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Solicitors & Advocates

Investing in INDIA

The Booklet investing in India has Authored by Sumes Dewan, Managing partner Lex Favios and Tanya Mishra, Senior Associate & Head of Corporate Practice.

The Corporate Team at Lex Favios has been a significant contributory to The Booklet – Investing in India.

We thank each and every one who has been part of this Journey with us!

At Lex Favios, we believe that thorough knowledge of the law is not enough. Our experience shows that outstanding and effective legal counsel requires a combination of this knowledge along with a firm grasp of our client's business and a sharing of their goals.

Mr. Sumes Dewan
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Mr. Dewan is a corporate and securities lawyer with a broad range of experience in M&A transactions and international listing transactions with over twenty five (25) years' experience. His background and experience proves particularly valuable on international transactions.

Mr. Dewan specializes in Foreign Investment in India, Corporate Laws, Banking & Finance, Joint Ventures, Cross Border Taxation Issues, Banking and Finance, Real Estate, SEBI Takeover Regulations, Banking and Finance and has been advising clients on issues related to making an offering in the domestic / international market, drafting the requisite documents for the initial public offering ("IPO") /American Depository Receipts ("ADR") /Global Depository Receipts ("GDR")/ Foreign Currency Convertible Bonds ("FCCB")/ Euro bonds and notes, Warrants, rights issues etc.

Mr. Dewan has been advising clients on issues relating to acquisition of both Indian and overseas companies including the foreign exchange and other governmental regulations applicable to such transactions; filing applications and obtaining clearances, with the various regulatory authorities; conducting legal due diligence; structuring the domestic and cross-border acquisition, with focus on issues such as tax management, determining the type of SPV, jurisdiction of SPV, type of instruments etc.; advising clients on various laws, rules and regulations applicable to the setting up of business operations in India; setting up real estate funds, advising real estate corporates with respect to joint development agreements, setting up real estate funds and advise on Indian legal, tax and exchange control implications.

Mr. Dewan is one of few lawyers in India to be admitted as an Honorary fellow of the Association of Fellows and Legal Scholars, Center for International Studies; and Member of Congress of Fellows of the Center for International Legal Studies. He has also been nominated on Direct Taxes and Intellectual Property Committee of Assocham (Chambers of Commerce in India.

Ms. Tanya Mishra
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Tanya's practice area covers Corporate Commercial, Mergers & Acquisitions, Private Equity Investments, Foreign Direct Investments, Franchising and Licensing and Hospitality.

She has advised and assisted numerous Indian and foreign companies in setting up their business operations in India, in light of permissibility of foreign investment in the proposed business sector under Indian laws while also providing review and analysis of applicable Indian laws, different business entities that can be set up and recommending the suitable entity/structure for the client to undertake the proposed business, way to repatriate profit and exit mechanism.

She has conducted legal due diligence of numerous companies in various service sectors for private equity investments and has assisted clients in drafting and concluding requisite transactional documents, such as Offer Letters (Binding/□ on-Binding), Asset Purchase Agreement, Share Subscription Agreement and Share Holders Agreements and instrumental in drafting and review of security documents for availing ECB from International Banks and providing Legal Opinion and enforceability certificate

She has been advising and assisting large hospitality corporates with respect to review of approvals and licenses for operating hotels in India under various Indian laws and regulations.

She has extensive experience in drafting of applications and obtaining approvals from various Indian regulatory bodies. She has drafted and negotiated various agreements including investment, share purchase, share subscription, shareholders, and other corporate agreements.

Foreword

The Booklet investing in India is a great compilation of various law and regulations pertaining to investing in India and provides an overview and insight to the laws and regulations applicable to foreign investment in India and setting up of legal entities. It provides a useful compilation of ideas and practical strategies for foreign investment in India.

To attract foreign investment in India directly, the Government of India has devised a rather liberal policy under which Foreign Direct Investment is permitted up to 100% under the automatic route in most sectors/activities. Given that India is becoming one of the fastest growing markets for foreign investment in the world, there is an increased need for knowledge of the relevant foreign investment laws.

The Authors, Sumes Dewan and Tanya Mishra, have brought together in this Booklet the plethora of laws and regulations pertaining to foreign investments in India in a concise form, directly from the statutes. This Booklet provides a clear insight to all the significant areas that need to be taken care of while investing in India.

I congratulate Sumes Dewan and Tanya Mishra for the Booklet and also congratulate Lex Favios for publishing it. I hope the readers would find *Investing in India* it as interesting and engaging as it was to me!

Abhinav Vasisht,

Senior Advocate

Foreword

As we step out of the pandemic, global geopolitical events continue to shake international markets. Despite this, the Indian economy continues to be an engine of economic growth driven by strong domestic demand and a burgeoning middle class. As data from the Ministry of Commerce & Trade and the figures here indicate, India overall remains an attractive destination for foreign investors.

In FY 2021-22, India attracted a record USD 83.57 billion in FDI inflows, a 23% increase from pre-COVID levels. As ever, Europe is one of the most important sources of investment into India. In fact, bilateral trade between the two regions grew by 43.5% in the same period, touching an all-time high of USD 116.36 billion.

Analysing these figures, it is interesting to note the significant rise in FDI inflows in manufacturing and Information & Communication Technology (ICT). These figures indicate investor confidence in government reforms and long-term strategic programmes. At the same time, India is fast becoming a global hub for innovation and emerging technologies, birthing several high-potential start-ups which can provide unique solutions for the global market.

For instance, the accreditation of the logistics sector with the infrastructure status, as well as the release of the National Logistics Policy, are expected to further accelerate alignment with international standards and regulations and ease financing, thereby catalysing investments.

The country has also taken consistent steps to become a stable and predictable investment destination. It has consequently improved its ranking on the World Bank's Doing Business Report (DBR) from 142 in 2014 to 63 in 2020.

The current geo-political landscape has also highlighted the need for businesses and supply chains to be resilient. As businesses explore alternate markets for production as well as consumption in a China-plus-one strategy, India is fast realising its potential of a leading economic player.

The strategic push given by EU and Indian leaders towards enhancing bilateral trade and partnership make the future of EU-India bilateral trade and investment all the more optimistic. The current Free Trade Agreement (FTA), currently being negotiated with both EU and UK, will be a gamechanger in this aspect.

In this context, this FDI Booklet is very contemporary and highly relevant for foreign investors interested in India. The thorough overview of salient features on India's foreign exchange policies, tax laws, capital market regulations, and the broader regulatory ecosystem and the corporate affairs environment, will render the booklet of immense value to its readers.

I congratulate the authors and recommend businesses and investors looking to enter the Indian market, to refer to this booklet, a complete guide to provisions pertaining to foreign investment and doing business in India, for important insights to support decision making.

Poul V. Jensen,
Managing Director,
European Business and Technology Centre

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GLOSSARY

AD Banks	Authorised Dealer Banks
ADRs	American Depository Receipts
AGM	Annual General Meeting
AIF	Alternate Investment Fund
AIF Regulations	SEBI (Alternate Investment Funds) Regulations, 2012
ALP	Arm's Length Price
AoA	Articles of Association
ARC	Asset Reconstruction Company
BoD	Board of Director
B2B	Business to Business
CBDT	Central Board of Direct Taxes
CBLOs	Collateralised Borrowing and Lending Obligations
CCI	Competition Commission of India
CCS	Cabinet Committee on Security
CCDs	Compulsorily Convertible Debentures
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CSO	Chief Security Officer
CIRP	Corporate Insolvency Resolution Process
CSR	Corporate Social Responsibility
CSR Rules	Companies (Corporate Social Responsibility) Rules, 2014
CIC	Credit Information Companies
CoA	The Companies Act, 2013
COO	Chief Operation Officer
CPA	Consumer Protection Act 2019
CCPA	Central Consumer Protection Authority
CRC	Central Registration Centre
CTO	Chief Technical Officer
DFRC	Duty Free Replenishment Certificate
DGCA	Director General of Civil Aviation
DPIIT	Department for Promotion of Industry and Internal Trade
DRT	Debt Recovery Tribunal
DRAT	Debt recovery Appellate Tribunal
DRR	Debenture Redemption Reserve
DTA	Domestic Tariff Area
DTH	Direct To Home
ECBs	External Commercial Borrowings
EDLI	Employees Deposit Linked insurance
EGM	Extra Ordinary General Meeting
EOUs	Export Oriented Units
EPF	Employees Provident Fund
EPS	Employees' Pension Scheme
ESI	Employees' State Insurance
ESI Act	Employees' State Insurance Act, 1948
ESOP	Employee Stock option Plan
ESOS	Employee Stock Option Scheme

ESPS	Employee Stock Purchase Scheme
FATF	Financial Action Task Force
FC	Financial Commitment
FCD	Fully Convertible Debenture
FCCB	Foreign Currency Convertible Bonds
FCEB	Foreign Currency Exchangeable Bonds
FCNR(B)	Foreign Currency Non-Resident(Bank) Deposits
FDI	Foreign Direct Investment
FEMA	The Foreign Exchange Management Act, 1999
FI	Foreign Investors
FII	Foreign Institutional Investor
FII Regulations	SEBI (Foreign Institutional Investors) Regulations, 1995
FIPB	Foreign Investment Promotion Board
FMC	Forward Markets Commission
FPI	Foreign Portfolio Investor
FPI Regulations	SEBI (Foreign Portfolio Investors) Regulations, 2014
FSSAI	Food Safety Standards Authority of India
FTWZs	Free Trade and Warehousing Zones
GDP	Gross Domestic Product
GDRs	Global Depository Receipts
GEAC	Genetic Engineering Approval Committee
GMPCS	Global Mobile Personal Communications Services
GRE	Graduate Record Examination
HFC's	Housing Finance Companies
HITS	Head end In the Sky Broadcasting services
IBC	Insolvency and Bankruptcy Code 2016
ICC	Internal Complaints Committee
ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations
IDA	International Development Association
IEC	Importer Exporter Code
IEM	Industrial Entrepreneur Memorandum
ILO	International Labour Organisation
IPLC	International Private Leased Circuit
IPO	Initial Public Offer
IPR	Intellectual Property Rights
IRDA	Insurance Regulatory and Development Authority
ISP Licenses	Internet Service Providers Licenses
ISRO	Indian Space Research Foundation
JV	Joint Venture
LCC	Local Complaints Committee
LLP	Limited Liability Partnership
LLP Act, 2008	Limited Liability Partnership Act, 2008
LNG	Liquefied Natural Gas
LRS	Liberalised Remittance Scheme
MBRT	Multi Brand Retail Trading
MEIS	Merchandise Exports from India Scheme
MoA	Memorandum of association
MRTP Act	Monopolistic and Restrictive Trade Practices Act, 1969
MSEs	Micro and Small Enterprises

