to be disposed by December 31, 2019. Further, the addition made under Section 56(2)(viib) would also not be pressed in further appeal.



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- iii. Income-Tax demand: It has been reiterated that outstanding income-tax demand relating to additions made under Section 56(2)(viib) would not be pursued and no communication in respect of outstanding demand would be made with the start-up entity. Other income-tax demand of the start-ups would not be pursued unless the demand is confirmed by Income-tax Appellate Tribunal.
- iv. Constitution of Start-up Cell: By way of order dated August 30, 2019, CBDT has constituted a Start-up Cell to redress grievances and to address various tax related issues in the cases of start-ups.

❖ The CBDT has by way of circular dated July 3, 2019 clarified that any income of non-resident investors from offshore investments routed through Category I or Category II Alternate Investment Funds ('AIFs'), being a deemed direct investment outside India by the non-resident investor, is not taxable in India under the IT Act. It is further clarified that loss arising from the offshore investment relating to the non-resident investor, being an exempt loss, will not be allowed to be set off or carried forward and set off against the income of the Category I or Category II AIF.

❖ Clarification Regarding Taxability of Income of Non-Residents from Investments Made Outside India Through AIFs

Employment

❖ The Supreme Court of India, by an order dated August 28, 2019, dismissed the review petition in the matter of **Surya Roshni Limited v. Employees Provident Fund**. The review petition was filed against the decision in the matter of **Regional Provident Fund Commissioner v. Vivekananda Vidyamandir**,² in which the Supreme Court held that certain allowances (particularly special allowance) given to employees would be considered a part of basic wages for the purposes for computation of provident fund contribution.

Additionally, the Employees' Provident Fund Organisation, by way of a Circular dated August 28, 2019 directed its officers to cease pursuing matters in the absence of *prima facie* evidence of arbitrary bifurcation of wages with the intention to avoid liability under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. The Circular also stated that such action would amount to roving inquiries/investigations which are impermissible under law. The Circular further directed officers to carry out investigations only with the permission of the Central Analysis Intelligence Unit and in accordance with administrative guidelines issued in this regard.

❖ Payment and Computation of Provident Fund Contributions

❖ On August 8, 2019, the Government of Karnataka notified the Karnataka Maternity Benefit (Amendment) Rules, 2019 ('MB Rules'). The MB Rules, *inter alia*, mandate employees having 50 or more employees to provide and maintain one crèche for every 30 children, who are below the age of six years. The crèche is to be located within the premises of the concerned establishment or within five hundred meters from the entrance to such establishment. The crèche must cater to children of all employees, including contract workers, irrespective of the nature of employment. The working hours of the crèche should coincide with the working hours of the mothers or the parent of the children enrolled therein.

❖ Karnataka Maternity Benefit (Amendment) Rules, 2019

❖ The Ministry of Labour and Employment, Government of India has circulated a draft Bill via letter dated August 23, 2019, proposing certain amendments to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('EPF Act'). The draft Bill has been issued as part of the Government's pre-legislative consultation process, inviting comments and inputs from stakeholders and other members of the public. The highlights of the draft Bill are as follows:

❖ Employees' Provident Funds & Miscellaneous Provisions (Amendment) Bill, 2019

- i. New definition of wages: The draft Bill proposes to replace the highly-debated definition of 'basic wages' under the EPF Act with a new definition of 'wages' which is aligned with the definition prescribed under the Code of Wages, 2019. This appears to be an attempt to put an end to the ambiguities concerning the inclusion of allowances and certain other wage components for computation of provident fund contributions. The definition specifies that if certain payments made by the employer exceed 50% (or such other percentage as may be prescribed) of the overall remuneration calculated, the amount which is in excess of the prescribed threshold will be deemed to be a part of the remuneration and will accordingly be added to the definition of 'wages'.
- ii. Limitation on proceedings: Presently, the EPF Act and the schemes thereunder, do not contemplate any limitation period for (i) initiation of proceedings under the EPF Act to determine its applicability to different establishments; or (ii) to deter-

² Regional Provident Fund Commissioner v. Vivekananda Vidyamandir; 2019 SCC OnLine SC 291.



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mine amounts due from the employers under various provisions of the EPF Act. The draft Bill proposes to introduce a limitation period of five years from the date on which the provident fund contributions / deficit amounts have been alleged to be due from the employer.

