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Corporate & Commercial

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Relaxations in minimum public shareholding

SEBI issued a circular dated May 14, 2020 (**2020 Circular**) granting relaxation to listed companies from the applicability of 2017 Circular that required recognized stock exchanges to review compliance of listed entities with Minimum Public Shareholding (**MPS**) requirements and introduced *inter alia* the procedure to be followed by stock exchanges/depositories on observance of non-compliance of MPS requirements by listed entities, their promoters and directors. The key aspects are summarized here:

- Issue notices to non-compliant entities intimating all actions taken/to be taken
- Impose a fine of INR 5,000 per day of non-compliance till the date of compliance
- Intimate the depositories to freeze the entire shareholding of the promoter and promoter group in such listed entity till the date of compliance
- Restrict the promoters, promoter group and directors of the non-compliant listed entity from holding any new position as a director in any other listed entity till date of compliance

In case any listed company is non-compliant for more than one year, the stock exchanges shall impose an increased fine of INR 10,000 in addition to the actions set out above. The 2017 Circular also grants stock exchanges the power to consider compulsory delisting of the non-compliant listed entity as per provisions of the Securities Contracts Regulation Act (**SCRA**).

While this compliance is required to be maintained under the SCRA and Securities Contracts Regulation Rules (**SCRR**), it is also required that such compliance is maintained pursuant to provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**).

Pursuant to 2020 Circular, stipulations of the 2017 Circular have been relaxed for listed entities that are due to comply with the MPS requirements between March 1, 2020 and August 30, 2020. Further, 2020 Circular also directs the stock exchanges to refrain from taking any penal actions provided in the 2017 Circular and withdraw penal actions, if any, initiated by the stock exchanges from March 1, 2020 till date for non-compliance of MPS requirements by listed entities.

The decision to relax the MPS requirements for listed entities has been taken by SEBI upon requests from several listed companies and industrial bodies citing unfavorable market conditions to conduct sale of shares. These relaxations also provide recourse to listed entities from freezing of excess promoter holding where it has increased beyond 75% because of other acquisitions or offers.

SEBI relaxes the takeover and buy-back regulations

On May 14, 2020, SEBI issued a circular (**Circular**) granting a one-time relaxation from strict enforcement of procedural requirements under Regulation 18(2) of the Takeover Regulations and Regulation 9(ii) of the Buy-Back Regulations for all open offers and buy-back tender offers opening till July 31, 2020. Pursuant to this Circular, SEBI has permitted the dispatch of letter of offer and tender form through electronic mode provided in Regulation 18(2) and 9(ii), subject to fulfilment of the following conditions by the acquirer/company:

- Publishing the letter of offer and tender form on the websites of the company, registrar, stock exchanges and managers to the offer
- Undertaking adequate steps, along with lead managers, to reach out to the shareholders through other means such as ordinary post, SMS, audio-visual advertisement on television or digital advertisement, etc.
- Publishing an advertisement containing details of the dispatch of letter of offer electronically and its availability on the websites of the company, stock exchanges, registrar and managers to the offer, in the same newspapers where the detailed public statement was published as per Regulation 14(3) of the Takeover Regulations (i.e., one English national daily and Hindi national daily with wide circulation, and any one regional language daily with wide circulation at the place where the registered office of the target company is situated and one regional language daily at the place of the stock exchange where the maximum volume of trading in the shares of the target company are recorded during the 60 days preceding the date of the public announcement).
- Publishing an advertisement containing prescribed material information and details of the dispatch of the letter of offer and tender form electronically and its availability in the websites of the company, stock exchanges, registrar and managers to the offer, in the same newspapers where the detailed public statement was published under Regulation 7(i) of the Buy-Back Regulations (i.e., one English national daily, Hindi national daily and regional national daily, all with wide circulation at the place where registered office of the company is situated)
- In addition to the aforesaid, the acquirer/company may publish the dispatch advertisement in additional newspapers
- Ensuring availability of all advertisements issued hereunder on the websites of the company, registrar, stock exchanges and managers to the offer

In addition to the above, the acquirer/company shall provide appropriate procedures for the inspection of material documents electronically and also attempt to adhere to the existing prescribed framework.

