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SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations 2021

Securities and Exchange Board of India (**SEBI**) vide Gazette notification dated May 05, 2021, notified the SEBI (Substantial Acquisitions of Shares and Takeover) (Amendment) Regulations, 2021 (**Amendment**) which amends the SEBI (Substantial Acquisitions of Shares and Takeover) Regulations, 2011 (**Regulations**).

The primary aim of the Regulation is to monitor and control acquisition of shares and voting rights in publicly listed companies of India. During the course of the time, the Regulation has gone through multiple amendments to keep up with the dynamic trading platforms and investor behavior patterns. The current Amendment aims to amend the Regulations to insert certain provisions relating to the Innovators Growth Platform and the trigger point for making open offer by an acquirer.

Amendment

The Amendment has amended the nomenclature wherein the Institutional Trading Platforms (**ITP**) has been substituted with Innovators Growth Platform (**IGP**). Further, the trigger for making a public offer under Regulations 3 and 6 of the Regulations, in the listed entities on IGP has been enhanced to 49% from the erstwhile 25%, pursuant to the Amendment.

Pursuant to the Amendment, the requirement to disclose further acquisition of shares to the board of that company, beyond the threshold of 5% has been revised to 10%. Regulation 29 (2) of the Regulations requires disclosure of change in shareholding or voting rights of the acquirer if such change exceeds 5% of total shareholding /voting rights from the erstwhile 2%, pursuant to the Amendment.

Furthermore, Regulation 26 (6) of the Regulations, which deals with the analysis by the committee of independent directors, the Amendment seeks to introduce disclosure of voting pattern of the meeting in which the open offer proposal was discussed as a part of the detailed public statement issued along with the open offer by the acquirer.

Conclusion

The Amendment is seen as another modification by SEBI to revive the market lows, as the trade and market experience a decline in value creation by different firms using such platforms. Setting the bar lower for shareholders and voting rights was intended to stamp on fair market play and encourage more transparency on the acquisition of shares, voting rights, and standing on the shareholder's board. However, intending to give liberty to the acquirers and motivate them to indulge in trading in companies, SEBI has relaxed the regulations to some extent. It would mean that the acquirer can buy such shares without triggering the need for making an open offer until 49%, unlike other listed entities whereupon acquiring 25% shares, the acquirer shall have to make an open offer to the public mandatorily. Any acquirer will now be able to exercise a little more room to avoid the procedural formality of public disclosures and infuse capital in cash straped companies.

Additional due diligence requirements for SSMI under IT Intermediary Guidelines Rules kick in

The Government of India (**GoI**) notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 on February 25, 2021. The said new rules superseded the Information Technology (Intermediaries Guidelines) Rules, 2011 and took effect on February 25, 2021the date of their publication in the Official Gazette.

However, Rule 4(1) of the said new rules, which applied to Significant Social Media Intermediaries (**SSMIs**) and required them to observe specific additional due diligence, gave them three months to comply with the said specific requirements. The period of three months was to run from the date the GoI notified the threshold of minimum registered users for a Social Media Intermediary (**SMI**) to be classified as a SSMI. On February 25, 2021, GoI issued another notification which provided the said threshold to be 5 million registered users.

The aforementioned period of three months expired on May 24, 2021, and now, the SSMIs are required to comply with the additional due diligence requirements as stipulated in Rule 4(1). Hereinbelow are the key additional requirements which an SSMI is required to comply with w.e.f. May 25, 2021:

- **Appointment of Chief Compliance Officer (CCO)** who shall be responsible for ensuring compliance with the IT Act and the rules made under the said Act and be liable under any proceedings relating to any third-party information, data or communication link hosted or made available by the SSMI. The CCO should be a KMP or senior executive of the SSMI and resident in India.
- Appointment of nodal contact person, who may be contacted by the law enforcement agencies for 24x7 coordination and to ensure compliance with their orders. Such person should also be resident in India.
- **Appointment of resident grievance officer** to whom a victim or user may make complaint for violation and who shall also be responsible for disposing of the complaint within fifteen days. The said resident grievance officer is also responsible for receiving the orders issued by the Appropriate Government.
- **Publication of monthly compliance reports.**

It is pertinent to mention that the SSMIs were provided grace period of three months only for the above compliances. SSMIs were already required to comply with certain additional compliances under the new rules. E.g. SSMIs engaged in providing messaging services are required to enable identification of first originator of a message or information. Also, an SSMI engaged in providing any service relating to transmission of information which earns it financial benefit or which is its exclusive intellectual property, is required to make a disclaimer to the effect that the said information is being advertised, sponsored or marketed or is subject to its exclusive ownership as intellectual property.