- iii. National Pension Scheme: In line with the announcements made in the Union Budget (2015-2016), the draft Bill proposes to allow employees covered under the Employees' Pension Scheme, 1995 to opt for the National Pension System governed under the Pension Fund Regulatory and Development Authority Act, 2013. This option is subject to an inquiry required to be conducted by the Central Provident Fund Commissioner, upon receipt of such application from employees.
- iv. Increased penalties: The current penalty framework under the EPF Act was last amended in the year 1988. The draft Bill proposes to revise such framework and to increase the quantum of penalty stipulated under the EPF Act by 10 times.
- v. Compounding of offences: The draft Bill contemplates compounding of offences (barring major offences such as making false statements or misrepresentation of facts). This will provide a mutually agreeable disposition of minor offences without the need for conducting a trial.

While the aforesaid amendments are yet to be crystallized, these proposed changes, particularly the revised definition of 'wages', are likely to have a significant impact on employers in India, particularly in relation to expatriate employees

❖ Draft Code on Social Security, 2019

❖ The Ministry of Labour and Employment, Government of India has published a preliminary draft of the Code on Social Security, 2019 on September 17, 2019. The draft Code has been issued as part of the Government's pre-legislative consultative process and comments and inputs from stakeholders and public have been invited. The draft Code proposes to simplify, amalgamate, rationalize and replace the following Central labour legislations: (i) The Employees' Compensation Act, 1923; (ii) The Employees' State Insurance Act, 1948; (iii) The Employees' Provident Fund and Miscellaneous Provisions Act, 1952; (iv) The Maternity Benefit Act, 1961; (v) The Payment of Gratuity Act, 1972; (vi) The Cine Workers Welfare Fund Act, 1981; (vii) The Building and Other Construction Workers Cess Act, 1996; and (viii) The Unorganised Workers' Social Security Act, 2008.

Intellectual Property

❖ Central Government Notifies the Patent (Amendment) Rules, 2019

❖ By way of a notification dated September 17, 2019, the Central Government amended the Patent Rules, 2003 ('**Patent Rules**') and published the Patent (Amendment) Rules, 2019 in the Official Gazette. The salient features of the 2019 amendments are as follows:

- i. Under the Patent Rules, patent agents were required to physically file the originals of certain documents e.g., power of authority, proof of right etc., within 15 days of electronic filing at the Indian Patent Office ('**IP**O'). This requirement has been relaxed under the 2019 amendments. The original documents are now required to be filed only upon being specifically asked for.
- ii. Under the Patent Rules, an applicant claiming a 'small entity' status was required to file the prescribed Form-28 at the time of filing any document for which a fee was specified. This was required to authenticate its status of a 'small entity' and avail the benefit of a reduced fee for small entities. Under the 2019 amendments, this requirement has now been extended even to 'startups'.
- iii. Under the Patent Rules, the facility of expedited examination could be availed by startups and applicants as International Searching Authority ('**ISA**') and/or International Preliminary Examining Authority ('**IPEA**') for their international applications. The 2019 amendments have now extended the 'expedited examination' facility to various other categories of applicants like small entities, female applicants, Government Departments, a Government company, applicants having their applications prosecuted under an agreement between the **IP**O and a foreign patent office (e.g., Patent Prosecution Highway facility) etc.
- iv. The 2019 amendments encourage electronic filing of Patent Cooperation Treaty ('**PCT**') applications and have waived the transmittal fee when filing **PCT** applications, electronically. Further, the fee for preparation of the certified copy of priority document has also been waived in case of e-transmission through **WIPO-DAS** instead of physical transmission as under the Patent Rules.

The 2019 amendments are welcome as these will make the patent prosecution process less expensive, simpler and more 'applicant' friendly.



❖ The Finance Act, 2019 has brought about certain amendments to the Prevention of Money Laundering Act, 2002 ('PMLA'). The primary amendment is to the definition of 'proceeds of crime' under the PMLA, which now includes properties not only derived or obtained from a scheduled offence, but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to a scheduled offence. Additionally, a person would be guilty of money laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or found to be involved in concealing, possessing, acquiring or using a property connected with proceeds of crime.

❖ The National Company Law Appellate Tribunal ('NCLAT') has on July 2, 2019³ held that the properties of a corporate debtor which are attached by the Director of Enforcement under Section 5(1) of the PMLA fall within the definition of 'Proceeds of Crime' under Section 2(1)(u) of the PMLA and such properties cannot be a part of a resolution plan by under the Insolvency & Bankruptcy Code, 2016 ('IBC').

