KEY CHANGES IN INDIA's COPORATE LAWS

(April 1, 2022 – November 30, 2022)

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FOREWORD

India's regulatory regime in the corporate sector has been witnessing swift changes. With a view to increase inbound investments, increase transparency and ensure checks and balances, the Securities and Exchange Board of India (SEBI), Ministry of Corporate Affairs (MCA) and the Reserve Bank of India (RBI) are constantly revamping regulations.

Also covered in our compendium this year, are important updates on International Financial Services Centre Authority (IFSCA). The IFSCA has revamped funds related legislation and recently launched the new set of regulations. All this has induced various businesses, to leverage this opportunity and set up their operations in International Financial Services Centre (IFSC) – reiterating the GOI's intent make IFSC a truly global investment hub.

To enable one to do business in/with India it is important to be cognizant of these changes.

To this end, ELP's team has curated a compilation on key changes in company law, securities market and foreign exchange laws.

We do hope this makes for some interesting reading and more so, serves as a ready reckoner for you and your clients.

Of course, if we can be of any assistance, please do reach out.

Regards
ELP's Corporate & Commercial Team

UPDATES: COMPANY LAW

Transfer and issuance of securities by companies to comply with foreign exchange laws | India Inc. gets extension to hold AGM/EGM through VC/OAVM till December 31, 2022

A. Compliance with foreign exchange laws while transferring and issuing shares

a. Amendment to Companies (Share Capital and Debentures) Rules, 2014

Under Rule 11 of the Companies (Share Capital and Debentures) Rules, 2014 (**Share Capital Rules**), the instrument of transfer of securities held in physical form is required to be in Form No. SH-4 (*Securities Transfer Form*) and is required to be delivered to the company within 60 days from the date of such execution.

Now, the following declaration has been inserted in the Form SH-4:

- **When Government approval under Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules) is NOT required**:

"Transferee is not required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to transfer of shares";

OR

- **When Government approval under NDI Rules is required, and if the same is procured and enclosed prior to the transfer:**

"Transferee is required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to transfer of shares and the same has been obtained and is enclosed herewith."

As a result of the aforesaid amendment, it will be essential for the company to not take on record any transfer of shares which lacks compliance with the aforesaid declarations. The aforesaid amendment has been made vide the Companies (Share Capital and Debentures) Amendment Rules, 2022 dated May 4, 2022 (available here).

b. Amendment to Companies (Prospectus and Allotment of Securities) Rules, 2014 (PAS Rules)

Rule 14 of the PAS Rules *inter alia* provides that a company shall make an offer or invitation to subscribe to securities through private placement only if such proposal has been previously approved by the shareholders of the company. This will be done by a special resolution for each of the offers or invitations.

Now, MCA has incorporated a conditionality that no offer or invitation of any securities under Rule 14 will be made to a body corporate incorporated in, or a national of, a country which shares a land border with India. An exception is made for such body corporate or the national, as the case may be, who have obtained Government approval under the NDI Rules and attached such approval with the private placement offer cum application letter.

Further, now, the applicant will be required to declare, in Form PAS-4 (*Private Placement Offer cum Application Letter*), whether the Government approval under the NDI Rules is required or not and accordingly, tick the applicable provision:

- **When Government approval is NOT required:**

  "The applicant is not required to obtain Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares"

OR

- **When Government approval is required:**

  "The applicant is required to obtain Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares and the same has been obtained and is enclosed herewith."

The said amendment will cast responsibility on the company to ensure that no private placement is made in violation of the newly introduced prohibited category unless Government approval is taken. The aforementioned amendments have been introduced vide the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022 dated May 5, 2022 (available here).

B. Relaxation in holding of AGM and EGM through VC/ OAVM till December 31, 2022

In furtherance of the earlier relaxations granted by MCA in respect of holding of AGM through VC/ OAVM, MCA has now permitted companies whose AGMs are due in the year 2022, to conduct their AGMs on or before **December 31, 2022,** through VC/ OAVM. It has been clarified that this relaxation should not be construed as conferring any extension of time for holding of AGMs by the companies under Companies Act, 2013. The aforesaid relaxation has been granted vide General Circular No. 2/2022 dated May 5, 2022 (available here).

In case of EGMs, MCA has permitted companies to hold EGMs through VC/OAVM or transact items through postal ballot in accordance with the earlier circulars till **December 31, 2022**. The extension has been given vide General Circular No. 3/2022 dated May 5, 2022 (available here).

Changes pertaining to Company Law vis-à-vis Foreign Exchange Laws, other changes

A. Subscribers and first directors to provide declaration of government approval under NDI Rules at the time of incorporation of a company

Section 7(1)(c) of the Companies Act, 2013 (**CA2013**) read with Rule 15 of the Companies (Incorporation) Rules, 2014 requires subscribers to the memorandum of association and each of the first directors named in the articles of association of the company to submit Form INC-9. Recently, the Ministry of Corporate Affairs substituted the existing Form INC-9; the new form consists of a declaration in respect of compliance under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**NDI Rules**). The subscriber/first director must declare whether such person is required to obtain government approval under the NDI Rules prior to subscription of shares.

Further, a declaration has been inserted in Part B of Form INC-32 (SPICe+) which is the application for incorporation of a company whereby the declaration shall provide that if any of the proposed directors seeking appointment are nationals of a country which shares a land border with India, necessary security clearance from Ministry of Home Affairs, Government of India shall be attached with the consent.

The above amendments were introduced vide the Companies (Incorporation) (Second Amendment) Rules, 2022 dated May 20, 2022 (available here) and shall come into effect from **June 1, 2022**.

B. Declaration of prior approval under NDI Rules while effecting corporate reorganizations/ restructuring

MCA has notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 (**Amendment Rules**), to further amend the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (**CAA Rules**) whereby companies submitting applications under Section 230 of CA2013 (*Power to compromise or make arrangements with creditors and members*) will be required to furnish a declaration in respect of prior approval under the NDI Rules.

Rule 25A of the CAA Rules, *inter alia* provides for a merger or amalgamation of a foreign company with an Indian company and vice-versa. In this regard, MCA has inserted sub-rule (4) vide the Amendment Rules to specifically deal with cases of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India wherein a declaration (in Form No. CAA-16) shall be required at the stage of submission of application under Section 230 of the CA2013.

The following declaration has been inserted in new Form No. CAA.16:

- **When Government approval under NDI Rules is NOT required:**

  "the Company/body corporate is not required to obtain prior approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019";

OR

- **When Government approval under NDI Rules IS required, and if the same is procured and enclosed prior to the transfer:**

  "the company/body corporate is required to obtain prior approval under the Foreign Exchange Management (Non-debt Instruments) Rules, and the same has been obtained and is enclosed herewith."

The aforesaid amendment has been introduced vide the Amendment Rules dated May 30, 2022 (available here).

C. Security clearance and declarations required for appointment as directors

MCA amended the Companies (Appointment and Qualifications of Directors) Rules, 2014 (**Appointment Rules**) wherein the following changes were notified:

- ***Security clearance/declaration to be attached with consent for appointment as director of a company:***

  Rule 8 of the Appointment Rules requires every person who has been appointed to hold the office of a director to, on or before the appointment, furnish to the company a consent in writing to act as such in Form DIR-2. Where the person seeking appointment is a national of a country which shares a land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India shall also be attached along with the consent. Consequent changes to Form DIR-2 have also been introduced wherein the person seeking appointment shall be required to declare whether security clearance is required for such person.

- ***Security clearance/declaration to be attached with application for Director Identification Number (DIN):***

  Rule 10 of the Appointment Rules *inter alia* provides for allotment of DIN to persons seeking appointment as director. It has been clarified that no application number shall be generated where the person applying for DIN is a national of a country which shares land border with India, unless necessary security clearance from the Ministry of Home Affairs, Government of India has been attached along with application for DIN. Accordingly, a declaration will be required to be given by the applicant in Form DIR-3.

The above amendment has been introduced vide the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 dated June 1, 2022 (available here).

D. Relaxation in filing Form CSR-2 for the preceding financial year 2020-21 till June 30, 2022

Vide notification dated February 11, 2022 (available here), MCA had introduced Form CSR-2 requiring companies that are mandated to undertake corporate social responsibility (**CSR**) activities under Section 135 of the CA2013 to furnish a report on CSR for the financial year 2020-21 on or before March 31, 2022.

In this regard, MCA has provided a relaxation whereby such companies will have to file Form CSR-2 on or before **30th June, 2022**, after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be.

The above relaxation has been provided vide Companies (Accounts) Third Amendment Rules, 2022 dated May 31, 2022 (available here).

E. Relaxation in paying additional fees in case of delay in filing Form 11 (Annual Return) by Limited Liability Partnerships up to June 30, 2022

MCA has, in view of the representations seeking extensions on the timelines for filing Form 11 (Annual Return) by limited liability partnerships (**LLP**) and for the purposes of facilitating a smooth transition from version-2 of MCA-21 to version-3 and to promote compliance on part of LLPs, decided to allow LLPs to file e-Form 11 (Annual Return of Limited Liability Partnerships) for the Financial Year 2021-2022 without paying additional fees up to June 30, 2022.

This relaxation has been issued vide General Circular dated May 27, 2022 (available here).

MCA provides 15-day period for re-submission of defective/incomplete form for removal of company's name

A. Amendment to Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016

Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 (**Removal of Names Rules**) *inter alia* provides that an application for the removal of the name of a company shall be made in Form STK-2 with the Registrar of Companies (**ROC**) along with documents as specified under Rule 4. Vide the Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022 (**Amendment Rules**), the following new clauses have been added:

- ***Re-submission of defective/ incomplete application for removal of name***: If the ROC, on examination of the application made in Form STK-2, requires further information or finds that such application or any document annexed therewith is defective or incomplete in any respect, the ROC will inform the applicant to remove the defects and re-submit the complete form within 15 days from the date of such information, failing which the ROC will treat the form as invalid in the electronic record, and will inform the applicant, accordingly. Even after re-submission of the form, if the ROC finds that the form/any document is defective or incomplete, another period of 15 days will be accorded to the applicant to remove the defect or complete the form, failing which the ROC will treat the form as invalid in the electronic record and shall inform the applicant, accordingly.
- ***Prior re-submissions not included***: Any re-submission of the application in Form STK-2 made prior to the commencement of the Amendment Rules will not be counted for the purposes of reckoning the maximum number of re-submissions of such form.
- ***Changes to Forms STK-1, STK-5 and STK-5A***: If the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation, the ROC can strike off such company's name under Section 248 of Companies Act, 2013. This language has been inserted in Forms STK-1 *(Notice by Registrar for removal of name of a company from the register of companies)*, STK-5 (*Public Notice*) and STK-5A (*Public Notice*) as one of the reasons for removal/ strike off of the name of the company.

The above changes have been introduced vide the Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022 dated June 9, 2022 (available here).

MCA prescribes procedure for physical verification of registered office of a company

In a recent amendment, Ministry of Corporate Affairs (**MCA**) has inserted a new Rule 25B under the Companies (Incorporation) Rules, 2014 (**Incorporation Rules**) providing for the procedure to be followed under Section 12(9) of the Companies Act, 2013 (**CA2013**) for physical verification of the registered office of the company. Under Section 12(9) of the CA2013, where the Registrar of Companies (**ROC**) has reasonable cause to believe that a company is not carrying on any business or operations, he can cause a physical verification of the registered office of the company.

The procedure for physical verification prescribed under the new Rule 25B is provided below:

Requirements of physical verification	The ROC, based upon the information or documents made available on MCA 21, is required to visit at the address of the registered office of the company and may cause the physical verification of the said registered office for the purposes of Section 12(9) of CA2013 in compliance with the following requirements: ▪ ***Witnesses to be present***: Physical verification to be done in the presence of 2 independent witnesses of the locality in which the said registered office is situated and may also seek assistance of the local police for such verification, if required. ▪ ***Authentication of documents***: ROC to carry the documents as filed on MCA 21 in support of the address of the registered office of the company for the purposes of physical verification and to check authenticity of the same by cross verification with the copies of supporting documents of such address collected during the said physical verification, duly authenticated from the occupant of the property whereat the said registered office is situated. ▪ ***Photograph of registered office***: ROC to take photograph of the registered office of the company while causing physical verification of the same.
Report of physical verification	The report on physical verification to contain the following information: ▪ Name and CIN of the company ▪ Latest address of the registered office of the company as per MCA 21 record ▪ Date of authorisation letter issued by ROC, and name of ROC ▪ Date and time of visit for physical verification of the registered office ▪ Location details along with landmark ▪ Details of the person available, if any, at the time of the visit (including name, address and relationship with the company, if any) ▪ Following documents are to be attached to the report: – Copy of the agreement/ownership/rent agreement/ No Objection Certificate of the registered office of the company from owner/tenant/lessor;

	– Photograph of the registered office; – Self-attested ID-Card of the person available, if any; – Any other documents.
Default in documents provided for registered office – removal of the name of company	If the registered office of the company is found to be not capable of receiving and acknowledging all communications and notices, the ROC shall send a **<u>notice to the company and all the directors of the company</u>**, of his intention to remove the name of the company from the register of companies. Such notice will also request the company and directors to send their representations along with copies of relevant documents, if any, within a period of 30 days from the date of the notice before taking further actions in accordance with Section 248 of CA2013 (*Power of Registrar to remove name of company from register of companies*).

The above amendment has been made vide the Companies (Incorporation) (Third Amendment) Rules, 2022 dated August 18, 2022 (available here).

MCA widens ambit of "small company" to further ease of doing business

With the objective of providing relaxations to more companies in terms of reduced compliance requirements available to a 'small company' under the Companies Act, 2013 (**CA2013**) and for ease of doing business, the Ministry of Corporate Affairs (**MCA)** has amended the Companies (Specification of Definition Details) Rules, 2014. With this amendment, for the purposes of definition of "small company", under Section 2(85) of CA2013, the maximum threshold for both paid up capital and turnover has been increased as follows:

	Pre-amendment threshold	Post amendment threshold
Paid Up Capital	INR 2 crore	INR 4 crore
Turnover	INR 20 crore	INR 40 crore

A few exemptions/ relaxations which are available to small company under CA2013 include:

- ***Board Meeting frequency:*** A small company is deemed to have complied with the provisions of Section 173 of CA2013, if at least 1 meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the 2 meetings is not less than 90 days.
- ***Signing of annual return***: Annual returns of a small company is required to be signed either by the company secretary, or where there is no company secretary, by the director of the company.
- ***Rotation of Auditors***: Small companies are exempt from the condition laid in Section 139(2) of CA2013, which mandatorily requires the rotation of auditors every 5 years in case of individual auditors and every 10 years in case of a firm of auditors.
- ***Preparation of financial statements***: Small companies are exempted from preparing a cash flow statement for the financial year in its preparation of financial statements.
- ***Lesser Penalties***: Section 446B of CA2013 *inter alia* provides for lesser penalties to be imposed on small companies for non-compliance of any of the provisions of CA2013.

The scope of a "small company" has been amended vide the Companies (Specification of Definition Details) Amendment Rules, 2022 dated September 15, 2022 (available here).

MCA amends CSR norms to further CSR objectives

With the objective of providing wider and clearer regulation for companies complying with Corporate Social Responsibility (**CSR**) norms under the Companies Act, 2013 (**CA2013**), Ministry of Corporate Affairs (**MCA**) has amended the Companies (Corporate Social Responsibility Policy) Rules, 2014 (**CSR Rules**). The amendments including following key changes:

- A company having any amount in its Unspent Corporate Social Responsibility Account (**UCSRA**) related to ongoing projects shall constitute a CSR Committee to comply with the CSR norms under CA2013;
- Removal of exemption from complying with CSR norms given to certain companies which ceased to come within the purview of Section 135;
- Clarity on implementing agencies which can carry out CSR activities;
- Changes in the amount that can be booked as expenditure towards Corporate Social Responsibility for companies undertaking impact assessment;
- New format for the Annual Report on CSR Activities has been provided along with revision of e-form CSR–1.

The above changes have been analyzed below:

Change	Implication
Compliance with CSR norms - Amount lying in UCSRA	Under Section 135, any amount remaining unspent pursuant to any ongoing project, is required to be transferred by the company within a period of 30 days from the end of the financial year to UCSRA. Such amount shall be spent by the company in pursuance of its obligation towards the CSR Policy within a period of 3 financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of 30 days from the date of completion of the third financial year. Now, as per the amendment, a company having any amount in its UCSRA is required to constitute a CSR Committee and comply with the provisions contained in Section 135 (2) to (6) of CA2013.
Removal of exemption from complying with CSR norms given to certain companies which ceased to come within the purview of section 135	Every company which ceased to be a company covered under section 135(1) for three consecutive financial years was not required to: (a) constitute a CSR Committee; and (b) comply with the provisions contained in Section 135(2) to 135 (6), till such time it met the criteria specified in section 135(1). Aforesaid exemption has been removed.
Implementing agencies – Scope of entities clarified | Statutory entities clarified	Now, if a company wants to set up entities to carry out CSR or wish to carry out through other entities not set up by it, then such entities would need to be a company established under section 8 of CA2013, or a registered public trust or a registered society, exempted under sub-

	clauses (iv), (v), (vi) or (via) of clause (23C) of section 10 or registered under section 12A and approved under 80G of the Income Tax Act, 1961. Further, in the event of implementing agency being statutory body constituted under an Act of Parliament or State legislature, then such body needs to be one constituted to undertake activities covered in Schedule VII of CA2013.
Impact assessment – change in CSR booking amount	A Company undertaking impact assessment may book the expenditure towards CSR for that financial year, which **shall not exceed two percent** (earlier "*five percent*") of the total CSR expenditure for that financial year or fifty lakh rupees, **whichever is higher** (earlier "*whichever is less*").

Additionally, the **Annexure II** of the CSR Rules which provides **Format for the Annual Report on CSR Activities** has been substituted with a new format and in the **e-form CSR–1**, serial number 1 and the entries relating thereto, the "***1. Nature of the entity***" serial number enlisting the entities through which CSR activities can be carried out by a company, has been substituted with a revised list.

The above amendment has been made vide Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 dated September 20, 2022 (available here) and is effective from September 20, 2022.

Non-compliance with the National Financial Reporting Authority Rules, 2018 to attract specific punishment

A. Non-compliance with NFRA Rules to attract specific punishment

The Ministry of Corporate Affairs has amended the National Financial Reporting Authority Rules, 2018 (NFRA Rules) to provide for a specific punishment for non-compliance. Contraventions of any of the provisions of the NFRA Rules, shall be punishable with a fine not exceeding INR 5,000. If the contravention is a continuing one, there is a further fine not exceeding INR 500 for every day after the first during which the contravention continues.

The above amendment has been introduced vide the National Financial Reporting Authority Amendment Rules, 2022 dated June 17, 2022 (available here).

UPDATES: SECURITIES LAWS

RPTs falling within revised materiality threshold to take shareholders' approval after April 1, 2022 | Key decisions at SEBI board meeting - Simplification of procedure for transmission of securities, revision in regulatory framework for CISs, provision of custodial services in respect of silver ETFs

A. Clarifications issued in respect of Related Party Transactions (RPTs)

SEBI had vide notification dated November 9, 2021 (available here) amended regulation 23 of the LODR Regulations which *inter-alia*, proved for a revised materiality threshold for seeking shareholders' approval, which is due to come into effect from April 1, 2022.

With the objective of providing a smooth implementation of the amended Regulation 23 of the LODR Regulations, SEBI has issued following clarifications:

- **Fresh approval from shareholders not required**: No requirement to seek fresh approval from the shareholders for an RPT that has been approved by the audit committee and shareholders prior to April 1, 2022.
- **Shareholders' approval required for material RPTs approved by audit committee prior to April 1, 2022**: Pursuant to Regulation 23(8) of the LODR Regulations, an RPT that has been approved by the audit committee prior to April 1, 2022 which continues beyond such date and becomes material as per the revised materiality threshold, shall be placed before the shareholders in the first general meeting held after April 1, 2022.
- **Omnibus approval granted for RPT**: An RPT for which the audit committee has granted omnibus approval, shall continue to be placed before the shareholders if it is material in terms of Regulation 23(1) of the LODR Regulations.
- **Explanatory statement to shareholders**: The explanatory statement contained in the notice sent to the shareholders for seeking approval for an RPT shall provide relevant information so as to enable the shareholders to take a view whether the terms and conditions of the proposed RPT are not unfavorable to the listed entity, compared to the terms and conditions, had similar transaction been entered into between two unrelated parties. The information so provided shall include but not be limited to the information specified in circular dated November 22, 2021 (available here) so as to enable to the shareholders to take an informed decision.

The above clarifications have been issued by SEBI vide circular dated March 30, 2022 (available here) and shall come into effect from **April 1, 2022**.

B. Amendments approved at the SEBI board meeting

SEBI has taken the following key decisions at its board meeting held on March 29, 2022 (press release is available here), in addition to approving the budget estimates for the financial year 2022-23:

I. Simplification of procedure for transmission of securities

With the objective of ensuring that uniform processes is followed by the Registrars to an Issue and Share Transfer Agents (RTAs)/listed companies in case of transmission of securities, SEBI has approved the following amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 **(LODR Regulations)** for easing the overall transmission process for investors:

- **Revised threshold limit for simplified documents**: The existing threshold limit for simplified documents has been revised:

Particulars	Revised limit
For securities held in physical mode per listed issuer	From INR 2,00,000 to INR 5,00,000
For securities held in dematerialized mode for each beneficiary account	From INR 5,00,000 to INR 15,00,000

- **Heirship certificate**: Legal heirship certificate or its equivalent certificate issued by competent Government authority will be an acceptable document for transmission of securities.

II. Changes to the Collective Investment Schemes (CIS) regulatory framework

In order to strengthen the regulatory framework for Collective Investment Schemes (**CIS**) in line with SEBI (Mutual Fund) Regulations, 1996, the following key amendments to the SEBI (Collective Investment Schemes) Regulations, 1999 (**CIS Regulations**) have been approved:

- **Net worth Criteria**: Enhancement of net-worth criteria and requirement of having track record in relevant field as an eligibility requirement for registration as a Collective Investment Management Company (**CIMC**).
- **Restriction on shareholding in another CIMC**: CIMC and its group/associates/shareholders are restricted to 10% shareholding or representation on board of another CIMC to avoid conflict of interest.
- **Skin in the game**: Mandatory investment of CIMC and its designated employees in the CIS to align their interest with that of the CIS.
- **Other mandatory requirements**: Mandatory requirement of minimum number of investors, maximum holding of a single investor and minimum subscription amount at CIS level.
- **Fees and expenses**: Rationalization of fee and expenses to be charged to the scheme.
- **Speedy procedures**: Reduction of timelines for offer period of scheme, allotment of units and refund of money to investors.

III. Custodial services of silver and silver related instruments by SEBI registered custodians

SEBI approved amendments to the SEBI (Custodian) Regulations, 1996, to enable SEBI registered custodians to provide custodial services in respect of silver or silver related instruments held by silver exchange-traded fund (ETFs) of mutual funds.

SEBI's relief on validity of RPT approval | Risk management framework for EGRs

A. Clarifications issued in respect of Related Party Transactions (RPTs)

In relation to RPTs, presently, Regulation 23(3)(e) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR Regulations**) provides that an omnibus approval granted by the audit committee shall be valid for a period not exceeding one year and shall require fresh approvals after expiry of one year. Further, Regulation 23(4) of the LODR Regulations requires shareholders' approval for material RPTs. Under Companies Act, 2013, Section 96(1) specifies that the time gap between two Annual General Meetings (AGMs) cannot be more than fifteen months.

In order to facilitate listed entities to align their processes to conduct AGMs and obtain omnibus shareholders' approval for material RPTs, SEBI has clarified the following:

- **Approval at AGM**:

  The shareholders' approval of omnibus RPTs approved in an AGM shall be valid upto the date of the next AGM for a period not exceeding 15 months.

- **Approval at general meeting other than AGM**:

  In case of omnibus approvals for material RPTs, obtained from shareholders in general meetings other than AGMs, the validity of such omnibus approvals shall not exceed 1 year.