MSMEs	Micro Small and Medium Enterprises
MSMED Act, 2006	Micro, small and Medium Enterprises Development Act, 2006
MSOs	Multi System Operators
NBFCs	Non-Banking Financial Companies
NCDs	Non-Convertible Debentures
NCLT	National Company Law Tribunal
NRE	Non-Residential External
NRI	Non-Resident Indian
OCDs	Optionally Convertible Debentures
ODIs	Offshore Derivative Instruments
PAC	Person action in Concert
PIO	Person of Indian Origin
PMRTS	Public Mobile Radio Trunked Services
PPP	Purchasing Power Parity
PSU	Public Sector Undertaking
P & I Club	Protection and Indemnity Insurance Club
QFIs	Qualified Foreign Investors
QIBs	Qualified Institutional Buyer
QIP	Qualified Investment Placement
RBI	Reserve Bank of India
RoC	Registrar of Companies
R&D	Research and Development
SAST Regulations	Substantial Acquisition of Shares and Takeovers Regulations
SEBI	Securities Exchange Board of India
SEIS	Services Exports from India Scheme
SEZ	Special Economic Zones
SIDBI	Small Industries Development Bank of India
SPV	Special Purpose Vehicle
TDRs	Transferable Development Rights
TIFC Regulations	Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004
TOEFL	Test of English as a Foreign Language
TRAI	Telecom Regulatory Authority of India
UMS	Universal Messaging Service
UTI	Unit Trust of India
VAT	Value Added Tax
VC Funds	Venture Capital Funds
WCT	Work Contract Tax
WLA	White Label ATMs
WLAO	White Label ATM Operations
WOS	Wholly Owned Subsidiary
WPPT	WIPO Performances and Phonograms Treaty
WT	Wholesale Trading

INTRODUCTION

India being the world's largest democracy and the second fastest growing major economy has all the factors to emerge as the most favourable manufacturing giant. These favourable conditions range from higher disposable incomes, emerging middle class, low cost but competitive and skilled workforce, educated youth to less language barriers which can automatically attract investors.

However, despite these odds, India over the decades has failed to make the mark among the leading manufacturing hubs. Foreign investors face an array of complexities in establishing and continuing a business in India. Not only do they consider the laws and regulations to be stringent but also face other issues like lack of infrastructure and political stability.

One of the forefront schemes in this regard is the national program 'Make in India' which was launched in September 2014. The Scheme has been in practice for a few years and has made considerable progress in its tenure. It seeks to implement a close network of the pro-business Government agencies with the business sector to promote economic growth coupled with significant investment in infrastructure, particularly in the metropolitan areas.

Some of the key changes/introductions which have been brought forward under the Modi Regime are as follows:

- Introduction of GST- Goods and Services Tax has removed the overflowing effects of tax and thereby has eased the tax system for the businesses.

  Through programs such as Digital India, the digitisation process has been augmented in the country. The procedure for taxation, company incorporation, etc. has been made online which eases the overall process and provides for improvement in efficiency.

- The introduction of the Insolvency and Bankruptcy Code 2016 as an integrated law, has taken the legislation at par with global standards. It provides easy exit with a painless mechanism in cases of insolvency of individuals as well as companies, the code has significant value for all stakeholders including government regulators. The Introduction of this Code has also done away with the overlapping provisions contained in various other laws.

- Schemes reflecting financial inclusion, such as Pradhan Mantri Jan Dhan Yojna have led to the creation of new bank accounts.

- Major development can be witnessed in the infrastructure and connectivity due to schemes such as 'Sagarmala' and 'Bharatmala'.

- The introduction of the "National Intellectual Property Rights Policy" in 2016 for boosting creativity and innovation in the country. The administration of Copyright Act,1957 and semiconductor integrated circus layout design Act 2000 have been transferred to the Industrial Policy and Promotion, which has enabled an integrated approach and synergy amongst different IP offices and Acts. Similarly, various steps have been taken by the government including augmentation of technical manpower, which have resulted in drastic reduction in pendency in IP applications and has boosted the filings which take place under such IP Acts.

- India has also witnessed significant growth in FDI influx after the launch of the scheme. The total FDI inflow between April 2014 and March 2018, has been approximately USD 222.89 Billion. In the year 2017-2018, the inflow of FDI was recorded at USD 61.69 Billion which has been topped as the highest ever recorded amount in a fiscal year.

- The introduction of the 4 labour codes, mainly a) the Code on Wages, 2019; b) Code on Social Security 2020; c) Code on Occupational Safety, Health and Working Conditions Code 2020; d) Industrial Relations Code 2020 has

reformed the archaic labour laws of India and has amended and amalgamated number of acts under such 4 codes in order to facilitate the ease of doing business in India and to streamline and simplify the country's existing and overlapping labour laws.

- The Government of India introduced the new Consumer Protection Act,2019 which came into force on 20th July 2020 replacing the previous enactment of 1986. The new Act has been introduced to overhaul administration and settlement of consumer disputes. The Amended Act has provided for strict penalties, including jail terms for adulteration and for misleading advertisements, but most important of all, it has come out with the Consumer Protection (E-Commerce) Rules, 2020.

- India has been ranked 63 out of 190 countries in the Ease of Doing Business Index according to the 'Doing Business 2020' report, which also stated that it has one of the economies with the most notable improvement.

- India is ranked 52 out of 129 countries in the Global Innovation Index 2019 and has moved up 24 places since 2014.

Chapter 1

FOREIGN DIRECT INVESTMENTS AND COLLABORATIONS

India is one of the fastest growing economies since the last few years and witnessed a large amount of foreign investment in various sectors. The Government has formulated a policy aiming towards attracting more and more funds considering the domestic business concerns simultaneously.

POLICY AND REGULATORY FRAMEWORK TOWARD FDI

The Government has put in place a policy framework on Foreign Direct Investment which is embodied in the Circular on Consolidated FDI Policy[1], issued every year to capture and keep pace with the regulatory changes.

The Foreign Investment Facilitation Portal is the new online single point interface of the Government of India for investors to facilitate Foreign Direct Investment. This portal is being administered by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry. This portal will continue to facilitate the single window clearance of applications which are through the approval route. Foreign investment proposals are proposed to be approved within 8 to 10 weeks from the date of filing on the online portal. If the online filing of the application is with a digital signature by an authorised signatory, physical submission of the copy is not required. For applications without a digital signature, once the e-filing of the application is completed, the applicant is required to file/courier only a SINGLE signed copy of the printed version of the online application, along with the duly authenticated copy of the documents attached with the application, to the Nodal Officers of the concerned Administrative Ministry/Department.

AUTOMATIC ROUTE

FDI Policy permits FDI up to 100% from foreign/NRI investors without prior approval in most of the sectors including the services sector under the automatic route. FDI in sectors/activities under automatic route does not require any prior approval either by the Government or the RBI. The investors are required to notify the concerned Regional office of RBI of receipt of inward remittances within 30 days of such receipt and will have to file the required documents with that office within 30 days after the issue of shares to foreign investors.

The present automatic route allows Indian companies engaged in all industries except for certain select industries/sectors to issue shares to foreign investors up to a hundred percent (100%) of their paid-up capital in Indian companies. There are also some areas where though Automatic Route is available, foreign investors cannot invest beyond a certain percentage of the paid-up capital of the Indian companies or where investment is subject to some other conditions.

Foreign investors have to, however, keep in mind that they may invest freely under the Automatic Route described above but where such investment does not conform to the policies of the Government of India, specific approval from the Government must be sought. For example, there are Government guidelines on location of industrial units, or there are certain items like explosives or liquor that need an industrial license.

If an Indian company does not conform to the locational guidelines or needs an industrial license, then it cannot issue shares under the automatic route.

[1]*Consolidated FDI Policy Circular of 2020, Department of Industrial Policy and Promotion, Government of India, Ministry of Commerce and Industry.*

GOVERNMENT APPROVAL ROUTE

All activities which are not covered under the automatic route, prior government approval for FDI/NRI shall be necessary. Areas/sectors/activities hitherto not open to FDI/NRI investment shall continue to be so unless otherwise decided and notified by the Government.

An investor can make an application for prior government approval even when the proposed activity is under the automatic route. A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares a land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.

In a recent development, the Government of India vide Press Note No. 3 dated April 17, 2020, curbed the opportunistic takeovers/acquisitions of Indian Companies. Further, A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares a land border with India or where the beneficial owner of investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan, can invest only under the Government route, in sectors/activities other than Defence, space, atomic energy and sectors/activities prohibited for foreign investment.

In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview mentioned above, such subsequent change in beneficial ownership will also require government approval.

Proposals requiring Government Approval.

