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DECEMBER 2020 • STRICTLY FOR PRIVATE CIRCULATION

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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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Corporate & SCRA

❖ Relaxation on Minimum Residency Requirement for Directors of a Company

❖ On account of the ongoing COVID-19 pandemic, the Ministry of Corporate Affairs ('**MCA**') had previously issued a Circular dated March 24, 2020 waiving the requirement of having at least one director of every company stay in India for at least 182 days per Financial Year (under Section 149 of the Companies Act, 2013 ('**Companies Act**')) for the Financial Year 2019-20. Pursuant to a Circular dated October 20, 2020, such relaxation has been extended to Financial Year 2020-21 as well.

❖ MCA Notification in Relation to Appointment of Independent Directors

❖ MCA has, by its Notification dated December 18, 2020, amended the Companies (Appointment and Qualification of Directors) Rules, 2014 ('**Directors Appointment Rules**'), which *inter alia* required that every individual named in the independent directors' data bank pass an online proficiency self-assessment test within a period of one year from the date of inclusion of their name in the data bank. This timeline has now been increased to two years, and the passing score has been reduced from 60% to 50%. Further, any person who has served in certain capacities for a total of at least three years (instead of the previously mandated 10 years) as on the date of inclusion of their name in the data bank is exempted from the proficiency test. These capacities include, as a director or key managerial person ('**KMP**') in one or more of: (i) listed public companies; (ii) unlisted public companies having a paid-up share capital of ₹10 crore (approx. US$1.4 million) or more; (iii) a body corporate listed on a recognised stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; (iv) a body corporate incorporated outside India having a paid-up share capital of US$2 million or more; or; (v) statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities.

❖ Relaxation in Relation to Private Placements to QIBs

❖ The MCA has by way of a Notification dated October 16, 2020, amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 ('**PAS Rules**'). Rule 14(1) of the PAS Rules provides that for the purposes of Sections 42(2) and 42(3) of the Companies Act, a company will not make an offer or invitation to subscribe to securities through private placement unless the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations. The MCA has now relaxed this requirement, with immediate effect, in relation to qualified institutional buyers ('**QIBs**') and provided that in relation to private placements to QIBs, it will be sufficient if the company passes a special resolution once a year for all the allotments to QIBs during the year.

❖ Commencement of Companies (Amendment) Act, 2020

❖ The MCA, by its Notification dated December 21, 2020, has notified 45 sections of the Companies (Amendment) Act, 2020 ('**CAA**'). Details of the provisions proposed to be amended by the CAA are reported here. The key provisions notified under the CAA, *inter alia*, include: (i) amendments related to provisions of winding up and dissolution of a company; (ii) reduction of penalties and fines/imprisonment for certain offences; and (iii) removal of imprisonment for certain offences.

Foreign Exchange

❖ Government Issues Standard Operating Procedure for Online Filing of FDI Proposals

❖ In line with the initiative of the Government of India ('**GOI**') to amend the existing Foreign Direct Investment ('**FDI**') regime, the Department for Promotion of Industry and Internal Trade ('**DPIIT**') has issued Standard Operating Procedures ('**SOPs**') dated November 9, 2020 for processing FDI proposals. The SOPs set out a framework for online filing of applications seeking prior approval for investments in sectors or activities that require prior approval under the Consolidated FDI policy dated October 15, 2020 (FDI Policy) and Foreign Exchange Management (Non-Debt Instrument) Rules, 2019. Annexure 1 to the SOP provides the list of documents to be submitted with the application, including the details of the significant beneficial owners of the investor entity. Additionally, the proforma for application for security clearance for FDI Proposals requires disclosure of "ultimate beneficial ownership" (without defining this term) of the investor company and details of shareholders of the investor company holding more than 10% shares. These details are also relevant in the context of the Government's recent amendment to the FDI regime, which requires prior approval of the Government for investments from countries sharing land border with India (details of which can be accessed here).

As per the SOP, applications for approvals must be filed through the Foreign Investment Facilitation Portal ('**FIFP**'). In this regard, the following points are key:

i. The GOI has identified the FIFP as the nodal online application point for all future proposals under the FDI Policy;

ii. The SOPs identify the specific timelines/ steps to be followed for processing applications that are filed online;

iii. The SOPs also provide a list of competent authorities for processing foreign investment proposals. The SOPs clarify that in respect of sectors/activities which are presently under the automatic route but required earlier Government approval, the concerned administrative ministry/department (as identified by DPIIT) would be the competent authority for the grant of *post facto* approvals. However, the *post facto* approval process will not automatically condone any past breaches of regulations (applicable at the time of such investments), which will be dealt with by the regulators on a case to case basis;

iv. The SOPs have replaced the inter-ministerial group discussion process, with a simpler and expeditious procedure to decide proposals, which involves the competent authority, the Reserve Bank of India ('**RBI**'), the Ministry of External Affairs ('**MEA**'), and additionally the Ministry of Home Affairs ('**MHA**') (only if such proposal for foreign investment requires security clearance under the FDI Policy);

v. The SOPs have prescribed timelines for internal consultations of the DPIIT, the competent authority, MEA and MHA. Broadly, a timeline of six to eight weeks has been envisaged for internal discussions of the concerned Governmental bodies on any proposal. The SOPs specify that the competent authority must convey its decision on the proposal to the applicant, within four weeks of completing its internal consultations;