The above clarification has been issued by SEBI vide circular dated April 8, 2022 (available here)

B. Comprehensive Risk Management Framework for Electronic Gold Receipt (EGR) Segment

SEBI released a comprehensive risk management framework for EGR segment, some of the key requirements under the framework are as follows:

Change	Explanation
Liquid assets	The liquid assets of the member deposited with clearing corporations (**CCs**) shall, at all times, be adequate to cover the following: ▪ ***MTM (Mark to Market) Losses***: Mark to market losses on outstanding settlement obligations of the member. ▪ ***VaR Margins***: Value at risk margins to cover potential losses for 99.9% of the days. ▪ ***Extreme Loss Margins***: Margins to cover the expected loss in situations that lie outside the coverage of the VaR margins. ▪ Any other margins as may be prescribed. Other provisions related to the aforesaid, reporting, verification of margins is provided in detail in the circular.
Rationalization of imposition of fines	The stock exchanges and CCs, in all segments to devise a standard framework for imposition of fine on the trading member/clearing member for incorrect/false reporting of margin collected from the clients.
Risk Reduction Mode	CC to ensure that the stockbrokers and clearing members are mandatorily put in risk-reduction mode when 90% of the member's collateral available

	for adjustment against margins gets utilized on account of trades that fall under a margin system including crystalized losses.
Settlement of funds	▪ The funds to be settled on gross basis at member level. ▪ CC to empanel clearing banks based on various financial and operational criteria. ▪ Clearing members to open single settlement account with any of the clearing banks.
Settlement of EGR	▪ Settlement of EGR shall be on T+1 rolling basis. ▪ Transactions to be settled on gross basis at the clearing member level and netting to be done at client level. ▪ Members will be required to maintain account with depositories including a pool account. ▪ Members to provide specific delivery instructions in favour of the CC on the settlement day. ▪ The delivering member to complete delivery instructions for transfer of EGR to Clearing Pool Account on settlement day by the specified pay-in time. ▪ The depositories will credit the receiving members' pool account/client's beneficiary account in accordance with the pay-out instructions received electronically from Clearing Corporation on the settlement day by the specified pay-out time.
Settlement Guarantee Fund, Default Waterfall and Stress Testing	CC to maintain a separate core settlement guarantee fund (Core SGF) for the EGR segment. The minimum corpus of SGF to be INR 10 crores.

The detailed risk management framework laid done by SEBI for the EGR segment has been provided under the SEBI circular dated April 11, 2022 (available here).

C. Alignment of regulatory framework for 'security cover'

SEBI, in its board meeting held on February 15, 2022 (available here) had approved the amendment to LODR Regulations for alignment of regulatory framework for 'security cover'. Accordingly, SEBI has amended Regulation 54 of the LODR Regulations and has replaced the term "asset cover" with "security cover".

Further, the amended Regulation 54(1) now provides that in respect of listed non-convertible debt securities, the secured listed entity is required to maintain 100% security cover or higher security cover as per the terms of offer document/ information memorandum and/or Debenture Trust Deed, sufficient to discharge the ***principal amount and the interest thereon*** *(prior to amendment the regulation only provided for principal amount)* at all times for the non-convertible debt securities issued.

The aforesaid amendment has been made vide the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2022 dated April 11, 2022 (available here).

Changes pertaining to LODR guidelines

A. Relaxations provided for compliance with certain provisions of the LODR Regulations

SEBI has provided the following relaxations to listed companies under the LODR Regulations:

Relevant LODR Regulation	Relaxation under the regulation
Regulation 36 (*Documents and Information to shareholders*)	Listed entities are required to send a hard copy of the annual report containing salient features of all the documents prescribed in Section 136 of the CA2013 to the shareholders who have not registered their email addresses, with 21 days before the AGM. Relaxation has been provided to listed entities from the above requirement up to **December 31, 2022.** It has been clarified that listed entities are required to send hard copy of full annual report to those shareholders who request for the same.
Regulation 44 (4) (*Meetings of shareholders and voting*)	In case of general meetings held through electronic mode only, the requirement of sending proxy forms to holders of securities in all cases mentioning that a holder may vote either for or against each resolution is dispensed with, up to **December 31, 2022**.
Regulation 47 (*Advertisement in Newspapers*)	It has been clarified that the notice of AGM published by advertisement under Regulation 47, shall contain a link to the annual report, so as to enable shareholders to have access to the full annual report.

The above relaxations are provided vide SEBI circular dated May 13, 2022 (available here).

SEBI issues guidelines for large value fund for accredited investors under the AIF regulations; mandates appointment of compliance officer for managers of AIFS

A. Guidelines for LVFs for accredited investors, mandatory appointment of compliance officer under the AIF Regulations

Guidelines for LVFs for accredited investors

Pursuant to the introduction of the framework of "accredited investors" vide the SEBI (Alternative Investment Funds) (Third Amendment) Regulations, 2021 dated August 3, 2021, the SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**) were amended to provide certain relaxations from regulatory requirements to "large value fund for accredited investors" (**LVF**) including ease of diversification norms, extension of tenure beyond 2 years, relaxation of minimum investment requirement, etc. SEBI has now laid down the following guidelines for LVF in relation to filing of LVF schemes with SEBI and extension of tenure.

Provision under AIF Regulations	Guidelines
Exemption from filing of private placement memorandum with SEBI by LVFs *In terms of proviso to Regulation 12 of AIF Regulations, LVFs are exempt from filing their placement memorandum with SEBI through merchant banker and incorporate comments of SEBI, if any, in their placement memorandum i.e. LVFs can launch their scheme under intimation to SEBI.*	In this regard, following has now been prescribed: ▪ ***<u>Submission of undertaking while filing placement memorandum</u>***: While filing the placement memorandum for LVF schemes with SEBI, a duly signed and stamped undertaking by CEO of the manager to the AIF (or person holding equivalent role or position depending on the legal structure of manager) and compliance officer of manager to the AIF is to be submitted in the format as prescribed by SEBI. The format for the undertaking *inter alia* provides affirmation on the following: - Independent exercise of due-diligence regarding information given in the placement memorandum, including the veracity and adequacy of disclosure made therein; - AIF, its sponsor and manager are fit and proper persons; - All the material disclosures in respect of the fund raising, investment by the scheme and management thereof have been made in the placement memorandum and are based on latest available information; - Satisfaction that the proposed activities of the scheme are bonafide, fall within the objectives of the fund as specified in the articles of association or trust deed or partnership deed of the AIF and are to meet the stated investment objective; - Disclosures made in the placement memorandum are true fair and necessary to enable the investors to make an

	- informed decision with respect to the investment in the proposed scheme and are in accordance with the AIF Regulations and applicable legal requirements; - Sponsor or manager are capable of fulfilling the requirement of maintaining continuing interest in the scheme as per the AIF Regulations; Details of disclosures in the placement memorandum with respect to compliance with provisions of the AIF Regulations, applicable to the proposed LVF scheme, and information with respect to disclosures in the placement memorandum are also required to be annexed to the undertaking as per the format now prescribed by SEBI. ▪ ***<u>Deadline for submission of undertaking if LVF scheme has already been filed by SEBI</u>***: In case the LVF schemes have already been filed with SEBI, a similar signed and stamped undertaking by CEO of the manager to the AIF (or person holding equivalent role or position depending on the legal structure of manager) and compliance officer of manager to the AIF is to be submitted to SEBI on or before **<u>July 31, 2022.</u>**
Extension of tenure of AIF beyond 2 years for LVFs *Close ended AIFs are permitted to extend its tenure up to 2 years with the approval of 2/3rd of its unit holders by value of their investment in the said AIF. LVFs are exempt from this requirement whereby LVFs are permitted to extend its tenure beyond 2 years, subject to terms of the contribution agreement, other fund documents and such conditions as may be specified by SEBI from time to time.*	In this regard, the following conditions have been prescribed: ▪ ***<u>Terms and conditions for extension to be laid down in relevant fund documents</u>***: The placement memorandum, contribution agreement or other fund documents of LVF shall lay down terms and conditions for extension of the tenure beyond 2 years to enable the investors to take an informed decision. ▪ ***<u>Approval required from trustee/board of directors/designated partners</u>***: LVF shall be required to obtain approval from its trustee/board of directors/designated partners (depending upon the legal structure of the LVF) for extending the tenure beyond 2 years, at least 1 month before expiration of the fund tenure or extended tenure. ▪ ***<u>Liquidation and winding up of LVF if requisite conditions are not fulfilled</u>***: If the requisite conditions specified in the placement memorandum, contribution agreement or other fund documents of LVF for extension of tenure beyond 2 years are not fulfilled, LVF shall liquidate and wind up in accordance with AIF Regulations and circulars issued thereunder.

Requirement of Compliance Officer for Managers of all AIFs

All AIFs are now required to ensure that the manager to the AIF designates an employee or director as "compliance officer" who shall be a person other than CEO of the manager (or such equivalent role or position depending on the legal structure of manager). The compliance officer shall be responsible for monitoring compliance with the provisions of the AIF Regulations and circulars issued thereunder.

The above guidelines have been issued vide SEBI circular dated June 24, 2022 (available here).

SEBI issues guidelines for investment in overseas companies by AIF/VCF: overseas investee company no longer required to have an Indian connection

In an important development, SEBI has issued guidelines for investment in overseas companies by alternative investment funds (**AIF**)/venture capital funds (**VCF**).

Pursuant to the erstwhile SEBI (Venture Capital Funds) Regulations 1996 and the present SEBI (Alternative Investment Funds) Regulations, 2012, AIF/VCF are permitted to invest in securities of companies incorporated outside India subject to such conditions or guidelines that may be stipulated or issued by the RBI and SEBI from time to time. In this regard, SEBI has issued guidelines laying down the following key aspects:

Summary of key requirements:

Application for allocation of overseas investment limit	AIFs/VCFs shall file an application to SEBI for allocation of overseas investment limit *inter alia* containing the following details: ▪ ***Applicant and its scheme***: Name of the AIF/VCF, category of AIF, registration number, name of scheme, name and address of branch of the bank through which the foreign currency transaction is proposed to be made ▪ ***Details of overseas investee company***: Name, country, date of incorporation of the overseas investee company, whether any investor of the AIF is a connected person of the overseas investee company ▪ ***Details of investment***: Type of instrument in which investment is proposed, nature of investment, amount proposed to be invested, amount invested in previous overseas investment, investible corpus of the scheme of the AIF/VCF ▪ ***Details of overseas investments made by the scheme in the past if any***. ▪ ***Undertaking by Trustee/Board/Designated Partners of the AIFs/VCFs***: Undertaking in respect of independent due diligence being carried out for the proposed investment, and satisfaction of (i) the bona fide nature of the proposed investment, (ii) its alignment with the investment objective of the scheme, and (iii) compliance with the regulatory framework. ▪ ***Undertaking by Manager of the AIF/VCF***: Undertaking in respect of *inter alia* the following: – Manager has exercised due diligence with respect to the investment decision. – Proposed investment is an equity/equity linked investment. – Overseas investee company is a foreign company whose shares are not listed on any recognized stock exchange in India or abroad. – AIF/VCF will not invest in a joint venture/ wholly owned subsidiary while making overseas investments.

	– Adherence with Foreign Exchange Management Act, 1999 (**FEMA**) and regulations issued thereunder, and other guidelines specified by RBI in respect of overseas direct investment.
No requirement for overseas investee company to have an Indian Connection	The requirement of the overseas investee company to have an Indian Connection, as specified in previous SEBI circulars dated August 9, 2007 (available here) and circular dated October 1, 2015 (available here), has been done away with.
Restriction on investment in overseas investee company incorporated in certain countries	▪ AIFs/VCFs to invest in an overseas investee company, which is incorporated in a country whose securities market regulator is: – a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or – a signatory to the bilateral Memorandum of Understanding with SEBI. ▪ AIFs/VCFs shall not invest in an overseas investee company, which is incorporated in a country identified in the public statement of Financial Action Task Force (FATF) as: – a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or – a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with FATF to address the deficiencies.
Liquidation of investments made in overseas investee company	If an AIF/VCF liquidates investment made in an overseas investee company previously, the sale proceeds received from such liquidation, to the extent of investment made in the said overseas investee company, shall be available to all AIFs/VCFs (including the selling AIF/VCF) for reinvestment.
Sale/transfer of investment in overseas investee company	AIFs/VCFs to transfer/sell the investment in overseas investee company only to the entities eligible to make overseas investments, as per the extant guidelines issued under FEMA.
Furnishing of details of sale/ disinvestment	AIFs/VCFs to furnish the sale/divestment details of the overseas investments to SEBI in the prescribed format within 3 working days of the divestment for updating the overall limit available for overseas investment by AIFs/VCFs. ***All the overseas investments sold/divested by AIFs/VCFs till date, shall also be reported to SEBI in the prescribed format within 30 days from the date of the circular.***

The above guidelines have been issued vide SEBI circular date **August 17, 2022** (available here).

SEBI permits FPIs to participate in exchange traded commodity derivatives market - EFEs mechanism discontinued

In continuation of the decision taken at SEBI board meeting dated June 29, 2022 (available here) to allow Foreign Portfolio Investors (**FPIs**) to participate in Exchange Traded Commodity Derivatives (**ETCDs**) market, SEBI has now laid down conditions for participation of FPIs in ETCDs. ***With this, the existing EFE (Eligible Foreign Entities) route for participating in ETCDs has been discontinued***.

Salient features for participation of FPIs in ETCDs are as under:

- ***Trading in non-agricultural commodity derivative***: To begin with, FPIs will be allowed to participate in cash settled non-agricultural commodity derivative contracts and indices comprising such non-agricultural commodities.
- ***FPIs to be subject to risk management measures***: FPIs desirous of participating in ETCDs shall be subject to risk management measures applicable from time to time.
- ***Position Limits for participation of FPIs in ETCDs***:
  - FPIs other than individuals, family offices and corporates may participate in eligible commodity derivatives products as 'Clients' and shall be subject to all rules, regulations and instructions, position limit norms as may be applicable to clients, issued by SEBI and stock exchanges, from time to time.
  - FPIs belonging to categories viz. individuals, family offices and corporates will be allowed position limit of 20% of the client level position limit in a particular commodity derivative contract.
- ***Compliance with SEBI regulations***: The participation of FPIs including individuals, family offices and corporates shall be subject to compliance with the provisions of SEBI (Foreign Portfolio Investors) Regulations, 2019, SEBI (Custodian) Regulations, 1996 and other applicable SEBI circulars on ETCDs.
- ***Stock Exchanges/Clearing Corporations may lay down additional requirements***: Stock Exchanges/Clearing Corporations may specify additional safeguards/conditions, as deemed fit, to manage risk and ensure orderly trading in ETCDs.

These changes have been made vide SEBI Circular dated September 29, 2022 (available here).

SEBI penalizes Independent Directors and KMP for misstatement in financial statements

Summary of adjudication order in the matter of Bombay Dyeing and manufacturing company limited dated October 31, 2022

Background

SEBI conducted an investigation to ascertain whether the books of accounts of Bombay Dyeing and Manufacturing Company Limited (**Company**) were manipulated for the financial years beginning from FY 2011-12 up to FY 2018-19 (**Investigation Period**). The investigation revealed that the Company, by entering into various memoranda of understanding (**MoUs**) with Scal Services Limited (**Scal**) (a group company of the Company whose entire shareholding was directly/indirectly held by the Company) during FY 2011-12 to FY 2017-18 and by subsequently recognizing revenue on the basis of aforesaid MoUs and not consolidating the transactions carried out with Scal, had inflated its sales and profits with respect to its real estate segment during FY 2011-12 to FY 2017-18 to the tune of approximately INR 2500 crores and INR 1300 crores respectively.

Allegations under the SCN

The SCN alleged that the independent directors who were also members of the Audit Committee of the Company (Noticees No. 1 to 5) failed to carry out adequate due diligence and exercise independent judgment as members of the audit committee of a listed company, to ensure that financial statements are free from material misstatement.

Further, the SCN has alleged that Noticees No. 6 to 9, in their capacities as CFOs of the Company throughout the Investigation Period, have issued certificate in the annual reports of the Company during the Investigation Period *inter alia* certifying that the financials of the Company presented true and fair view of its affairs and did not contain any misleading statement.

Key points regarding the facts of the matter:

On an analysis of the shareholding patterns of the Company and Scal and other group companies, the Adjudicating Officer (**AO**) found that during the Investigation Period, the Company held the entire share capital of Scal directly as well as indirectly through other group companies. The Company, along with Scal, executed a scheme to record non-genuine sales made to Scal to the tune of approximately INR 2,500 crores and profits to the tune of approximately INR 1300 crores during FY 2011-12 to FY 2017-18 by entering into MoUs with Scal. During the said period, the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of the Company in Scal. The entire shareholding in Scal was held by the Company through various other investment companies of the Group, and therefore, the Company was indeed exercising significant influence over Scal directly/indirectly.

Issue No.	Issue	Observations/ Findings of the AO
I.	Whether the Noticee 1 to 5 (Independent Directors and members of the	**A. Role of members of the audit committee** In order to understand the role of the members of the Audit Committee, the AO noted a recommendation of the Kumar Mangalam Birla Committee, which led to the insertion of Clause 49 in the Listing Agreement: "*a qualified and independent audit committee should be set*

	Audit Committee of the Company) have failed to comply with provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the LODR Regulations and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of LODR Regulations?[1]	*up by the board of a company. This would go a long way in enhancing the credibility of the financial disclosures of a company and promoting transparency*". In this regard, the Kumar Mangalam Birla Committee had inter alia observed that: *"The audit committee has an important role to play in this process, since the audit committee is a subgroup of the full board and hence the monitor of the process…. The committee's job is clearly one of oversight and monitoring and in carrying out this job it relies on senior financial management and the outside auditors."* The AO observed that ***the Noticees had an important role to play as members of the Audit Committee and as a subgroup of the Board of Directors. The Noticees were required to monitor the disclosures and accuracy of the same as a monitor of the process. As a result of the Noticees' failure to discharge their function as members of the audit committee, the Company was able to inflate its sales and profits with respect to its real estate segment. In view of the above, the AO found that the Noticees have failed in its duty to exercise oversight of the Company's financial reporting process and disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible.*** **B. AO's Findings:** **1. In respect of the accounts of the Company:** The AO noted that Noticees 1 to 5 were independent directors of the Company as well as audit committee members and that they reviewed the annual accounts of the Company which included balance sheet, profit & loss account, cash flow statement and auditor's report for FY 2011-12 to FY 2017-18, in their capacities of being the Audit Committee members. In this regard, it was noted that the Audit Committee, under the erstwhile Clause 49 of the Listing Agreement and LODR Regulations has been equipped with the powers to seek information from any employee, obtain outside legal or other professional advice, secure attendance of outsiders with relevant expertise, if it considers necessary. It was observed that the Noticees did not seek any explanation and did not provide any specific reason with respect to reduction in shareholding in Scal by the Company. On an analysis of the facts of the matter, it was observed that Scal was an 'associate' of the Company and in terms of the relevant accounting standards, the Company was liable for accounting the sales made to Scal and the revenue generated therefrom to the extent of the Company's interest in Scal. The Company failed to comply with the same. In this regard, the Noticees submitted that they had relied

[1] Relevant provisions of law for Issue I have been reproduced in Annexure A hereinbelow.

		on the opinions provided by the Chartered Account firm. However, it was noted in the order that the Company had not disclosed all the relevant information to the Chartered Accountant firm to give a true and correct view of whether Scal was an associate. ***The Noticees being Independent Directors and members of the Audit Committee of the Company should have realized the same and not relied on the Opinion of the Chartered Accountant firm without applying their mind.*** **2. In respect of disclosures of related parties and related party transactions** The AO found that the Company was exercising significant influence over Scal and therefore, the Company ought to have shown Scal as an "associate" for FY 2014 -15 under the Erstwhile Listing Agreement and from FY 2015- 16 to FY 2016- 17 in terms of LODR Regulations, which it failed to do. The Noticees have submitted that they have relied on the opinions provided by Mr. N. D. Gupta on whether Scal can be treated as "associate company" under AS – 18. However, as noted above, the Company had not disclosed all the relevant information to Mr. N. D. Gupta to enable him to give a true and correct view of whether Scal was an associate company or not**.** ***The Noticees being Independent Directors and members of the Audit Committee of the Company, right from the beginning of the Investigation Period, should have realized the same and not relied on the opinion of Mr. N. D. Gupta without applying their mind.*** **C. Conclusion:** The Noticees were held liable of violating the provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the LODR Regulations and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of LODR Regulations for the period from FY 2014 – 15 to FY 2017 -18.
II.	Whether the Noticee nos. 6 to 9 (CFOs of the Company throughout the Investigation Period) respectively have violated Clause 49(V) of the Listing Agreement, Clause 49(IX) of the Listing Agreement (post amendment dated	**A. Role of CFO:** In terms of Clause 49(V) of the Listing Agreement/ Clause 49 (IX) of the Listing Agreement/ Regulation 17(8) of LODR Regulations, the CFO of a listed company is required to certify that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations. **B. AO's Findings** The CFOs throughout the Investigation period signed the financial statements of the Company as well as the CEO/CFO certification as

	17/04/2014) read with Regulation 103 of the LODR Regulations and Regulation 17(8) & 33(2)(a) of the LODR Regulations?[2]	required under the applicable laws. The CFOs are expected to ensure compliance with the financial reporting, other regulatory and legal requirements which has been captured in Clause 49(V) of the Listing Agreement/ Clause 49 (IX) of the Listing Agreement/ Regulation 17(8) of LODR Regulations. In this role, the CFO is also required to communicate with the investors in a fair and transparent manner and thereby, enhance the investor's trust and confidence. Therefore, the ***CFOs have a critical role to play in the scheme of the things under the erstwhile Listing Agreement and the LODR Regulations***. Based on the analysis of the facts of the matter, the AO found that the Noticees had clearly violated the duty cast upon them. The AO found that that Noticee Nos. 7 to 9 (CFOs of the Company throughout the Investigation Period) signed the CEO/CFO Certification to the Board of the Company for the respective financial years as noted above and violated the following provisions which required them to certify that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations. Furthermore, it was noted that Clause 49 (IX) (A) of the Listing Agreement (post amendment dated April 17, 2014) and Clause A of Part B of Schedule II of the LODR Regulations clearly state that CFO shall certify to the Board that "they have reviewed the financial statements".
	Delay in issuance of the SCN	The Noticees in their reply dated May 30, 2022 stated that the SCN dated August 30, 2021, with respect to the alleged violations that took place in FY 2011-12 to FY 2018 -19, has been issued after a delay of 9 years. The Noticees have submitted that there has been an inordinate delay in issuing the SCN and therefore, imposition of penalty would be unjustified and arbitrary. In this regard, the AO relied on the observations of the Hon'ble Supreme Court in ***SEBI* v. *Sunil Khaitan*** (Civil Appeal No. 8249 of 2013): *"In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period.* ***What would be the reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge****. Though, no hard and fast rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors.*

[2] Relevant provisions of law for Issue II have been reproduced in Annexure B hereinbelow.

		Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/officer to consider the question objectively, fairly and in a rational manner." The AO noted that SEBI received complaints against the Company in 2019, based on which an investigation was initiated in the matter to *inter alia* examine possible violations of the provisions of the SEBI Act, SEBI (PFUTP) Regulations, 2003, LODR Regulations and Listing Agreement during the Investigation Period. The Investigation Report was prepared and finalized in June 2021. Thereafter, after examining the relevant evidence, SCN dated August 31, 2021 was issued to the Noticees. ***The AO inter alia observed that although SEBI became aware of the scheme devised by the Company in 2019, the scheme was devised in such a manner that it would not be easily detected by any regulatory body. Therefore, keeping in mind the observations of the Hon'ble Supreme Court in SEBI v. Sunil Khaitan, it was found that the contention of the Noticees that there has been an inordinate delay in issuing the SCN, and therefore, imposition of penalty is arbitrary is not tenable.***
III.	Does the violation, if any, by the Noticees attract monetary penalty under Section 15 HB of the SEBI Act?[3]	Noticee Nos. 1 to 5 have failed to carry out adequate due diligence and exercise independent judgement as members of the Audit Committee of a listed company, to ensure that financial statements are free from material misstatement, and therefore, violated the provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the LODR Regulations and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of LODR Regulations. The Noticee Nos. 7 to 9 in their capacities as CFO of the Company have issued certificate in the Annual Reports of the Company during the Investigation Period *inter-alia* certifying that the financials of the Company presented true and fair view of its affairs and did not contain any misleading statement. All Noticees except Noticee no. 6 (erstwhile CFO of the Company) are liable to be imposed with appropriate penalty under Section 15HB of the SEBI Act, 1992.
IV.	If so, what should be the monetary penalty that can be imposed taking into consideration the factors mentioned in	Because of the failure of the Noticees to carry out their responsibilities laid down in the LODR Regulations, the revenues and profit of the Company were inflated by approximately INR 2500 crores and INR 1300 crores respectively, during the period from FY 2011-12 to FY 2017-18. The AO found that Noticee nos. 1 to 5 as members of the Audit Committee failed in their duty to exercise oversight of the Company's

[3] Relevant provisions of law for Issue III have been reproduced in Annexure C hereinbelow.