FDI up to 100% is allowed under the automatic route in all activities/sectors except the following which will require approval of the Government:

- Activities/items that require an industrial license because the activity is licensable under the Industries (Development and Regulation) Act, 1951, as amended from time to time, cases where foreign investment is more than 24% in the equity capital of units manufacturing items reserved for small scale industries, and all activities that require an industrial license in terms of the locational policy notified by Government under the Industrial Policy of 1991.
- All proposals in which the foreign collaborator has a previous venture/tie up in India.
- All proposals relating to the acquisition of shares in an existing Indian company in favour of a foreign/Non-Resident Indian (NRI)/Overseas Corporate Body (OCB) investor.
- All proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted and/or whenever any investor chooses to make an application to the Foreign Investment Promotion Board and not to avail of the automatic route.

Change in Foreign Ownership Pattern

In case of infusion of fresh foreign investment within the permitted automatic route level resulting in a change in the ownership pattern or transfer of stake by existing investor to a new foreign investor, government approval will be required.

GENERAL PERMISSION OF RBI UNDER FEMA

RBI has granted general permission under FEMA in respect of proposals approved by the Government. Indian companies getting foreign investment approval through the Government route do not require any further clearance from RBI for the purpose of receiving inward remittance and issue of shares to the foreign investors.

The companies are, however, required to notify the concerned Regional office of the RBI about receipt of inward remittances within thirty (30) days of such receipt and to online file the required documents with the RBI within thirty (30) days after issue of shares to the foreign investors or NRIs in the Form FC-GPR.

FDI in Companies without Operations

Government approval would not be required for infusion of foreign investment into an Indian company which does not have any operations, and also does not have any downstream investments for undertaking activities which are under automatic route and without FDI-linked performance conditions, regardless of the amount or extent of foreign investment.

PROHIBITED SECTORS FOR FDI IN INDIA

FDI is not permissible in the following cases as per the RBI Master Direction-Foreign Investment in India dated 17th March 2022:

- Lottery Business including Government/private lottery, online lotteries, etc.
- Gambling and Betting including casinos etc.;
- Chit fund;
- Nidhi Company;
- Trading in TDRs;
- Real Estate business or construction of farmhouses; 'Real estate businesses shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014, as amended from time to time;
- Manufacturing of cigars, cheroots and cigarettes, of tobacco or of tobacco substitutes;
- Activities/sectors not open to private sector investment e.g. (i) Atomic Energy and (ii) Railway operations;
- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business, Gambling and Betting activities.

Investment under Schedule I of NDI Rules by an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can only invest under the Government approval route as per Press Note No. 3 (2020 *Series)*.

A person who is a citizen of Pakistan or an entity incorporated in Pakistan can, only with the prior Government approval, invest in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction or purview of these above-mentioned directions, such subsequent change in beneficial ownership shall also require Government approval.

FDI IN LIMITED LIABILITY PARTNERSHIPS (LLP's)

FDI is permitted under the automatic route in LLP's operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance conditions.

An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP in sectors in which hundred percent (100%) FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under the automatic route.

FDI in LLP is subject to compliance of the conditions of LLP Act, 2008 as amended from time to time.

START-UP COMPANIES

Start-ups can issue equity or equity linked instruments or debt instruments to FVCI against receipt of foreign remittance, as per the Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time. In addition, start-ups can issue convertible notes to person resident outside India subject to the following conditions:

(i) A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian start-up company for an amount of twenty-five lakh rupees or more in a single tranche.

Explanation:

For the purpose of this Regulation, a 'start-up company' means a private company incorporated under the CoA or Companies Act, 2013 and recognized as such in accordance with Notification No. G.S.R. 127(E) dated 19th February 2019 issued by the D.P.I.I.T., Ministry of Commerce and Industry, and as amended from time to time.

(ii) A start-up company engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with approval of the Government. Explanation: For the purpose of this regulation, the issue of shares against such convertible notes shall have to be in accordance with the Schedule I of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time.

(iii) A start-up company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE/FCNR (B)/Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time. Provided that an escrow account for the above purpose shall be closed immediately after the requirements are completed or within a period of six months. Consolidated FDI Policy 2020 Department for Promotion of Industry and Internal Trade provide that an escrow account shall be closed immediately after the requirements are completed or within a period of six months, whichever is earlier. However, in no case continuance of such escrow account shall be permitted beyond a period of six months.

(iv) NRIs may acquire convertible notes on a non-repatriation basis in accordance with Schedule IV of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time.

(v) A person resident outside India may acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with applicable pricing guidelines under FEMA. Prior approval from the Government shall be obtained for such acquisitions or transfers in case the start-up company is engaged in a sector which requires Government approval.

(vi) The start-up company issuing convertible notes shall be required to furnish reports as prescribed by the RBI.

FDI IN EOUS/ SEZS/ INDUSTRIAL PARK/ EHTP/ STP

Special Economic Zones (SEZs)

100% FDI is permitted under automatic route for setting up of Special Economic Zone. Units in SEZ qualify for approval through automatic route subject to sectoral norms. Details about the type of activities permitted are available in the Foreign Trade Policy issued by the Department of Commerce. Proposals not covered under the automatic route require approval by SEZ Board of Approval.

Capitalization of Import Payables

FDI inflows are required to be under the following modes:

- By inward remittances through normal banking channels or;
- By debit to the specified account of the person concerned maintained in an authorized dealer/authorized bank.

FDI VIA SHARE SWAP

In case of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Merchant Banker registered with SEBI or an investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Government will also be a prerequisite for investment by swap of shares for sectors under Government approval route. No approval of the Government is required for investment in automatic route sectors by way of swap of shares.

FDI IN MANUFACTURE OF ITEMS RESERVED FOR PRODUCTION IN MICRO AND SMALL ENTERPRISES (MSES)

FDI in MSEs (as defined under Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act, 2006) amendment dated 1st June 2020 is subject to the sectoral caps, entry routes and other relevant sectoral regulations. Any industrial undertaking which is not a Micro or Small-Scale Enterprise, but manufactures items reserved for the MSE sector requires government route where foreign investment is more than twenty four percent (24%) in the capital. Such an undertaking also requires an Industrial License under the Industries (Development & Regulation) Act, 1951, as amended from time to time for such manufacture. The issue of Industrial License is subject to a few general conditions and the specific condition that the Industrial Undertaking is required to undertake to export a minimum of fifty percent (50%) of the new or additional annual production of the MSE reserved items to be achieved within a maximum period of three (3) years. The export obligation is applicable from the date of commencement of commercial production and in accordance with the provisions of Section 11 of the Industries (Development & Regulation) Act, 1951 as amended from time to time.

As per FDI Circular 2017, the definition of 'Manufacture' has been amended to be:

"Manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing: -

(a) Resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or
(b) Bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

Downstream Investment

'Downstream investment' means indirect foreign investment, by one Indian company, into another Indian company, by way of subscription or acquisition. For the purpose of computation of indirect foreign investment, foreign investment in an Indian company shall include all types of foreign investments i.e., FDI, investment by FIIs, FPIs, QFIs, NRIs, ADRs, GDRs, FCCB, fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures.

ENTRY OPTIONS FOR FOREIGN INVESTORS IN INDIA

A foreign company planning to set up business operations in India has the following options:

Incorporated Entity

By incorporating a company under the CoA through:

- Joint Ventures
- Wholly Owned Subsidiaries

Foreign equity in such Indian companies can be up to hundred percent (100%) depending on the requirements of the investor, subject to equity caps in respect of the area of activities under the FDI policy.

As an Unincorporated Entity

As a foreign Company through:

- Liaison Office/Representative Office
- Project Office
- Branch Office

A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Liaison Office/Branch Office in India have to obtain permission from the RBI under provisions of FEMA 1999 as amended from time to time. The applications from such entities in Form FNC (Annex-1) will be considered by RBI under two routes:

A. **Reserve Bank Route** — Where principal business of the foreign entity falls under sectors where hundred percent (100%) FDI is permissible under the automatic route.
B. **Government Route** — Where principal business of the foreign entity falls under the sectors where hundred percent (100%) FDI is not permissible under the automatic route.

Applications from entities falling under Government Route and those from Non-Government Organisations/Non-Profit Organisations/Government Bodies/Departments are considered by the RBI in consultation with the Ministry of Finance, Government of India.

Liaison Office/Representative Office

A Liaison Office can undertake only liaison activities, i.e., it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India. The role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers. A Liaison Office can undertake the following activities in India:

i. Representing in India the parent company/group companies.
ii. Promoting export/import from/to India.
iii. Promoting technical/financial collaborations between parent/group companies and companies in India.
iv. Acting as a communication channel between the parent company and Indian companies.

Project Office

The RBI has granted general permission to foreign companies to establish Project Offices in India, provided they have secured a contract from an Indian company to execute a project in India:

i. The project is funded directly by inward remittance from abroad; or
ii. The project is funded by a bilateral or multilateral International Financing Agency; or
iii. The project has been cleared by an appropriate authority; or
iv. A company or entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the project.

However, if the above criteria are not met or if the parent entity is established in Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau, such applications have to be forwarded to the General Manager, Foreign Exchange Department for approval.

Branch Office

Branch Offices are permitted to remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the Authorised Dealer through whom the remittance is affected:

a) A Certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year;
b) A Chartered Accountant's certificate certifying:

i. The manner of arriving at the remittable profit
ii. That the entire remittable profit has been earned by undertaking the permitted activities
iii. That the profit does not include any profit on revaluation of the assets of the branch.

FOREIGN INVESTMENTS CAPS AND ENTRY ROUTE IN VARIOUS SECTORS

The Foreign Investment Cap and the Entry Routes applicable for various sectors as prescribed by the RBI are hereby mentioned in **Schedule 1** of this Investment Booklet.

Chapter 2

REPATRIATION AND REMITTANCE FACILITIES AND FOREIGN EXCHANGE IMPLICATIONS

REPATRIATION OF CAPITAL INVESTED IN INDIA

Capital investment made in India can be fully repatriated along with profits after completing certain formalities like after payment of taxes due on these, provided the investment was made on a repatriable basis.