SEBI increase the overall overseas limit for AIFs and VCFs from USD 750 million to USD 1500 million

After consultation with the Reserve Bank of India (**RBI**), the securities markets regulator SEBI has doubled the overall overseas investment limit for Alternative Investment Funds (**AIFs**) and Venture Capital Funds (**VCFs**) from USD 750 million to USD 1500 million vide its Circular dated May 21, 2021.

AIFs and VCFs which are registered with SEBI are authorized to invest in companies, entities and undertakings incorporated outside India subject to certain terms and conditions provided by SEBI from time to time. While the overall limit for overseas investment by these registered AIFs and VCFs has now been enhanced, all the other requirements, guidelines, terms and conditions stipulated by SEBI in Circulars dated August 09, 2007, October 01, 2015 and dated July 03, 2018 shall still be applicable.

FPCE & Anr v. The State of West Bengal & Anr – A step towards strengthening protection of homebuyers

The recent judgment of the Supreme Court (**SC**) in the case of *Forum for People's Collective Efforts (**FPCE**) & Anr v. The State of West Bengal & Anr*[1] is remarkable for its far-reaching effect on strengthening the Real Estate (Regulation and Development) Act, 2016 (**RERA**) and securing the interests of the homebuyers. The Division Bench struck down West Bengal Housing Industry Regulation Act, 2017 (**WB-HIRA**) as unconstitutional. In doing so, the Court held that the State legislature has transgressed the limitations on its power and has enacted a law that is repugnant to the parliamentary legislation on the same subject matter.

Brief background

West Bengal is the only state in the country wherein RERA, till now, had not been implemented. Although draft rules were framed pursuant to RERA in 2016, no further progress was made in that regard. Thereafter, in 2017, the State legislative assembly enacted WB-HIRA which was modeled on RERA and purported to regulate the contractual behavior of promoters and buyers in real-estate projects prevalent in the State. This Act was challenged in a petition under Article 32 of the Constitution by FPCE (**Petitioner**), on the ground that it is constitutionally impermissible for a State legislature to enact a law over the same subject matter by setting up a parallel legislation.

Argument of the Parties

The Petitioner argued that both the Central enactment and the State enactment pertain to same subject matter in Concurrent List to Seventh Schedule of the Constitution, i.e., Entries 6 and 7, and there exists repugnancy between the two. Through RERA, Parliament had intended to create an exhaustive code regulating the contractual relationship between promoters and buyers in the real estate sector. Since WB-HIRA is a 'copy-paste replica' of the Central enactment barring a few cosmetic changes, it is repugnant and void under Article 254 of the Constitution. Additionally, WB-HIRA had not received assent of the President and hence was not protected under Article 254(2) of the Constitution.

The Petitioner also argued that the few inconsistencies that did exist between RERA and WB-HIRA tilted the law in favor of promoters and denied homebuyers of important safeguards incorporated in the Central enactment. A few such inconsistencies that dilute the protective nature of RERA are the absence of any provision regarding 'adjudicating officer'; variation in the definition of 'garage' and 'force majeure', and the removal of the concept of 'planning area' in the State legislation. Lastly, the Petitioner contended that if WB-HIRA was upheld as constitutionally valid, it would incentivize States to enact a similar parallel regime regulating real-estate projects. Such a duplicate regime would result in complete chaos in the real-estate sector and would render the scheme of RERA as uniform national legislation wholly redundant.