	Section 15J of the SEBI Act?[4]	financial reporting process and disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible. Further, Noticee Nos. 7 to 9 as CFOs wrongly certified that that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations. As a result of the same incorrect and misleading financial results have been published on the stock exchange under Regulation 30 of LODR Regulations which have been relied upon by the investors of the securities market to make their investment decisions.

Current Status:

The Company has filed an appeal with the Securities Appellate Tribunal (**SAT**) against SEBI's adjudication order dated October 31, 2022.

ANNEXURE A
RELEVANT PROVISIONS FOR ISSUE I

Listing Agreement
Clause 49 - Corporate Governance
The company agrees to comply with the following provisions:
…
II. Audit Committee
…
(D) Role of Audit Committee
The role of the audit committee shall include the following:
1. Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible.

Listing Agreement (post amendment dated April 17, 2014)
49. Corporate Governance
…
…
III. Audit Committee
…
…
D. Role of Audit Committee
The role of the Audit Committee shall include the following:
1. Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible;

SEBI (LODR) Regulations, 2015

[4] Relevant provisions of law for Issue IV have been reproduced in Annexure D hereinbelow.

Audit Committee.
18. …
…
…
(3) The role of the audit committee and the information to be reviewed by the audit committee shall be as specified in Part C of Schedule II.

Repeal and Savings
103. (1) On and from the commencement of these regulations, all circulars stipulating or modifying the provisions of the listing agreements including those specified in Schedule X, shall stand rescinded.
(2) Notwithstanding such rescission, anything done or any action taken or purported to have been done or taken including any enquiry or investigation commenced or show cause notice issued in respect of the circulars specified in sub-regulation (1) or the Listing Agreements, entered into between stock exchange(s) and listed entity, in force prior to the commencement of these regulations, shall be deemed to have been done or taken under the corresponding provisions of these regulations.

SCHEDULE II: CORPORATE GOVERNANCE
…
…
…
PART C: ROLE OF THE AUDIT COMMITTEE AND REVIEW OF INFORMATION BY AUDIT COMMITTEE
A. The role of the audit committee shall include the following:
<u>(1) oversight of the listed entity's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible;</u>

ANNEXURE B
RELEVANT PROVISIONS FOR ISSUE II

<u>Listing Agreement</u>
Clause 49 - Corporate Governance
The company agrees to comply with the following provisions:
…
V. CEO/CFO certification
The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that:
(a)They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:
<u>(i) these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;</u>
<u>(ii) these statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.</u>

<u>Listing Agreement (post amendment dated April 17, 2014)</u>
49. Corporate Governance
…
IX. CEO/CFO certification

The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that:
A. They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:

1. these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;
2. these statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

SEBI (LODR) Regulations, 2015
Board of Directors.
17.
…
…
(8) The chief executive officer and the chief financial officer shall provide the compliance certificate to the board of directors as specified in Part B of Schedule II.

Repeal and Savings
103. (1) On and from the commencement of these regulations, all circulars stipulating or modifying the provisions of the listing agreements including those specified in Schedule X, shall stand rescinded.
(2) Notwithstanding such rescission, anything done or any action taken or purported to have been done or taken including any enquiry or investigation commenced or show cause notice issued in respect of the circulars specified in sub-regulation (1) or the Listing Agreements, entered into between stock exchange(s) and listed entity, in force prior to the commencement of these regulations, shall be deemed to have been done or taken under the corresponding provisions of these regulations.

SCHEDULE II: CORPORATE GOVERNANCE
…
PART B: COMPLIANCE CERTIFICATE
The following compliance certificate shall be furnished by chief executive officer and chief financial officer:
A. They have reviewed financial statements and the cash flow statement for the year
and that to the best of their knowledge and belief:

(1) these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;
(2) these statements together present a true and fair view of the listed entity's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

ANNEXURE C
RELEVANT PROVISIONS FOR ISSUE III

"Penalty for contravention where no separate penalty has been provided.
15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees."

ANNEXURE D

RELEVANT PROVISIONS FOR ISSUE IV

*"**Factors to be taken into account while adjudging quantum of penalty**.*

15J. While adjudging quantum of penalty under 15-I or section 11 or section 11B, the Board or the adjudicating officer shall have due regard to the following factors, namely: —

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

Explanation. —For the removal of doubts, it is clarified that the power to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section."

Listed Companies - To Disclose or Not? SEBI Attempts to Provide Clarity

Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR Regulations**) requires listed entities to disclose material events and information to the stock exchanges. Events specified in Para A of Part A of Schedule III of LODR Regulations (**Para A/Mandatory Disclosures**) are deemed to be material events which listed entities are required to disclose. Events enumerated in Para B of Part A of Schedule III of LODR Regulations (**Para B/Discretionary Disclosures**) are required to be disclosed based on application of the guidelines for materiality, which the listed entities are required to frame (**Materiality Policy**) based on the criteria specified in regulation 30(4) of LODR Regulations.

Further, Annexure I to SEBI circular no. CIR/CFD/CMD/4/2015 dated September 09, 2015 (available here) on 'Continuous Disclosure Requirements for Listed Entities' (**Circular**) specifies the details which a listed entity needs to disclose for the events specified under Para A and Para B.

With a view to streamline the disclosure requirements for material events and information under Regulation 30 of the LODR Regulations, SEBI has issued a consultation paper (**Consultation Paper**) to review various aspects of the disclosure requirements prescribed under the LODR Regulations and propose modifications/ amendments to the same. Key proposals include:

A. AMENDMENTS TO REGULATION 30 OF LODR REGULATIONS

Proposal	Need for modification/addition	Details of Proposal
Materiality Threshold prescribed for disclosure of events specified under Para B	It was observed that many entities do not disclose such events specified under Para B on the ground that they are not considered material by them as per their Materiality Policy framed in terms of the criteria prescribed in regulation 30(4) of LODR Regulations. Further, most entities are seen to be following a very generic Materiality Policy, simply reproducing therein merely the regulatory provisions under LODR Regulations, affording them a lot of discretion to decide as to whether or not to disclose an event specified under Para B.	It is therefore proposed to make the provision of Regulation 30(4) of LODR Regulations more objective and non-discretionary by introducing a quantitative criteria of minimum threshold for disclosure of events specified under Para B, which will also bring in uniformity in the Materiality Policy across listed entities. Accordingly, it has been proposed that the listed entities shall disclose an event or information specified under Para B whose threshold value or the expected impact in terms of value exceeds the lower of the following: ▪ 2% of turnover, as per the last audited standalone financial statements of the listed entity; ▪ 2% of net worth, as per the last audited standalone financial statements of the listed entity; ▪ 5% of three-year average of absolute value of profit/loss after tax, as per the last 3 audited standalone financial statements of the listed entity.

Materiality Policy to assist employees in identifying potential material events / information	Under Regulation 30(4), listed entities may provide additional quantitative threshold or criteria for determining materiality of events in their Materiality Policies. The Consultation Paper envisages a situation in a listed entity when a certain material event or information may originate at ground level to which the key managerial personnel (**KMPs**) authorized by the board of directors to determine the materiality of an event or information as per the Materiality Policy of the entity may not have immediate access to. This may lead to non-disclosure of the event on time even if the said event or information is material.	It is proposed to specify the following under clause (ii) of Regulation 30(4) of LODR Regulations: ▪ Materiality Policy of the listed entity shall not dilute any requirements specified under this regulation. ▪ Materiality Policy of the listed entity shall be framed in a manner so as to assist employees in identifying potential material event or information which shall be escalated and reported to the relevant Key Managerial Personnel for determining materiality of the event or information and for making disclosure to stock exchange(s).
Timelines for disclosure of certain events to be reduced to 12 hours	As per Regulation 30(6) of LODR Regulations, the timeline for disclosure of events or information is within twenty-four hours from the occurrence of the event or information. In certain instances, it was observed that the disclosure of an event by the listed entity was made at the last hour, by which time the information about the said event had already been circulated publicly in the media. It was also observed that at times, the information had to be disclosed by the listed entities only after queries were raised by stock exchanges based on media reports.	It is proposed that for certain material events or information which emanate from the listed entity, the timeline for disclosure by the entity shall be reduced from 24 hours to 12 hours. The proposed timeline for disclosure of events specified under Part A of Schedule III of LODR Regulations has been provided in Annex II of the Consultation Paper.
Mandatory verification of market rumours for the	As per Regulation 30(11) of LODR Regulations, a listed entity may on its own initiative, confirm or deny any reported event or information to stock exchange(s).	In addition to the general provision of Regulation 30(11) of LODR Regulations, it is proposed to add a proviso to regulation 30(11) as below:

top 250 listed entities	Verification of reported events or information which may have material effect on the listed entity is essential to avoid establishment of a false market sentiment or impact on the securities of the entity. With the growing influence of print, television and digital media, companies need to keep pace and ensure verification of such rumours, in order to stay contemporary.	*"Provided that top 250 listed entities shall necessarily confirm or deny any event or information reported in the mainstream media, whether in print or digital mode, which may have material effect on the listed entity under this regulation.* *Explanation – The top 250 listed entities shall be determined on the basis of market capitalization, as at the end of the immediate previous financial year."*
Disclosure of communication from any regulatory, statutory, enforcement or judicial authority	Often, disclosures under regulation 30 of LODR Regulations are made by listed entities pursuant to receipt of a communication (notice, order, direction, etc.) from any regulatory, statutory, enforcement or judicial authority. As a best practice, many listed entities also disclose a copy of the said communication or its web link, if available. However, some companies use their discretion to their advantage and do not disclose such communication(s). Hence, for those companies such material information may not be available to the investors. It is noted that some of these communications may contain confidential information or may have regulatory restriction on disclosure and hence, it may pose a challenge for some companies to make upfront disclosure of such communications.	It is proposed that a provision may be added in Regulation 30 of LODR for enabling SEBI to come out with a guidance for disclosure of such communications.

B. AMENDMENTS TO PARA A AND PARA B – ADDITIONAL EVENTS PROPOSED TO BE ADDED

In order to address the gaps identified, remove ambiguity and to enhance transparency and availability of information to the investors, the Consultation Paper proposes to include certain additional events and also to modify certain events specified under Para A and Para B.

PROPOSALS IN RESPECT OF PARA A / MANDATORY DISCLOSURES		
Events proposed to be added to Para A		
Proposal	**Requirement for modification**	**Details of Proposal**
Announcements/ communications made to any form of mass communication media by directors or promoters or key managerial personnel or senior management	Keeping track of all the announcements and communication made by the listed entity or its officials from time to time and through different media forums can be difficult and impractical for investors. It may give rise to information asymmetry despite the necessary announcement having been made by the listed entity at different forums. In general, such media announcements are made since they are considered significant from the perspective of the listed entity.	For the benefit of the investors, mandating disclosure of all such announcements and communication at one place will promote equal access to information to all the stakeholders, and accordingly, the following language is proposed to be added: *"Announcement or communication to any form of mass communication media by directors or promoters or key managerial personnel or senior management of a listed entity, in relation to the listed entity, which is not already made available in the public domain by the listed entity."*
Disclosure of regulatory actions	Although disclosure of "regulatory action(s) with impact" is covered under sub-para 8 of Para B, the Circular does not explicitly specify regulatory action(s) that need to be disclosed.	Mandating such disclosures under Para A will provide necessary information to the investors, and accordingly the following language is proposed: *"Action(s) taken or initiated by any regulatory, statutory, enforcement or judicial authority against the listed entity or its directors or key managerial personnel or senior management or promoter or subsidiary, in relation to the listed entity, towards the following: suspension; imposition of fine/penalty; settlement of proceedings; debarment; disqualification; closure of operations; sanctions imposed; warning or caution; search or seizure; inspection; investigation into affairs of the entity; and re-opening of accounts under section 130 of the Companies Act, 2013."* It is also proposed to specify disclosure of the following details along with the disclosure of the above-mentioned event: ▪ *Name of the authority*.

		▪ *Nature and details of the action(s) taken or initiated.* ▪ *Date of receipt of direction or order, including any ad-interim or interim orders, or any other communication from the authority.* ▪ *Details of the violation(s) committed.* ▪ *Impact on financial, operational or other activities of the listed entity.*
Voluntary revision of financial statements or report of the board of directors	Revision of financial statements or report of the board of directors of a listed entity is a material event which may impact investment decisions of the investors.	Mandating such disclosure under Para A will provide necessary information to the investors, and accordingly, the following language has been proposed: *"Voluntary revision of financial statements or the report of the board of directors of the listed entity under section 131 of the Companies Act, 2013."*
Disclosure of letter of resignation of KMP/ senior management/ director	At present, disclosure of letter of resignation, along with detailed reasons for the resignation, is mandated only in case of resignation of auditors and independent directors under sub-para 7A and 7B of Para A, respectively. Additionally, reasons for resignation of key managerial personnel, senior management and directors other than independent director is also material information for investors.	Following language has been proposed: *"In case of resignation of a key managerial personnel or a senior management or a director other than independent director, the letter of resignation along with detailed reasons for the resignation as given by the key managerial personnel or the senior management or the director shall be disclosed to the stock exchanges by the listed entities within seven days from the date of resignation."*
Disclosure of indisposition/ unavailability of MD/CEO for more than 1 month	The MD/CEO of a company has significant roles and responsibilities in the management of the company who also instils confidence among the investors and other stakeholders regarding proper functioning of the company. In case the MD / CEO is not available to perform his roles and responsibilities for a long period of more than a month, the same	Following language has been proposed: *"The Managing Director or the Chief Executive Officer of the listed entity is indisposed or unavailable to fulfil requirements of his/her role in a regular and consistent manner for more than one month."*

	should be disclosed to the investors.	
Events proposed to be modified in Para A:		
Meaning of "acquisition" under sub-para 1 of Para A	At present, listed entity acquiring control, or 5% or more of the shares or voting rights in a company is required to be disclosed. However, there may be a situation where a listed entity acquires shares in a company without effecting any change in its shareholding in the company. This may occur due to equal investment in the company by all the shareholders of the company. Such an acquisition may however need to be treated as material event if the cost of acquisition exceeds the materiality threshold as discussed in the Consultation Paper.	The said minimum threshold is proposed to be added in the explanation of 'acquisition' under sub-para 1 of Para A. Further, it may be clarified that acquisition can be in an existing company or in a newly incorporated company as well.
Disclosure of "sale of stake in an associate company" and "sale or disposal of the whole or substantially the whole of an undertaking(s)" in sub-para 1 of Para A	At present, disclosure of sale of disposal of any unit(s), division(s) or subsidiary of a listed entity is required. The sale of stake in an associate company or sale or disposal of an undertaking of the listed entity are also material information for the investors.	Accordingly, it is proposed to add disclosure of sale of stake in an associate company and sale or disposal of the whole or substantially the whole of an undertaking(s) of the listed entity by modifying sub-para 1 of Para A.
Explanation for "sale or disposal of subsidiary" and "sale of stake in associate company" in sub-para 1 of Para A	No explanation is provided for 'sale' or 'disposal' under sub-para 1 of Para A, especially with respect to subsidiaries or associate companies, which creates an ambiguity. Since any additional 2% acquisition of shares or voting rights in any company requires disclosure under sub-para 1 of Para A, the same threshold is proposed for selling of shares or voting rights	Accordingly, the following explanation is proposed to be added in sub-para 1 of Para A: *"sale or disposal of subsidiary" and "sale of stake in associate company" shall include –* *(i) ceasing control in the subsidiary; or,* *(ii) sale or agreeing to sell more than two per cent of shares or voting rights in the subsidiary or associate company."*

	of the subsidiary or associate company.	
Exemption from disclosure of inter-se transfer of shares in sub-para 1 of Para A	It is noted that an *inter-se* transfer of the shares or voting rights in a subsidiary or an associate company between the listed entity and any of its wholly owned subsidiary(ies) may not result in any change in the ultimate ownership of the shares or voting rights of the listed entity.	The Consultation Paper has invited comments on whether such *inter-se* transfer of shares may be exempted from disclosure.
Disclosure of revision ratings and new ratings in sub-para 3 of Para A	The Circular specifies disclosure of both revision in ratings as well as new ratings.	Sub-para 3 of Para A which currently states '*Revision in Rating(s)*' may be modified as '*New rating(s) or revision in rating(s)*' to remove ambiguity.
Disclosure of ratings or revision in ratings under sub-para 3 of Para A	Credit rating agencies disclose on their websites, ratings or revision in ratings provided by them even if the same was not requested for by the listed entity or the request was later withdrawn.	To avoid information asymmetry, it is, proposed to add the following language in the Circular for the disclosure: *"The disclosure of rating or revision in rating shall be made even if it was not requested for by the listed entity or the request was withdrawn by the listed entity."*
Disclosure of frauds/default by and/or arrest of director/senior management/ subsidiary under sub-para 6 of Para A	At present, disclosure of fraud/defaults by listed entity or its key managerial personnel or promoter, and arrest of key managerial personnel or promoter are mandated. Additionally, fraud/defaults by director or senior management of the listed entity, fraud/defaults by subsidiary of the listed entity, and arrest of director or senior management of the listed entity are also material information for investors.	Sub-para 6 of Para A may be modified to include the following: i. *fraud/defaults by director of the listed entity* (moved from sub-para 9 of Para B). ii. *fraud/defaults by senior management of the listed entity.* iii. *fraud/defaults by subsidiary of the listed entity.* iv. *arrest of director or senior management of the listed entity.* Further, In order to remove ambiguity, an explanation of the term 'default' may be added in sub-para 6 of Para A as defined in SEBI Circular no. SEBI/ HO/ CFD/ CMD1/ CIR/ P/ 2019/ 140 dated November 21, 2019 (available here). It may also be clarified that fraud/default/arrest is required to be disclosed whether it has happened in India or abroad.

Disclosure of change in senior management under sub-para 7 of Para A	At present, disclosure of change in directors, key managerial personnel, auditor and compliance officer are mandated. However, change in senior management is not mandated to be disclosed. Given that details of senior management are required to be disclosed at the time of filing of public offer documents, change in such senior management is a material information for investors.	Sub-para 7 of Para A may be modified to mandate disclosure in case of change in senior management.
Removal of disclosure regarding reference to Board for Industrial and Financial Reconstruction (BIFR)	In sub-para 11 of Para A, disclosure regarding BIFR may be removed since the same is no longer in existence. Disclosure of events in relation to the corporate insolvency resolution process (CIRP) has already been specified under sub-para 16 of Para A.	-
Timeline for disclosure of analysts or institutional investors' meet	Sub-para 15 of Para A requires disclosure of schedule of analysts or institutional investors' meet. This disclosure is required to be made prior to the investors' meet. However, no timeline has been specified for making such disclosures which creates ambiguity and also does not provide enough time to the investors to register or attend such meets.	It is proposed to specify that the schedule of such meets should be disclosed at least 2 working days in advance (excluding the date of the intimation and the date of the meet).

PROPOSALS IN RESPECT OF PARA B / DISCRETIONARY DISCLOSURES		
Events proposed be added in Para B		
Proposal	**Requirement for modification**	**Details of Proposal**
Disclosure of delay or default in payment of fines, penalties, dues, etc.	Delay or default in payment of fines, penalties, dues, etc., if material, may impact operations and/or performance of the entity.	The following event is proposed to be added in Para B: *"Delay or default in payment of fines, penalties, dues, etc. to any regulatory,*

		statutory, enforcement or judicial authority."
Events proposed to be modified in Para B		
Disclosure of material tie-ups, adoption of new line(s) of business and closure of operations	Sub-para 2 of Para B requires disclosure of material tie-ups, adoption of new line(s) of business and closure of operations. However, the above events are required to be disclosed by a listed entity only if they bring change in its general character or nature of business of the listed entity. This limitation may be removed since the events may be material even if they don't change the general character or nature of business. Additionally, closure of operation of any subsidiary of the listed entity having material impact on the operations or performance of the entity is also significant event requiring disclosure.	Sub-para 2 of Para B is proposed to be modified as below: *"Any of the following events pertaining to the listed entity:* *(i) arrangements for strategic, technical, manufacturing, or marketing tie-up; or* *(ii) adoption of new line(s) of business; or* *(iii) closure of operation of any unit/division/subsidiary (entirety or piecemeal)"*
Disclosure of material loan agreements where the listed company is either a lender or a borrower	Sub-para 5 of Para B requires disclosure of material loan agreements in which the listed entity is a borrower which are binding and not in normal course of business. However, material loan agreements in which the listed entity is a lender should also be disclosed to provide such information to the investors.	It is proposed to remove the term 'as a borrower' in reference to loan agreements in sub-para 5 of Para B in order to mandate disclosure of all material loan agreement(s), which are binding and not in normal course of business, entered into by the listed entity *<u>either as a lender or as a borrower</u>*. It may be clarified that disclosure of loan agreement for lending shall not be applicable to a listed entity which is a bank or a non-banking financial company.
Exemption from disclosure for certain loan agreements	It is noted here that loan agreement(s) for lending to wholly owned subsidiaries of the listed entity may not be material and would usually be in normal course of business.	Comments are invited on whether such loan agreement(s) for lending to wholly owned subsidiaries may be exempted from disclosure under sub-para 5 of Para B.
Disclosure of instances where subsidiary/director	At present, material litigations or disputes where the listed entity/ its key managerial personnel/ promoter/ultimate person in	The Circular may be modified to include instances where any subsidiary or director of the listed entity becomes party to any litigation, assessment, adjudication,

is party to litigations, etc.	control becomes a party are required to be disclosed as specified in the Circular for disclosure under sub-para 8 of Para A. Additionally, information pertaining to material litigations or disputes where the subsidiary or director of the listed entity becomes a party is also material information for investors.	arbitration or dispute in conciliation proceedings.
Disclosures in respect of guarantees, indemnity, or surety	Sub-para 11 of Para B requires disclosure when the listed entity gives guarantees, indemnity or becomes a surety for any third party. The rationale of this disclosure is to inform investors about the material financial obligations on the listed entity for any third party.	In order to cover all such obligations, it is proposed to add in the sub-para, the words "by whatever name called" in reference to the guarantees, indemnity, or surety, which are required to be disclosed.

C. PROPOSAL FOR DISCLOSURE OF CYBER SECURITY INCIDENTS OR BREACHES AND LOSS OF DATA / DOCUMENTS IN THE CORPORATE GOVERNANCE REPORT

With the advancements in technology and the companies adopting such newer technologies, cyber security incidents or breaches and loss of data/documents have become a major concern. Such incidents may impact the operations and/or performance of the listed entity. Disclosure of such events are necessary for investors to understand the associated risks and impact. However, immediate disclosure of such events may not be desired since the entity may be vulnerable to further attacks.

The disclosure with root cause analysis and remedial measures taken, etc. may be mandated under the quarterly compliance report on corporate governance (**CG Report**) required to be submitted by listed entities under Regulation 27 of LODR Regulations. It is proposed that the listed entities may be required to make disclosures in relation to "cyber security incident" or "cyber security breaches" or loss of data/ documents of the listed entity in the quarterly CG Report in the format given below:

S. No.	Nature of the event (cyber security incident/cyber security breach/ loss of data or documents)	Date of the event	Brief of the event	Impact on the operations of the listed entity	Corrective action taken	Compliance with the guidelines of CERT-In or other concerned authority

The above changes to the LODR Regulations have been proposed vide the Consultation Paper dated November 12, 2022 (available here) and public comments are invited till **November 27, 2022**.

Qualifications added to appointment & removal of independent directors | Schemes for companies having listed non-convertible securities

SEBI has notified amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR Regulations**) vide the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2022 (**LODR Amendment Regulations**).

Significant changes include:

- Deemed appointment of an independent director (**ID**) in certain cases introduced even if special resolution fails to get requisite majority, and removal of such ID made subject to additional qualification;
- Submission of report of monitoring agency for preferential issue or qualified institutions placement with stock exchange and audit committee;
- In respect of financial results of listed entities having non-convertible securities listed on the stock exchange(s), following have been introduced/ modified:
  - Financial statements for the last quarter of the financial year to be submitted within 60 days from the end of the quarter;
  - Submission of statement of assets and liabilities and statement of cash flows at the end of every half year, along with the financial results;
  - Line items revised which are to be disclosed on submission of quarterly and annual financial results;
  - Statement indicating utilization of issue proceeds of non-convertible securities to be submitted along with the quarterly financial results;
  - Submission of statement disclosing material deviations in use of proceeds of non-convertible securities from the objects of the issue;
  - Publication of consolidated financial results along with line items;
  - Procedure prescribed for filing of draft scheme of arrangement and scheme of arrangement for listed entities having listed non-convertible securities.