REMITTANCE OF ROYALTY/TECHNICAL FEE

Indian companies can remit royalties and technical fees for trademark or technical collaboration, directly through AD Banks, after the agreement is filed with RBI, under the automatic route i.e., without any approval of the Government of India. RBI has delegated the authority vested in it to permit remittance of royalties and technical fees to the AD Banks.

REMITTANCE OF DIVIDEND

Dividend on shares held by foreign investors is fully repatriable, subject to certain dividend formalities and dividend balancing, wherever applicable**.** Dividends are freely repatriable, however, remittance of dividend requires permission when investment was allowed subject to dividend balancing condition. Therefore, if the original investment was not subject to dividend balancing condition, there are no restrictions involved. Indian companies paying dividend, have to make an application to an AD Bank of RBI, supported by the company's Balance Sheet and Profit and Loss Account, resolution of the company passed at the AGM declaring the dividend, details of the non-resident shareholders and a copy of RBI's approval for holding of shares by the NRIs. The application is to be made by the Indian company in the form prescribed by RBI.

The remittance will be allowed after completing the aforesaid formalities. It may be clarified here that the interim dividend is also allowed to be fully repatriated.

REMITTANCE BY RESIDENT INDIANS UNDER LIBERALISED REMITTANCE SCHEME

Earlier, different limits were prescribed for remittances from India for individuals for different purposes, now overall limit of USD 2,50,000 has been specified for each individual.

Under Liberalised Remittance Scheme (LRS)[2], resident individuals are allowed to remit up to USD 250,000 per F.Y. (April-March) for any permitted current or capital account transactions or a combination of both. If an individual has already remitted any amount under the LRS, then the limit for such an individual would be reduced from the present limit of USD 250,000 for the F.Y. by the amount already remitted.

The overall limit can be used for any of the following purposes:

i. Private visits to any country (except Nepal and Bhutan)
ii. Gift or donation
iii. Going abroad for employment
iv. Emigration
v. Maintenance of close relatives abroad

[2] *The Master Circular on Miscellaneous Remittances in India dated 1st July 2015 provides for Liberalised Remittance Scheme.*

vi. Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up
vii. Expenses in connection with medical treatment abroad
viii. Studies abroad
ix. Any other current account transaction which is not covered under the definition of current account in FEMA 1999.

Transactions which require prior approval of the Central Government

Purpose of Remittance	Ministry/Department of Government of India whose approval is required
1. Cultural Tours	Ministry of Human Resources Development, (Department of Education and Culture)
2. Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public Sector Undertakings	Ministry of Finance, (Department of Economic Affairs)
3. Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport, (Chartering Wing)
4. Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport, (Chartering Wing)
5. Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
6. Remittance of hiring charges of transponders by (a) TV Channels (b) Internet Service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology
7. Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8. Remittance of prize money/sponsorship of sports activity abroad by a person other than International / National / State Level sports bodies, if the amount involved exceeds USD 100,000.	Ministry of Human Resources Development (Department of Youth Affairs and Sports)
9. Remittance for membership of P&I Club	Ministry of Finance (Insurance Division)

Remittance of Non-Trade current account transactions

Authorised Dealer – Category II are authorised to release/remit foreign exchange for the non-trade current account transactions. Individuals can avail of foreign exchange facility for the aforementioned purposes within the limit of USD 250,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the RBI.

RECEIPT OF FUNDS FROM ABROAD

There are no restrictions on the receipt of remittances in India, through banking channels, from any foreign country. There are also no restrictions on the import of foreign currency cheques, postal orders, and similar negotiable instruments. All foreign currency drafts can be converted freely into Indian Rupees through AD Banks while traveller's cheques and foreign currency notes/coins may be converted into rupees through moneychangers, specially authorised by RBI to undertake such transactions.

SITTING FEES & COMMISSION TO NON- RESIDENT DIRECTORS

RBI has granted general permission to companies in India for making payments in Indian Rupees to their non-resident, non-whole-time directors while on a visit to India for the company's work such as attending Board meetings etc. This general permission is, however, subject to the condition that the company has obtained the necessary approval from the Central Government wherever it applies.

Applications for remittances of savings out of sitting fees paid to the non-resident directors by the Indian companies concerned for actual attendance of Board meetings should be made to AD Bank's on respective form together with a certificate issued by the company concerned confirming payment of sitting fees.

REMITTANCE OF INTEREST

The Indian companies can make an application for remittance of interest on bonds/debentures issued to NRIs, to the AD Banks with necessary details. The AD Bank will ensure remittance of the net amount of interest upon deduction of withholding tax on the same.

DONATIONS FOR SETTING UP OF CHAIRS IN EDUCATIONAL INSTITUTIONS OUTSIDE INDIA

It has been decided by the RBI to allow Indian corporates with proven track record to contribute funds from their foreign exchange earnings for setting up chairs in educational institutions outside India and similar such purposes. Such cases will be considered by Reserve Bank on case-to-case basis. Authorised dealers may forward all such applications to the Chief General Manager, Reserve Bank of India, Central Office, Exchange Control Department, External Payments Division, Central Office Building, Mumbai-400 001, together with (a) details of their foreign exchange earnings during the last 3 years, (b) brief background of the company's activities, and (c) details of the chair proposed to be set up in the educational institution (d) likely benefits to the corporate[3].

[3] *Setting up of Chairs in Educational Institutions Outside India A.P. (DIR Series) Circular No.25 (March 1, 2002)*

Chapter 3

FUNDING OPTIONS

An Indian entity may raise funds for different purposes depending on the time periods ranging from very short to fairly long duration. The total amount of financial needs of an entity depends on the nature and size of the business. The scope of raising funds depends on the sources from which funds may be available.

FDI IN PARTNERSHIP FIRMS

A person resident outside India other than NRIs/PIO shall require prior approval of RBI for making investment in the capital of a firm or a proprietorship concern or any association of persons in India.

However, a NRI or a PIO resident outside India can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided:

a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.

b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.

c) NRIs/PIO may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option.

d) Amount invested shall not be eligible for repatriation outside India.

FDI IN LLP'S

FDI is permitted under the automatic route in LLP's operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance conditions.

An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP in sectors in which hundred percent (100%) FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route.

FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.

INDIAN COMPANIES

Indian Companies can raise finance by a number of methods as provided below:

Equity Instruments

a) Equity Shares
b) Preference Shares
c) CCDs
d) Depository Receipts GDRs/ADRs

Debt Instruments

a) ECBs
b) OCDs/ NCDs
c) FCCBs

The details of the instruments provided above are discussed below:

EQUITY INSTRUMENTS – EQUITY SHARES & PREFERENCE SHARES

Kinds of Share Capital

a) Equity Share Capital – Means all share capital which is not preference share capital.

b) Preference Share Capital - Means that part of the issued share capital of the company which carries or would carry a preferential right with respect to:

i. Payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and
ii. Repayment, in the case of a winding up or repayment of capital.

ISSUANCE OF SHARES UNDER THE COMPANIES ACT, 2013

Private Placement

A company may, if authorized by a Special Resolution passed in a general meeting, issue shares in any manner whatsoever including by way of a preferential offer, to any persons whether or not those persons include the persons referred to in clause (a) or clause (b) of sub-section (1) of Section 62 of CoA. Such issue on preferential basis should also comply with conditions laid down in Section 42 of the CoA. A valuation report of registered valuer determining the price of shares is also mandatory.

Any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in Section 42 of the CoA.

The offer of securities or invitation to subscribe securities, shall be made to not more than two hundred (200) persons in the aggregate in a F.Y. (excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employee's stock option as per provisions of clause (b) of sub-section (1) of Section (62) of the CoA. This restriction would be reckoned individually for each kind of security that is equity share, preference share or debenture (i.e., 200 for equity shares, 200 for preference shares and 200 for debentures) - Rule 14(2)(b).

The value of such offer or invitation per person shall be with an investment size of not less than twenty thousand rupees (20000) of face value of the securities - Rule 14(2)(c).

The provisions of clauses (b) and (c) of sub-rule (2) of Rule 14 shall not be applicable to:

a. Non-banking financial companies
b. Housing finance companies

A company shall allot its securities within sixty (60) days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen (15) days from the date of completion of sixty (60) days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day - Section 42(6).

The company shall maintain a complete record of private placement offers in Form PAS-5 and also file along with private placement offer letter in Form PAS-4 with RoC within a period of thirty (30) days of circulation of the private placement offer letter.

A return of allotment of securities under Section 42 of the CoA shall be filed with the ROC within thirty (30) days of allotment in Form PAS-3.

Contravention of Section 42 of the CoA attracts penalty which may extend to the amount involved in the offer or invitation or two (2) Crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty (30) days of the order imposing the penalty - Section 42(10).

1. **Preferential Allotment**

CoA deals with Preferential Allotment for private limited and public unlisted companies

In case of listed companies, SEBI's ICDR Regulations contain separate set of provisions for preferential allotments and public offers.

Issuance of Shares Under FEMA

Investment by a foreign entity in an Indian company is subject to the sectoral caps provided under the Consolidated FDI Policy. The same has been provided in Chapter 2 above.

Further, price of shares issued to persons resident outside India shall not be less than (a) the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company is listed on any recognised stock exchange in India; (b) the fair valuation of shares done as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker where the shares of the company are not listed on any recognized stock exchange in India.

2. Debentures Under Companies Act, 2013

Under CoA, "debenture" includes debenture stock, bonds and any other securities of a company evidencing the debt, whether constituting a charge on the assets of the company or not. No company can issue any debentures carrying any voting rights[4].

Conditions to issue secured debentures[5]

- Date of its redemption shall not exceed ten (10) years from the date of issue. For setting up of infrastructure projects, period can exceed ten (10) years but not thirty (30) years;
- Secured by the creation of a charge, having a value which is sufficient for the due repayment of the amount of debentures and interest;
- Appoint a debenture trustee to execute a debenture trust within sixty (60) days of allotment of debentures.