State of West Bengal (**Respondent**) argued that State enactment was complimentary to Central enactment. The question of repugnancy does not arise because Parliament had never intended RERA to be a complete and exhaustive code. To buttress this submission, the Respondent relied upon Section 88 and 89 which explicitly permit other laws to operate alongside RERA and stipulate that wherever there is any inconsistency, the Central enactment would prevail. This clearly indicates that the Parliament had always intended for RERA to co-exist with other legislations. Additionally, Parliament by virtue of Section 92 of RERA had only repealed the Maharashtra Housing (Regulation and Development) Act, 2012, which was the prevailing legislation in the State of Maharashtra prior to RERA. However, no attempt was made to repeal the West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993, the predecessor of WB-HIRA. The purposeful repeal of only the Maharashtra Act is clearly indicative of the fact that RERA does not evince any intention to shut out other State enactments. Rather, the parliamentary intent has always been to make RERA permissive and accommodative of other legislations.

Findings of the Court

SC opined that the overlap between provisions of WB-HIRA and RERA was significant, leaving no doubt that State enactment was repugnant to Central enactment under Article 254 of Constitution. SC grounded its conclusion on following factors:

- The provisions of a statute are directly in conflict with a law enacted by Parliament so that compliance with one is impossible along with obedience to the other
- Parliament has intended to occupy the entire field by enacting an exhaustive and complete code
- The subject matter of the legislation by the State is identical to the legislation which has been enacted by Parliament whether prior or later in point of time

The Court remarked that the provisions of WB-HIRA do not compliment RERA. Instead, WB-HIRA purports to occupy the same field as the Union legislation. Reasoning that the State legislative assembly had lifted provisions word-for-word and incorporated them into a State enactment, the Court held that the aforementioned threshold of repugnancy was met.

Secondly, SC outrightly rejected the respondent's argument that Section 88 and 89 indicate that RERA is not an exhaustive code. Section 88 is the parliament's attempt to ensure that remedies created by cognate legislations such as the Consumer Protection Act, 2019, are not ousted. Thus, the State legislature is competent to enact legislations that are allied to, incidental, or cognate to the exercise of parliament's legislative authority. However, in doing so, the State legislature cannot encroach upon the legislative authority of the parliament which has supremacy within the ambit of the subjects falling within the concurrent list.

[1] Writ Petition (C) No. 116 of 2019

Thirdly, SC observed that several provisions of WB-HIRA are in dissonance with RERA, denying the homebuyers of the essential safeguards encapsulated in the Central enactment. Lastly, since WB-HIRA had not received the President's assent under Article 254(2), it is was not shielded from the rigid rule of repugnancy.

In sum, the approach adopted by the Court seems to be predicated on its understanding of the deleterious consequences that would follow if the constitutionality of such parallel legislations was upheld. Not only would it act as an encouragement to States to encroach upon the matters listed in the Concurrent List, but would also denudate RERA of its vigor and render it unworkable.

Recognizing the need to avoid uncertainty and to further protect the interest of homebuyers in the State of West Bengal, SC invoked its powers under Article 142 of the Constitution and declared that the judgment would operate prospectively and would not impact registrations, sanctions, and permissions previously granted under WB-HIRA prior to the date of this judgment.

Our viewpoint

This decision of SC is laudable as it has acted as a shield against illegal attempts of the States to water down provisions of RERA and fail or omit to implement it. It also comes off as a major respite to the numerous homebuyers in West Bengal who have been denied the same institutional safeguards as are available under the parliamentary regime. It is important to note that RERA was a culmination of a nationwide clarion call for a uniform pan-Indian legislation. This judgment is thus momentous as it reaffirms the position of RERA in the States, secures the interest of the homebuyers, and sends a warning call to all those who attempt to reduce RERA to a dead letter.

Contribution to AIF set up in offshore jurisdiction including IFSCs

In another attempt to relax the provisions of Overseas Direct Investment (**ODI**), RBI recently permitted Indian Party (**IP**) to make offshore investment in an AIF by treating it under automatic route to simplify the offshore remittance process involved to comply with sponsor commitment for such funds.

RBI, under the ODI route by Residents in JVs/WOS abroad, permits IP incorporated as a company in India or a registered partnership firm or other approved entity making investment in a JV or WOS abroad, and includes any other entity in India as may be notified by the RBI, subject to certain conditions.

Importantly, RBI guidelines for offshore investments made by IP did not prescribe certainty for investment route for investments in approved offshore AIFs, including that for International Financial Services Centres (**IFSC**), which had to primarily comply with local AIF regulations. AIF regime in IFSC obligates the entity to be established through a minimum sponsor commitment of 2.5% of the corpus or USD 750,000 for Category 1 and 2 AIFs, whichever is lower, and % of the corpus or USD 1.5 million, whichever is lower for Category 3 AIFs.