vi. In case of proposals involving total foreign equity inflow of more than ₹5,000 crore (approx. US$684 million), the competent authority is required to place the same for the consideration of the Cabinet Committee on Economic Affairs ('**CCEA**') within the aforesaid timelines. The CCEA's decision has to be conveyed to the applicant within one week thereof;

vii. The SOPs have also rationalized and specified the documents that have to be submitted along with the application, as well as the approval letter formats typically to be issued by the relevant competent authority. The standard approval letter format shared in the SOPs provides additional conditions which *inter alia* relate to valuation, taxability and compliance with the prevention of money laundering guidelines; and

viii. DPIIT may be approached for obtaining clarifications (on a need only basis regarding specific issues on the FDI policy).

❖ RBI Discontinues FEMA Filings to Ensure Minimal Compliance Costs

❖ The RBI by its Circular dated November 13, 2020 has updated the Master Directions on 'Reporting of Foreign Exchange Management Act, 1999' dated January 01, 2016. The Circular discontinues 17 of the existing returns and reports prescribed under the Foreign Exchange Management Act, 1999 ('**FEMA**') with immediate effect. The discontinued forms which have been listed in the annexure to the Circular include:

i. Daily inflow/outflow of foreign funds on account of investment by Foreign Portfolio Investors ('**FPIs**');

ii. Monthly data relating to actual inflow /outflow of remittances on account of investments by Foreign Institutional Investors ('**FIIs**') in the Indian capital market;

iii. Inflow/outflow of remittances on account of investments by Foreign Venture Capital Investor ('**FVCIs**') and market value of investments made by FVCIs;

iv. Reporting of inflow/outflow details in respect of mutual fund by asset management companies;

v. Form DRR for issue/transfer of sponsored/unsponsored depository receipts: Please note that it is only the hardcopy filing of form DRR that has been discontinued. The domestic custodian may continue to report the form DRR on FIRMS application in terms of Regulation 4 (5) of FEMA (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019; and

vi. Monitoring of disinvestments by overseas corporate bodies.

❖ RBI Issues Circular to Delegate Powers of Compounding Certain Contraventions to its Regional /Sub-Offices

❖ The RBI through its Circular dated November 17, 2020 has delegated the powers to compound certain contraventions relating to the 'transfer or issue of securities by a person resident outside India' to the regional offices/ sub-offices of RBI. Further, the RBI has notified that classification of certain contraventions as 'technical' (i.e. dealt with by way of an administrative/ cautionary advice) will be discontinued and such contraventions will be regularized by imposing minimal compounding amount as per the compounding matrix contained in the Master Direction on Compounding of Contraventions dated January 01, 2016.

❖ RBI Grants Powers to AD Banks with Respect to Approval Processes for Export of Goods and Services

❖ In relation to the approval processes for export of goods and services, the RBI by a Circular dated December 4, 2020 has delegated the following powers to the Authorised Dealer Banks ('**AD Banks**'):

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i. The ceiling of US$ 1 million has been removed and AD Banks have been allowed to regularize dispatch by the exporter directly to the consignee or his agent, resident in the country of final destination;
ii. Power to write-off without limits has been delegated to AD Banks even in cases where documents are dispatched directly to the exporter;
iii. AD Banks will now be permitted to allow Indian companies to set-off their export receivables against import payables for goods and services with their overseas group or associate companies, either on net basis or gross basis through a centralised treasury arrangement; and
iv. AD Banks will be able to consider refund requests without insisting on import of goods, which are perishable in nature, or had been auctioned or destroyed by the port, customs. At present, refund of export proceeds to the overseas importer is required to be made due to poor quality of the goods exported.

Capital Markets

❖ SEBI FAQs on Disclosure of Forensic Audits

❖ The Securities and Exchange Board of India ('**SEBI**') had, on October 8, 2020, amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**Listing Regulations**') to mandate disclosures by listed entities relating to the initiation of forensic audits. Our Client Alert on this amendment can be accessed here. On November 27, 2020, SEBI has issued frequently asked questions ('**FAQs**') in relation to this requirement, and made the following key clarifications:

i. Forensic audits refer to audits initiated with the objective of detecting any misstatements in financials, misappropriation/ siphoning or diversion of funds, but do not cover matters such as product quality control, manufacturing, recruitment practices, supply chain process and matters that would not require revision to financial statements of the listed entity; and
ii. In the disclosure of the final forensic audit report, any personally identifiable information (including names of individuals and commercially sensitive information) may be expunged.

❖ SEBI's Informal Guidance Regarding Regulation 24 of the Listing Regulations

❖ Under Regulation 24(3) of the Listing Regulations, a listed company is required to place the minutes of the meeting of the board of directors of the unlisted subsidiaries at the listed company's board meeting. Through its informal guidance dated October 22, 2020 to Redington (India) Limited, SEBI has clarified that for the purpose of compliance with Regulation 24(3) of the Listing Regulations, if a listed entity has a foreign subsidiary which is not required to have a board of directors and conduct board meetings, the requirement will be met in accordance with Regulation 24(4) which mandates that the management of the unlisted subsidiary will periodically bring to the notice of the board of directors of the listed entity, a statement of all significant transactions and arrangements entered into by the unlisted subsidiary.