The above changes have been analysed in the table below.

Amendment	Particulars of amendment
Appointment, re-appointment or removal of an independent director (ID) | Deemed appointment in certain cases	Regulation 25(2A) of the LODR Regulations provides that the appointment, re-appointment or removal of an ID of a listed entity, shall be subject to the approval of shareholders by way of a **<u>special resolution</u>**. SEBI has now provided for the following conditionalities for appointment/removal of ID: ***<u>Deemed appointment of ID</u>***: Where a special resolution for the appointment of an ID fails to get the requisite majority of votes **<u>but</u>**: ▪ the votes cast in favour of the resolution exceed the votes cast against the resolution, **<u>and</u>**

	▪ the votes cast by the public shareholders in favour of the resolution exceed the votes cast against the resolution, then the appointment of such an ID shall be deemed to have been made. ***Removal of ID***: An ID appointed in the method as provided above shall be removed **only if**: ▪ the votes cast in favour of the resolution proposing the removal exceed the votes cast against the resolution, **and** ▪ the votes cast by the public shareholders in favour of the resolution exceed the votes cast against the resolution.
Submission of report of monitoring agency appointed for preferential issue or qualified institutions placement with stock exchange and audit committee	Presently, under Regulation 32(6) and 32(7) of LODR Regulations, where the listed entity has appointed a monitoring agency to monitor utilisation of proceeds of ***a public or rights issue***, the listed entity is required to submit to the stock exchange any comments or report received from the monitoring agency and the monitoring report is also required to be placed before the audit committee. SEBI has now provided that even in case of ***preferential issue or qualified institutions placement***, where the listed entity has appointed a monitoring agency to monitor utilisation of proceeds, the listed entity is required to submit to the stock exchange any comments or report received from the monitoring agency and the monitoring report is also required to be placed before the audit committee. Consequently, an amendment has also been introduced in Part C(6) of Schedule II of the LODR Regulations (*Role of the Audit Committee and Review of Information by Audit Committee*) whereby the role of the audit committee has been provided to *inter alia* include reviewing, with the management, the statement of uses/application of funds raised through an issue (public issue, rights issue, preferential issue, etc.), the statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice and the report submitted by the monitoring agency monitoring the utilisation of proceeds of a public issue or rights issue or ***preferential issue or qualified institutions placement***, and making appropriate recommendations to the board to take up steps in this matter.
Timeline prescribed for submission of financial statements for the last quarter of the financial year	Presently, Regulation 52(1) of the LODR Regulations *inter alia* requires listed entities having non-convertible securities listed on recognized stock exchanges, to prepare and submit unaudited or audited quarterly and year to date standalone financial results on a quarterly basis within 45 days from the end of the quarter, other than the last quarter, to recognized stock exchange(s).

	The LODR Amendment Regulations now clarify that ***for the last quarter of the financial year***, the listed entity shall submit un-audited or audited quarterly and year to date standalone financial results ***within 60 days from the end of the quarter*** to the recognised stock exchange(s).
Auditing of issuers by Comptroller and Auditor General of India	Presently, Regulation 52(2)(d) of the LODR Regulations provides for two step process for disclosure of the annual audited financial results for issuers being audited by the Comptroller and Auditor General of India, has been done away with. Now, issuers, which are required to be audited by the Comptroller and Auditor General of India under applicable law, shall submit: ▪ un-audited financial results along with the limited review report issued by the Comptroller and Auditor General of India or an auditor appointed by the Comptroller and Auditor General of India or a Practising Chartered Accountant, to the stock exchange(s), within 60 days from the end of the financial year; and ▪ the financial results, audited by the Comptroller and Auditor General of India, to the stock exchange(s), within 9 months from the end of the financial year.
Submission of statement of assets and liabilities and statement of cash flows	Listed entities having listed non-convertible securities shall submit a statement of assets and liabilities and statement of cash flows as at the end of every half year, by way of a note, along with the financial results.
Line items revised which are to be disclosed on submission of quarterly and annual financial results	Now, a listed entity having listed non-convertible securities, while submitting quarterly and annual financial results, shall disclose the following line items along with the financial results: ▪ debt-equity ratio; ▪ debt service coverage ratio; ▪ interest service coverage ratio; ▪ outstanding redeemable preference shares (quantity and value); ▪ capital redemption reserve/debenture redemption reserve; ▪ net worth; ▪ net profit after tax; ▪ earnings per share: ▪ current ratio; ▪ long term debt to working capital; ▪ bad debts to Account receivable ratio; ▪ current liability ratio; ▪ total debts to total assets;

	▪ debtors' turnover; ▪ inventory turnover; ▪ operating margin percent; ▪ net profit margin percent. If the information mentioned above is not applicable to the listed entity, it shall disclose such other ratio/equivalent financial information, as may be required to be maintained under applicable laws, if any.
Statement indicating utilization of issue proceeds of non-convertible securities to be submitted along with the quarterly financial results	Listed entities having listed non-convertible securities to submit to the stock exchange(s), along with the quarterly financial results, a statement indicating the utilisation of the issue proceeds of non-convertible securities, in such format as may be specified by SEBI, till such proceeds of issue have been fully utilised or the purpose for which the proceeds were raised has been achieved, as opposed to the earlier requirement of submitting such statement within 45 days from the end of every quarter.
Statement disclosing material deviations in use of proceeds of non-convertible securities from the objects of the issue to be submitted along with the quarterly financial results	A listed entity having listed non-convertible securities is required to submit to the stock exchange(s), along with the quarterly financial results, a statement disclosing material deviation(s) (if any) in the use of issue proceeds of non-convertible securities from the objects of the issue, in such format as may be specified by SEBI, till such proceeds have been fully utilised or the purpose for which the proceeds were raised has been achieved.
Publication of consolidated financial results along with line items in newspaper	Regulation 52(8) of the LODR Regulations *inter alia* requires a listed entity having listed non-convertible securities to publish the financial results and statement referred to in Regulation 52(4) in at least 1 (one) English national daily newspaper circulating in the whole or substantially the whole of India. The LODR Amendment Regulations have introduced the following changes in this respect: ▪ Following the amendment to Regulation 52(4) of the LODR Regulations in respect of disclosure of line items along with the financial results, the term "statement" has been substituted with "line items"; and ▪ Where the listed entity has submitted both standalone and consolidated financial results, to the stock exchange(s), it shall publish consolidated financial results along with the line items referred to in the revised Regulation 52(4), in the newspaper."
Procedure for filing of Draft Scheme of Arrangement and Scheme of Arrangement for	▪ ***<u>Filing of draft scheme of arrangement with stock exchanges and obtaining no-objection letter</u>***: Without prejudice to the provisions of Regulation 11 of the LODR Regulations (*Scheme of*

listed entities having listed non-convertible securities	*Arrangement*), the listed entity that has listed non-convertible debt securities or non-convertible redeemable preference shares, intends to undertake a scheme of arrangement or is involved in a scheme of arrangement under Sections 230-234 and Section 66 of the Companies Act, 2013 (**CA2013**), shall file the draft scheme of arrangement with the stock exchange(s), along with a non-refundable fee as specified, for obtaining the no-objection letter, before filing of such scheme with the National Company Law Tribunal (**NCLT**), in terms of the requirements as specified by SEBI or stock exchange(s) from time to time. ▪ ***Mandatory requirement to obtain no-objection letter before filing any scheme of arrangement***: The listed entity shall not file any scheme of arrangement under sections 230-234 and section 66 of the CA2013 with the NCLT unless it has obtained a no-objection letter from the stock exchange(s). ▪ ***Placing the no-objection letter before NCLT:*** The listed entity shall place the no-objection letter of the stock exchange(s) before the NCLT at the time of seeking approval for the scheme of arrangement in the manner as may be specified from time to time. ▪ ***Validity of the no-objection letter***: The validity of the no-objection letter of the stock exchange(s) shall be 6 months from the date of issuance, within which the draft scheme of arrangement shall be filed by the listed entity with the NCLT. ▪ ***Submission of documents on sanction of scheme***: Upon sanction of the scheme by the NCLT, the listed entity shall submit such documents, to the stock exchange(s), as may be specified by SEBI and/ or stock exchange(s) from time to time. ▪ ***Compliance with other requirements***: The listed entity shall ensure compliance with such other requirements as may be specified by SEBI from time to time. ▪ ***Requirements not applicable to restructuring proposal approved as part of a resolution plan by NCLT***: The requirements specified herein and under the new Regulation 94A of LODR Regulations shall not apply to a restructuring proposal approved as part of a resolution plan by the NCLT under section 31 of the Insolvency Code, subject to the details being disclosed to the recognized stock exchanges within 1 day of the resolution plan being approved.
Duties and obligations of recognized stock exchanges in case of a draft scheme of arrangement & scheme of arrangement	Following the insertion of Regulation 59A on Draft Scheme of Arrangement and Scheme of Arrangement for listed entities having listed non-convertible securities, the LODR Amendment Regulations has also inserted a new Regulation 94A which lists out the duties and obligations of recognized stock exchanges in case of a draft scheme

	of arrangement or scheme of arrangement submitted by entities that have listed their non-convertible debt securities or non-convertible redeemable preference shares: ▪ ***Submission of draft scheme of arrangement with SEBI***: Upon receipt of the draft schemes of arrangement and the documents, the designated stock exchange shall forward the same to SEBI in such manner as may be specified. ▪ ***Submission of no-objection letter to SEBI***: The stock exchange(s) shall submit to SEBI its no-objection letter on the draft scheme of arrangement, after ascertaining whether the draft scheme of arrangement is in compliance with securities laws, within the timelines as may be specified from time to time. ▪ ***Issuance of no-objection letter***: The stock exchange(s), shall issue no-objection letter to the listed entity in the manner and within the timelines, as may be specified from time to time. The validity of the No-objection letter of stock exchanges shall be 6 months from the date of issuance. ▪ ***Objections to scheme of arrangement***: The stock exchange(s) shall bring the objections to the notice of NCLT at the time of approval of the scheme of arrangement by the NCLT. ▪ ***Stock exchange's recommendations on documents of listed entity***: Upon sanction of the Scheme by the NCLT, the stock exchange shall forward its recommendations to SEBI on the documents submitted by the listed entity.
Unclaimed amount in escrow account to be transferred to Investor Protection and Education Fund created by SEBI	Regulation 61A of the LODR Regulations *inter alia* provides for dealing with unclaimed non-convertible securities and benefits accrued thereon whereby it is provided that where the interest/dividend/redemption amount has not been claimed within 30 days from the due date of interest/dividend/redemption payment, a listed entity shall transfer the same to an escrow account. Where any amount transferred to the escrow account remains unclaimed for 7 years, the same shall be further transferred to the 'Investor Education and Protection Fund' constituted in terms of section 125 of CA2013. The LODR Amendment Regulations has clarified that for listed entities which do not fall within the definition of "company" under the CA2013 and the rules made thereunder, any amount in the escrow account that remains unclaimed for 7 years shall be transferred to the Investor Protection and Education Fund created by SEBI in terms of section 11 of the SEBI Act, 1992.
Fees in respect of draft scheme of arrangement	▪ ***Fees to be remitted with along with draft scheme of arrangement:*** – For an entity with listed specified securities or listed specified securities and listed nonconvertible debt securities

	or non-convertible redeemable preference shares: A fee at the rate of 0.1% of the paid-up share capital of the listed/ transferee/ resulting company, whichever is higher, post the sanction of the scheme by the NCLT. The total amount of fees payable shall not exceed INR 5,00,000. – For an entity with only listed non-convertible debt securities or non-convertible redeemable preference shares: A fee at the rate of 0.1% of the amount of outstanding debt of the listed/ transferee/ resulting company, whichever is higher, post the sanction of the scheme by the NCLT. The total amount of fees payable shall not exceed INR 5,00,000. ▪ ***Method of remittance of fees***: The fees shall be paid by way of direct credit to the bank account of the Board through NEFT/ RTGS/ IMPS or any other mode allowed by RBI or by means of a demand draft in favour of "Securities and Exchange Board of India" payable at Mumbai.

The above amendments have been made to the LODR Regulations vide the LODR Amendment Regulations dated November 14, 2022 (available here).

AIFS to segregate and ring-fence assets and liabilities of each scheme | Parameters provided for first close, tenure and change of sponsor/manager

In an important change for the AIF industry, SEBI has mandated that the assets and liabilities of each scheme of an AIF are segregated and ring-fenced from other schemes of the AIF; and bank accounts and securities accounts of each scheme are segregated and ring-fenced. This will be an important change in scenarios where multiple schemes are launched under same AIF structure. Further, SEBI has provided guidelines on following:

- Timeline for declaration of First Close of schemes of AIFs;
- Calculation of tenure of close-ended schemes of AIFs; and
- Fee for change in control of manager/sponsor or change in manager/sponsor of AIFs

The aforementioned changes require existing AIFs which are not in compliance as on November 17, 2022, to transition within certain timelines.

The changes are analysed below:

Change	Explanation and impact
Segregation and ring-fencing of schemes	The Investment manager **and** either (a) the trustee or (b) the trustee company or (c) the Board of Directors or (d) designated partners of the AIF, as the case may be, shall ensure that: ▪ the assets and liabilities of each scheme of an AIF are segregated and ring-fenced from other schemes of the AIF ; and ▪ bank accounts and securities accounts of each scheme are segregated and ring-fenced. ***The change will ensure that liabilities of one scheme do not eat into assets of other schemes. However, implementation of this would require fund managers to put in necessary steps wherever required.***
Timeline for declaration of First Close of schemes of AIFs	SEBI has provided following with respect to how that the first close of the scheme shall be declared by an AIF: ▪ The First Close of a scheme shall be declared not later than 12 months from the date of SEBI communication for taking the PPM of the scheme on record. ▪ In case of open ended schemes of Category III AIFs, the First Close shall refer to the close of their Initial Offer Period. ▪ Corpus of the scheme at the time of declaring its First Close shall not be less than the minimum corpus prescribed in AIF Regulations for the respective category/sub-category of the AIF. ▪ The commitment provided by sponsor or manager at the time of declaration of First Close, to the extent to meet the aforesaid minimum

	corpus requirement, shall not be reduced or withdrawn or transferred, post First Close. ▪ Existing schemes of AIFs, who have not declared their First Close, shall declare their First Close not later than 12 months from November 17, 2022. ▪ Existing schemes of AIFs, whose private placement memorandum (**PPM**) were taken on record prior to 12 months from November 17, 2022 and have not declared their First Close, shall submit updated PPM with SEBI in the format specified in SEBI circular SEBI/HO/IMD/DF6/CIR/P/2020/24 dated February 05, 2020, through a SEBI registered merchant banker along with due diligence certificate from the merchant banker as specified in Annexure A of SEBI Circular SEBI/HO/IMD/IMD-I/DF6/P/CIR/2021/645 dated October 21, 2021 and such updated PPM shall be circulated to investors before declaration of First Close. ▪ The First Close of Large Value Fund for Accredited Investors (**LVF**) scheme shall be declared not later than 12 months from the date of grant of registration of the AIF or date of filing of PPM of scheme with SEBI, whichever is later. ▪ Existing LVF schemes shall declare their First Close not later than 12 months from November 17, 2022. ▪ In case the First Close of a scheme is not declared within the timeline prescribed above, the AIF shall file a fresh application for launch of the said scheme as per applicable provisions of AIF Regulations by paying requisite fee to SEBI.
Calculation of tenure of close-ended schemes of AIFs	Following has bene provided by SEBI on the manner of calculating the tenure of a close ended scheme of an AIF, including the manner of modification of the tenure: ▪ The tenure of close ended schemes of AIFs shall be calculated from the date of declaration of the First Close. ▪ An AIF may modify the tenure of a scheme at any time before declaration of its First Close. Prior to declaration of the First Close, the investor may withdraw or reduce commitment provided to such scheme of an AIF. ▪ Existing schemes of AIFs which have declared their First Close, may continue to calculate their tenure from the date of Final Close in terms of SEBI Circular CIR/IMD/DF/7/2015 dated October 1, 2015. Such existing schemes of AIFs, which are yet to declare Final Close, shall declare their Final Close as per the timeline provided in the PPM of the scheme and the AIF/manager shall not have any discretion to extend the said timeline provided in the PPM.

Fee for change in control of manager/sponsor or change in manager/sponsor of AIFs	In case of change of Sponsor or Manager, or change in control of the AIF, Sponsor or Manager, prior approval from SEBI is required, subject to levy of fees and any other conditions as may be specified by SEBI from time to time. In this regard, the following is specified: ▪ A fee equivalent to the registration fee applicable to the respective category/sub-category of the AIF, shall be levied in case of change in control of manager/sponsor and in case of change in manager/sponsor. The cost paid towards such fee by manager/sponsor shall not be passed on to the investors of the AIF in any manner. ▪ In case change in control of manager/change of manager and change in control of sponsor/change of sponsor of an AIF is proposed simultaneously, aforesaid fee equivalent to single registration fee shall be levied. ▪ The aforesaid fee shall not be levied in the following cases for change in sponsor or change in control of sponsor: – The manager is acquiring control in or replacing the sponsor; – Exit of sponsor(s) in case of AIF having multiple sponsors. ▪ The aforesaid fee shall be paid within 15 days of effecting the proposed change in manager/sponsor or change in control of manager/sponsor. ▪ In case of the applications pending with SEBI as on November 17, 2022, for change in control of manager/sponsor or change in manager/sponsor, the requirement of fee shall be applicable only in those applications where none of the schemes of AIFs managed/sponsored by manager/sponsor have declared their First Close. ▪ The prior approval granted by SEBI in this regard shall be valid for a period of 6 months from the date of SEBI communication for the approval.

The changes have been notified vide SEBI (Alternative Investment Funds) (Fourth Amendment) Regulations, 2022 dated November 15, 2022 (available here), and Guidelines laid down/framed *vide* Circular dated November 17, 2022 (available here).

AIFs priority distribution model draws SEBI's attention – Regulator temporarily restricts such AIFs from accepting fresh commitment or making new investments

In a major move, SEBI has decided to temporarily restrict Alternate Investment Funds **(AIFs)** schemes which have adopted priority distribution model among investors from accepting any fresh commitment or making investment in a new investee company, till SEBI comes up with a view in this regard.

The aforesaid view was taken by SEBI vide SEBI circular dated November 23, 2022 (available here) **(SEBI Circular)** and has been discussed below in brief:

- The SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**) define "Alternative Investment Fund" as a privately pooled investment vehicle, which collects funds from investors, for investing it in accordance with a defined investment policy for the benefit of its investors.
- Further, vide SEBI circular dated June 19, 2014 (available here), Guidelines on disclosures, reporting and clarifications under AIF Regulations were released under which Clause 3(c) provided that, with respect to investment by the ***sponsor/manager*** in the AIF, the sharing of loss by the sponsor/manager shall not be less than pro rata to their holding in the AIF vis-à-vis other unit holders.
- The AIF Regulations does not explicitly restrict the sharing of loss by ***a class of investors*** to not be less than pro rata to their holding in the AIF vis-à-vis other classes of investors/unit holders.
- Accordingly, it was brought to SEBI's attention that certain schemes of AIFs have adopted a distribution waterfall in such a way that ***one class of investors (other than sponsor/manager)*** share loss more than pro rata to their holding in the AIF vis-à-vis other classes of investors/unit holders, since the later has priority in distribution over former (**Priority Distribution Model**).
- The aforesaid matter is being examined by SEBI in consultation with Alternative Investment Policy Advisory Committee, AIF industry associations and other stakeholders. Meanwhile, it has been decided by SEBI that the AIF schemes which have adopted aforesaid Priority Distribution Model, ***shall not accept any fresh commitment, or make investment in a new investee company***, till a view is taken by SEBI in this regard.

The SEBI Circular has come into force with immediate effect.

UPDATES: FOREIGN EXCHANGE LAWS

Foreign investment rules tweaked to relax & expand applicability of various provisions

A. Amendments to Foreign Exchange Management (Non-debt Instruments) Rules, 2019:

The Ministry of Finance introduced following changes to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**NDI Rules**):

- **Extension of conversion period of Convertible Notes to 10 years:**

The term "convertible note" has been revised to mean an instrument issued by a startup company acknowledging receipt of money initially as debt, repayable at the option of the holder, or which is convertible into such number of equity shares of that company, within a period not exceeding ***ten years*** *(earlier the time period was five years)* from the date of issue of the convertible note, upon occurrence of specified events as per other terms and conditions agreed and indicated in the instrument. This will give start-ups longer duration to allow conversion of monies raised through convertible notes.

- **Revision to what would constitute 'equity instruments':**
  - <u>**Fully paid convertible debentures/preference shares**</u>: The definition of term 'convertible debenture' and "preference shares" has been revised to mean fully and mandatorily convertible debentures/ preference shares ***which are fully paid***.
  - <u>**Equity shares issued under other applicable laws:**</u> Equity shares issued by an Indian Company in accordance with the provisions of the Companies Act, 2013 or any other applicable law, shall include equity shares that have been partly paid, and shall be treated as 'equity instruments'.
  - <u>**Meaning of share warrants**</u>: The definition of term 'share warrants' has been revised to mean those which are issued by an Indian Company in accordance with the regulations made by the Securities and Exchange Board of India, ***the Companies Act, 2013 or any other applicable law*** *(earlier the provision only referred to SEBI)*.
- **Meaning of foreign investment in case of beneficial ownership:**

The explanation to the definition of 'foreign investment' has been modified to state that if a declaration is made by a person as per the provisions of the Companies Act, 2013 ***or any other applicable law, as the case may be*** *(earlier there was only reference to Companies Act 2013)*, about a beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

- **Revision to definition of 'Indian company':**

The term 'Indian company' which is presently defined to mean a company incorporated in India, the following definition has been substituted to include within its ambit body corporates established by or under Central or State Acts:

> ***'Indian company'***
>
> *means a company as defined in the Companies Act, 2013 or a body corporate established or constituted by or under any Central or State Act, which is incorporated in India;*
>
> *Note: (i) It is clarified that reference to 'company' or 'investee company' or 'transferee company' or 'transferor company' in these rules also includes a reference to a body corporate established or constituted by or under any Central or State Act.*
>
> *(ii) It is further clarified that if the term 'Company ' or 'Indian company' or 'Investee company' or 'transferee company' or 'transferor company' is qualified by a reference to a company incorporated*

under the Companies Act, 2013 such term shall mean a company incorporated under the said Act but not a body corporate.

(iii) It is also clarified that 'Indian company' does not include a society, trust, or any entity, which is excluded as an eligible investee entity under the FDI Policy.

- **Concept of 'Share Based Employee Benefits' introduced:**

The concept of "Share Based Employee Benefits" has been introduced and Rule 8 has been revised to allow Indian companies to issue equity instruments under 'Share Based Employee Benefits'.

"Share Based Employee Benefits" has been defined to mean issue of equity instruments to employees or directors or employees or directors of the holding company or joint venture or wholly owned overseas subsidiary or subsidiaries who are resident outside India, pursuant to Share Based Employee Benefits schemes formulated by an Indian Company.

- **Clarification on the meaning of 'subsidiary':**

It has been clarified that the term "subsidiary" shall have the same meaning as is assigned to it in the Companies Act, 2013, as amended from time to time.

- **Compromise/arrangement/division of one or more Indian company:**

Rule 19 permitted transferee company to issue equity instruments to the holders of transferor company subject to certain conditions, where a merger or amalgamation of two or more Indian companies has been approved by the National Company Law Tribunal (**NCLT**). This has been modified to include in addition to scheme of merger or amalgamation, ***scheme of compromise or arrangement or transfer of undertaking of one or more Indian company to another Indian company or involving division of one or more Indian company***.

Further, it has been clarified that Government approval shall not be required in case of mergers and acquisitions taking place in sectors under automatic route.