The details on 'Debentures' have been provided under the Chapter 5 (Company Law).

Compulsorily Convertible Debentures under FDI

Investments can be made by non-residents in the fully, compulsorily and mandatorily convertible debentures/fully through the Automatic Route or the Government Route depending on the sectoral caps provided in the FDI Policy. It is freely repatriable without any restrictions (net of applicable taxes).

Only where debentures are mandatorily convertible into equity and the same are issued in the form of Compulsory Convertible Debentures, the same would form part of FDI.

Conversion formula

The conversion formula is determined upfront at the time of issue of the debentures. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such debentures.

Transfer of convertible debentures.

Non-resident investors can also invest in Indian companies by purchasing/acquiring convertible debentures from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of convertible debentures by way of transfer subject to the following:

a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, convertible debentures to any person resident outside India (including NRIs). Government approval is not required for transfer of convertible debentures in the investee company from one non-resident to another non-resident in sectors which are under automatic route. In addition, approval of Government will be required for transfer of stake from one non-resident to another non-resident in sectors which are under Government approval route.
b) NRIs may transfer by way of sale or gift the convertible debentures held by them to another NRI.
c) A person resident outside India can transfer any security to a person resident in India by way of gift.

[4] *As per the Companies Share Capital and Debentures Rules, 2014*
[5] *As per Rule 18 of Companies Share Capital and Debentures Rules, 2014*

d) A person resident outside India can sell the convertible debentures of an Indian company on a recognized Stock Exchange in India through a stockbroker registered with stock exchange or a merchant banker registered with SEBI.
e) A person resident in India can transfer by way of sale, convertible debentures of an Indian company under private arrangement to a person resident outside India.
f) General permission available, by way of sale under private arrangement by a person resident outside India to a person resident in India.

Reporting of inflow

An Indian company receiving investment from outside India for issuing debentures, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than thirty (30) days from the date of receipt in the Advance Reporting Form.

Reporting of Issue

After issue of mandatorily & compulsorily convertible debentures/fully, mandatorily, the Indian company is required to file Form FC-GPR under FIRMS Portal, not later than thirty (30) days from the date of issue of compulsory convertible debentures.

3. GDR

GDRs means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible securities issued or transferred to that foreign depository and deposited with a domestic custodian.

GDR[6] is defined in the CoA[7], as an instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

A GDR is a depository receipt, or certificate created by overseas depository bank outside India and issued to non-resident investors. Such GDR is issued against issue of equity shares or foreign currency convertible bonds of the issuing company. Indian Companies generally issued GDR, which can be traded in many European countries. GDR is denominated in dollar or some freely convertible currency.

One GDR represents one or more shares or convertible bonds.

GDR Holder can cancel the GDR and convert it into equity shares after a cooling period of normally, forty-five (45) days. Till it is converted, GDR holder does not have any voting right. Once the GDRs are converted, the shares issued are listed on any stock exchange in India. The GDR holder, in fact, does not hold any shares in his name. Underlying shares/bonds issued by the company are in the name of overseas depository bank. The overseas depository bank does not physically hold

[6] *GDRs were earlier governed from the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993. It has now been repealed with respect to GDRs and Depositories Receipt Scheme, 2014 is the new legislation implemented by the respective authorities namely RBI, Securities Exchange Board of India (**SEBI**), Ministry of Corporate Affairs (**MCA**) and Ministry of Finance.*

[7] *Rules pertaining to GDRs has been prescribed under section 41 read with 469 of the Companies Act, 2013 and Companies (Issue of Global Depository Receipts) Rules, 2014.*

the shares. The shares or bonds are in physical custody of domestic custodian bank in India as agent of the overseas depository bank.

4. American Depository Receipts

ADRs are securities issued by a depository bank. It is a negotiable instrument issued by an Overseas Depository bank representing the underlying ordinary shares in a non-US company. It is issued to overseas investors. These are denominated in US $ for trading in US markets. Overseas Depository bank located in foreign country issues ADRs against equity shares held by Domestic Depository (local custodian). Issuing company has to deal with depository in foreign country for notices etc. It is regulated by the Securities Exchange Commission.

Classification

- Level 1 ADR: Traded only over the counter markets and cannot be listed on a national stock exchange.
- Level 2 ADR: Allowed to be listed on a major U.S. stock exchange and requires partial reconciliation to US GAAP or International Financial Reporting Standards. Companies must also comply with the Sarbanes Oxly Act, which requires accounting and financial disclosures as well as other reporting standards.
- Level 3 ADR: Requires fully reconciled financial statement to US GAAP. Foreign companies issuing level 3 ADRs can also raise capital through public offering of the ADR within the U.S.

The Indian companies are not going for ADR as:

- Cost of ADR issue is prohibitive.
- Initial costs including listing fees and registration fees with SEC are high.
- Stringent disclosure and investment protection norms
- No publicity is allowed when issue is open.

AMENDMENTS IN PRIVATELY SHARES PLACEMENT AS PER SECTION 42 OF THE COMPANIES ACT, 2013

There are certain conditions given under Amendments in Privately Shares Placement as per Section 42 of the companies which has to be followed while placing shares privately. Following are the Amendments:

1. **The maximum number of persons**: In a financial year, private placement offer letter can be sent only to 200 persons or less. Out of those 200 persons, Qualified Institutional Buyers and employers are excluded. Moreover, the limits of those 200 persons are calculated individually for each kind of security. This offer must be made to the selected group of a person who is identified by the board of Directors.
2. **Private Placement offer letter conditions**: The offer can be made to the identified persons in a prescribed form. For example, the Name and Address of the persons shall be recorded by a company in a full a prescribed manner.
3. **The Right of Renunciation**: Private placement offer does not have any right of renunciation. But the person whose name is written in the offer letter can apply for the subscription.
4. **Mode of payment for subscription money**: The mode of payment shall be either by cheque or demand draft/other banking channels. But it cannot be made by cash.
5. **Allotment money use**: The Company is not entitled to use the private placements money until allotment is made and the return of allotment (form PAS-3) is filed with the Registrar as prescribed by sub-section (8). This is the major change by Amendment Act, 2017.
6. **No further offer until the previous completion**: No invitation of security will be made until and unless allotments that were made earlier will be completed.

7. **Separate Bank Account**: A separate bank account would be opened for keeping the money received from placing shares which will be used only for repayment.
8. **To whom the offer will be made**: Persons whose names are recorded by the company prior to the invitation to subscribe shall only be given an offer.
9. **No advertisement of offer**: Under this Section, companies offering securities are not entitled to make advertisements through media, marketing strategy, distribution channels or any agents to inform a large number of the public about such an offer.
10. **Days within shares shall be issued**: Allotment process should only be completed within 60 days of receiving of money.
11. **If fail to allot within 60 days**: In case, there is a failure of allotment within 60 days then till 75th day the money must be repaid. If the allotment is not made timely then there will be a liability of interest at 12% p.a.
12. **A minimum deviation between two offers**: There is no provision for the gap between the two offers in the Amendments in Privately Shares Placement so far, but a company can get into the new offer as soon as it is done with the previous one.
13. **Maximum offers**: There is no condition in the act that provides the maximum number of offers in a financial year. Accordingly, it may come with a private placement of shares any number of times in a financial year. But offer made will be to 200 people in a financial year.

DEBT INSTRUMENT – LOAN / EXTERNAL COMMERCIAL BORROWINGS (ECBs)

LOANS BY DOMESTIC COMPANIES

Long-term and medium-term loans can be secured by companies from financial institutions/commercial banks. Loans agreed to be sanctioned must be covered by securities by way of mortgage of the company's property or assignment of stocks, shares, gold, etc. This method of financing does not require any legal formality except that of creating a mortgage on the assets.

FOREIGN LOANS – EXTERNAL COMMERCIAL BORROWINGS

With the aim of further liberalising the foreign currency loan regime in India, the RBI, pursuant to a circular dated 1st August 2022, introduced sweeping changes, and rationalised the framework for ECB's and Rupee denominated bonds.

The parameters set in accordance with the new circular are as follows:

- Merging of Tracks: Before the RBI issued Circular containing revised guidelines for ECBs, there was a Track system put in place and the foreign currency denominated by ECB could be availed under Track 1 (short term foreign currency ECB) and Track II (long term foreign currency ECB). RBI has now merged the foreign currency denominated ECB into a single track. Furthermore, the RBI has also merged Track III (Rupee denominated ECB) and the framework on Rupee denominated bonds (i.e., masala bonds) as 'Rupee denominated ECB'. The earlier framework was separate for ECBs and masala bonds.

- ECB Limits: ECB up to USD 1.5 billion or its equivalent per financial year, irrespective of its specified activities/sector, which otherwise is in compliance with the parameters set out in the ECB regulations, can be raised under the automatic route. Earlier, the ECB regulations set out different limits for ECBs which would be raised by eligible entities/borrowers engaged in specified activities/sectors under the automatic route, which have now been aggregated. There are no sector specific limits which exist, pursuant to the circular.

- Form of ECB: According to the previous rules, both foreign currency denominated ECB and INR. ECB could be availed by way of loans including bank loans, securitised instruments (e.g., floating/fixed rate notes, bonds, non-convertible, optionally convertible and partially convertible debentures), trade credits beyond three years of financial lease. In addition to such, with the new guidelines in place, INR and ECB can be prevailed in the form of preference shares. FCCB as well as FCEB would continue to be a mode for availing foreign currency denominated ECB.

- Eligible Borrowers: The eligibility criteria of a borrower have now been liberalised and have been expanded to include all entities eligible to receive FDI. Additionally, port trusts units in SEZs, SIDBI, EXIM Bank, registered entities engaged in micro-finance activities, viz., registered not for profit companies, registered societies/trusts/cooperatives and non-government organizations are now eligible for availing ECB. Some of such companies which are availing ECB are companies in sectors such as animal husbandry, agriculture, petroleum, natural gas, and broadcasting, insurance etc.