❖ Amendments to SEBI (Issue and Listing of Debt Securities) Regulations, 2008

❖ SEBI has, by way of a Notification dated October 8, 2020, made the following key amendments to the SEBI (Issue and Listing of Debt Securities) Regulations, 2008:

i. Matters to be included in the debenture trust deed with respect to debt securities are now aligned with the matters to be included in a debenture trust deed under the Companies Act and the deed will be bifurcated into two parts–Part A containing statutory/standard information pertaining to the debt issue and Part B containing details specific to the particular debt issue;
ii. The issuer of debt securities is required to give an undertaking in the information memorandum / disclosure document that the assets on which charge is created are free from any encumbrances or where the assets are already charged, the permission or consent to create a second or *pari passu* charge on the assets of the issuer has been obtained from the earlier creditor;
iii. The issuer will be required to create a recovery expense fund ('**REF**'), to enable debenture trustees ('**DTs**') to take prompt action for enforcement of security in case of defaults with respect to listed debt securities. SEBI has issued a Circular on October 22, 2020, requiring such issuers to deposit an amount equal to 0.01% of the issue size (capped at ₹ 25,00,000 (approx. US$ 34,000)) in cash or cash equivalents, including bank guarantees (subject to certain conditions) with the designated stock exchange. In case of a default, the DT is required, after obtaining consent from the holders of the debt securities for enforcement of security, to call upon the designated stock exchange to release the REF to the DT. The Circular became effec-

tive from January 1, 2021 and applies to applications for listing of debt securities made on or after January 1, 2021. Existing issuers with listed debt securities will be provided an additional time period of 90 days to create a REF; and

iv. Additional disclosures in the disclosure documents / information memorandum have been prescribed.

SEBI has issued Guidelines dated November 3, 2020 to give effect to the aforesaid amendments and certain amendments dated October 8, 2020 to the SEBI (Debenture Trustees) Regulations, 1993, which were introduced to secure the interest of investors in listed debt securities and to enable DTs to perform their duties effectively ('**Guidelines**'). These Guidelines *inter alia* require the issuer of listed debt securities to provide specified documents (such as details and underlying documentation with respect to the assets on which a charge is proposed to be created) to the DT at the time of execution of the debenture trustee agreement to enable the DT to exercise due diligence with respect to the creation of security.

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❖ Monitoring and Disclosures by Debenture Trustees

❖ SEBI has, by way of Circular dated November 12, 2020 provided that in order to enable a DT to discharge its obligations in respect of listed debt securities, the DT must undertake independent periodical assessment of the compliance with covenants or terms of the issue of listed debt securities including for 'security created'. In this regard, under the Circular, SEBI has provided monitoring and disclosure requirements by DTs which have come into force with effect from the quarter ended December 31, 2020 for listed debt securities, the key features of which are set out below:

i. **Monitoring of 'security created' / 'assets on which charge is created'**: DTs will carry out due diligence for creation of security at the time of issuance of debt securities and on a continuous basis and carry out periodical monitoring as prescribed under the Circular. The terms of periodical monitoring are required to be included in the debenture trust deed, and SEBI has prescribed a timeline within which debenture trust deeds for existing listed debt securities are to be amended / supplemented;

ii. **Disclosure on website by DT:** The DT will make the disclosures as specified under the Circular, on a continuous, quarterly, half-yearly and yearly basis, on its website; and

iii. **Reporting of regulatory compliance**: Earlier formats for periodical reporting by DTs have been rescinded and the DTs are now required to furnish revised periodical reports to SEBI in the formats as prescribed under the Circular.

❖ Amendment to SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003

❖ SEBI has amended the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 on October 19, 2020, to clarify that any act of diversion, misutilisation or siphoning off of assets/ earnings of a listed company or concealment of such act or any device, scheme or artifice to manipulate the books of accounts/ financial statements of such companies, that would directly or indirectly manipulate the price of securities of such companies, will be and will always be deemed to have been considered as manipulative, fraudulent and an unfair trade practice in the securities market.

❖ SEBI revises FAQs on Insider Trading Regulations

❖ SEBI on October 8, 2020 has revised the FAQs to the SEBI (Prohibition of Insider Trading) Regulations, 2015. SEBI clarified that a listed company should maintain structured digital database ('**SDD**') internally, which will contain information including details of unpublished price sensitive information ('**UPSI**'), details of persons with whom such UPSI is shared (along with their permanent account number / other unique identifier) and details of persons who have shared the information. Similarly, another SDD should be maintained internally by fiduciaries and intermediaries. The illustration to this FAQ was also amended to clarify that the individuals from listed companies (sharing UPSI) and individuals from fiduciaries or intermediaries (receiving UPSI from listed companies) should be identified in the SDDs.

❖ SEBI's Informal Guidance regarding Certain Provisions of the AIF Regulations

❖ SREI Multiple Asset Investment Trust sought clarification on whether the existing SEBI norms limit 'qualified buyer' under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') only to those AIFs which are body corporates for the purposes of subscribing to security receipts issued by an asset reconstruction company. In response, SEBI on October 26, 2020 stated that as per the existing regulatory framework, Categories II and III AIF established as a 'trust' may qualify as 'qualified buyer' under the SARFAESI Act and subscribe to security receipts issued by an asset reconstruction company, subject to the conditions mentioned in the Notification dated May 16, 2018 issued by the RBI, the AIF Regulations, SARFAESI Act and other applicable laws.