- **Clarification and alignment of definition of 'real estate business':**

The term "real estate business" has been modified as follows, and is aligned with the definition provided under "Construction Development: Townships, Housing, Built-up infrastructure" in which 100% foreign investment is permitted under automatic route:

*Explanation: For the purpose of this rule, 'real estate business' means **dealing in land and immovable property with a view to earning profit from there** and does not include development of townships, construction of residential or commercial premises, roads or bridges, **educational institutions, recreational facilities, city and regional level infrastructure, townships, real estate broking services** and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014 and earning of rent or income on lease of the property, not amounting to transfer.*

- **20% FDI under automatic route for LIC**

A new sub-sector for Life Insurance Corporation of India (**LIC**) has been inserted. Foreign investment upto 20% in LIC has been permitted under automatic route, subject to certain conditions as mentioned therein. Amongst other conditions, such investment in LIC will be subject to the provisions of the Life Insurance Corporation Act, 1956, as amended from time to time and such provisions of the Insurance Act, 1938, as amended from time to time, as are applicable to LIC.

The aforesaid amendment has been made vide the Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2022 released by the Ministry of Finance dated April 12, 2022 (available here).

Government revamps Overseas Investment Rules: Allows investment in financial services, deferred payment of consideration & other changes

With a view to liberalize and promote ease of doing business in India, the Central Government and the Reserve Bank of India (**RBI**) have simplified the existing framework for overseas investment by persons resident in India and has notified the Foreign Exchange Management (Overseas Investment) Rules, 2022 (**OI Rules**) read with the Foreign Exchange Management (Overseas Investment) Regulations, 2022 (**OI Regulations**) and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (**OI Directions**) in supersession of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 (collectively OI Rules, OI Regulations and OI Directions are referred to as the (**OI Regime**).

While clarity on certain aspects may be forthcoming in the near future, *prima facie* some of the key observations under the OI Regime are as follows:

- **Overseas Direct Investment (ODI) in financial services activity:**

An Indian entity which is not engaged in financial services activity in India has been permitted to make ODI in a foreign entity which is directly or indirectly engaged in financial services activity (except banking or insurance), subject to the condition that such Indian entity has posted net profits during the preceding three financial years. This was earlier not permitted and is likely to open doors for many Indian entities looking to invest in overseas financial services activities.

It is also interesting to note that the condition relating to obtaining of approval (as may be required) from regulators of relevant financial services activities, in India and host country/jurisdiction for engaging in such financial services activities in the host country/jurisdiction, (as applicable to an Indian entity engaged in financial services activities which intends to undertake such activity), is currently not applicable to an Indian entity which proposes to undertake financial services activity in host country/jurisdiction and is not engaged in the same in India.

Prior to the OI Regime, an Indian entity engaged in the financial services activity had to mandatorily obtain approval from the Indian regulator and regulator of host country/jurisdiction for undertaking financial services activity in the host country/jurisdiction. Under the present OI Regime, regulatory approval only if required, under Indian law or laws of the host country/jurisdiction, will need to be obtained. Family offices will likely explore this opportunity to invest overseas in financial services activity through their core investment company (**CICs**) and nonbank financial company (**NBFCs**).

- **Clarity on definitions of Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI):**

Overseas Direct Investment (ODI) has been defined as:

- acquisition of any unlisted equity capital (equity shares, perpetual capital, irredeemable or in the nature of fully and compulsorily convertible); or
- subscription as a part of the Memorandum of Association of a foreign entity, or
- with respect to listed foreign entity
    - investment in 10% or more of the paid-up equity capital of a listed foreign entity, or

  - investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity. Control in this context amongst other things includes shareholders agreement or voting agreements that entitle the holder to 10% or more of voting rights in the listed foreign company.
  - ODI investments will continued to be treated as such even where the above limits fall.

Overseas Portfolio Investment (**OPI**) has been defined as:

- investment, other than ODI, in foreign securities, but does not include
  - investment in any unlisted debt instruments; or
  - any security issued by a person resident in India who is not in an international financial services centre (**IFSC**).
  - any derivatives unless otherwise permitted by RBI; or
  - any commodities including Bullion Depository Receipts (**BDRs**).

OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.

Further, both in case of Indian entity and Resident Individuals specific investments have been identified as ODI and/or OPI. By defining the terms ODI and OPI, the Government has brought clarity on the distinction between the two, which has for long been debatable.

- **ODI-FDI investments:**

The OI Regime has permitted persons resident in India to make financial commitments in foreign entities that have invested prior to or invest into India at any time post such investment, either directly or indirectly, through structures **with up to two layers of subsidiaries**. By restricting only the number of layers and not investment into India, it prima facie appears that investment by a person in Indian in foreign entity which invests back in India has been permitted by the Government.

However, resident individuals can make overseas investments by way of ODI only in an operating foreign entity (not engaged in financial services activity) which does not have subsidiary or step down subsidiary where the resident individual has control (as defined in the OI Regime) in foreign entity.

- **Deferred payment of consideration:**

The OI Regime has permitted deferred payment of consideration for acquisition or transfer of foreign securities, subject to certain conditions, which was earlier not permitted.

- **Write-off on account of disinvestment:**

The OI Rules have dispensed with the requirement of approval for write-off on account of disinvestment. This is expected to make the process of disinvestment much faster and smoother.

- **Pricing to be at arms' length:**

The OI Rules require pricing to be done on arms' length basis for any issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India. The onus has been put on the AD bank to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation.

Considering that the AD Banks will have flexibility to decide on this aspect, it is preferable that RBI specifies the guiding principles to determine 'arms length pricing'.

- **ODI in Start- Ups**:

ODI in start-ups is permitted to be made **only** out of internal accruals of the investing entity or own funds of the resident individual. As per the OI Rules, this investment is permitted in 'start-ups' recognised as such under the laws of the host country/host jurisdiction. Not many countries specifically define what is or is not a 'start-up', so in any country where there is no specific definition, this condition becomes infructuous. The RBI may need to clarify its position in this regard.

- **Grandfathering of transactions:**

The OI Regime mentions that any investment or financial commitment outside India **made in compliance with the earlier regime** and held as on the date of publication of the OI Rules shall be deemed to have been made under the OI Regime. However, if any investments or financial commitments have been made in the past which was not in accordance with the then prevailing law, then the OI Regime will not be applicable and specific compounding application will need to be made for the same.

- **Discontinuation of utilization of subsidiary/holding net worth:**

Prior to the OI Regime, an Indian entity for purposes of overseas investments, could utilize the net worth of its Indian subsidiary/holding company to the extent not availed of by the holding company or the subsidiary company, subject to certain conditions. However, the OI Directions now specify that the concept of utilizing the net-worth of subsidiary/holding company by the Indian entity has been discontinued. This would impact large conglomerates where subsidiaries are typically used to structure foreign investments.

The OI Regime is expected to open avenues for investment by Indian residents in foreign country/jurisdiction, which were earlier restricted, and provide array of opportunities while structuring transactions.

The key provisions of the aforementioned OI Rules and OI Regulations have been summarized below:

A. Foreign Exchange Management (Overseas Investment) Rules, 2022

Key definitions | Overseas Investment, Financial Commitment, ODI, OPI	▪ **'Overseas Investment'** means financial commitment and Overseas Portfolio Investment (**OPI**) by a person resident in India. ▪ **'Financial Commitment'** is the aggregate amount of investment made by a person resident in India by way of overseas direct investment (**ODI**), debt other than OPI in a foreign entity or entities in which the ODI is made and shall include the non fund-based facilities extended by such person to or on behalf of such foreign entity or entities; ▪ **'ODI'** is investment (a) by way of acquisition of unlisted equity capital of a foreign entity, or (b) subscription as a part of the memorandum of association of a foreign entity, or (c) investment in 10% or more of the paid-up equity capital of a listed foreign entity or (d) investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity. Where an investment by a person resident in India in the equity capital of a foreign entity is classified as ODI, such investment shall continue to be treated as ODI even if

<table>
<tr><td></td><td>the investment falls to a level below 10% of the paid-up equity capital or such person loses control in the foreign entity.
'OPI' means investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC. OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.</td></tr>
<tr><td>Non-applicability of the OI Rules</td><td>The OI Rules does not apply to:
any investment made outside India by a financial institution in an IFSC;
acquisition or transfer of any investment outside India made:
out of Resident Foreign Currency Account; or
out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or
in accordance with Section 6(4) of FEMA.</td></tr>
<tr><td>Classification of debt and non-debt instruments</td><td><table>
<tr><th>Debt Instruments</th><th>Non-debt Instruments</th></tr>
<tr><td>Government bonds;
corporate bonds;
all tranches of securitization structure which are not equity tranche;
borrowings by firms through loans; and
depository receipts whose underlying securities are debt securities;</td><td>Investments in equity in incorporated entities (public, private, listed and unlisted);
capital participation in Limited Liability Partnerships;
all instruments of investment as recognized in the Foreign Direct Investment policy from time to time;
investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts;
investment in units of mutual funds and Exchange-Traded Fund which invest more than 50% in equity;
the junior-most layer (i.e. equity tranche) of securitization structure;
acquisition, sale or dealing directly in immovable property;
contribution to trusts; and
depository receipts issued against equity instruments.</td></tr>
</table></td></tr>
<tr><td>Rights Issue and Bonus Issue</td><td>Any person resident in India who has acquired and continues to hold equity capital of any foreign entity in accordance with FEMA or the rules or regulations made thereunder may invest in the equity capital issued by such entity as a rights issue or may be granted bonus shares subject to the OI Rules.</td></tr>
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<tr><td></td><td>The person resident in India acquiring the rights may renounce such rights in favour of a person resident in India or a person resident outside India.</td></tr>
<tr><td>Conditionalities for investment or financial commitment outside India</td><td>No person resident in India to make or transfer any investment or financial commitment outside India except as provided under FEMA read with the OI Rules and regulations made FEMA.

Investments made outside India by a person resident in India to be made subject to the following conditionalities:
Foreign entity should be engaged in a bona fide business activity: “Bonafide business activity” shall mean any business activity permissible under any law in force in India and the host country / host jurisdiction;
Investment can be made directly or through step down subsidiary or the special-purpose vehicle, whereby the structure of such subsidiary or step down subsidiary of the foreign entity shall comply with the structural requirements of a foreign entity;
Investment shall be subject to the limits and the conditions laid down in the OI Rules and the regulations.
Prior approval of the Central Government required in case of overseas investment / transfer of investment in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as may be advised by the Central Government from time to time.</td></tr>
<tr><td>No objection certificate (NOC) required in certain cases</td><td><u>Circumstances where NOC is required</u>: NOC shall be required to be obtained from the lender bank or regulatory body or investigative agency prior to making any financial commitment or undertaking disinvestment under the OI Rules or OI Regulations where any resident in India:
has an account appearing as a non-performing asset; or
is classified as a wilful defaulter by any bank; or
is under investigation by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office
<u>Failure to furnish NOC</u>: If the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within 60 days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.</td></tr>
<tr><td>Overseas Direct Investment (ODI) by Indian entity | Instruments for ODI, ODI in financial</td><td><table><tr><td>Manner of making ODI</td><td>ODI to be made by way of investment in equity capital for the purpose of undertaking bonafide business activity.
<u>Instruments for ODI</u>: ODI may be made or held by way of:
subscription as part of memorandum of association or purchase of equity capital, listed or unlisted;
acquisition through bidding or tender procedure;</td></tr></table></td></tr>
</table>

services activity, limits on financial commitment		▪ acquisition of equity capital by way of rights issue or allotment of bonus shares; ▪ capitalization, within the time period, if any, specified for realization under FEMA, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or the RBI under FEMA or any rules or regulations made or directions issued thereunder; ▪ the swap of securities; ▪ merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country/host jurisdiction.
	ODI in financial services activity	***Indian entity engaged in financial services activity can make ODI in foreign entity, which is directly or indirectly engaged in financial services activity,*** subject to the following conditions: ▪ Indian entity has posted net profits during the preceding 3 financial years; ▪ Indian entity is registered with or regulated by a financial services regulator in India; ▪ Indian entity has obtained approval as may be required from the regulators of such financial services activity, both in India and the host country/host jurisdiction, for engaging in such financial services. ***Indian entity not engaged in financial services activity can make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity,*** subject to the condition that such Indian entity has posted net profits during the preceding 3 financial years. Further, an Indian entity not engaged in the insurance sector may make ODI in general and health insurance where such insurance business is supporting the core activity undertaken overseas by such an Indian entity. A foreign entity shall be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India. ***<u>Exemption from net profit requirement</u>***: If an Indian entity does not meet the net profits requirement due to the impact of Covid-19 during the period from 2020-2021 to 2021-2022, then the financial results of such period may be excluded for considering the profitability period of 3 years. Such period may be extended by RBI in consultation with the Central Government.

		Non-applicability of these conditions: Overseas Investment by banks and non-banking financial institutions regulated by the RBI shall be subject to the conditions laid down by RBI in this regard.
	Limit for financial commitment	▪ Total financial commitment (**TFC**) made by an Indian entity ***in all the foreign entities taken together*** at the time of undertaking such commitment ***not to exceed 400%*** of its net worth as on the date of the last audited balance sheet. ▪ TFC not to include capitalization of retained earnings for determining such limit but shall include: – utilization of the amount raised by the issue of American Depository Receipts or Global Depositary Receipts and stock-swap of such receipts; and – utilization of the proceeds from External Commercial Borrowings to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit. ▪ Exemption from TFC has been provided to Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities outside India engaged in strategic sectors.
Overseas Portfolio Investment (OPI) by an Indian entity		An Indian entity may make OPI which shall not exceed 50% of its net worth as on the date of its last audited balance sheet, subject to the following: ▪ A listed Indian company may make OPI including by way of reinvestment. ▪ An unlisted Indian entity may make OPI only by way of: – acquisition of equity capital by way of rights issue or allotment of bonus shares; – capitalization, within the time period, if any, specified for realization under FEMA, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the RBI under FEMA or any rules or regulations made or directions issued thereunder; – the swap of securities; – merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country / host jurisdiction.
Overseas Investment by resident individual	**Manner of making overseas investment**	▪ Any resident individual may make ODI by way of investment in equity capital or OPI and shall be subject to the overall ceiling under the Liberalized Remittance Scheme of RBI (**LRS**). ▪ ***Instruments for overseas investment***: A resident individual may make or hold overseas investment by way of:

		– ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step down subsidiary where the resident individual has control in the foreign entity; – OPI, including by way of reinvestment; – ODI or OPI, as the case may be, by way of: (a) capitalization, within the time period, if any, specified for realization under FEMA, of any amount due from the foreign entity the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or RBI; (b) swap of securities on account of a merger, demerger, amalgamation or liquidation; (c) acquisition of equity capital through rights issue or allotment of bonus shares; (d) gift; (e) inheritance; (f) acquisition of sweat equity shares; (g) acquisition of minimum qualification shares issued for holding a management post in a foreign entity; (h) acquisition of shares or interest under Employee Stock Ownership Plan (**ESOP**) or Employee Benefits Scheme (**EBF**). ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control. Acquisition of less than 10% of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), will be treated as OPI.
	Acquisition by way of gift or inheritance	▪ A resident individual may, without any limit, acquire foreign securities by way of inheritance from a person resident in India who is holding such securities or from a person resident outside India. ▪ A resident individual, without any limit, may acquire foreign securities by way of gift from a person resident in India who is a relative and holding such securities. ▪ A resident individual may acquire foreign securities by way of gift from a person resident outside India in accordance with the provisions of the Foreign Contribution

		(Regulation) Act, 2010 and the rules and regulations made thereunder.
Overseas Investment by person resident in India other than Indian entity and resident individual	**ODI by Registered Trust or Society**	Registered trust or a registered society engaged in the educational sector or which has set up hospitals in India may make ODI in a foreign entity with the ***prior approval of RBI***, subject to the following conditions: ▪ the foreign entity is engaged in the same sector as the Trust/Society; ▪ the Trust/Society should have been in existence for at least 3 financial years before the year in which such investment is being made; ▪ the constitutional documents of the Trust/Society permit the proposed ODI; ▪ such investment have the approval of the trustees in case of a Trust and the governing body or council or managing or executive committee in case of a Society; ▪ in case the Trust/Society require special licence or permission from the Central Government/ relevant local authority, the special licence or permission has been obtained and submitted to the designated AD bank.
	Overseas investments by Mutual Funds (MF) or Venture Capital Funds (VCF) or Alternative Investment Funds (AIF)	A MF/VCF/AIF (**Funds**) may acquire or transfer foreign securities as stipulated by SEBI from time to time in accordance with the OI Rules and other applicable laws. ▪ Limits on investment to be decided by the concerned regulatory body (RBI for aggregate limits, SEBI for individual limits); ▪ Investments by Funds to be routed through the AD Bank ▪ Investment made by Funds to be treated as OPI.
Overseas Investment in IFSC by person resident in India	Person resident in India may make overseas investment in an IFSC in the manner as laid down in Schedule I/ II/ III/ IV of the OI Rules, subject to the following: ▪ in the case of an ODI made in an IFSC, the approval by the financial services regulator concerned, wherever applicable, shall be decided within 45 days from the date of application complete in all respects failing which it shall be deemed to be approved; ▪ an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, who does not meet the net profit requirement, may make ODI in an IFSC; ▪ a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI;	

	▪ a resident individual may make ODI in a foreign entity, including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step down subsidiary outside IFSC where the resident individual has control in the foreign entity.
Pricing guidelines	Issue or transfer of equity capital of a foreign entity from (i) a person resident outside India/person resident in India to a person resident in India who is eligible to make such investment; or (ii) person resident in India to a person resident outside India, is required to be at ***a price arrived on an arm's length basis.*** AD bank is required to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation before facilitating such transaction.
Transfer or liquidation	***Transfer by way of sale***: A person resident in India holding equity capital is permitted to transfer such investment by way of sale to a person resident in India, who is eligible to make such investment under the OI Rules, or to a person resident outside India. ***Transfer under merger/ amalgamation/ demerger/ buyback***: In case the transfer is on account of merger/amalgamation/demerger/on account of buyback of foreign securities, such transfer or liquidation in case of liquidation of the foreign entity, shall have the approval of the competent authority as per the applicable laws in India or the laws of the host country/host jurisdiction. ***Disinvestment by a person resident in India***: Such divestment shall be subject to the following conditions: ▪ the transferor, in case of full disinvestment other than by way of liquidation, shall not have any dues outstanding for receipt, which such transferor is entitled to receive from the foreign entity as an investor in equity capital and debt; ▪ the transferor, in case of any disinvestment must have stayed invested for at least 1 year from the date of making ODI: The above conditions for disinvestment will not apply in case of a merger/ demerger / amalgamation between 2 or more foreign entities that are wholly-owned, directly or indirectly, by the Indian entity or where there is no change or dilution in aggregate equity holding of the Indian entity in the merged or demerged or amalgamated entity.
Restructuring of balance sheet of person resident in India who has made ODI in a foreign entity, permitted by	***Restructuring by foreign entity***: Person resident in India who has made ODI in a foreign entity may permit restructuring of the balance sheet by such foreign entity, which has been incurring losses for the previous 2 years as evidenced by its last audited balance sheets, subject to ensuring compliance with reporting, documentation requirements and subject to the diminution in the total value of the outstanding dues towards such person resident in India on account of investment in equity and debt, after such restructuring not exceeding the proportionate amount of the accumulated losses.

such foreign entity	***Diminution in value to be certified***: In case of such diminution where the amount of corresponding original investment is more than USD 10 million or in the case where the amount of such diminution exceeds 20% of the total value of the outstanding dues towards the Indian entity or investor, the diminution in value shall be duly certified on an arm's length basis by a registered valuer as per the Companies Act, 2013 or corresponding valuer registered with the regulatory authority or certified public accountant in the host jurisdiction. The certificate dated not more than 6 months before the date of the transaction to be submitted to the designated AD bank.
Restrictions and prohibitions of ODI is certain sectors	***Prohibition on ODI in the following sectors***: ▪ real estate activity, which means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing; ▪ gambling in any form; and ▪ dealing with financial products linked to the Indian rupee without specific approval of the RBI. ***Restriction on ODI in start-ups***: Any ODI in start-ups recognized under the laws of the host country/host jurisdiction, to be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual. ***ODI not to result in a structure with more than 2 layers of subsidiaries***: No person resident in India to make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries. This restriction is not applicable to the classes of companies provided under Rule 2(2) of the Companies (Restriction on Number of Layers) Rules, 2017.
Restriction on acquisition or transfer of immovable property outside India	▪ ***Permission of RBI***: No person resident in India can acquire or transfer any immovable property situated outside India without the general or special permission of RBI. However, RBI permission is not required for a property: – held by a person resident in India who is a national of a foreign State; – acquired by a person resident in India on or before the 8th day of July, 1947 and continued to be held by such person with the permission of the RBI; – acquired by a person resident in India on a lease not exceeding 5 years. ▪ ***Acquisition from person resident in India***: Person resident in India may acquire immovable property outside India by way of inheritance or gift or purchase from a person resident in India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition; ▪ ***Acquisition from person resident outside India***: Person resident in India may acquire immovable property outside India from a person resident outside India:

	– by way of inheritance; – by way of purchase out of foreign exchange held in RFC account; – by way of purchase out of the remittances sent under LRS. Such remittances under LRS may be consolidated in respect of relatives if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme; – jointly with a relative who is a person resident outside India; – out of the income or sale proceeds of the assets, other than ODI, acquired overseas under FEMA. ▪ ***Acquisition by Indian entity having an overseas office***: Indian entity having an overseas office may acquire immovable property outside India for the business and residential purposes of its staff, as per RBI directions issued from time to time. ▪ Person resident in India who has acquired any immovable property outside India in accordance with the foreign exchange provisions in force at the time of such acquisition may: – transfer such property by way of gift to a person resident in India who is eligible to acquire such property under the OI Rules or by way of sale; – create a charge on such property in accordance with FEMA or the rules or regulations made thereunder or RBI directions issued from time to time.

The OI Rules have been notified vide MOF notification dated August 22, 2022 (available here).