It is pertinent to note that these relaxations are only one-time relaxations and are applicable only to open offers and buy-back tender offers opening till July 31, 2020. Through these relaxations, SEBI intends to ease the burden on companies and acquirers from compliance and procedural requirements with the Takeover Regulations and Buy-Back Regulations, which has become increasingly difficult due to the ongoing Covid-19 pandemic and the lockdown imposed by the State and Central governments. This is one of the many welcome measures introduced by SEBI in order to enable companies to function in a seamless fashion, in these trying times.

Direct overseas listing by Indian companies

On May 17, 2020, Ministry of Finance, Government of India (**MoF**) announced that Indian companies would now be allowed to list their shares directly in foreign stock exchanges. While consequent amendments and clarifications in legal and regulatory regime are awaited, the move would now allow Indian companies access to multiple jurisdictions for raising capital, with differing costs and listing conditions. At present, direct listing of Indian companies shares on foreign bourses is not permitted and possible options to raise capital from listed options were restricted to American Depository Receipts (**ADRs**) and Global Depository Receipts (**GDRs**) which were increasingly becoming less popular with the Indian corporates. Government of India and Securities and Exchange Board of India (**SEBI**) have been exploring options so that Indian corporates could access a larger pool of foreign capital.

Policy shift towards direct listing of shares abroad stems from report of a Committee constituted by SEBI in 2018 for listing of equity shares of companies incorporated in India on foreign stock exchanges and of companies incorporated outside India on Indian stock exchanges (**Committee Report**), which had recommended permissible jurisdictions for listing of equity shares of an Indian company based on following principles:

- Countries which are a member of Board of International Organization of Securities Commissions (**IOSCO**) and whose securities market regulator is either a signatory to the IOSCO's multilateral memorandum of understanding or is a signatory to a bilateral memorandum of understanding with SEBI for information sharing arrangements
- Countries which are members of the Financial Action Task Force (**FATF**)
- Countries not identified in the public statement of the FATF as:
  - A jurisdiction having strategic anti-money laundering or combating the financing of terrorism deficiencies to which countermeasures apply
  - A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies
  - Any other jurisdiction notified by Central Government in consultation with SEBI and/or other regulatory authorities, following an overall review and evaluation of such jurisdiction's capital markets regulations

The criteria for listing in permissible jurisdictions are akin to those of the listing of rupee denominated bonds (commonly referred as '**Masala Bonds**') in foreign exchanges which were introduced in past by Reserve Bank of India. An initial list of 10 jurisdictions were identified as permissible jurisdictions in Committee Report which included United States, China, Japan, South Korea, United Kingdom, Hong Kong, France, Germany, Canada and Switzerland.

While this is a welcome mov, actual implementation of the policy would require amendment to several regulations including Foreign Exchange Management (Non-debt Instruments) Rules, 2019; Companies Act, 2013 including rules thereunder; and SEBI regulations related to listing and disclosures, in addition amendment in taxation laws.

Holding of general meetings by audio visual means

Key circulars issued by MCA

- **April 8, 2020** – clarifies the procedure for passing ordinary and special resolutions amidst Covid-19 outbreak **(EGM Circular) and** provides certain relaxations from provisions of the Companies Act, 2013 **(Act)** by allowing EGMs to be conducted through video conferencing **(VC)** or other audio-visual means **(OAVM)**
- **April 13, 2020** – provides clarifications pertaining to manner of issuance of notice for EGMs, voting by show of hands and postal ballot, etc.
- **April 21, 2020** – allows companies whose financial year has ended on December 31, 2019, to hold their AGM within 9 months (by September 30, 2020), instead of the prescribed 6-month period under the Act
- **May 5, 2020** – allows annual general meetings to also be conducted by VC and OAVM **(AGM Circular)**

Matters that may be transacted

EGM Circular requires companies to hold EGMs only where the same is considered to be unavoidable. Apart from matters of ordinary business, only those items of special business which are considered to be unavoidable by Board may be transacted in an EGM.