❖ AIFs in International Financial Services Centres

❖ International Financial Services Centres Authority on December 9, 2020 has issued a Circular amending the norms governing the set-up of AIFs in International Financial Services Centres ('**IFSC**') under SEBI (IFSC) Guidelines, 2015 ('**IFSC Guidelines**') and the operating guidelines dated November 26, 2018. The amendment has been introduced to align the current framework governing AIFS in IFSCS with the international framework. The key changes introduced by the Circular deal with: (i) engagement by an AIF in leveraging activities and the conditions thereof; and (ii) co-investment in a portfolio company through a segregated portfolio by issuing a separate class of units and the conditions thereof.

❖ Clarifications on Issue of Depository Receipts to NRIS

❖ SEBI had, by its Circular dated October 10, 2019, prescribed the framework for issue of depository receipts, which *inter alia* barred non-resident Indians ('**NRIS**') from holding depository receipts issued by Indian companies. This Circular was discussed in our previous write-up available here. By its Circular dated December 18, 2020, SEBI has clarified that the above restriction will not apply to issue of depository receipts to NRIS pursuant to: (i) share based employee benefit schemes implemented in terms of the SEBI (Share Based Employee Benefits) Regulations, 2014; and (ii) a bonus or rights issue. Further, SEBI has clarified that the listed company will be responsible for identifying NRIS who are issued depository receipts under employee benefit schemes and for providing information of such NRI holders to the designated depository for the purpose of monitoring of limits.

❖ SEBI's Informal Guidance regarding Disclosure of Bidding Data of Securities

❖ The regulations prescribed by SEBI require stock exchanges and syndicate members to disclose bidding data on the stock exchange website and bidding terminals of syndicate members respectively for public information. The data is required to be updated by stock exchanges on an hourly basis. However, public communication, including advertisement material, relating to issue of specified securities or units are required to contain only such information as contained in the draft offer document/offer document. With regard to offer for sale ('**OFS**') transactions on the stock exchange platform, the seller is not required to disclose any information regarding the listed company. However, by virtue of being a listed company, certain information regarding the company is available on the websites of the stock exchanges and therefore available to the public. Through its informal guidance dated October 28, 2020 to Citigroup Global Markets India Private Limited, SEBI stated that the book running lead managers ('**BRLMS**') will not share the bidding data (standalone and aggregate) with investors during the bidding period. SEBI has also stated that the BRLMS will not share information (other than the bidding data) available in the public domain, including information on the websites of the stock exchanges and the issuers in an initial public offer, rights issue, further public offer, qualified institutions placement and OFS of specified securities and units as and when requested by investors. SEBI has clarified that BRLM may direct investors to the channels wherefrom publicly available information can be accessed.

❖ Consultation Paper on Review of Requirement of Minimum Public Offer for Large Issuers

❖ The Securities Contracts (Regulation) Rules, 1957 ('**SCRR**') currently prescribes the following in relation to an initial public offering ('**IPO**'):

POST IPO MARKET CAPITALISATION (CALCULATED AT THE IPO PRICE)	MINIMUM IPO SIZE	TIMELINE TO MEET MINIMUM PUBLIC SHAREHOLDING REQUIREMENT OF 25%
Up to ₹ 1,600 crore	25% of the post-IPO equity share capital	By way of the IPO
Greater than ₹ 1,600 crore but up to ₹ 4,000 crore	₹ 400 crore	Three years from the date of listing
Greater than ₹ 4,000 crore	10% of the post-IPO equity share capital	Three years from the date of listing

On November 20, 2020, SEBI issued a consultation paper from the perspective of issuers with a post-IPO market capitalisation exceeding ₹10,000 crore for reviewing (i) the minimum IPO size and (ii) the timeline for meeting the minimum public shareholding requirement of 25%. The consultation paper proposed the following revisions to the SCRR and invited comments from the public:

<table>
<tr><th>POST IPO MARKET CAPITALISATION (CALCULATED AT THE IPO PRICE)</th><th>MINIMUM IPO SIZE</th><th>TIMELINE TO MEET MINIMUM PUBLIC SHAREHOLDING REQUIREMENT</th></tr>
<tr><td>Greater than ₹ 10,000 crore and up to ₹ 1,00,000 crore</td><td rowspan="2">₹ 1,000 crore
+
5% of the post-IPO market capitalisation in excess of ₹ 10,000 crore</td><td>• 10% to be achieved within 18 months from the date of listing
• 25% to be achieved within three years from the date of listing</td></tr>
<tr><td>Greater than ₹ 1,00,000 crore</td><td>• 10% to be achieved within two years from the date of listing
• 25% to be achieved within five years from the date of listing</td></tr>
</table>

❖ Consultation Paper on Review of NCDS along with Warrants under QIP

❖ SEBI issued a consultation paper on December 2, 2020 regarding issue of non-convertible debentures ('**NCDS**') along with warrants as a staple product and as a segregated product, offered through qualified institutions placement ('**QIP**') under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**ICDR Regulations**'). Through the consultation paper, SEBI has proposed to discontinue segregated offering of NCDs along with warrants to QIBs through the QIP route. Further, stapled offering of NCDs along with warrants to QIBs may be retained under the ICDR Regulations, with the ability to segregate the instruments after the issuance/allotment. SEBI has also proposed to allow issuance of 'naked warrants' to QIBs through QIP mechanism with guidelines on upfront payment, pricing and tenure of warrants.