Contribution to an AIF set up in offshore Jurisdiction including IFSCs

AIF in IFSC or offshore jurisdiction proposed by IP must comply with multiple conditions, including that of obtaining prior approval from RBI to make a case for such fund setup. Accordingly, in order to facilitate IPs to establish fund vehicles in approved AIF offshore jurisdictions including that of IFSC, RBI notified that any sponsor contribution from an IP to an AIF established in an overseas jurisdiction, including IFSCs in India, will be regarded as ODI and treated under automatic route subject to satisfaction of prescribed conditions.

Key takeaways

RBI notification intends to clarify initial set-up and sponsor commitment made by IP in India, either in IFSC or other jurisdictions, to treat it under automatic route while remitting the fund for such purposes through the banking channel. Separately, one can hope that the additional conditions such as prior approval from financial services regulator, track record and so on are also relaxed especially for establishing AIF in IFSC to grant the much needed impetus to entities proposed to be set up by India based sponsors for financial inclusion, especially where the RBI can easily monitor and supervise the activities of the AIFs established in IFSC.

SEBI Guidelines on compensation of key employees in AMCs

In order to better align the interest of key employees[2] of Asset Management Companies (**AMCs**) with the unit holders of the mutual fund scheme, SEBI has come out with a circular dated April 28, 2021 (**Circular**) in which it states that a minimum of 20% of the salary/perks/bonus/non-cash compensation (gross annual CTC), net of income tax and any other statutory contributions of the key employees shall be paid in the form of units of mutual fund schemes. The provisions of the Circular shall be applicable with effect from July 01, 2021.

- **Compensation:** The compensation paid in form of units shall be proportioned to asset under the management of the scheme in which the key employee has a role/oversight in, and thus overnight funds and existing closed ended schemes are excluded. Further, it shall be paid uniformly over the period of 12 months on the date of payment of salary/other compensations, and in case of compensation paid in form of employee stock options, the date of exercising such option shall be considered as the date of payment. Furthermore, with a view to allow key employees to diversify their unit holdings, in case of dedicated fund managers managing only a single scheme/single category of schemes, 50% of the aforementioned compensation shall be by way of units of the scheme/category managed by the fund manager and the remaining 50% can, if they so desire, be by way of units of those schemes whose risk value as per the risk-o-meter is equivalent or higher than the scheme managed by the fund manager.

[2] As per the Circular, the following are considered as Key Employees: (i) Chief Executive Officer, Chief Investment Officer, Chief Risk Officer, Chief Information Security Officer, Chief Operation Officer, Fund Manager(s), Compliance Officer, Sales Head, Investor Relation Officer(s), heads of other departments, Dealer(s) of the AMC; (ii) Direct reportees to the CEO (excluding Personal Assistant/Secretary); (iii) Fund Management Team and Research team and (iv) Other employees as identified & included by AMCs and Trustees.

- **Lock-in period and redemption:** The unit-based compensation shall be locked-in for a period of minimum of 3 years or for the tenure of the scheme, whichever is less, and no redemption shall be allowed during this lock-in period. However, SEBI has allowed AMCs to borrow against such units in case of an emergency. Further, no redemption of these units shall be allowed during the above-mentioned lock-in period in case of resignation or retirement of a key employee before attaining the age of superannuation (as defined in the AMC service rule).
- **Clawback:** The units allotted to key employees are subject to clawback in the event of violation of code of conduct, fraud or gross negligence by them, which is to be determined by SEBI.

Conclusion

This Circular is an effort by SEBI to allow 'skin in the game' and comes with the aim of forcing fund managers to be invested alongside mutual fund investors, which in turn instils confidence in such investors. However, there are a few issues that require further consideration. As an example forcing key employees to invest does not guarantee success neither does it assure ethical behaviour or prove the capability of a key employee. Further, there is a huge difference between the compensation received by a senior and a junior level key employee, wherein unless their compensation is increased, a substantial portion of their compensation package will be locked-in for a period of 3 years.