Manner of conducting AGM and EGM

The AGM and EGM circulars (**Circulars**) provide a mechanism of conducting these meetings, including matters such as notice of meeting, required quorum, casting of vote, appointment of chairman, etc. Further, the Circulars also provide for separate mechanisms for companies which are required to provide e-voting facilities and companies which are not required to provide e-voting facilities. Companies which are not required to provide for e-voting facility can conduct an AGM by way of VC/OAVM only where they have email ids of at least half of its total members who (i) in case of a Nidhi company, hold shares of more than INR 1,000 in face value or more than 1% of total paid-up share capital, whichever is less; (ii) in case of other companies having share capital, who represent not less than 75% of such part of paid-up share capital of company as gives a right to vote at meeting (iii) in case of companies not having share capital, who have right to exercise not less than 75% of total voting power exercisable at meeting.

Applicable protocols that are to be followed for conducting general meetings

Matter	Protocol to be followed in the EGM/AGM
Notice of the meeting	▪ The notice of the meeting shall be given by email registered with the company/depository participant /depository. Financial statements and other annexures may be circulated by email.
Public notice	▪ For companies required to provide e-voting facility, the public notice shall contain details such as a statement that the EGM/AGM is to be conducted through VC/OAVM, date and time of meeting, manner in which vote is to be cast, availability of notice on website and with stock exchange, manner in which members can register their email ids, etc. ▪ For companies not required to provide e-voting facility, where contact details of any of members are not available with company, it shall issue a public notice in newspaper of vernacular language where registered office is situated & one in newspaper of English language having wide circulation in the district and such public notice shall contain statement that EGM/AGM is to be convened through VC/OAVM and shall also provide for manner in which members can register their email ids.

Matter	Protocol to be followed in the EGM/AGM
	▪ Public notice is to be issued before issuance of individual notice in case of AGM.
Maintenance of recorded transcript	▪ Recorded transcript shall be maintained by company and made available on website of company in case of a public company.
Minimum standards of VC/OVAM facility	▪ The company shall ensure that the meeting convened through VC/OAVM facility allows two-way teleconferencing for the ease of participation of the members. The VC/OAVM facility must have a capacity to allow at least 1000 members in case of companies required to provide e-voting facility, and at least 500 members or members equal to total number of members, whichever is lower, in case of companies not required to provide e-voting facility, to participate on 'first come first served' basis. ▪ 'First come first served' rule will not applicable to promoters, institutional investors, key managerial personnel and shareholders with 2% or more shareholding, auditors, chairman of committees
Time frame for VC/OVAM facility	▪ The VC/OVAM facility shall be kept open at least 15 minutes before the scheduled time of the meeting and shall not be closed till the expiry of 15 minutes after the conclusion of the meeting.
Attendance through VC/OVAM	▪ Attendance of members through VC/OAVM shall be counted for quorum under section 103 of the Act.
Voting by the members present in the meeting	▪ In case of companies required to provide e-voting facility, the members present in the meeting, who have not cast their vote through remote e-voting, shall be allowed to vote through e-voting system. ▪ In case of companies not required to provide e-voting facility, the company shall provide a designated e-mail address (password protected) to all members at the time of sending the notice of meeting, where the members shall convey their vote by sending emails through their registered email id, when a poll is required to be taken during the meeting on any resolution. ▪ Voting may be by show of hands in case of companies with less than 50 members unless poll is demanded.
Election of Chairman	▪ Unless articles require any specific person to be appointed as a Chairman for meeting, Chairman for meeting shall be appointed in accordance with section 104 where there are less than 50 members present at meeting; in all other cases, Chairman shall be appointed by a poll conducted through e-voting system during meeting.
Voting by the authorized representatives	▪ Representatives of members may be appointed for purpose of voting through remote e-voting or for participation and voting in meeting. ▪ Proxies are not allowed.
Attendance of independent director and auditor	▪ At least one independent director (if it is required to appointed), and the auditor or his authorized representative, shall attend such meeting.
Filing of resolutions	▪ All resolutions, passed in accordance with this mechanism shall be filed with ROC within 60 days of meeting, clearly indicating that mechanism provided herein along with other provisions of Act and rules were duly complied with during such meeting.
Other requirements	▪ Notice to contain details of framework specified herein and shall contain a helpline which may be accessed for any assistance in attending meeting. ▪ In case, of inability to pay the dividend to any shareholder by the electronic mode, due to unavailability of the details of the bank account, the company shall upon normalization of the postal services, dispatch the dividend warrant/cheque to such shareholder by post. ▪ Where permission for holding physical AGM has been obtained, facility for VC/OAVM should be made available and all resolutions will be passed by e-voting.