Banking and Finance

❖ Opening of Current Accounts by Banks – Need for Discipline

❖ The RBI had, on August 6, 2020 ('**Original Circular**'), issued revised instructions to scheduled commercial banks and payment banks for opening of current bank accounts with a view to improve credit discipline. For our summary of the Original Circular, please click here. The RBI, on November 2, 2020, extended the timeline for compliance with the Original Circular with reference to existing current, cash credit ('**CC**') and overdraft ('**OD**') accounts from November 05, 2020 to December 15, 2020. The RBI, on December 14, 2020, also issued FAQs on operational issues regarding the maintenance of existing current accounts by the banks.

❖ Reversing the restriction placed under the Original Circular, the RBI has now permitted opening of specific accounts required under statute or the instructions of regulatory authorities, without requiring compliance with the Original Circular, on the condition that such accounts must be used for permitted and specified transactions only. An indicative list of such accounts has been provided which includes RERA accounts (for maintaining 70% of advance payments collected from the home buyers), accounts permitted under FEMA, and accounts for the purposes of initial public offerings, new fund offers, follow on public offers, dividend payments, allotment of debentures or issuance of commercial papers.

Additionally, the FAQs also clarify the following:

i. Banks must monitor all current and CC/OD accounts on a half-yearly basis;
ii. Only fund and non-fund based credit facilities sanctioned by scheduled commercial banks and payments banks will be included for the purpose of computing aggregate exposure of the banking system to a borrower;
iii. Banks may open a current account in relation to a specific project, if the borrower has not availed any CC/OD facilities for that project and the cash flows in the current account are from that specific project only. For borrowers with multiple projects / multiple business units, banks may open multiple escrow accounts for the monitoring of project-wise / unit-wise cash flows, subject to the above;
iv. Where term loans are for purposes other than supply of goods or services and the payment destination is unidentifiable, banks may route such term loans through CC/OD or current accounts of the borrower opened in accordance with the Original Circular. Where the payment destination is identifiable, banks may make disbursement of the term loan directly without routing it through CC/OD accounts;
v. Where there are multiple lending banks, borrowers are free to choose their escrow managing banks but all such lending banks must be a part of the escrow agreement, the terms and conditions of which may be decided mutually by the lending banks and the borrower; and
vi. Banks may only debit collection accounts for transferring funds into the escrow account of borrower.

❖ Review of Regulatory Framework for Housing Finance Companies

❖ The RBI, on October 22, 2020 ('**HFC Circular**'), introduced changes to the regulatory framework for Housing Finance Companies ('**HFCs**'). The key changes are set out below:

i. **HFC Definition** – An HFC is now a company incorporated under the Companies Act which fulfils the following conditions:
   (a) It is a non-banking financial company ('**NBFC**') whose financial assets, in the business of providing finance for housing, constitute at least 60% of its total assets (netted off by intangible assets); and
   (b) Out of the total assets of the company (netted off by intangible assets), not less than 50% should be by way of housing finance, *i.e.* financing, for the purchase, construction, renovation, repairs of residential dwelling units for individuals;
ii. **Minimum Net Owned ('NOF') Requirement** – The NOF for a company to commence and/or carry on the business of housing finance as its principal business is now ₹200,000,000 (approx. US$ 2.74 million). Existing HFCs have been given a staggered timeline of upto March 31, 2022 to comply with this requirement;
iii. **NBFC-ICCS** – HFCs which seek to be treated as NBFC – Investment and Credit Com-

panies ('**NBFC-ICCs**'), must approach the RBI for conversion of their certificate of registration from HFC to NBFC-ICC, in a manner as set out in the HFC Circular;

iv. **Applicability of NBFC Guidelines** – Certain guidelines applicable to NBFCs have been extended to HFCs. This list consists of the RBI Master Direction – Monitoring of Frauds in NBFCs (Reserve Bank) Directions, 2016 and RBI Master Direction – Information Technology Framework for the NBFC sector dated June 8, 2017. In addition, instructions issued by the RBI with respect to the following have been made applicable to all HFCs: (a) definition of public deposits; (b) implementation of Indian Accounting Standards; (c) relevant Master Directions in respect of loans against security of shares; (d) relevant Master Directions in respect of loans against security of single product – gold jewellery; (e) relevant Master Directions in respect of levy of foreclosure charges; (f) guidelines on securitization transactions and reset of credit enhancement; (g) managing risks and code of conduct in outsourcing of financial services; (h) guidelines on liquidity risk management framework; and (i) guidelines on liquidity coverage ratio.

v. **Exposure to Group Companies in Real Estate Business** – In case of companies in a group engaged in real estate business, HFCs may have exposure either to the group company engaged in real estate business or lend to retail individual home buyers in the projects of such group companies. Such exposure directly or indirectly, cannot be more than 15% of owned fund for a single entity in the group and 25% of owned fund for all such group entities. HFCs are required to follow arm's length principles in letter and spirit in relation to such transactions.