- Recognised Lender: The track categorisations have now been done away with in terms of lenders. Entities which are resident of Financial Action Task Force or International Organization of Securities Commission compliant countries will be recognised as lenders for extending ECB facility to eligible borrowers.

- Minimum Average Maturity Period ("MAMP"): The MAMP for all ECBs is now prescribed as three (3) years. However, for ECBs raised from foreign equity holders and utilised for working capital purposes, general corporate purposes, or repayment of rupee loans, the MAMP will be five (5) years. Furthermore, the MAMP for ECB up to USD 50 Million per financial year raised by companies in the manufacturing sector will be 1 year.

- Prescribed Form for Reporting ECB: Form 83 has now been replaced with Form ECB. Form ECB is required to be submitted by the eligible borrowers for obtaining a loan registration number and for intimating RBI of any changes in the terms of ECBs already availed.

- End use restriction: There has been no substantial change in the negative list of end-uses prescribed by the RBI except definition of the term 'real estate activities' have now been introduced.

- Start Ups: Any entity recognised by the central government as a 'start-up' is allowed to raise ECB up to USD three (3) million or equivalent per financial year. It has been clarified that start-ups under the special dispensation or other start-ups which are eligible to receive FDI can also raise ECB under the general ECB framework.

- Entities under Restructuring: Any entity which is under CIRP under the IBC 2016 can raise ECB only if it is specifically permitted under the resolution plan.

DEBT INSTRUMENT – FOREIGN CURRENCY CONVERTIBLE BONDS (FCCBs)

FCCBs means a bond issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993.

FCCBs mean a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which are payable in foreign currency and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part, on the basis of any equity related warrants attached to the debt instruments.

The bonds are drawn from "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993". This scheme has been repealed except for the purpose of FCCBs on which it is still applicable.

FCCBs being debt instruments fall under the ECB Policy as given in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 and the Master Circular named "External Commercial Borrowings and Trade Credits" by RBI dated July 1, 2015, which consolidates the law on the same.

Requirements under FEMA

- Maturity period of at least 5 years,
- If call & put option used, it cannot be exercisable prior to 5 years,
- Issuance possible only without any warrants attached, and
- Issue related expenses should not exceed 4% of issue size in case of private placement, shall not exceed 2% of the issue size.

Redemptions under ECB Guidelines

AD Category - I banks are permitted to allow Indian companies to refinance the outstanding FCCBs, under the automatic route as these companies might be facing difficulty in meeting the redemption obligations. However, these permissions are subject to compliance with the terms and conditions:

- Fresh FCCBs shall be raised with the stipulated average maturity period and applicable all-in cost being as per the extant ECB guidelines;
- The amount of fresh FCCB to not exceed the outstanding redemption value at maturity of the outstanding FCCBs;
- The fresh FCCB cannot be raised six months prior to the maturity date of the outstanding FCCBs;
- The purpose of FCCB has to be clearly mentioned as 'Redemption of outstanding FCCBs' in Form 83 while obtaining Loan Registration Number from the Reserve Bank;
- The designated AD - Category I bank has to monitor the end-use of funds;
- FCCB beyond USD 500 million for the purpose of redemption of the existing FCCB will be considered under the approval route; and
- FCCB availed for the purpose of refinancing the existing outstanding FCCB will be reckoned as part of the limit of USD 750 million available under the automatic route as per the extant norms.

Powers delegated to AD Category I banks to deal with ECB: The Designated AD Category I banks can approve any request for changes in respect of ECB, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in the name of borrower, and any other parameter comply with extant ECB norms and with the consent of the lenders.

Foreign Currency Exchangeable Bonds

FCEBs, as per "Foreign Currency Exchangeable Bonds Scheme, 2008" means a bond expressed in any freely convertible foreign currency issued by 'Issuing Company' and subscribed by a person resident outside India, in foreign currency. The bond is exchangeable into equity shares of another company to be called "offered company". The FCEB should be in compliance with the FDI Policy.

The distinction between FCCB and FCEB is that in FCCB, the company issuing FCCB offers its own shares, while in FCEB, the shares offered are of the promoter group company.

Chapter 4

OVERSEAS INVESTMENT BY INDIAN ENTITY

An Indian party may make direct investment in a JV or WOS outside India subject to the conditions prescribed under Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (TIFC Regulations). The total financial commitment of the Indian party can be up to four hundred percent (400%) of the net worth of Indian party as on date of last audited balance sheet.

PROHIBITIONS

Indian residents are not allowed to make investments in foreign entities dealing in banking business or real estate, this will not include the investment in townships, roads, bridges, and commercial/residential premises. Specific approval of RBI is required to invest in these entities.

CONDITIONS FOR GUARANTEE

The guarantees provided by the Indian company have to be within the ceiling of the Indian entity, there must be a specific guaranteed amount mentioned. Overseas Investment should be within the present ceiling of four hundred percent (400 %) of net worth of the Indian Company as on the date of the last audited balance sheet. In case of performance guarantees breach the ceiling then approval must be taken from the RBI. Further all guarantees are required to be reported to RBI under the Form ODI. Partnership firms can allow individual partners to hold shares in JV/WOS's if the host country regulations consent to it.

SWAP OF SHARES

Category 1 Merchant Banker register with SEBI or an investment banker outside India registered with the appropriate regulatory authority in the host country will be required to make valuation of the shares, in case of an investment made by share swap. FIPB will also have to give approval before investment by swap of shares can be initiated.

ADR/GDR

An Indian party may acquire shares of a foreign company in exchange of ADRs/GDRs, and they will be subject to the Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 and the guidelines that are issued by the Government of India from time to time, provided:

i. ADRs/GDRs are listed on any stock exchange outside India;
ii. The ADR and/or GDR issued for the purpose of acquisition is backed by underlying fresh equity shares issued by the Indian Party;
iii. The total holding in the Indian entity by persons resident outside India in the expanded capital base, after the new ADR and/or GDR issue, does not exceed the sectoral cap prescribed under the relevant regulations for such investment under FDI;
iv. Valuation of the shares of the foreign company shall be

    a. as per the recommendations of the Investment Banker if the shares are not listed on any recognized stock exchange; or
    b. based on the current market capitalisation of the foreign company arrived at on the basis of monthly average price on any stock exchange abroad for the three months preceding the month in which the acquisition is committed and over and above, the premium, if any, as recommended by the Investment Banker in its due diligence report in other cases.

ISSUE OF GUARANTEE BY AN INDIAN PARTY TO STEP DOWN SUBSIDIARY OF JOINT VENTURES/WHOLLY OWNED SUBSIDIARY

Indian parties can issue corporate guarantees through the automatic route for the step-down JV/WOS operating as a Special Purpose Vehicle as long as the amount guaranteed is within the present ceiling of four hundred percent (400%) of the net worth of the Indian Party. The Indian promoter company can also extend corporate guarantee on behalf of the step-down subsidiary. These guarantees will be reported to the RBI through the Form ODI through the designated AD Category – I bank concerned. For second step down subsidiaries, guarantee can be provided through the approval route subject to the Indian company holding more than fifty one percent (51%) of the stake indirectly.

OBLIGATIONS OF INDIAN PARTIES

An Indian Party which has made direct investment abroad has to follow the following obligations: **(RBI/FED/2015-16/10, FED Master Direction No. 15/2015-16)**

(i) receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months, or such further period as Reserve Bank may permit, from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian Party or the date on which the amount due was allowed to be capitalised;

(ii) repatriate to India, all dues receivable from the foreign entity, like dividend, royalty, technical fees etc., within 60 days of its falling due, or such further period as the Reserve Bank may permit: and

(iii) submit to the Reserve Bank, through the designated Authorised Dealer, every year on or before June 30, an Annual Performance Report (APR) in Part III of Form ODI in respect of each JV or WOS outside India, and other reports or documents as may be prescribed by the Reserve Bank from time to time. The APR, so required to be submitted, has to be based on the audited annual accounts of the JV/WOS for the preceding year, unless specifically exempted by the Reserve Bank;

AD Category - I bank is required to monitor the receipt of such documents and satisfy itself about the bonafides of the documents. A certificate to this effect should be submitted by the designated AD category – I bank to the Reserve Bank along with the APR (Part III of Form ODI).

(2) Reporting requirements including submission of Annual Performance Report are also applicable for investors in unincorporated entities in the oil sector.

3) Where the law of the host country does not mandatorily require auditing of the books of accounts of JV/WOS, the Annual Performance Report (APR) may be submitted by the Indian Party based on the un-audited annual accounts of the JV/WOS provided:

a. The Statutory Auditors of the Indian Party certify that 'the un-audited annual accounts of the JV / WOS reflect the true and fair picture of the affairs of the JV/WOS' and
b. That the un-audited annual accounts of the JV/WOS have been adopted and ratified by the Board of the Indian Party.

(4) An annual return on Foreign Liabilities and Assets (FLA) is required to be submitted directly by all the Indian companies which have received FDI and/or made FDI abroad (i.e., overseas investment) in the previous year(s) including the current year, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics, and Information Management (DSIM), Reserve Bank of India.

The Annual Return on FLA is available on the RBI website (www.rbi.org.in → Forms category → FEMA Forms) which can be duly filled-in, validated and sent by e-mail, by July 15 every year.