Companies (CSR Policy) Amendment Rules 2021

The Companies Amendment Acts of 2019 and 2020 resulted in some major changes in the CSR provision under Section 135 of the Companies Act. The Ministry of Corporate Affairs (**MCA**) on January 22, 2021 notified the Companies (Corporate Social Responsibility Policy) Amendment Rules 2021 (**New Rules**) giving effect to the changes introduced in CSR by the Companies Amendment Acts of 2019 and 2020.

CSR has been evolving in India ever since CSR spending was statutorily mandated in 2014 and now, in the wake of urgent emerging health care requirements, MCA has issued multiple clarifications on what companies could consider as part of their CSR expenditure.

Few noteworthy changes brought to the CSR Regime vide the New Rules and subsequent notifications of the MCA are as below:

- Any company engaged in research and development of new vaccines, pharmaceuticals, and medical devices in the ordinary course of business may undertake research and development of new vaccines, medicines, and medical devices relevant to Covid-19 as CSR during the FYs 2020-21, 2021-22, and 2022-23, subject to the following conditions:
  - Such R&D activities must be carried out in collaboration with any of the institutes or organisations mentioned in Item (ix) of Schedule VII of the Companies Act (eg. Indian Council of Medical Research, Council of Scientific and Industrial Research, Department of Biotechnology and the Department of Science and Technology)
  - Details of such activity must be disclosed separately in the annual report on CSR included in the board's report
- Contributions made by companies towards the following activities are now allowed to be considered as eligible CSR expenditure:
  - Contributions to the PM CARES Fund
  - Contributions to incubators or R&D projects in the field of science, technology, engineering and medicine, funded by the central or state government, a public sector undertaking or any agency of the central or state government
  - Contributions to public-funded universities engaged in conducting research in science, technology, engineering and medicine to promote sustainable development goals, in collaboration (additional) with Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy and the Department of Pharmaceuticals
- Companies could use CSR funds for creating health infrastructure for Covid-19 care, establishment of medical oxygen and storage plants, manufacturing and supply of oxygen concentrators, ventilators, cylinders and other medical equipment for countering Covid-19
- **Amendment to Rule 7:** As companies are now allowed to set off CSR expenditure above the required 2% expenditure in any financial year against the required expenditure for up to three financial year, if a company spends an amount in excess to their CSR requirements

The provisions of the New Rules appear to be more structured and paint a promising picture for India's CSR regime. These changes have reduced the excessive discretion in the hands of a company, have enhanced clarity, and introduced uniformity by laying down the procedures to be followed in certain respects by introducing new statutory requirements. While the companies are battling the gruesome blows of Covid and at the same time are in recalibration mode by trying to shift their operational guidelines as per the framework of the new CSR Rules, which has introduced significant changes to monitoring and evaluation of CSR activities, and utilization of CSR expenditure and also mete out serious punishment for non-compliance. The aforesaid are merely highlights of the wide array of transitional challenges which companies have to deal with while, simultaneously juggling with the impact of Covid on businesses.

Phase 3 of SEBI's peak margin norms comes into effect

Last year SEBI had introduced so-called peak margin norms in a bid to minimize speculative trading. In simple terms, the leverage brokers can offer to their clients to trade in cash, as well as derivatives market has been curtailed. The norms are being implemented in following phases:

- **Phase 1:** December 2020 to February 2021 in which traders were supposed to maintain at least 25% of the peak margin.
- **Phase 2:** March to May 2021 in which the margin was raised to 50%.
- **Phase 3:** June to Agusut 2021 in which the margin will be raised to 75%.
- **Phase 4:** September 2021 onwards it will be raised to 100%.

Accordingly, now the brokers will calculate a minimum margin of 75% of the trade value which will not only be based on the end-of-the-day position but also on intraday peak position applicable for diverse products.

Penalty for margin shortfall or non-collection is in the range of 0.5% and 1%, depending on the short collection. If there is a shortfall or non-collection of margins for over three consecutive days or over five days per month, the penalty can go up to 5%.