The RBI intends to harmonize the regulations for HFCs and NBFCs in a phased manner to avoid any potential disruptions. Further, HFCs are proposed to be exempted from certain requirements under the RBI Act, 1934 with respect to maintenance of percentage of assets and reserve fund, which will be effected through separate notifications. A master direction addressed to HFCs in this regard is expected soon.

❖ Co-Lending by Banks and NBFCs to Priority Sector

❖ With a view to improve the flow of credit to the unserved and underserved sectors of the economy and make available funds at an affordable cost, the RBI, on November 5, 2020, superseded its previous Circular dated September 21, 2018 on co-origination of loans by banks and NBFCs for lending to priority sector with a new 'co-lending model' ('**CLM**'). All outstanding loans under the superseded Circular will continue to be classified under priority sector until earlier of their repayment or maturity.

Under the new scheme, foreign banks (including wholly owned subsidiaries) with less than 20 branches will not be permitted to co-lend with NBFCs. Banks may not enter into a CLM arrangement with an NBFC belonging to its promoter group. Banks and NBFCs are required to formulate board approved policies for co-lending and publish such policies on their websites. Banks are permitted to co-lend with all registered NBFCs (including housing finance companies), based on a prior agreement which clearly sets out the arrangement and the roles and responsibilities of the parties. Depending on the nature and specifics of the agreement, banks would be required to adhere to additional circulars issued by the RBI.

Co-lending banks will take their share of the individual loans on a back-to-back basis in their books. However, NBFCs are required to retain a minimum of 20% share of the individual loans on their books. Further, banks can claim priority sector status in respect of their share of credit while engaged in co-lending. The NBFC will be the single point of interface for the customers for customer related issues and shall enter into loan agreements with the borrowers demarcating the roles of the co-lenders. Co-lenders are also required to formulate a grievance redressal arrangement to resolve any complaints registered by borrowers with the NBFC, failing which it can be escalated by the borrower to the concerned Banking Ombudsman/Ombudsman for NBFCs or the Customer Education and Protection Cell in RBI.

All transactions between the lenders relating to co-lending will be routed through an escrow account maintained with the banks. Additionally, in the event of termination of the CLM between the co-lenders, the lenders are required to implement a business continuity plan to ensure uninterrupted service to the borrowers till repayment of the loans under the CLM.

Telecommunications

❖ Department of Telecommunications Issues New Guidelines for 'Other Service Providers'

❖ The Department of Telecommunications ('**DoT**') by way of its Notification dated November 5, 2020 issued new guidelines for Other Service Providers ('**OSPs**') ('**OSP Guidelines**') superseding the existing guidelines. The OSP Guidelines aim to improve ease of doing information technology business in India, particularly for voice-based business process outsourcing ('**BPO**') services. The key changes introduced under the OSP Guidelines include: (i) deletion of definition of 'Application Services' that earlier created ambiguity for various businesses including providers of IT enabled services. The revised OSP Guidelines have now limited application to voice based Business Process Outsourcing entities; (ii) removal of registration requirements for OSP centres; (iii) liberalization of the concept of work from home and work from anywhere; (iv) removal of the requirement to deposit bank guarantee by an OSP to avail any facility or dispensation provided; (v) allowing the sharing of Electronic Private Automatic Branch Exchange (EPABX) infrastructure between domestic OSPs and international OSPs without any regulatory approval; and (vi) removal of penalties, audit provisions and procedural compliances such as periodic reporting obligations and submission of a network diagram approved by telecom service providers to regulatory authorities.

Media

❖ New FDI Policy for Digital Media – News and Current Affairs

❖ The Government had, through Press Note No. 4 of 2019 dated September 18, 2019 ('**PN 4**'), amended the law relating to FDI in digital media. Following PN 4, FDI in entities engaged in the uploading / streaming of news and current affairs through digital media was permitted only with the prior approval of the Government and only to the extent of 26%. FDI in such entities was not subject to any restrictions before the introduction of PN 4.

The Government has now, through a clarification issued on October 16, 2020, clarified that the entities to which the new policy would apply are: (i) digital media entities (which stream/upload news and current affairs on websites, apps or other platforms); (ii) news agencies (which gather writes and distribute/transmit news, directly or indirectly to digital media entities and/or news aggregators); and (iii) news aggregators (which use software or web applications, aggregate news content from various sources and such websites, blogs, podcasts, video blogs and user submitted links in one location). All these entities are required to align their FDI to 26% within one year from October 16, 2020.

Following these changes and notifications by the Ministry of Information and Broadcasting ('**MIB**'), entities engaged in these activities are now required to comply with various requirements, including notifying MIB of their compliance with FDI regulations, proposals for reducing FDI (where required) and additional requirements in relation to Government approval for further capital infusions, citizenship requirements for directors and chief executive officers and prior security clearance for all foreign personnel deployed in India for more than 60 days.