TRANSFER OF WAY OF SALE OF SHARES OF A JOINT VENTURE/WHOLLY OWNED SUBSIDIARY

(1) An Indian Party, without prior approval of the Reserve Bank, may transfer by way of sale to another Indian Party which complies with the provisions of Regulation 6 of FEMA Notification 120/RB-2004 dated July 7, 2004 as amended from time to time, or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to the following conditions:

i. the sale does not result in any write off of the investment (or financial commitment) made.
ii. the sale is affected through a stock exchange where the shares of the overseas JV/WOS are listed;
iii. if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV/WOS;
iv. the Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission, or other entitlements and / or export proceeds from the JV or WOS;
v. the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
vi. the Indian Party is not under investigation by CBI/DoE/SEBI/IRDA or any other regulatory authority in India.

(2) The Indian Party is required to submit details of such disinvestment through its designated AD category-I bank within 30 days from the date of disinvestment.

TRANSFER OF WAY OF SALE OF SHARES OF A JOINT VENTURE/WHOLLY OWNED SUBSIDIARY INVOLVING WRITE OFF ON THE INVESTMENT (OR FINANCIAL COMMITMENT

(1) Indian Party may disinvest, without prior approval of the Reserve Bank, in any of the under noted cases where the amount repatriated after disinvestment is less than the original amount invested:

i. in case where the JV/WOS is listed in the overseas stock exchange;
ii. in cases where the Indian Party is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore;
iii. where the Indian Party is an unlisted company and the investment (or financial commitment) in the overseas venture does not exceed USD 10 million; and
iv. where the Indian Party is a listed company with net worth of less than Rs.100 crore but investment (or financial commitment) in an overseas JV/WOS does not exceed USD 10 million.

(2) Such disinvestments shall be subject to the conditions listed at B.15 (1) items (ii) to (vi) and B.15 (2)

(3) An Indian Party, which does not satisfy the conditions laid down above for undertaking any disinvestment in its JV/WOS abroad, shall have to apply to the Reserve Bank for prior permission.

-(RBI/FED/2015-16/10, FED Master Direction No. 15/2015-16)

PLEDGE OF SHARES OF JV, WOS AND STEP-DOWN SUBSIDIARY

An Indian company can create a security in the form of a pledge of a JV/WOS or Step-Down Subsidiary outside India. The security would be created to the benefit of an authorised dealer or a public financial institution in India or an overseas lender for the purpose of fund or non-fund-based facility for its JV/WOS/Step Down Subsidiary, or for any other JV/ WOS/SDS of the Indian Party subject to the terms and conditions prescribed under Regulation 18 of the Notification and A.P. (DIR Series) Circular No.54 dated December 29, 2014.

OVERSEAS DIRECT INVESTMENTS BY RESIDENT INDIVIDUALS

From 5 August 2013 onwards a resident individual, either alone or in association with another resident individual or with an Indian party can make overseas direct investment in the equity shares and compulsorily convertible preference shares of a JV/WOS outside India. RBI shall set the limit that individuals can invest in overseas direct investment. These will be in provision to the LRS.

Under the LRS, all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both. Further, resident individuals can avail of foreign exchange facility for the purposes mentioned in the LRS, within the limit of USD 2,50,000 only. If an individual remits any amount under LRS in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 by the amount so remitted).

ROLLOVER OF GUARANTEES

(1) It has been decided not to treat/reckon the renewal/rollover of an existing/original guarantee, which is part of the total financial commitment of the Indian Party in terms of Regulation 6 of FEMA Notification 120/RB-2004 dated July 7, 2004, as a fresh financial commitment, provided that:

a. the existing/original guarantee was issued in terms of the then extant/prevailing FEMA guidelines;
b. there is no change in the end use of the guarantee, i.e., the facilities availed by the JV/WOS/Step Down Subsidiary;
c. there is no change in any of the terms & conditions, including the amount of the guarantee except the validity period;
d. the reporting of the rolled over guarantee would be done as a fresh financial commitment in Part II of Form ODI, as hitherto; and
e. if the Indian Party is under investigation by any investigation/enforcement agency or regulatory body, the concerned agency / body shall be kept informed about the same.

(2) In case, however, the above conditions are not met, the Indian Party shall obtain prior approval of the Reserve Bank for rollover/renewal of the existing guarantee through the designated AD bank.

- (RBI/FED/2015-16/10, FED Master Direction No. 15/2015-16)

CREATION OF A CHARGE ON DOMESTIC AND FOREIGN ASSETS

An Indian party can create charge on its assets or the assets of its sister concern, group, associate companies in India in favour of an overseas lender for fund based or non-fund-based facility in exchange for the JV/WOS or Step-Down Subsidiary outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification and A.P. (DIR Series) Circular No.54 dated December 29, 2014.
Further an Indian company can create a charge on assets of its overseas JV/WOS or Step-Down Subsidiary in India as a security in favour of the AD bank in India for fund based or non-fund-based facility for itself or for the JV/WOS or Step-Down Subsidiary outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification and A.P. (DIR Series) Circular No.54 dated December 29, 2014.

PLEDGE

The shares acquired by person resident in India are allowed to be pledged for obtaining credit facilities in India.

AUTOMATIC ROUTE

The following investments are permitted without the permission of the RBI, if investment is as per prescribed conditions under TIFC Regulations:

- Direct investment in JV/WOS abroad as per the ceilings prescribed by the RBI from time to time. However, any financial commitment exceeding USD 1 billion (or its equivalent) in a financial year would require prior approval of the RBI even when the total financial commitment of the Indian Party is within the eligible limit under the automatic route, that is, within four hundred percent (400%) of the net worth as per the last audited balance sheet.
- For the purpose of making investment/undertaking financial commitment in overseas JV/WOS, the Indian Party should approach an Authorised Dealer Category - I bank with an application in Form ODI (Master Document on Reporting) and prescribed enclosures/documents for effecting such remittances. (**RBI/FED/2015-16/10)**
- Issue of corporate guarantee by an Indian Party to step down subsidiary of JV/WOS. Provided that the Indian party holds fifty one percent (51%) or more stakes in the overseas subsidiary.
- Setting up of Special Purpose Vehicle/Investment/Financial commitment through Special Purpose Vehicle
- Investment/Financial commitment in unincorporated entities overseas in the oil sector subject to the prior approval of the competent authority.
- Investment in agricultural Operations Overseas directly or through overseas offices
- Portfolio investment, not exceeding fifty percent (50%) of Indian company's net worth in equity or rated bonds of company registered overseas.
- Investment in financial Services Sector, subject to the conditions prescribed under Regulation 7 of the TIFC Regulations. An Indian Party seeking to make investment (or financial commitment) in an entity outside India, which is engaged in the financial sector, should fulfil the following additional conditions:

    - be registered with the regulatory authority in India for conducting the financial sector activities;
    - has earned net profit during the preceding three financial years from the financial services activities;
    - has obtained approval from the regulatory authorities concerned both in India and abroad for venturing into such financial sector activity;
    - has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

  Any additional investment (or financial commitment) by an existing JV/WOS or its step down subsidiary in the financial services sector is also required to comply with the above conditions.

  Regulated entities in the financial sector making investments (or financial commitment) in any activity overseas are required to comply with the above guidelines. Unregulated entities in financial services sector in India may invest in non-financial sector activities subject to compliance with provisions of Regulation 6 of the Notification No. FEMA 120/RB-2004 dated July 7, 2004. Trading in commodities exchanges overseas and setting up JV/WOS for trading in overseas exchanges will be reckoned as financial services activity and require clearance from SEBI. (**RBI/FED/2015-16/10)**

APPROVAL ROUTE

Prior approval of the RBI would be required in all other cases of direct investment/FC abroad. For this purpose, application together with necessary documents should be submitted in Form ODI through their Authorised Dealer Category – I bank.

RBI would, inter alia, take into account the following factors while considering such applications:

a. Prima facie viability of the JV/WOS outside India;
b. Contribution to external trade and other benefits which will accrue to India through such investment;
c. Financial position and business track record of the Indian party and the foreign entity; and
d. Expertise and experience of the Indian party in the same or related line of activity as of the JV/WOS outside India.

Chapter 5

COMPANY LAW

INCORPORATION OF A COMPANY

A. APPROVAL OF NAME

CoA read with Companies (Incorporation) Rules, 2014 governs the operations of a corporate enterprise. First step in incorporation of a company is to seek approval for the proposed name from the ("CRC")[8] of the State/Union Territory, in which the registered office of the company is proposed to be situated along with the fee provided in the Companies (Registration offices and fees), 2014 for the purpose of registration of a name and needs to be approached for the purpose of reservation of names. It is to be noted that the CRC shall process applications for reservation of name i.e., e-FORM No. INC 1 and the processing and approval of names proposed under e-FORM NO. INC-29 shall continue to be done by respective Registrar of Companies having jurisdiction over incorporation of companies under the CoA. This approval is granted subject to conditions namely; the name should not be ambiguous or similar to an existing company, it should not also resemble too nearly with the name of an existing company. etc. Further, the words 'Limited' and 'Private Limited' should form the last part of the name of a public or private company, respectively.

The documents that are to be filed with the RoC for the purposes of incorporation of a company include the MoA and AoA.

B. MOA

The MoA sets out the constitution of the company. It is a document that regulates the external affairs of a company and therefore, must be drawn up on the formation of registered or incorporated company. The MoA of every company should state the following:

- The name of the company with 'Limited' as the last word of the name in the case of a public company and with 'Private Limited' as the last words of the name in the case of a private company;
- The State in which the registered office of the company is situated;
- The main objects to be pursued by the company on its incorporation along with objects incidental or ancillary to attainment of the main objects;
- The nature of liability of the members of the company, whether limited or unlimited. For instance, in case of a company limited by shares, liability of the members is limited to the amount unpaid on the shares held by them.
- If it is a One Person Company, then the MOA must also state the name of the nominee who shall be dealing with the affairs of the company in the event of death of the subscriber, shall become the member of the company.
- The authorised share capital i.e., the amount of share capital with which the company is to be registered and division thereof into shares of a fixed amount.

[8] MCA Notification [F. No. A-42011/03/2016-Ad.II] dated 22nd January 2016.