❖ The Supreme Court, while considering the following clause under the agreement 'Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar', on July 25, 2019⁴ has held that where the agreement specifies the jurisdiction of the Court at a particular place, only such Court will have the jurisdiction to deal with the matter and the parties have intended to exclude the jurisdiction of all other courts. The Court noted that having agreed that the venue of the arbitration will be Bhubaneswar, the intention of the parties was to exclude the jurisdiction of all other Courts. The absence of words like 'exclusive jurisdiction', 'only', 'exclusive' and 'alone' was not decisive and does not make any material difference.

❖ The NCLAT, in its decision dated July 3, 2019,⁵ has held that a foreign decree which was pending execution in India has not yet crystallized into "debt payable in law" and, therefore, the foreign decree holder could not rely on such a decree (which was passed ex-parte for default of appearance of the corporate debtor) for initiating proceedings under the IBC.

❖ The Supreme Court on July 1, 2019⁶ has held that the burden of proof is upon the party seeking to implead a non-signatory in an arbitration to prove the third party's intention to consent to the arbitration agreement. The Supreme Court further held that the fact that a third party happens to be a constituent of a group of companies (of which the signatory is also a constituent) will be of no avail as the third party was neither the signatory to the arbitration agreement nor did it have any causal connection with the process of negotiations preceding the agreement or its execution.

❖ NCLAT has for the first time considered the issue of parallel insolvency proceedings against the same entity across multiple jurisdictions, in its decision dated September 26, 2019 ('Order'), passed in relation to the Corporate Insolvency Resolution Process ('CIRP') of Jet Airways (India) Limited ('Jet'). In addition to the Indian CIRP, insolvency proceedings have also been admitted against Jet in the UK and in the Netherlands. The Dutch court-appointed bankruptcy trustee ('Dutch Trustee') approached the NCLAT seeking cooperation from the Indian resolution professional ('Indian RP'). The NCLAT had directed the Dutch Trustee and the Indian RP to explore means of cooperation. Accordingly, the Dutch Trustee and the Indian RP had negotiated a protocol governing the mode and extent of cooperation. By the Order, the NCLAT approved a cross-border insolvency protocol agreed to between the Indian RP and the Dutch Trustee. This assumes significance given that neither Dutch law nor Indian law contain a framework recognising or providing for cross-border insolvency issues such as the present case. The NCLAT found that the Dutch Trustee was "equivalent" to the Indian RP, and was entitled to attend meetings of the Committee of Creditors (albeit without a right to a vote).

❖ Amendments to the PMLA made by the Finance Act, 2019

❖ Properties Attached as 'Proceeds of Crime' under PMLA cannot be part of a Resolution Plan under IBC

❖ Exclusion of Jurisdiction of Courts

❖ Ex-Parte Foreign Decree (which is Pending Execution in India) Does Not Constitute Debt under IBC unless Payable under Indian Law

❖ Non-Signatory Party cannot be Impleaded to Arbitration Proceedings without Establishing its Intention to be Bound to Arbitration

❖ NCLAT approves Cooperation between Dutch Insolvency Trustee and Resolution Professional under the IBC

³ Rototmac Global Private Limited (through Anil Goel, Liquidator) v. Deputy Director, Directorate of Enforcement, Company Appeal (AT) (Insolvency) No. 140 of 2019 (NCLAT).

⁴ Brahmani River Pellets Ltd v. Kamachi Industries Limited, Civil Appeal No. 5850 of 2019 (Supreme Court).

⁵ Peter Johnson John v. KEC Industries Limited, Company Appeal (AT) (Insolvency) No. 188 of 2019 (NCLAT).

⁶ Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited, Petition for Arbitration (Civil) No. 65 of 2016 (Supreme Court).



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❖
Best Indian Law Firm
International Legal Alliance Summit Awards, 2019 and 2017

❖
Corporate Law Firm of the Year
Chambers Forum India Awards, 2019

❖
Ranked No. 1
for India in the M&A Announced Deals League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal Rankings Q3 2019

❖
Ranked No.1
for the Indian M&A Announced and Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings Q3 2019

❖
Ranked No.1
for Emerging Markets Involvement Announced and Completed Deals and
Asia Pacific Involvement M&A Announced and Completed Deals League Tables by Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings Q3 2019

❖
Ranked No. 2
for India in the M&A Rankings by Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors H1 2019

❖
Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

❖
Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2018 & 2017

❖
Best Law Firm of the Year – India
Corporate USA Today – Law Awards, 2018

❖
India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

❖
Outstanding Law Firm of the Year, India
Corporate and Mergers & Acquisitions Highly Recommended Law Firm of the Year
Asialaw Profiles, 2018

❖
Ranked No. 1
for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors, Jan – Jul 2019

❖
Ranked No.1
RSG Top 40 Indian Law Firms Ranking, 2017

❖
Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

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