❖ Government Notification to Bring OTT Platforms under MIB

❖ The Government issued a Notification dated November 9, 2020 stating that all digital audio-visual content (including films, web shows, and news and current affairs content) on over-the-top ('**OTT**') streaming platforms will now fall under the ambit of the MIB. The MIB will be able to regulate such content which was, until now, largely unregulated, except for the general provisions of the Information Technology Act, 2000 governing online content and the voluntary self-regulatory code of best practices signed in 2020 by 15 OTT platforms (including Netflix and Hotstar) under the aegis of the Internet and Mobile Association of India.

Taxation

❖ ITAT Rules that Beneficial DTAA Rates to Prevail over DDT Rate under IT Act

❖ In a recent decision of the Income Tax Appellate Tribunal ('**ITAT**') dated October 13, 2020 involving an Indian subsidiary of a German company, ITAT held that the dividend distribution tax ('**DDT**') rate as provided for in the Indian German Double Taxation Avoidance Agreement ('**DTAA**') would prevail over the rates as provided under the Income Tax Act, 1961 ('**IT Act**'). ITAT further held that any amendment to the domestic tax provisions would not override the DTAA. The case involved payment of dividend by an Indian subsidiary to its German parent company and the Indian subsidiary was paying DDT as mandated under Section 115O of the IT Act. Subsequently, for the Financial Year 2012-13, the plea for the beneficial rate available under the DTAA was taken up for the first time before the ITAT by way of an additional ground.

ITAT whilst relying on the decision of the Hon'ble Bombay High Court in the case of **Godrej and Boyce Manufacturing Company Limited *v.* Deputy Commissioner of Income Tax**[1] held that DDT was a tax levied on the company paying the dividend and not on the shareholder. ITAT by relying on various provisions of domestic tax law also observed that the tax was on income of the shareholder which included dividend. Having observed so, ITAT then analysed the legislative history of DDT and observed that the intent of shifting the burden of tax back on the company rather than on the shareholders was merely for convenience/administrative purposes and hence, even though the terminology used in Section 115-O was "additional income tax", in substance the tax was that of the shareholder and it was only for administrative purposes that the burden of payment of tax was shifted on the company.

Information Technology

❖ Government Continues to Ban Chinese Apps on Security Concerns

❖ The GOI, through the Ministry of Electronics and Information Technology ('**MEITY**') has by way of its Order dated November 24, 2020, blocked access to further 43 Chinese mobile applications, in addition to, previous blocking orders issued by the MEITY on June 29, 2020 (blocking 59 applications) and September 2, 2020 (blocking 118 applications). The Order has been issued under Section 69A of the Information Technology Act, 2000, on the basis that these applications are engaged in activities prejudicial to the sovereignty and integrity of India, defence of India, security of State and public order. MEITY has relied on reports received from the Cyber Crime Coordination Center, Ministry of Home Affairs as the basis for issuing the Order. A committee set up under the (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009, will recommend whether these restrictions should continue or be lifted, until which time, these applications will continue to remain blocked.

MEITY in response to a right to information application has clarified that while no penalties are prescribed for individual users found using the blocked apps, intermediaries are liable to penalties as prescribed under Section 69A of the Information Technology Act, 2000 for non-compliance with the blocking order.

Litigation & Arbitration

❖ SC Holds that Disputes Arising from the Transfer of Property Act, 1882 are Arbitrable

❖ In **Vidya Drolia and Ors. *v.* Durga Trading Corporation**,[2] the Supreme Court of India ('**SC**') overruled the decision in **Himangni Enterprises *v.* Kamaljeet Singh Ahluwalia**,[3] and held that landlord-tenant disputes under the Transfer of Property Act, 1882 ('**TP Act**') and disputes under lease/tenancy agreements governed by the TP Act are arbitrable. However, landlord-tenant disputes which are covered and governed by rent control legislations would not be arbitrable, as a specific Court or forum has been given exclusive jurisdiction such situations. The Court also held that disputes relating to mortgage under the TP Act were incapable of being settled by arbitration as they involved rights *in rem* (against the world in general) as opposed to rights *in personam*.

❖ SC on Maintainability of Appeal against Order Granting Enforcement of Foreign Award

❖ The SC in the case of **Noy Vallensina Engineering S.P.A. *v.* Jindal Drugs Ltd.**[4] has held that a foreign arbitral award rendered in a foreign seated arbitration cannot be set aside by the Courts of India under Part I of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**').

❖ Choice of Foreign Law and Seat of Arbitration between Two Indian Parties

❖ A single judge of the Gujarat High Court in **GE Power Conversion India Private Limited *v.* PASL Wind Solutions Private Ltd.**[5] has held that the Arbitration Act does not *per se* prohibit two Indian parties from choosing a foreign seat as the seat of an arbitral proceeding. Such an agreement would not violate the Arbitration Act, the public policy of India or the Indian Contract Act, 1872. It further held that the nationality of the parties has no relevance for considering the applicability of Part II of the Arbitration Act, which is solely based on whether the foreign seat of arbitration is signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. If this requirement is fulfilled, Part II of the Act will be applicable.