B. Foreign Exchange Management (Overseas Investment) Regulations, 2022

Salient features of the OI Regulations have been discussed hereinbelow:

Financial commitment by Indian entity by modes other than equity capital	Indian entity may lend or invest in any debt instrument issued by a foreign entity or extend non fund-based commitment to or on behalf of a foreign entity including overseas step down subsidiaries of such Indian entity subject to the following conditions within the financial commitment limit as prescribed in the OI Rules: ▪ the Indian entity is eligible to make ODI; ▪ the Indian entity has made ODI in the foreign entity; ▪ the Indian entity has acquired control in such foreign entity at the time of making such financial commitment.
Financial commitment by Indian entity by way of debt	An Indian entity may lend or invest in any debt instruments issued by a foreign entity subject to the condition that such loans are duly backed by a loan agreement where the rate of interest shall be charged on an arm's length basis. "Arm's length" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.
Financial commitment by way of guarantee	▪ ***Issuance of guarantees***: The following guarantees may be issued to or on behalf of the foreign entity or any of its step down subsidiary in which the Indian entity has acquired control through the foreign entity: – corporate or performance guarantee by such Indian entity; – corporate or performance guarantee by a group company of such Indian entity in India, being a holding company (which holds at least 51% stake in

	the Indian entity) or a subsidiary company (in which the Indian entity holds at least 51% stake) or a promoter group company, which is a body corporate; – personal guarantee by the resident individual promoter of such an Indian entity; – bank guarantee, which is backed by a counter-guarantee or collateral by the Indian entity or its group company as above, and issued, by a bank in India. ▪ ***Guarantee extended by a group company***: Where the guarantee is extended by a group company, it shall be counted towards the utilisation of its financial commitment limit independently and in case of a resident individual promoter, the same shall be counted towards the financial commitment limit of the Indian entity. – Where the commitment is extended by a group company, any fund-based exposure to or from the Indian entity shall be deducted from the net worth of such group company for computing its financial commitment limit – Where the guarantee is extended by a promoter, which is a body corporate or an individual, the Indian entity shall be a part of the promoter group. ▪ Guarantee cannot be open-ended. ▪ The guarantee, to the extent of the amount invoked, shall cease to be a part of the non-fund based commitment but be considered as lending. ▪ ***Guarantee extended jointly and severally by 2 or more Indian entities***: 100% of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities. ▪ ***Performance guarantee:*** 50% of the amount of guarantee shall be reckoned towards the financial commitment limit. ▪ ***Roll over guarantee***: Roll-over of guarantee shall not be treated as fresh financial commitment where the amount on account of such roll-over does not exceed the amount of original guarantee.
Financial commitment by way of pledge or charge	***Creation of pledge or charge***: Indian entity, which has made ODI by way of investment in equity capital in a foreign entity is permitted to: ▪ ***Create a pledge in favour of an AD bank/public financial institution in India/ overseas lender***: Indian entity may pledge the equity capital of the foreign entity in which it has made ODI or of its step down subsidiary outside India, held directly by the Indian entity in a foreign entity and indirectly in step down subsidiary, in favour of an AD bank or a public financial institution in India or an overseas lender, for availing fund based or non-fund based facilities for itself or for any foreign entity in which it has made ODI or its step down subsidiaries outside India or in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself. ▪ ***Create a charge by way of mortgage, pledge, hypothecation or other identical modes*** on: – its assets in India, including the assets of its group company or associate company, promoter or director, in favour of an AD bank or a public financial institution in India or an overseas lender as security for availing of the fund

	based or non-fund based facility or both, for any foreign entity in which it has made ODI or for its step down subsidiary outside India; or – the assets outside India of the foreign entity in which it has made ODI or of its step down subsidiary outside India in favour of an AD bank in India or a public financial institution in India as security for availing of the fund based or non-fund based facility or both, for itself or any foreign entity in which it has made ODI or for its step down subsidiary outside India or in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself. ***Conditions for creation of pledge or charge***: ▪ value of the pledge/charge or the amount of the facility, whichever is less, shall be reckoned towards the financial commitment limit provided such facility has not already been reckoned towards such limit and excluding cases where the facility has been availed by the Indian entity for itself; ▪ overseas lender in whose favour there is such a pledge or charge shall not be from any country or jurisdiction in which financial commitment is not permissible under the OI Rules; ▪ creation or enforcement of such pledge or charge shall be in accordance with FEMA or rules or regulations made or directions issued thereunder.
Acquisition or transfer of equity capital by way of deferred payment under the terms of the agreement	***Deferred payment of consideration for equity capital***: Where a person resident in India acquires equity capital by way of subscription to an issue or by way of purchase from a person resident outside India or where a person resident outside India acquires equity capital by way of purchase from a person resident in India, and where such equity capital is reckoned as ODI, the payment of amount of consideration for the equity capital acquired may be deferred for such definite period from the date of the agreement as provided in such agreement subject to the following: ▪ the foreign securities equivalent to the amount of total consideration shall be transferred or issued upfront by the seller to the buyer; ▪ the full consideration finally paid shall be compliant with the applicable pricing guidelines; ▪ the deferred part of the consideration in case of acquisition of equity capital of a foreign entity by a person resident in India shall be treated as non-fund based commitment. ***Indemnification of buyer***: The buyer may be indemnified by the seller up to such amount and be subject to such terms and conditions as may be mutually agreed upon and laid down in the agreement.
Modes of payment	A person resident in India making OI may make payment: ▪ by remittance made through banking channels; ▪ from funds held in an account maintained in accordance with FEMA; ▪ by swap of securities;

	▪ by using the proceeds of American Depository Receipts or Global Depositary Receipts or stock-swap of such receipts or external commercial borrowings raised in accordance with FEMA and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.
Obligations of person resident in India	▪ ***Submission of documents as evidence for investment***: A person resident in India acquiring equity capital in a foreign entity, which is reckoned as ODI, to submit to the AD bank share certificates or any other relevant documents as per the applicable laws of the host country or the host jurisdiction, as the case may be, as an evidence of such investment in the foreign entity within six months from the date of effecting remittance or the date on which the dues to such person are capitalized or the date on which the amount due was allowed to be capitalized, as the case may be. ▪ ***Unique Identification Number***: A person resident in India, through its designated AD bank, shall obtain a Unique Identification Number or "UIN" from the Reserve Bank for the foreign entity in which the ODI is intended to be made before sending outward remittance or acquisition of equity capital in a foreign entity, whichever is earlier. ▪ ***Designation of one AD Bank***: All transactions relating to a particular UIN to be routed through AD Bank. Where more than one person resident in India makes financial commitment in the same foreign entity, all such persons shall route all transactions relating to that UIN through the AD bank designated for that UIN. ▪ ***Realization and repatriation of dues to India***: A person resident in India having ODI in a foreign entity, wherever applicable, to realize and repatriate to India, all dues receivable from the foreign entity with respect to investment in such foreign entity, the amount of consideration received on account of transfer or disinvestment of such ODI and the net realizable value of the assets on account of the liquidation of the foreign entity as per the laws of the host country or the host jurisdiction, as the case may be, within ninety days from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator. ▪ ***Remittance towards earnest money***: Person resident in India who is eligible to make ODI permitted to make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD bank for participation in bidding or tender procedure for the acquisition of a foreign entity. In case of an open-ended bid bond guarantee, it shall be converted into a close-ended guarantee not later than 3 months from the date of award of the contract.
Reporting requirements for Overseas Investment	▪ All reporting by a person resident in India to be made through the designated AD Bank. ▪ Person resident in India to report the following for ***ODI/ financial commitments/ undertaking disinvestment***: – financial commitment, whether it is reckoned towards the financial commitment limit or not, at the time of sending outward remittance or making a financial commitment, whichever is earlier; – disinvestment within 30 days of receipt of disinvestment proceeds;

	– restructuring within 30 days from the date of such restructuring. ▪ ***OPI/ transfer of OPI by way of sale*** to be reported within 60 days from the end of the half-year in which such investment or transfer is made as of September or March-end. ▪ ***OPI by way of acquisition of shares or interest under ESOP/ EBF*** to be reported by the office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where the resident individual is an employee or director. ▪ ***Submission of Annual Performance Report (APR)***: A person resident in India acquiring equity capital in a foreign entity which is reckoned as ODI, to submit APR with respect to each foreign entity every year by 31st December and where the accounting year of such foreign entity ends on 31st December, the APR shall be submitted by 31st December of the next year. – APR not required where (i) a person resident in India is holding less than 10% of the equity capital without control in the foreign entity and there is no other financial commitment other than by way of equity capital; or (ii) a foreign entity is under liquidation. – APR shall be based on the audited financial statements of the foreign entity. APR may be submitted based on unaudited financial statements certified as such by the statutory auditor of the Indian entity or by a chartered accountant where the statutory audit is not applicable, if the person resident in India does not have control in the foreign entity and the laws of the host country/ host jurisdiction do not provide for mandatory auditing of the books of accounts. – In case more than one person resident in India has made ODI in the same foreign entity, the person holding the highest stake in the foreign entity shall be required to submit APR and in case of holdings being equal, APR may be filed jointly by such persons. – Person resident in India shall report the details regarding acquisition or setting up or winding up or transfer of a step down subsidiary or alteration in the shareholding pattern in the foreign entity during the reporting year in the APR. ▪ ***Submission of Annual Return on Foreign Liabilities and Assets*** to be made in accordance with RBI directions.
Delay in reporting | Submission/ filing can be made with late submission fee	Person resident in India who does not submit the evidence of investment within the specified timeline or does not make any filing within the specified time for OI, may make such submission/filing along with Late Submission Fee within such period as may be advised, and at the rates and in the manner as may be directed by the RBI from time to time. Such facility can be availed within a maximum period of 3 years from the due date of such submission/filing. The OI Regulations also place a restriction on further financial commitment whether fund-based or non-fund-based, directly or indirectly, towards the foreign entity or transfer such investment till any delay in reporting is regularized.

The OI Regulations were notified vide RBI notification dated August 22, 2022 (available here).

UPDATES: IFSCA

New Fund Management Regulations issued for IFSC-Gift City to Overhaul Fund Governance

In an important development for the fund industry, the International Financial Services Centre Authority (**IFSCA**) has notified the IFSCA (**Fund Management**) Regulations, 2022 (available here) (**IFSCA Fund Regulations**). The IFSCA Fund Regulations have been introduced to regulate the framework for investment funds in India's International Financial Services Centre (**IFSC**), in particular Gujarat International Finance Tec-City (**GIFT City**). The IFSCA Fund Regulations will come into force on the 30th (thirtieth) day from the date of its publication in the Official Gazette i.e., April 19, 2022.

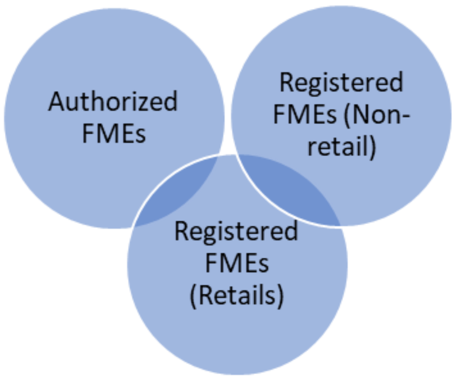
As an immediate result of the introduction of the IFSCA Fund Regulations, various regulatory provisions and circulars issued by Securities and Exchange Board of India (**SEBI**) with respect to the funds in IFSC will cease to operate. Amongst others, the IFSCA Fund Regulations, in particular, repeal the applicability of SEBI (**Alternative Investment Funds**) Regulations, 2012; SEBI (**Mutual Funds**) Regulations, 1996; Chapter VI on Funds of SEBI (**International Financial Services Centres**) Guidelines, 2015, in IFSC. Further, all existing Fund Managers of Alternative Investment Fund (**AIFs**) registered by IFSCA will need to seek fresh registration from IFSCA under the IFSCA Fund Regulations within six (6) months from the effective date.

The IFSCA Fund Regulations in essence will govern, inter alia, an establishment of fund management entities (**FMEs**); schemes for fund management – venture capital schemes, restricted schemes (non-retail), retail schemes, special situation funds focusing on special situation assets, exchange traded funds; other fund management activities such as portfolio management, investment trust being Infrastructure Investment Trust (**InvIT**), Real Estate Investment Trust (**REIT**), family investment fund; environmental, social and governance (**ESG**) norms to be followed by FMEs; listing by the funds; general obligations and responsibilities; and advertisement by funds.

Certain key aspects of the IFSCA Fund Regulations have been discussed below under the following heads:

A. Mandatory certificate of registration from IFSCA as a Fund Management Entity (FME)

- ***Certificate of Registration***: Any entity intending to undertake the business of fund management shall not commence operations in IFSC unless it has obtained a certificate of registration from the IFSCA as a Fund Management Entity (**FME**).
- ***Validity of Certificate of Registration***: The certificate of registration of FME shall be valid for such period as may be specified, unless it is suspended or cancelled by the IFSCA or surrendered by the FME and taken on record by the IFSCA.



B. Classification of FMEs

The FME shall seek registration under any of the following three categories, explained below:

- ***Authorized FME:*** The FMEs that pool money from accredited investors or investors investing above the specified threshold by way of private placement and invest in start-ups or early-stage ventures through a Venture Capital Scheme. Family Investment Fund investing in securities, financial products and such other permitted asset classes shall also seek registration as an Authorised FME.
- ***Registered FME (Non-Retail):*** The FMEs that pool money from accredited investors or investors investing above a specified threshold by way of private placement for investing in securities, financial products and such other permitted asset classes through one or more restricted schemes. Such FMEs shall also be able undertake Portfolio Management Services (including for multi-family office) and act as investment manager for private placement of Investment Trust (REITs and InvITs). Such FMEs shall also be able to undertake all activities as permitted to Authorised FMEs.
- ***Registered FME (Retail)***: The FMEs that pool money from all investors or a section of the investors under one or more schemes for investing in securities, financial products and such other permitted asset classes through retail or restricted schemes. Registered FME (Retail) may act as investment manager for public offer of Investment Trusts (REITs and InvITs). Such FMEs shall also be able to launch ETFs. Further, such FMEs shall also be able to undertake all activities as permitted to Authorized FMEs and Registered FMEs (Non-retail).
- ***No change in category:*** A FME which has been granted a certificate of registration under a particular category cannot change its category, except with the prior approval of the IFSCA.

C. Eligibility conditions of applicants seeking certificate of registration from the IFSCA

Provision	Explanation
Legal form of the applicant	▪ Applicant shall be present in an IFSC by forming a company or limited liability partnership (**LLP**) or branch thereof or any other form as may be permitted by the IFSCA, subject to certain conditions; ▪ A Registered FME (Retail) shall not be permitted though LLP mode or its branch; ▪ Branch structure is permitted only for a FME which is already registered and/or regulated by a financial sector regulator in India or a foreign jurisdiction for conducting similar activities; ▪ Activity of fund management should be permitted by the memorandum of association in case of a company or the LLP agreement in case of LLP; ▪ A Registered FME (Retail) shall have at least 4 directors with at least 50% of the directors to be independent directors and not associated with the FME.
Sound Track Record	The applicant shall have a sound track record and general reputation of fairness and integrity in all its business transactions. "sound track record" shall mean: ▪ ***In case of Registered FME (Retail)***: FME or its holding company shall not have less than 5 years of experience in managing Assets Under Management (**AUM**) of at least USD 200 million with more than 25,000 investors or at least 1 person in control of the FME holding more than 25% shareholding in the FME be carrying on business in financial services for a period of not less than 5 years. However, to facilitate new generation fintech companies with innovative ideas that may lead to further market development, any other criteria for sound track

	record may be considered by IFSCA. ▪ ***In case of Registered FME (Non-Retail) and Authorized FME***: FME shall employ such employees, who shall have relevant experience as specified under the regulations.
Net Worth Requirements	An entity seeking registration as a FME shall, at all times, comply with the net worth requirements: <table><tr><td>**Authorized FME**</td><td>USD 75,000</td></tr><tr><td>**Registered FME (Non-retail)**</td><td>USD 5,00,000</td></tr><tr><td>**Registered FME (Retail)**</td><td>USD 1,000,000</td></tr></table>An entity operating as a branch shall at all times comply with the minimum net worth requirements which may be maintained at the parent level. However, the parent entity shall ensure that adequate funds are available for branch for its day to day operations. Minimum contribution requirement with respect to FMEs, will be included while calculating the net-worth as stated above.
Other eligibility conditions	▪ ***Appointment of Principal Officer***: The applicant to designate a principal officer who shall be responsible for overall activities of the FME including but not limited to fund management, risk management and compliance. ▪ ***Appointment of KMP:*** In case of Registered FME, in addition to the principal officer, one key managerial personnel(s) (**KMP**) to be designated as the compliance and risk manager. In case of Registered FME (Retail), in addition to above, an additional KMP to be appointed who shall be designated with the responsibility of fund management. ▪ ***Change in principal officer and KMP:*** Any changes in the principal officer and/or the KMP to take place only with the prior approval of IFSCA. ▪ ***Fit and Proper Persons***: The applicant and its principal officer, directors/ partners/ designated partners, KMP and controlling shareholders shall be fit and proper persons, at all times, as prescribed. ▪ ***Infrastructure***: The entity to have necessary infrastructure commensurate to the size of its operations in IFSC.

D. Constitution of the Fund/Scheme

- A FME may launch various schemes and prior to the filing of a scheme document, it shall appoint the Board of Directors in case of Company, Designated Partners in case of LLP and Trustees (including the Board in case of a Trustee company) in case of a Trust. These will be referred to as fiduciaries.
- A FME is also required to ensure that all the fiduciaries meet with the fit and proper requirements.
- A FME intending to launch retail schemes shall take prior approval of the IFSCA for appointing any person as a fiduciary.

Schemes for Fund Management | Restricted Schemes (Non-Retail Schemes)

Provision	Explanation
Eligible Schemes (Category-I, II, III AIFs)	Restricted Schemes are schemes that may be launched by Registered FMEs for various investment strategies for: ▪ investing in start-up or early-stage ventures or social ventures or infrastructure or other sectors or areas which the government or regulators consider as socially or

	economically desirable and shall include venture capital funds, social venture funds, infrastructure funds, ESG Funds, Special Situation funds and such other Schemes/Funds as may be specified by the IFSCA. Schemes falling under this clause shall be a **close ended scheme and filed before IFSCA as Category I AIF**. ▪ investment for undertaking diverse or complex trading strategies including investment in listed or unlisted derivatives and for permitted investments under longevity finance. The schemes under this clause shall be filed before IFSCA **as Category III AIF and may be launched as open ended or close ended schemes**. ▪ investment which does not fall under the clause (a) and (b) above. The schemes under this clause shall be filed before IFSCA as **Category II AIF and shall be launched as close ended schemes**.
Filing of placement memorandum	▪ ***Timeline for filing of placement memorandum:*** Registered FMEs may launch restricted schemes through a private placement by filing the placement memorandum with the IFSCA along with the application fees, 21 days before the of launch of the scheme. ▪ ***Validity of placement memorandum***: The validity of the placement memorandum for launch of the scheme shall be 6 months from the date of filing with the IFSCA or the date of observation letter of the IFSCA, whichever is later. ▪ ***Green Channel***: The restricted schemes soliciting money only from accredited investors shall be restricted schemes under a green channel and can open for subscription from investors immediately upon filing with the IFSCA.
Eligible Investors	▪ Restricted schemes shall have less than 1,000 investors or such number as may be specified by the IFSCA. ▪ Accredited Investors or investors investing above USD 150,000 may invest in such schemes. ▪ In case of investors who are employees or directors or designated partners or partners of the FME, the minimum value of investment shall be USD 40,000.
Nature of scheme	▪ Restricted schemes may be launched as open ended or close ended schemes. ▪ In case of a close ended scheme, the maximum tenure and amount to be raised should be decided upfront and disclosed in the placement memorandum. The minimum tenure of a close ended scheme shall be 1 year. ▪ Tenure of schemes can be extended to 2 years and beyond 2 years subject to certain conditionalities. ▪ Restricted schemes shall be constituted in IFSC as Company or LLP or Trust under the applicable laws of India.
Permissible investments (including physical	A restricted scheme may invest the moneys collected under any of its schemes only in a specific list of instruments which *inter alia* include securities issued by unlisted entities, securities listed or to be listed or traded on stock exchanges in IFSC, India or foreign jurisdiction, money market instruments, debt securities, derivatives including

assets such as real estate, art, bullion)	commodity derivatives, units of mutual funds and AIFs in India and foreign jurisdiction, investment in LLPs, etc. Importantly, a close ended scheme may invest up to twenty percent (20%) of the corpus in other physical assets such as real estate, bullion, art or any other physical asset as may be specified by the IFSCA from time to time.
Investment Restriction	▪ In case of an open-ended scheme, maximum investment in securities of unlisted companies should not exceed 25% of the corpus of the schemes. ▪ Minimum size of the restricted schemes shall be USD 5 Million. ▪ Restricted schemes may invest in its associate subject to the prior approval of 75% investors in the scheme by value.
Disclosure to investors	▪ The placement memorandum for such FMEs shall *inter alia* disclose the investment objective, the targeted investors, proposed corpus, investment style or strategy, investment methodology and proposed tenure, etc. ▪ Any material deviation or alteration to the fund strategy should be made with the consent of at least 2/3rd of investors by value. ▪ The FME shall ensure that the NAV is disclosed to the investors at least on a monthly basis in case of an open-ended scheme and half-yearly in case of a close ended scheme. ▪ The FME shall ensure that the portfolio under the scheme is disclosed to the investors at least on a quarterly basis within 1 month from the end of the quarter.
Borrowing and Leveraging allowed	A restricted scheme may borrow funds or engage in leveraging activities, subject to the following conditions: ▪ The maximum leverage by the scheme, along with the methodology for calculation of leverage, shall be disclosed in the placement memorandum ▪ The leverage shall be exercised in accordance with the disclosures in the placement memorandum and any deviation to be subject to consent of 2/3rd of the investors by value ▪ The FME employing leverage shall have a comprehensive risk management framework appropriate to the size, complexity and risk profile of the fund
Valuation Norms	FMEs to value its investments in accordance with certain overarching principles to ensure fair treatment to all investors including existing investors as well as investors seeking to invest. These principles *inter alia* include: ▪ Principles of fair valuation ▪ Identification of valuation methodologies ▪ Consistent valuation of assets held by FME

<table>
<tr><td></td><td>

- Periodic review of the valuation policies and procedures.

</td></tr>
<tr><td>Computation of NAV</td><td>FME to compute the NAV of each restricted scheme at least on a monthly basis and in case of a close ended restricted scheme the computation of NAV shall take place at least half-yearly.</td></tr>
<tr><td>Skin in the game of FMEs – Relocation of offshore funds benefits</td><td>

FME shall ensure that under a restricted scheme, the FME or its associate shall invest:

<table>
<tr><th></th><th>Scheme with targeted corpus of less than USD 30 million</th><th>Scheme with targeted corpus of more than USD 30 Million</th></tr>
<tr><td>In case of a close ended scheme</td><td>at least 2.5% of the targeted corpus and not exceeding 10% of the targeted corpus</td><td>at least USD 750,000 and not exceeding 10% of the targeted corpus</td></tr>
<tr><td>In case of open ended scheme</td><td>at least 5% of the targeted corpus and not exceeding 10% of the targeted corpus</td><td>at least USD 1,500,000 and not exceeding 10% of the targeted corpus</td></tr>
</table>

Timeline for contribution: The said contribution in proportion to investor's investment in the scheme shall be made by the FME or its associate entity within forty-five (45) days (which may be extended subject to IFSCA's approval) and maintained on ongoing basis. The contribution, if brought in by FME, shall be included for the purpose of net worth requirements.

Exemption from contribution: The said contribution shall be exempted in certain situations:

- where at least 2/3rd of the investors in the scheme by value permits waiver of such contribution;
- where at least 2/3rd of the investors in the scheme are accredited investors;
- where scheme is a fund of fund scheme investing in a scheme which has similar such requirements;
- in case of relocation of funds /schemes established or incorporated or registered outside India to IFSC.

</td></tr>
<tr><td>Co-investment and leverage</td><td>

- A restricted scheme may co-invest in permissible investments under these regulations through a SPV or through a segregated portfolio by issuing a separate class of units and shall ensure. The SPV may undertake leverage as disclosed in the placement memorandum.
- The investments by such segregated portfolios shall, in no circumstance, be on terms more favourable than those offered to the common portfolio of the restricted scheme.
- Appropriate disclosures have been made in the placement memorandum regarding creation of segregated portfolio.

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</table>

E. Schemes for Fund Management | Venture Capital Schemes (VCS) | Green channel

- ***Investments***: VCS are schemes that can be launched by FMEs that invest primarily in unlisted securities of start-ups, emerging or early-stage venture capital undertakings mainly involved in new products, new services, technology or intellectual property right based activities or a new business model or other schemes which invest in such entities and shall also include an angel fund. Venture Capital Schemes shall be filed before IFSCA as "venture capital fund" **under Category I AIF**.
- ***Green channel***: The filing of scheme documents for such VCS shall be under a green channel i.e. the schemes filed can be open for subscription by investors immediately upon filing with the IFSCA. The validity of the placement memorandum for launch of the venture capital scheme shall be six (6) months from the date of filing with the IFSCA.
- ***Eligible Investors***: (a) VCS to have less than 50 investors; (b) Accredited Investors or investors investing above USD 250,000 shall be permitted to invest in such schemes.
- ***Permissible Investments:*** A VCS may invest moneys collected under any of its schemes only in specified avenues, such as securities issued by unlisted entities; securities listed or to be listed or traded on stock exchanges in IFSC, India or foreign jurisdiction; debt securities; securitized debt instruments; other VCS set up in the IFSC, India and foreign jurisdiction; units of mutual funds and AIFs in India, IFSC or foreign jurisdiction; limited liability partnerships; other securities or financial products/ assets or instruments as specified by the IFSCA.
- ***Nature of scheme***: Only close ended schemes with a minimum tenure of 3 years. Tenure can be extended subject to fulfilment with certain conditions. VCS shall be constituted in IFSC as Company or LLP or Trust under the applicable laws of India.
- ***Corpus of scheme and investment Restrictions***: Minimum size of the corpus to be USD 5 million, and total corpus shall not exceed USD 200 million. Further, VCS shall invest at least 80% of the AUM in investee companies incorporated for less than 10 years or other VCS.
- ***Borrowing***: A VCS may borrow funds or engage in leveraging activities, subject to the certain conditions including disclosure of maximum leverage by the scheme in the placement memorandum.
- ***Computation of NAV***: To be done at least on an annual basis.
- ***Skin in the game of FME***: The FME shall ensure that under a venture capital scheme, the FME or its associate shall invest:
  - at least 2.5% of the targeted corpus and not exceeding 10% of the targeted corpus in a scheme with targeted corpus of less than USD 30 million;
  - at least USD 750,000 and not exceeding 10% of the targeted corpus in a scheme with targeted corpus of more than USD 30 million.
- ***Timeline for contribution by FME:*** The said contribution in proportion to investor's investment in the scheme shall be made by the FME or its associate entity within forty-five (45) days (which may be extended subject to IFSCA's approval) and maintained on ongoing basis. The contribution, if brought in by FME, shall be included for the purpose of net worth requirements.
- ***Exemption from contribution***: The said contribution shall be exempted in certain situations:
  - where at least 2/3rd of the investors in the scheme by value permits waiver of such contribution;
  - where at least 2/3rd of the investors in the scheme are accredited investors;
  - where scheme is a fund of fund scheme investing in a scheme which has similar such requirements;

- in case of relocation of funds /schemes established or incorporated or registered outside India to IFSC.