Conducting AGMs and EGMs by VC or OAVM would be a cost-effective method for companies to transact business, in addition to ensuring that meetings are conducted in a timely and efficient manner. However, VC and OAVM may present difficulty in participation given attendant technical challenges, privacy concerns, uninvited participants, security of any confidential information shared during the meeting, etc. In light of this, it is important to review privacy policy and encryption policy of platforms on which meeting is to be conducted, in order to ensure that personal data of participants is protected.

Changes in CSR framework

Section 135 of Companies Act, 2013 (**Act**) requires companies to constitute a Corporate Social Responsibility Committee (**CSR Committee**) which is responsible for formulating a CSR policy for the company. This is mandatory for companies having net worth of INR 500 crore or more; turnover of INR 1000 crore or more or having net profit of INR 5 crore or more.

It is the duty of Board to ensure that the company spends at least 2% of average net profits made during three immediately preceding financial years or immediately preceding financial year where the company has not completed 3 financial years since its incorporation, in pursuance of its CSR policy. The Draft Rules, which have not been notified by the MCA as yet, propose further strengthening the CSR framework.

Amendments to the CSR Rules

The MCA had invited public comments on the Draft Companies (CSR Policy) Amendment Rules, 2020 **(Draft Rules)**. Some of the key changes proposed under the Draft Rules are as follows:

- Amend definition of key terms including CSR by providing certain exclusions to the definition, such as:
  - CSR activities that significantly benefit 25% or more of the employees of the company and their families
  - Political contributions and any activity undertaken outside India or in ordinary course of business
- CSR Policy must provide a clear approach and direction, as per recommendations of the CSR Committee, for selection, monitoring and implementation of CSR activities
- Chief Financial Officer has been identified as the person responsible for ensuring utilization of the CSR funds
- Two or more companies can collaborate to undertake a CSR project as long as each of them is able to report on the project separately
- Definitions for terms such as 'International Organization', 'Ongoing Projects' and 'Public Authority' have been provided under the draft rules
- Registration of implementing authorities is mandatory under the Draft Rules
- Engagement with International Organizations has been allowed for implementation of CSR Policy with prior approval of Central Government
- Addition of Rule 10 which provides for the establishment of a National Unspent Corporate Social Responsibility Fund by the Central Government for transfer of the unspent CSR funds, and pending setting up of such fund, to any fund specified in Schedule VII

Clarifications issued by MCA in respect of Covid-19 donations

Schedule VII to Companies Act, 2013 provides for activities which may be included by a company in their CSR Policy. The Ministry of Corporate Affairs **(MCA)** on March 23, 2020 provided clarifications on spending of CSR Funds for Covid-19 stating that such spending would be an eligible CSR activity and could be spent for various activities related to Covid-19 as provided under Schedule VII of the Act relating to promotion of health care,

preventive health care, sanitation and disaster management. The items listed in Schedule VII could be interpreted liberally for this purpose.

Subsequently, on March 28, 2020, MCA vide an office memorandum clarified that Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund **(PM CARES Fund)** qualifies as CSR expenditure. In furtherance to this MCA issued a notification on May 26, 2020 and included PM CARES fund in the list of items that qualifies as CSR expenditure.