1 328 ITR 81.
2 2020 SCC OnLine SC 1018
3 (2017) 10 SCC 706
4 2020 SCC OnLine SC 957
5 Arb. Pet. 131 & 134 of 2019

Separately, the Delhi High Court in the case of **Dholi Spintex Pvt. Ltd *v.* Louis Dreyfus Company India Pvt. Ltd.**[6] has held that an arbitration agreement/clause is independent of the underlying contract. Accordingly, the parties may choose a different governing law for the arbitration clause, from the substantive law of the underlying contract. The Delhi High Court also clarified that two Indian parties can choose a foreign law as the law governing arbitration under the contract.

❖ Avoidance Applications Cannot Survive after Conclusion of CIRP

❖ The Delhi High Court in **Venus Recruiters Private Limited *v.* Union of India and Ors.**[7] has held that an application for avoidance of transactions cannot be adjudicated by the National Company Law Tribunal ('**NCLT**') upon conclusion of the Corporate Insolvency Resolution Period ('**CIRP**'). Once the CIRP has concluded, the NCLT has no further jurisdiction over the matter, except on issues pertaining to the resolution plan itself. The role of a resolution professional ('**RP**') is finite and it cannot continue to act on behalf of the corporate debtor once the new management takes over, unless otherwise provided for in the resolution plan. The Delhi High Court clarified that an application for avoidance of any preferential transaction should be for the benefit of the creditors and is not intended to be utilised by the corporate debtor in its new avatar.

❖ Madras HC Holds that Credit Rating Agencies are not Amenable to Writ Jurisdiction

❖ The Madras High Court in **Mahasemam Trust *v.* Union of India and Ors.**[8] has held that credit rating agencies do not fall within the ambit of term 'State' under Article 12 of the Constitution of India, as they do not discharge any public function. Therefore, they are not amenable to the writ jurisdiction of the Courts of India.

❖ Disputes under the Trust Act Cannot be Subject Matter of Arbitration

❖ The Delhi High Court in **Dr. Bina Modi *v.* Lalit Kumar Modi**,[9] relied on **Vimal Kishor Shah *v.* Jayesh Dinesh Shah**[10] and held that the disputes relating to trust, trustees and beneficiaries arising out of a trust deed and the Indian Trusts Act, 1882 are not capable of being decided by an arbitrator despite the existence of an arbitration agreement to that effect between the parties. It was further held that the Court would have jurisdiction to grant an anti-arbitration injunction where the party seeking the injunction can demonstrate that the agreement is null and void, inoperative or incapable of being performed.

❖ Emergency Arbitrations are Per Se Not Contrary to Public Policy or Arbitration Act

❖ In **Future Retail Limited *v.* Amazon.com NV Investment Holdings LLC**,[11] the Delhi High *inter alia* held that an interim award issued by an emergency arbitrator (restraining the Future Group from going forward with the deal with Reliance Retail) was *prima facie* not *coram non judice*. It further held that the order passed by an emergency arbitrator under the Arbitration Rules of Singapore International Arbitration Centre, 2016 cannot be said to be contrary to the Act as the Act does not prohibit parties from obtaining emergency relief before an emergency arbitrator.

❖ Acknowledgement of Liability Cannot be Used to Extend Limitation Period under the Insolvency Jurisdiction

❖ In **Bishal Jaiswal *v.* Asset Reconstruction Company**[12], the National Company Law Appellate Tribunal, held that entries in the balance sheet / annual return of a corporate debtor cannot be treated as an acknowledgement under Section 18 of the Limitation Act, 1963. Insolvency jurisdiction being distinct from recovery mechanism, an acknowledgement cannot shift forward the date of default for the purposes of computing limitation for an application under Section 7 of the Insolvency and Bankruptcy Code.

6 2020 SCC Online Del 1476
7 2020 SCC OnLine Del 1479
8 2020 SCC Online Mad 3133
9 2020 SCC Online Del 1678
10 (2016) 8 SCC 788
11 2020 SCC OnLine Del 1636
12 2020 SCC OnLine NCLAT 681

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'Outstanding Firm' for Corporate/M&A and Private Equity
Asialaw Profiles, 2021

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'Band 1 Firm' for Corporate/M&A and Private Equity
Chambers Asia–Pacific Awards, 2021

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'Tier 1 Firm' for Corporate/M&A and Private Equity
Legal 500, 2021

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'Tier 1 Firm' for M&A and Private Equity
IFLR1000, 2021

❖

Law Firm of the Year
VC Circle, 2020

❖

Best Overall Law Firm of the Year
India Business Law Journal, 2020

❖

'Band 1 Firm' for Corporate/M&A
Chambers Global Awards, 2020

❖

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

❖

Ranked No.1
RSG Top 50 Indian Law Firms Ranking, 2019
RSG Top 40 Indian Law Firms Ranking, 2017

❖

Ranked No. 1 by Deal Value
and No.2 Deal Count in Any Indian Involvement Announced League Table
Refinitiv Emerging Markets M&A Review - Legal Rankings, 2020

❖

Ranked No. 2
by Deal Count and by Deal Volume in India Announced League Table
Bloomberg's Global M&A Market Review- Legal Rankings, 2020

❖

Ranked No. 2
by Deal Value in the India League Table
Mergermarket Global & Regional M&A Report –League Tables of Legal Advisors, (2020)

❖

Ranked No. 1 for PE by Deal Value
Venture Intelligence League Tables of Legal Advisors, 2020

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