- ***Co-investment and leverage***: Co-investment in permissible investment through a SPV under a framework specified by the IFSCA or through a segregated portfolio by issuing a separate class of units. Such SPV may undertake leverage as disclosed in the placement memorandum.

F. Schemes for Fund Management | Retail Schemes

- ***Type of FME:*** Retail Schemes are schemes that shall be launched by Registered FMEs (Retail) for pooling money from all investors or a section of investors through an offer document for investment as per its stated investment objective in various permissible investments.

- ***Nature of scheme:*** Retail schemes may be open ended or close ended.

- ***Eligible Investors***: Retail schemes shall have at least 20 investors with no single investor investing more than 25% in a scheme.

- ***Permissible investments***: A retail scheme may invest moneys collected under any of its schemes only in securities listed or to be listed or traded on stock exchanges in IFSC, India or foreign jurisdictions; securities issued by unlisted entities; money market instruments; debt securities; securitized debt instruments, which are either asset backed or mortgage-backed securities; other investment schemes set up in the IFSC, India and foreign jurisdiction subject to appropriate disclosure in the offer documents; derivatives including commodity derivatives only for the purpose of hedging subject to suitable disclosures in the offer document; units of mutual funds and alternative investment funds in India and foreign jurisdiction; or such other securities or financial products/assets or instruments as specified by IFSC.

- ***Investment Restrictions*** *inter alia* include:

  - *Open ended schemes*: Maximum investment in unlisted securities should not exceed 15% of the total AUM of the schemes.
  - *Close ended schemes investing more than 15% in unlisted securities*: Minimum amount of investment by an investor shall be USD 10,000.
  - Retail schemes shall not invest more than 10% of its AUM in securities of a single company.
  - The minimum size of the retail schemes shall be USD 5 Million.

- ***Skin in the game***: The FME shall ensure that under a retail scheme, the FME or its associate shall invest, lower of 1% of the AUM of the scheme or USD 200,000.

G. Schemes for Fund Management | Family Investment Funds (FIFs)

Provision	Explanation
Legal form	Family Investment Fund could be set up in the IFSC as a Company, Trust (Contributory Trust only) or LLP or any other form as may be permitted by the IFSCA from time to time.
Minimum corpus	A FIF in IFSC should have and maintain a minimum corpus of USD 10 million within a period of 3 years from the date of obtaining certificate of registration.
Nature of fund	Open-ended or close-ended, depending upon the requirements of the family.

Permissible activities	FIF may undertake all activities related to managing family investment fund and as may be specified by the IFSCA.
Permissible investments	FIF may invest money in a specific set of instruments which *inter alia* include securities issued by unlisted entities, securities listed or to be listed or traded on stock exchanges in IFSC, India or foreign jurisdiction, money market instruments, debt securities, derivatives including commodity derivatives, investment in LLPs, units of mutual funds and AIF in India and foreign jurisdiction, and physical assets such as real estate, bullion, art, etc.
Borrowing	FIF may borrow funds or engage in leveraging activities as per their risk management policy.

H. Schemes for Fund Management | Special Situation Funds (SSF)

- ***What is an SSF:*** A scheme that invests in special situation assets in accordance with its investment objectives and may act as a resolution applicant under the Insolvency and Bankruptcy Code, 2016 (**Insolvency Code**).

- ***Permissible Investment***: SSFs can invest in special situation assets which *inter alia* include:

  – stressed loan available for acquisition in terms of Clause 58 of Master Direction – Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 (**RBI Master Direction**), a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (**IBC**) or in terms of any other policy of Reserve Bank of India (**RBI**) or IFSCA or Government of India issued in this regard from time to time;

  – security receipts issued by an Asset Reconstruction Company (**ARC**) registered with RBI;

  – securities of investee companies:

    - whose stressed loans are available for acquisition in terms of Clause 58 of the RBI Master Direction, a resolution plan approved under the IBC or in terms of any other policy of the RBI or IFSCA or Government of India issued in this regard from time to time;
    - against whose borrowings, security receipts have been issued by an ARC registered with the RBI;
    - whose borrowings are subject to corporate insolvency resolution process under Chapter II of the IBC;
    - who have disclosed all the defaults relating to the payment of interest or repayment of principal amount on loans from banks / financial institutions/ systemically important non-deposit taking Non-Banking Financial Companies (**NBFC**)/ deposit taking NBFC and /or listed or unlisted debt securities and such payment default is continuing for a period of at least 90 calendar days after the occurrence of such default; and

  – any other asset as may be specified by IFSCA from time to time.

- ***Nature of Scheme***: A SSF to be close ended with a minimum tenure of 3 years. Tenure can be extended subject to fulfilment of certain conditions. A SDF shall be constituted in IFSC as a company or LLP or Trust under the applicable laws of India.

- ***Borrowing***: An SSF shall not borrow or engage in any leveraging activities other than to meet day-today operational requirements.

I. Exchange Traded Funds (ETFs)

- ***Type of FME:*** Only Registered FMEs (Retail) shall launch ETFs.
- ***Type of ETFs:*** ETF shall be mandatorily listed and traded on a recognised stock exchange and shall include:
  - Equity Index based ETFs
  - Debt Index based ETFs
  - Commodity based ETFs
  - Hybrid ETFs (investing in 2 or more asset class)
  - Actively Managed ETF
  - Any other ETFs subject to approval of the concerned recognised stock exchange and IFSCA

The IFSCA Fund Regulations provide for governing structures for the aforesaid ETF schemes.

J. Focus on Environment Social Governance (ESG)

- The IFSCA Fund Regulations mandate a FME managing AUM above USD 3 Billion as at the close of a financial year or any other threshold of AUM as may be specified by IFSCA, to:
  - establish policy on governance around material sustainability-related risks and opportunities
  - disclose in its annual report how the FME identifies, assesses and manages material sustainability-related risks
  - establish and disclose in its annual report the process of factoring sustainability-related risks and opportunities into fund manager's investment strategies and processes, including, where relevant, data and methodologies used
  - comply with any other sustainability related requirements as may be specified by IFSCA
- Further, a FME that launches a scheme related to ESG, is required to make full disclosure regarding investment objective, investment policy, strategy, material risk, benchmark, etc., in the manner as may be specified by the IFSCA.
- Further, all scheme documents filed by FME with the IFSCA are required to disclose whether sustainability related risks are incorporated in the decision making. The FME shall provide details when sustainability related risks are incorporated in the decision making. **A negative statement shall be included when sustainability related risks are not incorporated in the decision making**.

K. Other Fund Management Services

Provision	Explanation
Portfolio Management Services	▪ A Registered FME may offer portfolio management services to its clients. ▪ A FME in its capacity as a portfolio manager may have the following categories as clients: – a person resident outside India; – a non-resident Indian; – a non-individual resident in India who is eligible under FEMA to invest funds offshore; and

	– an individual resident in India who is eligible under FEMA to invest funds offshore, to the extent allowed under the liberalised remittance scheme (LRS) of RBI. Further, the IFSCA Fund Regulations provide for norms related to disclosures, reporting, investment restrictions and other general obligations of portfolio managers.
Investment Trusts	▪ The IFSCA Fund Regulations provide for a detailed consolidated regulatory framework for REITs and InvITs. ▪ Any person from IFSC or India or a foreign jurisdiction desirous to operate an Investment Trust in the IFSCs shall obtain registration with IFSCA. ▪ An Investment Trust is permitted to raise funds through: – Public issue with units listed on a recognised stock exchange in IFSC; or – Private placement with units listed on a recognised stock exchange in IFSC; or – Private placement whose units are not proposed to be listed on any recognised stock exchange. ▪ In case of private placement, any Registered FME may act as Investment Manager to such Investment Trusts. ▪ In case of a public issues, a Registered FME (Retail) shall only be eligible to be appointed as an Investment Manager.

L. Listing of schemes/ units of FMEs

- ***Listing of open-ended schemes***: May be listed by FMEs at their discretion on recognized stock exchanges in IFSC.
- ***Listing of close ended schemes***: May be listed by FMEs at their discretion on recognized stock exchanges in IFSC. However, a close ended retail scheme shall be mandatorily listed on at least one of the recognised stock exchanges.
- ***Listing of ETFs***: Units of ETFs to be mandatorily listed on at least one of the recognised stock exchanges.
- ***Listing of Investment Trusts***: Units of Investment Trust (except for private placement of Investment Trust whose units are neither listed nor proposed to be listed on a recognized stock exchange) shall be listed on a recognized stock exchange within defined timelines.

The IFSCA Fund Regulations also provide for conditions of delisting of ETFs or Investment Trusts or schemes by recognized stock exchanges.

M. General Obligations and Responsibilities

Provision	Explanation
Code of Conduct	Every FME, its fiduciaries, KMPs (including Principal officer, Fund Managers and Designated Compliance Officer) shall abide by the Code of Conduct as specified under the regulations
Records	Every FME shall keep and maintain proper books of account, records and documents, for each scheme so as to explain its transactions and to disclose at any point of time the financial position of each scheme and in particular give a

	true and fair view of the state of affairs of the scheme and intimate to IFSCA the place where such books of account, records and documents are maintained.
Business continuity plan	A registered FME shall maintain a business continuity plan identifying procedures relating to an emergency or significant business disruption and shall conduct an annual review of its business continuity plan.
Cyber security	A registered FME to have a robust cyber security and cyber resilience framework in place.
Advertisement	A detailed advertisement code is provided which is required to be adhered to.
Risk management system	A registered FME to have a sound risk management system for comprehensively managing all risks.
Change in control	Prior approval of the IFSCA required in case of any direct or indirect change in control of the FME.
Investment Committee	The FME may, at its discretion, constitute an Investment Committee to make investment decisions for the schemes. All responsibilities casted upon the FME and Fund Managers under the regulations to the extent applicable shall also be complied with by the members of such Investment Committee.
Annual report and Audit	▪ FME shall prepare in respect of each financial year an annual report of accounts of the schemes and abridged summary thereof and shall be submitted to the IFSCA not later than four months from the end of financial year. The Annual Report and abridged summary shall contain details that are necessary for the purpose of providing a true and fair view of the operations of the scheme. ▪ Every scheme launched by FME shall have the annual statement of accounts audited by an auditor who is not in any way associated with the FME.
Merger/ demerger/ reconstruction of schemes	Merger/ demerger/ restructuring of schemes permissible, subject to the approval of the IFSCA / guidelines as may be issued by the IFSCA.
Independent custodian	The FME shall appoint an independent custodian to carry out the custodial services at least for the following schemes: – Retail schemes; – Open ended restricted schemes; and – All other schemes managing AUM above USD 70 Million.
Redemption	A close ended scheme shall be fully redeemed at the end of maturity period.

Changes pertaining to GIFT City

A. Courses offered by foreign universities/institutions notified as a financial service

In a move to boost the education sector in India, the Ministry of Finance recently notified courses offered in financial management, fintech, science, technology, engineering and mathematics by foreign universities or foreign institutions in the International Financial Services Centre (**IFSC**) at GIFT City, as financial services.

The above change was introduced vide notification dated May 23, 2022 (available here).

B. Fee structure under the IFSCA (Fund Management) Regulations, 2022

Recently, the IFSCA notified the IFSCA (Fund Management) Regulations, 2022 (**Fund Management Regulations**) vide notification dated April 19, 2022 (available here), which shall come into force on the thirtieth day from the date of its publication in the Official Gazette. The Fund Management Regulations were introduced to regulate the framework for investment funds in IFSC. Accordingly, IFSCA issued the fee structure for the various activities to be undertaken by Fund Management Entities (**FME**) under the Fund Management Regulations.

I. Fee Structure:

(1) Application and Registration Fees for applicants seeking registration as a FME in the IFSCA:

Application Fee	USD 2,500
Registration Fee	
Authorised FME (except Family Investment Fund)	USD 5,000
Registered FME (Non -retail)	USD 7,500
Registered FME (Retail)	USD 10,000
Family Investment Fund	USD 15,000

(2) Fees for various activities

A. Filing of placement memorandum/ offer document with IFSCA	
Venture Capital Scheme	USD 7,500
Restricted Scheme	
(i) Category I Alternative Investment Fund	USD 7,500
(ii) Category II Alternative Investment Fund	USD 15,000
(iii) Category III Alternative Investment Fund	USD 22,500
Retail Scheme	USD 22,500

Exchange Traded Fund (**ETF**)	USD 22,500
Investment Trust	0.05% of the offer size
B. FME desirous of undertaking the activity of Portfolio management services	**USD 5,000**

(3) ***Applications for Regulatory / Innovation Sand box, Fund lab, etc***.: USD 2,500 along with requisite application

(4) ***Annual Fee***: Each FME shall pay an annual fee of USD 2,000. The annual fee shall be applicable for financial year after the year in which certificate of registration is granted by IFSCA and shall be payable in the first month of each financial year i.e. in April.

II. Fresh registration for entities already registered with IFSCA:

It has been clarified that all existing entities providing portfolio management services, and managers of alternative investment funds (**AIFs**) registered with and registered with IFSCA shall seek fresh registration within 6 months from the effective date of the Fund Management Regulations. However, all AIFs already registered with IFSCA before the effective date of Fund Management Regulations shall be considered as grandfathered and fresh registration for such funds / schemes shall not be required.

III. Waiver of fee for registered FME filing ESG schemes and ETFs:

Registered FMEs filing ESG schemes with IFSCA will be waived the scheme filing fee as if the disclosures in the scheme are in line with the disclosures provided by IFSCA for such schemes. The waiver of fee shall be applicable to only the first 10 ESG schemes registered with IFSCA and each FME shall be permitted to avail the waiver only once. Further, Registered FMEs filing ETFs with IFSCA will be waived the filing fee for the first 3 ETFs filed by such FME with IFSCA. The waiver of fee shall be applicable only to the first 30 ETFs registered with IFSCA.

The above fee structure has been issued vide circular dated May 19, 2022 (available here).

C. Guidelines for seeking NOC by Stockbrokers / Clearing Members for setting up WOS/SDS/JV in GIFT IFSC

With the objective of streamlining the process of applications from stockbrokers/ clearing members for granting no-objection certificates (**NOC**) for setting up wholly owned subsidiaries (**WOS**), step down subsidiaries (**SDS**), Joint Ventures (**JV**), etc. in the IFSC set up in GIFT City (**GIFT IFSC**), SEBI has issued the following guidelines:

(1) ***Format of application for NOC***:

Application shall be made in the format as prescribed by SEBI along with a list of supporting documents for seeking NOC for setting up WOS/SDS/JV in GIFT IFSC. Further, pursuant to setting up WOS/ investment in SDS/JV, etc., the applicant shall be required to maintain net worth for each category of registration in accordance with the relevant laws and directions issued by respective stock exchanges/depositories.

Details to be included in the application	▪ Details of all registrations of the applicant company in India and abroad ▪ Net worth of the applicant company ▪ Relevant details of promoters, directors and key persons of the applicant ▪ Details of regulatory action taken/ initiated/ pending, if any, against the applicant/ promoters/ directors/ key personnel/ principal officer of the applicant company (in India/abroad) ▪ Any fee remaining unpaid to SEBI by applicant/ associates ▪ Amount of proposed investment ▪ Whether the applicant is setting up a WOS/SDS or entering into a JV or acquiring stake in an existing company ▪ Details of the proposed WOS/SDS/JV in GIFT IFSC
Supporting documents	▪ Certificate of Net worth based on the latest audited results ▪ NOC obtained from all stock exchanges/ depositories where the applicant is a member/ participant, in case the applicant is a stock broker/ depository participant ▪ Details of any non-compliance with respect to the "fit and proper person" criteria ▪ Declaration cum undertaking with respect to the "fit and proper person" criteria duly stamped and signed by the authorised signatories of the applicant ▪ Latest shareholding pattern of the applicant and list of shareholders who have controlling interest

(2) ***Process of obtaining NOC***:

(a) Stockbrokers and clearing members shall apply through a stock exchange where the applicant is a member, along with the required information, documents and NOC received from all stock exchanges/clearing corporations/depositories in which the applicant is a member/participant.

(b) Stock exchanges/ clearing corporations (where the applicant is only clearing member) are then directed to forward the complete application to SEBI, after verification along with its recommendation.

The above guidelines were issued vide SEBI circular SEBI/HO/MIRSD/DoR/P/CIR/2022/61 dated May 13, 2022 (available here).

Resident individuals not permitted to invest in bullion depository receipts on IIBX in IFSC under LRS route

A. Resident individuals not permitted to investment in Bullion Depository Receipts (BDRs) on India International Bullion Exchange (IFSC) Limited (IIBX) through LRS route

For the purposes of foreign exchange laws, any unit set-up in International Financial Services Centre (IFSC) is treated as being outside the domestic jurisdiction, thereby requiring investment in IFSC to comply with the provision of Foreign Exchange Management Act, 1999 read with the relevant regulations.

In this regard, vide circular dated February 16, 2021 (available here) (**LRS Circular**), the Reserve Bank of India had permitted resident individuals to make remittances under the liberalized remittance scheme (**LRS**) route in International Financial Services Centres (**IFSC**) in India only for making investments in IFSCs in ***securities***, other than those issued by entities/companies resident (outside IFSC) in India.

Earlier, vide notification dated August 31, 2020 (available here), the Ministry of Finance had notified the bullion spot delivery contract and BDR with underlying bullion as a financial product and related services as financial services. Further, bullion spot delivery contract and BDR with underlying bullion have also been included in the definition of 'securities' under the Securities Contract Regulations Act, 1956 vide notification dated December 24, 2021 (available here).

IFSCA has now clarified that resident individuals, as referred to in the LRS Circular, are not permitted to transact/invest in BDR on IIBX through the LRS route.

However, it has been stated that the aforesaid clarification is without prejudice to the participation of Qualified Jewellers notified by the IFSCA, in terms of DGFT notification no.49/2015-2020 dated January 05, 2022 for purchase of BDRs for the sole purpose of import of gold through IIBX.

This clarification was issued by the IFSCA vide circular dated June 17, 2022 (available here).

VCC structure recommended for funds in GIFT city

With the objective of promoting innovative structures and attracting international players in International Financial Services Centres (**IFSC**), the International Financial Services Centre Authority (**IFSCA**) is contemplating to allow variable capital company (**VCC**) structure in the funds space in the IFSC – GIFT City (Gujarat International Finance Tec-City) and has recently released the Report of the Expert Committee for drafting a Legal Framework for allowing Variable Capital Company Structure in the IFSCs (available here) (**Expert Committee Report**). This is one of the many other moves to position GIFT City as a global financial hub.

Earlier, IFSCA had constituted an expert committee (**Krishnan Committee**) to examine the relevance and adaptability of VCCs for IFSCs in India, which released its report on the introduction of VCCs in the IFSC in May 2021. Following the report of the Krishnan Committee, IFSCA had discussions with the relevant stakeholders and meetings with Ministry of Corporate Affairs and other representatives and pursuant to this discussion, IFSCA constituted another expert committee (**Expert Committee**) to draft a legal framework for allowing the VCC structure to operate in IFSCs in India.

The recommendations of the Expert Committee have been analysed in detail in the table below.

<table>
<tr><th>Recommendations</th><th colspan="2">Detailed analysis</th></tr>
<tr><td rowspan="3">Principles driving the design of the proposed legal framework for VCC</td><td colspan="2">The legal framework should recognise VCCs as a vehicle to house only pooled funds. The Expert Committee agreed that the following key principles should drive the design of the proposed legal framework for VCCs:</td></tr>
<tr><td>Promoting the competitiveness of the VCC structure</td><td>

Given that VCCs are intended to house funds, the legal framework be drafted to ensure that VCCs are at least as attractive to house funds as existing structures, such as trusts.
Specifically, the legal framework should ensure that VCCs are low-cost structures, which attract lower governance requirements, can be wound up quickly and can maintain confidentiality of investor information.
The fundamental features of a VCC should be retained – specifically variable capital requirements, ability to house multiple pools of assets that are ring-fenced from each other and flexibility on pay-outs to investors.
</td></tr>
<tr><td>Principle based legislation with flexibility to introduce subordinate legislation</td><td>

The legislation introducing VCCs should be principle-based and should avoid prescriptive requirements.
There should be sufficient flexibility for the legal framework to be adapted to the needs and challenges that may arise in practice.
</td></tr>
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		▪ Vast latitude should be given to specify ***subordinate legislation relating to VCCs***. The approach followed under the SEBI Act, 1992 should serve as a model for deciding the extent of reliance on subordinate legislation.
	Framework to focus on the 'entity' not 'activity'	▪ Presently, Fund Management Entities (**FMEs**) launch schemes in separate vehicles, such as trusts etc. In addition to FMEs launching schemes in trusts, etc., the VCC should be another vehicle that can be used by FMEs to launch and house schemes. ▪ The IFSCA (Fund Management) Regulations, 2022 (**FME Regulations**) which puts in place certain regulatory requirements for funds housed in trusts, companies, etc., including requirements relating to minimum corpus, permissible investments, winding up and listing should apply to the schemes housed within a VCC as well, and the FME Regulations should be amended to accommodate this. ▪ Requirements that apply to establish and register FMEs, however, would not apply to VCCs, as VCCs will not be FMEs and will only be structures established by FMEs to house schemes. Consequently, the legal framework for introduction of VCCs should clarify the basic structure of a VCC that can operate in a VCC and lay down standards for the incorporation and dissolution of a VCC. ▪ However, the framework for the formation of VCCs should not venture into regulating its business operations, as this would lead to overlaps and potentially more onerous compliances for VCCs that would render it a less competitive vehicle for fund activities.
	Alignment with activity regulation	The framework introducing VCCs should be closely aligned with the requirements under the FME Regulations that would apply to funds housed within the VCC. This will ensure that VCCs are subject to a cohesive regulatory framework.
Inclusion of the legal framework as part of the IFSCA Act	The Expert Committee recommended that instead of introducing the VCC framework as part of a nationally applicable legislation, such as the Companies Act, 2013 (**CA2013**) or a stand alone law, it should be introduced as an amendment to the International Financial Services Centre Authority Act, 2019 (**IFSCA Act**) for the following reasons:	

	▪ ***Compliance with a single legislation***: The Expert Committee felt that there was a need to ensure that the business regulation and entity regulation was intrinsically linked, and that VCCs would have to comply with requirements under a single legislation, instead of attempting disjointed compliances across different legislations. ▪ ***Regulation by IFSCA under the same legislation ensuring ease of doing business for VCCs***: IFSCA, which has already been discharging its functions under the IFSCA Act, would not need to attempt regulation from different lenses as a regulator under multiple legislations, thereby avoiding gaps and overlaps in regulation and ensuring greater ease of doing business for VCCs, and more streamlined regulation of VCCs as well. ▪ ***IFSCA Act to regulate all financial entities***: This would serve as a first step towards converting the IFSCA Act to a code for regulating all financial entities and activities that take place within the IFSCs. ▪ ***Cohesive and unified approach to regulate financial activities within IFSC***: As IFSC becomes a hub for international finance, more innovative structures and activities would be carried out from within the IFSC. Given this, it would be important to update the legal framework relating to these activities from time to time. Instead of creating various pieces of legislation, it would be useful to update the IFSCA Act, so that a cohesive and unified approach to regulation of financial activities in the IFSCs can be taken.
Administration of VCCs to be carried out by IFSCA	▪ ***One regulatory agency i.e. IFSCA***: The Expert Committee noted that a VCC is essentially a vehicle to house funds. IFSCA already regulates funds in the IFSCs and the Expert Committee believes that VCCs should have interface with only one regulatory agency. Having different agencies for entity regulation, and activity regulation of VCCs could lead to overlaps in compliances and gaps in regulation. This would reduce the attractiveness of the VCC as a structure to house funds. ▪ ***Entity regulation to be carried out by IFSCA***: The Expert Committee felt that since entity regulation (e.g. incorporation, prescription of governance norms, requirement of filings, dissolution, etc.) would be closely linked to activity regulation, there may not be the need to introduce another agency for entity regulation. Therefore, even functions such as incorporation, registration and dissolution of a VCC, should be carried out under the aegis of IFSCA, instead of the Central Government. ▪ ***"Registry activity" to be carried out by IFSCA:*** The Expert Committee is of the view that processes such as registration of a sub-fund of a VCC, which could be conceived of as a 'registry activity', would have to go hand in hand with obtaining permissions from IFSCA to launch the schemes which would be housed in the sub-fund of VCC. To ensure that these processes can be streamlined, such activities should be carried out by the IFSCA itself, and requisite capacity should be built within the IFSCA to enable this.
Types of securities |	▪ ***Issuance of equity/ debt securities***: A VCC may be able to issue both debt and equity securities. Where a VCC is an umbrella VCC, it may issue different

Equity/debt securities, Management and Participating shares	classes of equity and debt securities to represent the interest of the holder in the specific sub-fund that each class of securities would correlate to. ▪ ***<u>Management shares and participating shares</u>***: Drawing reference from the Model Constitution for VCCs prepared by the Singapore Academy of Law and taking into account the manner in which funds are organised in India, the Expert Committee is of the view that a VCC should be given an option to segregate its equity share capital into management shares and participating shares. – **Management shares**: The initial subscribers/ incorporators of the VCC may subscribe to management shares. Management shareholders should have voting rights but limited economic rights, with no right to receive any share of the profits of the VCC or any proceeds of realisation of the assets of the VCC. A management shareholder would have a right to vote in proportion to her share in the paid-up management share capital of the VCC. – **Participating shares**: Participating shareholders should have economic rights, specifically the right to participate in the distributable proceeds, income and profits earned by the VCC from holding or disposal of investments. However, their voting rights should be limited to those proposals that involve a variation of their rights, or such other matters as may be provided in the articles of the VCC. A participating share holder should have a right to vote in proportion to her share in the net asset value of the participating share capital of the VCC. – **Total voting power of management shareholders and participating shareholders**: Where a resolution is to be approved both by management shareholders and participating shareholders, the total voting power should be calculated as an aggregate of the paid-up management share capital and the aggregate net asset value of the holders of the participating share capital who are entitled to vote on the resolution. Given this option for a VCC to issue management and participating shares, the Expert Committee was of the view that it may not be necessary to allow VCCs to issue preference shares.
Insolvency and closure of a VCC to be regulated by FME Regulations	▪ ***<u>Winding down/insolvency of VCC to be regulated by FME Regulations</u>***: The FME Regulations provide a mechanism for the winding down of funds, including at the direction of IFSCA The Expert Committee was of the view these should and would deal with the winding down or transfer of the business of a VCC where a VCC is insolvent when the FME Regulations are extended to cover the schemes housed in the VCC itself. Once the business is either wound up under the activity specific regulation, only the corporate entity of the VCC would remain and this would not be carrying out any business. Given this, there would not be the need to provide a detailed winding down process.