On April 10, 2020 MCA also issued FAQs to address certain queries raised by companies pertaining to eligibility of expenditure related to Covid-19 activities as CSR spend in consequence of March 23 notification. Vide this FAQ, MCA not only clarified what was stated in both the circulars mentioned above, but also dealt with issues pertaining to contributions made to state funds and payment of wages falling within the ambit of CSR expenditure. MCA stated that since Chief Minister's Relief Fund or State Relief Fund for Covid-19 is not included in Schedule VII of the Act, any contribution made to these funds would not qualify as admissible CSR expenditure.

However, contributions made to the State Disaster Management Authority to combat Covid-19 would qualify as CSR expenditure. MCA further clarified that payment of wages or salary to workers, contract labor, casual or daily wage workers, would not qualify as a CSR expenditure as the same is a contractual. However, ex-gratia payment made to temporary or casual or daily wage workers, especially for purposes of COVID-19 related hardships, would qualify as a CSR expenditure as a onetime exception, provided that an explicit declaration to this effect is made by the Board of the company and is duly certified by the statutory auditor.

Disclosure of financials of listed entities

On May 20, 2020, SEBI issued an advisory (**Circular**) under SEBI (LODR) Regulations, 2015 to all listed entities regarding disclosure of material impact of Covid-19 on their financials. The Circular provides that companies should evaluate impact of Covid-19 on their business performance and financials, both qualitatively and quantitatively, to the extent possible and disseminate the same to relevant stock exchanges, to ensure that all the investors have access to timely and updated information.

The circular provides guidance on the matters which can be disclosed with respect to impact of pandemic:

- Ability to maintain operations including information on factories/units/office spaces functioning as well as closed down
- Schedule, if any, for restarting the operations
- Steps taken to ensure smooth functioning of operations
- Estimation of future impact of the pandemic on operations
- Details of impact of the pandemic on the following parameters:
  - Capital and financial resources
  - Profitability
  - Liquidity position
  - Ability to service debt and other financing arrangements
  - Assets
  - Internal financial reporting and control
  - Supply chain
  - Demand for products/services
- Details of existing contracts/agreements where non-fulfilment of obligations therein by any party will have significant impact on the entity's business

The Circular also suggests that the company may disclose further material updates on a regular basis and provide impact of the pandemic on their financial statements to be filed with exchanges.

CCI proposes to amend Combination Regulations

The Competition Commission of India (**CCI**) issued a press release[1] proposing to omit Para 5.7 from Form I, which provides for giving information regarding non-compete restrictions (**Restrictions**) under the Combination Regulations[2]. If the proposal is effectuated, it may assist CCI in adhering to the timelines for deciding applications seeking its approval for combinations.

Parties entering into a combination may not henceforth be required to furnish information on non-compete restrictions for the purpose of its examination by the CCI. They won't also be required to justify such non-compete restrictions, if the CCI's current thinking is anything to go by.

CCI is of the view that prescribing a general set of standards for assessment of non-compete restrictions may not be appropriate in modern business environments. While it may be possible to conduct a detailed examination on case by case basis, the same may, however, not be feasible considering the timelines followed in combination cases as per the release.

It maybe recalled that the CCI had already issued a Guidance Note explaining the circumstances under which a non-compete restriction would be regarded as 'ancillary' or 'not ancillary'. The Guidance Note provides that three years of non-compete obligation is usually justified in case of transfer of goodwill and know-how and two years in case of transfer of goodwill alone. It further provides that the scope of non-compete shall be restricted to the business sold and the territory where it was conducted. However, a finding that the restriction is not ancillary does not raise any presumption of infringement under the provisions of the Act.

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[1]Press Release No. 10/2020-21, dated May 15, 2020, CCI, https://www.cci.gov.in/sites/default/files/whats_newdocument/PublicComments-Non-Compete.pdf
[2]Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

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