While the new peak margin rules have been introduced to rectify the situation of excess leverage and limit speculative trading and protect traders, there is also fear that this will lower intraday trading volumes and market liquidity. When there is greater leverage and a high level of trading activity, market liquidity is naturally higher. But because full margin will be needed by September 2021, experts feel that turnover may be affected. Reports state that the NSE retail cash/overall cash average daily turnover dropped 2.5/10% Month on Month (**MoM**) while NSE retail/overall derivatives turnover changed minus 6.5% combined with an additional 3% MoM.

However, the trends need to be watched through the subsequent months before it shows the real impact on volumes. It it noteworthy that given similar concerns, Commodity Participants Association of India had asked SEBI to continue with the 50% peak margin norms and defer the current higher limit.

Draft consultation paper proposing changes to the 'promoter' concept under ICDR regulations

As per suggestions of Primary Markets Advisory Committee (**PMAC**) and as part of its continuing efforts to review policy framework and adopt best international practices aimed at providing better information to investors for decision making, SEBI has proposed to revamp the concept of 'promoter' in the context of Indian securities market through a public consultation paper to make it relevant in present market conditions and support ease of doing business.

Traditionally, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**) prescribe and govern promoter participation and ownership in an Indian company, including other operational norms for minimum promoters' contribution, lock-in period, date of allotment in IPO, in order to determine and evaluate disclosure from control perspective. SEBI has now proposed to liberalise the ICDR Regulations norms through a Draft Consultation Paper and sought public comments on easing the lock-in period for promoters, rationalizing the definition of 'promoter group' and move to the concept of 'person in control' for promoters and other shareholders after an IPO.

The salient features of the proposal are discussed here:

- **Trimmed lock-in periods for minimum promoter's contribution and other shareholders for public issuance on the Main Board exchange**
  - In case of offer for sale or financing (excluding capital expenditure for a project), the draft proposes to reduce the lock-in period for minimum promoters' contribution to 1 year from the date of allotment in IPO instead of the existing requirement of 2 years.
  - Shares held by promoter(s) will be exempt from lock-in requirements after 6 months from the date of allotment in IPO, only for the purpose of achieving compliance with minimum public shareholding norms.
  - Promoters' holding exceeding minimum threshold requirement will be locked in for a period of 6 months (instead of existing requirement of 1 year) from the date of allotment in the IPO – as a result, the entire pre-issue capital held by persons excluding promoters will also be locked-in for a reduced period of 6 months from the date of allotment in the IPO.
- **Streamline disclosure norms of Group Companies**
  - To minimize the compliance burden, only name and registered office address of all Group Companies can be disclosed in the Offer Document.
  - All other disclosure requirements – such as financials of top 5 listed/unlisted Group Companies, litigation, nature of activities, equity capital, reserves, sales, profit after tax, earnings per share and diluted earnings per share, net asset value etc. – presently done in the Draft Red Herring Prospectus are proposed to be replaced with disclosures to be made on websites of listed companies.
- **Shifting from concept of 'promoter' to 'person in control'**
  - ICDR Regulations define 'promoter' as a person named in the offer document, or in the annual return of the issuer, or a person who has control over the issuer (directly or indirectly), or in whose advice, directions or instructions the Board of Directors of the issuer is accustomed to act. The draft proposes to revisit the existing concept of 'promoter' and replace this with 'person in control' or 'controlling shareholders', to better reflect present market realities. This will require consequential amendments under various regulations like SEBI Regulations ICDR Regulations, LODR Regulations, Takeover Regulations and SEBI (Prohibition of Insider Trading) Regulations, owing to implications on the related laws administered by other regulators.

Conclusion

In order to ensure smooth transition and avoid any disruptions, the implementation of these proposed changes is expected to be concluded over a 3 year period. Accordingly, SEBI has invited comments to review the regulatory framework for promoter, promoter group and group companies under SEBI ICDR Regulations on or before June 10, 2021.

SEBI clearly recognizes that prospective listed companies with matured businesses have pre-existing institutional investors such as private equity firms, AIFs, etc. Therefore, the switch to a 'person in control' or 'controlling shareholder' concept makes imminent sense and is aligned with international best practices. Such a transition will help bring about standardization and consistency to the concept of 'control'. Importantly, shifting the goal post from promoter group to control based ownership prevalent under the internationally accepted concept including adopted in certain other SEBI regulations would add standardisation and consistency to the consolidation and reporting principle through the concept of control.

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