	▪ ***Summary process for dissolution of corporate entity***: A summary process for the dissolution of the corporate entity, such as that employed for striking off under the CA2013, should be provided. This process should only be such that IFSCA can satisfy itself that there are no pending liabilities to any participating members of the VCC; and sufficient provision has been made for the realisation of all amounts due to the VCC and for the payment or discharge of any other liabilities and obligations within a reasonable time. ▪ ***Rescuing a VCC***: With regard to rescue, the Expert Committee noted that the process for schemes of arrangement for VCCs could also be used to 'rescue' the VCC or its sub-funds, in case of an insolvency situation. The FME Regulations already empower IFSCA to order merger of funds and order change in the fund manager of a fund. They also provide for the maintenance of business continuity plans and for the restructuring of schemes. The Expert Committee recommended that these should be extended to funds housed in a VCC, and no further rescue tools would need to be provided for in the proposed legal framework.
Audit and Accounting as per the FME Regulations	The Expert Committee recommend that accounting and auditing should be done for VCCs in the same manner that it is done for other vehicles housing funds. The Expert Committee noted that the FME Regulations have put in place certain requirements for audit. The committee recommended that IFSCA should have broad flexibility to prescribe audit and accounting requirements that are consistent with the requirements under the FME Regulations, which should evolve with market dynamics and therefore be provided for in the subordinate legislation.
Basic Structure and Incorporation of VCC | Stakeholders of a VCC, structure of entity, internal governance mechanisms, constitution documents, incorporation, registered office, nomenclature of the VCC	▪ ***Stakeholders of a VCC***: The stakeholders of a VCC shall be Shareholders/ Investors, Board of Directors, Fund Manager and Custodian. However, the requirement to appoint a fund manager and a custodian should flow from the regulations governing the business of the VCC, i.e. the FME Regulations, and need not find place in the legislative framework to introduce VCCs. ▪ ***Structure of entity***: A VCC should be a body corporate with separate legal existence, perpetual succession, limited liability and ability to sue and be sued in its own name, similar to a public listed company, but with variable capital, i.e., no minimum capital requirement and flexible norms on issue or redemption of shares. Further, IFSCA should specify higher governance/ compliance requirements for "public VCCs" in case certain thresholds are met. ▪ ***Internal governance mechanisms***: In addition to the governance requirements provided in legislation (which would include the requirement to set up a board) or by the applicable regulator, the VCC would define its internal governance mechanisms in its constitutional documents, i.e., certificate of incorporation, memorandum of association and articles of association. ▪ ***Minimum requirements of constitution documents of a VCC***: The approach adopted in the CA2013 should broadly be followed:

	– The constitution documents of a VCC should include a Memorandum of Association setting out the main objective of the VCC and other objectives ancillary to the main objective, and an Article of Association, setting out the rules for the internal management of the VCC. – A certain threshold for the alteration of these constitution documents should be prescribed in the act. A more stringent process for the alteration of these constitution documents, as and when required, may be prescribed in the respective documents, subject to the requirement of filing the details of alterations with the registrar. ▪ ***Incorporation of a VCC***: The system followed in relation to the companies to be followed. However, IFSCA to administer the incorporation. ▪ ***Registered office of the VCC***: VCCs should at all times have their registered office in the IFSC. Further, IFSCA may prescribe requirements, if any, in relation to physical presence of directors/ employees of the VCC in IFSC. ▪ ***Nomenclature of a VCC/sub-funds***: To allow people dealing with VCCs to distinguish them from companies incorporated under the CA2013 and limited liability partnerships, the VCC should have its name registered with the Registrar of VCC with the last words 'Variable Capital Companies (International Financial Services Company) Limited' or 'VCC (IFSC) Ltd'. The process of obtaining the name of a VCC/ sub-funds shall be similar to the one for companies under the CA2013. The restrictions applicable to certain undesirable names would be as prescribed by the MCA. ▪ ***Open-ended or close ended funds and conversion of funds***: VCC structure should be available for both open-ended and close-ended strategies. The funds may be allowed to convert from open-ended to close-ended, and vice versa, in accordance with the norms specified by the IFSCA. In case of public sub-funds, conversion of open-ended to close-ended schemes shall be subject to consent of investors and exit shall be provided to investors who dissent for such conversion.
Governance and Management of VCCs | Register of shareholders, significant beneficial owners, accounting standards, related party transactions, board of directors of a VCC	▪ ***Register of shareholders of a VCC***: A register of shareholders should be created and made available for inspection only to the members of the concerned sub-fund and public authorities for regulatory, supervisory and law enforcement purposes. The register should also be filed with the ROVCC. However, shareholders should only be able to access that information on the register that pertains to themselves. ▪ ***Collection and disclosure of information relating to significant beneficial owners***: A VCC should also be mandated to maintain information relating to significant beneficial owners and file with the Registrar of VCC regularly. The Registrar of VCC should however ensure that this information is not made public. The Registrar of VCC / the IFSCA may seek this information in certain circumstances, in which case, the VCC should be mandated to provide the same. However, such disclosures should only be made to IFSCA. ▪ ***Accounting standards***: The VCC should be allowed to prepare their financial statements using any financial reporting standard, i.e., US GAAP, or IndAS or IFRS. The accounting policy followed by sub-funds should clearly be

	documented in the financial statements. ▪ ***<u>Preparation of financial statements of umbrella VCCs</u>***: The financial statements of each sub-fund should be maintained separately but may be aggregated (not consolidated) at the VCC level for filing with the Registrar of VCC/IFSCA. ▪ ***<u>Disclosure requirement for related party transactions</u>***: VCCs should disclose related party transactions, including those with directors and fund managers in their financial statements per relevant accounting standards. It is to be noted that certain related party transactions are already restricted under the FME Regulations. ▪ ***<u>Constitution of board of directors of a VCC</u>***: VCCs should have a board of directors that should be constituted in line with the requirements of the CA2013: – The board should have a minimum of <u>two directors</u> of whom at least <u>one should be an Indian resident</u>. – Where VCCs are publicly traded or have publicly traded sub-funds, they should appoint <u>one independent director</u>. In other cases, investors should be able to require the appointment of an independent director as part of their fund subscription agreement. – Directors should be '<u>fit and proper' persons</u>, and at least one director of the VCC should be common with that of the fund manager. – The requirements for qualifications of directors should be synchronised with the requirements under the FME Regulations. ▪ ***<u>Role of the board of directors of a VCC</u>***: The Board should take the responsibility for the overall conduct of the VCC along with the Fund Manager. ▪ ***<u>Appointment of Company Secretaries</u>***: Appointment of company secretaries should be mandated only if the share capital of the VCC exceeds a prescribed threshold. Such a secretary should be an Indian resident. Company secretaries need not be 'employed' but may be 'engaged' as well. ▪ ***<u>Administration of VCC's affairs</u>***: IFSCA may provide details for administration and management of VCCs in subordinate legislation. While it may take inspiration from the CA2013 as applied to companies licensed to operate from the IFSC, it may prescribe more flexible requirements.
Capital and Rights and Powers of Shareholders | Transferability of securities, fresh issue or redemption/ buy-back of securities, payment of	▪ ***<u>Organisation of VCC's capital</u>***: VCCs would issue shares that would either represent the investment in the VCC itself or in its sub-funds in case of an umbrella VCC. The VCC must issue a separate class or classes of shares for each sub-fund. ▪ ***<u>Transferability of securities of a VCC or sub-fund</u>***: A sub-fund may be set up as a publicly traded or privately traded sub-fund. The IFSCA may specify the conditions which a publicly traded sub-fund must comply with or the circumstances in which a sub-fund must be necessarily classified as a publicly traded sub-fund (such as a threshold linked to the number of investors, etc.).

<table>
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<td>dividend, valuation of securities, shareholder meeting requirements</td>
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– Public sub-funds should be able to list their securities on IFSCA's stock exchange.
– Private sub-funds should be able to list their debt securities on IFSCA's stock exchange. Any restrictions on transferability of equity securities may be built in their scheme documents.

▪ <u>Fresh issue or redemption/buy-back of securities or capital reduction by VCCs</u>: There should not be any need for shareholder or regulatory approval for the same. However:
– Publicly traded sub-funds or VCCs should not be able to redeem capital except in cash.
– Public VCCs or sub-funds should make buy-back offers to all shareholders of a class, unless otherwise approved by a requisite majority of shareholders. Buy-back or redemption of shares should only be done if shares are fully paid up.
– Redemptions and consequent reductions of capital should be reflected in the Annual Report.
– Redemption to be at NAV or any other internationally accepted valuation mechanism, as chosen in the scheme document.
– Only redemption should be envisaged for participating shares. The mechanism for redemption should not require shareholder or regulatory approval (subject to certain limitations). However, management shares should not be redeemable. Instead VCCs may have the option to buy back or reduce some (but not all) management shares with requisite shareholder/ regulatory approval.

▪ <u>Payment of dividends</u>: Dividends should be paid out of both capital and profits subject to positive net worth of the sub-fund, VCC.

▪ <u>Valuation of securities of a VCC/sub-fund</u>: Valuation of securities of VCC should be at NAV or any other internationally accepted valuation mechanism, as chosen in the scheme document. Valuation to be conducted every 3 months for publicly traded VCCs/ sub-funds and as per scheme document for privately traded VCCs and sub-funds.

▪ <u>Shareholder meeting requirements of VCC</u>: Private VCCs and sub-funds should not have mandatory annual general meeting requirements. Public VCCs and sub-funds should be able to have video conference annual general meetings.
– Shareholders should be able to call for extraordinary general meetings, with flexibility to call for such meetings at a sub-fund level.
– Basic principles for conducting meetings should be in the act but the procedure for conducting meetings should be left to each VCCs constitutional documents. They can be in line with those mandated under CA2013.
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<tr>
<td>Sub-funds | Structure and setting up of sub-</td>
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▪ <u>No mandatory requirement for sub-funds</u>: The VCC may be a stand-alone VCC or an umbrella VCC containing sub-funds.

▪ <u>Structure of sub-funds</u>: The sub-fund of a VCC should not be a legal person separate from the VCC; it should derive its character from the VCC. In mutual
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funds, activities of sub-funds, cross cell contagions	fund parlance, a sub-fund is akin to a scheme of a mutual fund. Each sub-fund's assets and liabilities however would remain separate from the assets and liabilities of the VCC. ▪ ***Setting up of sub-funds***: A VCC may set up one or more sub-funds, without the prior approval of the Registrar of VCC. On the creation of new sub-funds under a particular VCC, the IFSCA should suo-moto intimate information about the sub-fund to the Registrar of VCC. The IFSCA and the Registrar of VCC must have an appropriate information sharing mechanism to facilitate this exchange. Thereupon, the Registrar of VCC should allot a unique identification number to each sub-fund that may be linked to the VCC. The IFSCA should administer the registration. ▪ ***Activities of sub-fund to be carried at VCC/ sub-fund level***: As a VCC is the legal entity, it will enter contracts with external parties alone. Further, only a VCC can sue (or be sued by) an investor or a third party and not the sub-funds. Any charge created on the assets of the VCC shall be registered with the Registrar of VCC. The legal framework should recognise that administrative activities, such as filing of charges, should take place at the VCC level, to ensure lower costs of administration. ▪ ***Prevention of cross cell contagion***: It should be the explicit duty of board of directors to prevent cross-cell contagion in constitutional documents, adequate penalty provisions in law, and cross-cell investments to be restricted in accordance with scheme documents or in IFSCA regulations. – **Disclosure of details**: A VCC should be required to disclose the name, unique sub-fund identification number and that the sub-funds have segregated assets and liabilities in all documents in which its sub-fund is referred to, prior to entering into agreements on behalf of its sub-fund. – **Umbrella VCC**: The letterhead of an umbrella VCC should contain the phrase 'An umbrella fund with segregated liability between sub-funds'. – **Segregation of liability clause in third party agreements**: To ensure that the third party is aware about the implications of having segregated liability, the act should provide to incorporate the below clause in third party agreements: '*the party or parties contracting with the umbrella fund shall not seek, by whatever means, to have recourse to any assets of any sub-fund in the discharge of all or part of a liability which was not incurred by that sub-fund*'. Appropriate penal provisions should be introduced in case the provisions are not complied with. – **Prohibition in constitutional documents**: The constitutional documents should also contain prohibitions on direct/ indirect commingling of assets and liabilities.
Segregation of assets and liabilities of sub-funds amongst themselves and vis-à-vis each other	The governing act for VCC should specifically provide for the segregation of the assets and liabilities of sub-funds: ▪ The assets of a sub-fund cannot be used to discharge the liabilities of or claims against the VCC or any other sub-fund of the VCC; ▪ Any liability incurred on behalf of or attributable to any sub-fund of a VCC must be discharged solely out of the assets of that sub-fund;

	▪ Any income accruing to the sub-fund must be distributed to the investors of that sub-fund or re-invested by that sub-fund, and any loss incurred by a sub-fund must be absorbed by that sub-fund alone; and ▪ Each sub-fund is bankruptcy remote from the insolvency proceedings initiated in respect of another sub-find. This would mean that the investors and creditors of a particular sub-fund may claim their returns and fulfil their claims out of the assets of that sub-fund only, and not from the other assets of the VCC (including the assets of any other sub-fund). ▪ A VCC should be permitted to allocate common assets and liabilities not attributable to any sub-fund between the sub-funds in a manner that it considers fair to shareholders. The allocation method based on which various expenses should be allocated, may be prescribed in the constitution document.
Mergers and Acquisitions of VCCs/ their sub-funds	▪ ***Mergers of VCCs/ their sub-funds***: The merger/ acquisition of a sub-fund of the VCC with another sub-fund of the same or another VCC should be permitted. The merger/ acquisition of one VCC with another VCC should also be permitted. ▪ ***Approvals required to effect a merger***: At the sub-fund/VCC level, approval should be taken from shareholders. The threshold for approval and the manner of taking approval should be prescribed in the scheme/constitution document. Approvals should be taken after full disclosure regarding the merger, including the nature of the merger, benefits of the merger, the rights and obligations of the shareholders, and the expected timelines – IFSCA should prescribe a specified percentage of creditors who would be required to approve a merger if such merger affects creditor rights. – IFSCA may prescribe guidelines for approval of and reporting of mergers in the case of publicly traded funds. – No NCLT approval should be sought. – It also agreed that the IFSCA Act and subordinate provisions should provide enabling provisions for such mergers. Broadly, these provisions should provide that: – The appropriate “approval” authority for mergers would be IFSCA, and it should be empowered to provide detailed conditions for mergers in subordinate legislation. – An exit mechanism should be provided for dissenting investors, in line with any regulations issued by IFSCA. ▪ ***Off market transfer of securities***: Once the merger/acquisition of VCC/sub-funds of VCC is completed, all the assets and liabilities of the merged/ acquired VCC/sub-fund should be transferred to the remaining VCC/sub-fund. To provide ease in such transfers, the VCC/sub-funds should be permitted to undertake the off-market transfer of the securities it holds. ▪ ***Cross border mergers***: Cross-border merger of sub-funds of a VCC may also be contemplated, in line with the cross-border mergers permissible under the Undertakings for Collective Investment in Transferable Securities

	Regulations, 2011. Details of a cross-border merger process should be provided for in regulations.
Redomiciliation to be allowed	▪ IFSCA may consider granting recognition to offshore corporate funds set up in Financial Action Task Force compliant jurisdictions to operate under the IFSC AIF guidelines with minimum disruptions. This flexibility of migration may also be extended to domestic funds for migration to the IFSC. ▪ On redomiciliation, the corporate entity will be required to seek registration as an IFSC VCC along with its sub-fund, if any, under the act. The registration process of such entities should be similar to any other new VCCs to be set up in the IFSC. ▪ Redomiciliation should only be permitted for the entity that substantially resembles a VCC. ▪ IFSCA should engage with the Central Government to pave the way forward for its introduction and to prescribe the minimum standards/requirements for such redomiciliation/ cross border merger. ▪ The legal framework should recognise/ enable outbound redomiciliation.
Taxation of VCCs	▪ ***<u>Separate tax regime</u>***: The taxability of the VCC and its sub-funds from India sourced income would be dependent upon the type of registration obtained by the VCC/sub-funds, i.e. whether as an AIF, Mutual Fund, REITs, InvIT, etc. Accordingly, there should be no requirement to have a separate tax regime for the VCCs and its sub-funds for the income earned from investment in India. ▪ ***<u>Assessment and filing of income tax of an umbrella VCC</u>***: Each sub-fund should be deemed to be a separate 'person' for the purposes of the Income-tax Act, 1961, and be permitted to obtain a separate PAN in its own name and file tax returns for itself. All the provisions of the Income-tax Act, 1961 should be applicable to the sub-funds treating them as a separate person. The PAN as a 'Company' should be allotted to each sub-funds. Appropriate changes be made to the Income Tax Act, 1961. ▪ ***<u>Taxation of VCCs abroad</u>***: Tax Residency Certificates should be issued at the sub-fund level to ensure they can take advantage of DTAAs. VCCs should have features that make it available for checking the box selection. appropriate changes be made to the Income Tax Act, 1961. ▪ ***<u>Taxation of M&As between VCC sub-funds or VCCs themselves</u>***: Both mergers and acquisitions of VCC/sub-funds are tax neutral irrespective of whether they are within the same VCC or between two separate VCCs. appropriate changes be made to the Income Tax Act, 1961

The above recommendations have been provided in detail in Part A of the Expert Committee Report and Part B of the Expert Committee Report provides for the recommended draft legislation as well as a recommended structure for subordinate legislation relating to VCCs. The Expert Committee Report released on November 30, 2022 is available here.

GLOSSARY

AGMs	Annual General Meetings
AIFs	Alternative Investment Funds
AIF Regulations	SEBI (Alternative Investment Funds) Regulations 2012
AO	Adjudicating Officer
APR	Annual Performance Review
ARC	Asset Reconstruction Company
AUM	Asset under Management
BDRs	Bullion Depository Receipts
BIFR	Board for Industrial & Financial Reconstruction
CA2013	Companies Act, 2013
CAA Rules	Companies (Compromises, Arrangements & Amalgamations) Rules 2016
CCs	Clearing Corporations
CICs	Core Investment Companies
CIMC	Collective Investment Management Company
CIN	Company Identification Number
CIRP	Corporate Insolvency Resolution Process
CIS	Collective Investment Schemes
CSR	Corporate Social Responsibility
CSR Rules	Companies (Corporate Social Responsibility Policy) Rules 2014
DIN	Director Identification Number
EBF	Employee Benefit Fund Scheme
EFE	Eligible Foreign Entities
EGMs	Extra Ordinary General Meetings
EGRs	Electronic Gold Receipts
ESOP	Employee Stock Option Plan
ETCDs	Exchange Traded Commodity Derivatives
ETFs	Exchange Traded Funds
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FMEs	Fund Management Entities
FPIs	Foreign Portfolio Investors
IBC	Insolvency & Bankruptcy Code 2016
IDs	Independent Directors
IFSCA	International Financial Service Centre Authority
IFSC	International Financial Service Centre
IMPS	Immediate Payment Service
InvIT	Infrastructure Investment Trust
JV	Joint Venture
KMP	Key Managerial Personnel

LLPs	Limited Liability Partnerships
LODR Regulations	SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
LRS	Liberalized Remittance Schemes of EBI
LVF	Large Value Fund
MCA	Ministry of Corporate Affairs
MOUs	Memoranda of Understanding
MTM	Mark to Market
NAV	Net Asset Value
NBFC	Non-Banking Financial Company
NCLT	National Company Law Tribunal
NDI Rules	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
NEFT	National Electronic Fund Transfer
NFRA	National Financial Reporting Authority Rules 2018
NOC	No Objection Certificate
OAVM	Other Audio-Visual Means
ODI	Overseas Direct Investment
OI	Overseas Investment
OI Directions	Foreign Exchange Management (Overseas Investment) Directions, 2022
OI Regulations	Foreign Exchange Management (Overseas Investment) Regulations, 2022
OI Rules	Foreign Exchange Management (Overseas Investment) Rules, 2022
OPI	Overseas Portfolio Investment
PAS Rules	Companies (Prospectus & Allotment of Securities) Rules 2014
PPM	Private Placement Memorandum
RBI	Reserve Bank of India
REIT	Real Estate Investment Trust
RFC	Resident Foreign Currency
ROC	Registrar of Companies
RTGS	Real time Gross Settlement
RPT	Related-Party Transactions
SAT	Securities Appellate Tribunal
SEBI	Securities and Exchange Board of India
SCN	Show Cause Notice
SDS	Step Down Subsidiaries
SSF	Special Situation Funds
TFC	Total Financial Commitment
UCSRA	Unspent Corporate Social Responsibility Account
VaR	Value at Risk
VC	Video Conferencing
VCF	Venture Capital Funds
VCS	Venture Capital Schemes
WOS	Wholly-owned Subsidiaries

ABOUT US

Established in 2001 with the aim of bringing together a diverse set of professionals to deliver effective solutions for clients, Economic Laws Practice (ELP) is today a leading full-service law firm in India with more than 200 professionals – lawyers, chartered accountants, cost accountants, company secretaries, sector experts and economists – assisting clients on transactional, advisory, litigation, regulatory and tax matters.

ELP was recently featured as among the top 10 law firms in India in the RSG India Report 2019 and several of our practices are rated as Tier 1 by leading agencies in India and globally.

ELP has an extensive client base across multiple industry sectors with clients from Fortune 500 companies, public sector undertakings, multinationals, Indian corporate houses and startups. We work closely with leading global law firms in the United Kingdom, the United States, the Middle East and Asia-Pacific region, giving us the ability to provide real-time support on cross-border concerns.

We actively seek to build and nurture long-term relationships and our clients value us for providing practical, implementable and enforceable advice. Each project team is steered by experienced professionals with extensive domain knowledge and expertise, ably supported by immensely talented and young professionals.

ELP is actively engaged and collaborates with regulators, legislators, businesses and industry associations to foster a conducive environment for business to grow and thrive. Our firm also has a robust pro bono practice where we provide legal services across the spectrum ranging from education, healthcare and other social sectors.

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