There should be at least seven (7) subscribers to the MoA in case of a public company and at least two (2) subscribers to the MoA in case of a private company.

C. AOA

The AoA contain the rules and regulations for managing the internal affairs of the company and achieving the objects set out in the MoA. This document lays down the rights and duties of the members/shareholders of the company. It is subordinate to the MoA. It is a contract between the Company and its members/shareholders and the company, both, shall have certain rights and duties towards each other. AoA is to be submitted at the time of applying for incorporation of the company. It binds not only the existing members but the ones who might join in future. It is essential for a private company to have its own AoA, whereas there is no such essential requirement for a public company. If a public company does not register its AoA, the standard model of AoA as provided in the CoA applies.

The RoC issues a Certificate of Incorporation after the required documents are presented along with the requisite registration fee. The registration fee is dependent on the quantum of authorised share capital of a company. The process of incorporating a company takes about two (2) weeks.

The AoA contains following details among other details:

- The appointments of directors
- Directors' meetings – the quorum and percentage of vote
- Management decisions – who manages, board or founder.
- Transferability of shares – assignment rights of the founders or other members of the company do.
- Casting vote of a Chairman, and his/her mode of election.
- The dividend policy – a percentage of profits to be declared when there is profit or otherwise.
- Winding up – the conditions, notice to members.
- First right of refusal.

D. DIRECTORS

In a private company a minimum of two (2) directors are required to be appointed whereby in a public company, a minimum of three (3) directors are required to be appointed. However, the maximum number of directors in both private as well as public companies can be fifteen (15).

E. SUBSCRIBERS

In a private company, there are two (2) initial subscribers required, however, in a public company the requirement is seven (7).

F. FAST TRACK INCORPORATION

Recently, a fast-track company incorporation process has been introduced whereby a company can be incorporated within 48 hours subject to the proper filing of documents with the RoC.

The companies can also be incorporated in an online mode through e-filing of the required documents.

ONE PERSON COMPANY

Section 2(62) defines One Person Company as a company having only one member. It is a new concept which has been introduced under the CoA, it gives opportunities to the people who try to commence their own business.

It can be incorporated by filling SPICe, without filling RUN, with eMOA and eAOA and in case where eMOA and eAOA are not applicable, users are required to attach the pdf attachments of MOA and AOA. Such company can be converted into either a Private or Public Company by filling form INC-6.

Only One Shareholder

Only a natural person, who is an Indian citizen and resident in India, shall be eligible to incorporate a One Person Company. Such a person cannot be a member or nominee for any other company.
Explanation: The term "Resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty-two (182) days during the immediately preceding one financial year.

Nominee for the Shareholder

The Shareholder shall nominate another person who shall become the shareholders in case of death/incapacity of the original shareholder. Such nominee shall give his/her consent and such consent for being appointed as the Nominee for the sole Shareholder. Only a natural person, who is an Indian citizen and resident in India shall be a nominee for the sole member of a One Person Company.

Director

It must have a minimum of One (1) Director, the Sole Shareholder can himself be the Sole Director. The Company may have a maximum number of fifteen (15) directors.

Companies Incorporation 2nd Amendment Rules 2021:

Process for Conversion of OPC into Private or Public company:

i. The One Person company shall alter its memorandum and articles by passing a resolution in accordance with sub-section (3) of Section 122 of the Act to give effect to the conversion and to make necessary changes incidental thereto.
ii. A One Person company may be converted into a Private or Public Company, other than a company registered under Section 8 of the Act, after increasing the minimum number of members and directors to two or seven members and two or three directors, as the case may be, and maintaining the minimum paid-up capital as per the requirements of the Act for such class of company and by making due compliance of Section 18 of the Act for conversion.
iii. The company shall file an application in e-Form No. INC-6 for its conversion into Private or Public Company, other than under Section 8 of the Act, along with fees as provided in the Companies (Registration offices and fees) Rules, 2014 by attaching documents, namely:-
    a. Altered MOA and AOA;
    b. copy of resolution;
    c. the list of proposed members and its directors along with consent;
    d. list of creditors; and
    e. the latest audited balance sheet and profit and loss account.
iv. On being satisfied that the requirements stated herein have been complied with, the Registrar shall approve the form and issue the Certificate. Hence pursuant to the aforesaid amendment the requirement of filing INC-5 has been done away with and the format of INC-6 has been changed.

SHARE CAPITAL

As per the CoA, a company limited by shares, can issue two kinds of share capital. These are preference share capital (preferred stock) and equity share capital (common stock). Further, the equity share capital is of two (2) categories, namely, shares with voting rights and shares with differential rights, as to dividend, voting or otherwise.

A. PREFERENCE SHARE CAPITAL

Preference share capital[9], with reference to any company, means that part of the share capital of a company, which: carries or would carry a preferential right with respect to

- Preferential right to a fixed amount or rate of dividend; and
- Preferential right to repayment of capital in the event of winding up of the company or repayment of capital.

A company may issue redeemable preference shares if it is authorised by its AoA. Such preference shares can be redeemed within twenty (20) years from the date of issuance. It is pertinent to note here that redemption of preference shares does not amount to reduction of the paid-up capital since the redemption must be finalised out of fresh issue of shares or out of capital redemption reserves created from accumulated profits.

B. EQUITY SHARE CAPITAL

The CoA provides an exclusionary definition of equity share capital i.e., equity share capital is that part of share capital which is not preference share capital. The equity share capital is of two (2) categories, namely, shares with voting rights and shares with differential rights, as to dividend, voting or otherwise. Shares with differential rights can be created in accordance with the rules prescribed by the Government of India.

Shares may be issued at par, at premium, where a company issues shares at a premium, a sum equivalent to the value of premium is required to be transferred to a "Share Premium Account". The Share Premium Account can be utilised for specified purposes only.

SWEAT EQUITY SHARES

A company may issue sweat equity shares belonging to a class of shares issued at a discount, subject to the following:

- The issue of shares at a discount is authorised by a Special Resolution passed by the company in general meeting;
- The resolution specifies the number of shares, the current market price, consideration if any and the classes of directors or employees to whom such shares are to be issued.
- At the date of issue of such shares, the company must have completed at least one year of incorporation or five years in case of a start-up company.
- Equity shares issued by a listed company should comply with the regulations made by SEBI.

The issue of shares of a company is restricted to its authorised capital specified in the MoA. The authorised capital may be increased, if permitted by the AoA of the company.

9 Section 43(b) of the Companies Act,2013

EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)

A company can also increase its paid up/subscribed capital by allotment of further shares to employees under a scheme of employees' stock option after passing a Special Resolution for the same or to any other person subject to passing of an Ordinary Resolution and such conditions as may be prescribed.

After Amendment made by Finance Act-2020 applicable w.e.f. A/Y 2021-22:

- By Finance Act-2020 amendment has been made, to consider the challenges faced both by employees and **eligible start-ups** and has sought to offer some relief in the form of deferring the Taxation of ESOPs, From the FY 2020-21, an employee receiving ESOPs from an eligible start-up need not pay tax in the year of exercising the option. The Tax on the 'perquisite' will be required to deposited within 14 days from earlier of the following events:

    1. Expiry of **five years** from the year of allotment of ESOPs
    2. Date of **sale** of the ESOPs by the employee
    3. Date of **termination** of employment

FURTHER ISSUE OF SHARES

In case a company wishes to increase its paid-up/subscribed capital by allotment of further shares, then such further shares can:

1. Be offered to the existing equity shareholders. The offer should be in proportion to their shareholding. If they do not accept the offer, the BoD may issue further shares as they think is most beneficial to the company.

2. Be offered to any person, if it is authorised by a special resolution, either for cash or for a consideration other than cash, subject to the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

DEBENTURES

A company may raise funds by issuing debentures. A debenture is one of the most common methods of borrowing. Section 2(30) of the CoA defines debenture to be inclusive of debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. Debenture is the most relevant instrument, and it is a method of raising the capital by the company. A debenture is like a certificate of loan or a loan bond which is a proof of the fact that the company will be liable to pay a particular amount with interest. Although the money raised by the debentures becomes a part of the company's capital structure, it does not become share capital. The difference between shares and debentures is that the person buying the shares becomes the part owner of the company; however, the person buying the debentures becomes the creditor and therefore, in case of company winding up/bankruptcy, the debenture holders are paid first.

Section 71 of CoA extensively deals with debentures. A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption. The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a Special Resolution passed at a general meeting.

Certain other features include:

- No company shall issue debentures carrying any voting rights.
- When debentures are issued under this section, the company shall create debenture redemption reserve account out of the company's profits.

- Interest shall be paid, and the debentures shall be redeemed in accordance with the terms and conditions of their issue.

TYPES OF DEBENTURES

Secured Debentures: A company shall not issue secured debentures, unless it complies with the following conditions, namely –

- Term of Debentures: An issue of secured debentures may be made, provided the date of its redemption shall not exceed ten (10) years from the date of issue.
- Secured by charge: An issue of debentures shall be secured by the creation of a charge on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.
- Appoint Debenture Trustee: Company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than sixty (60) days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders.
- Charge/Mortgage in favour of Debenture Trustee: The security for the debentures by way of a charge or mortgage shall be created in favour of the debenture trustee on-

a) Any specific movable property of the company (not being in the nature of pledge); or
b) Any specific immovable property wherever situated, or any interest therein.

Unsecured Debentures: As per Rule 18(1)(a) of Companies (share capital and debentures) Rules, 2014 prescribed time limit for issue of secured debenture, unsecured debentures can be issued for any time period by the company. Where no charge is created, the issuer company will have to comply with the provisions of the Companies (Acceptance of Deposits) Rules, 2014 as unsecured debentures\bonds are treated as "deposits". SEBI revised guidelines is silent on this aspect but none-the-less the provisions of CoA will apply to the listed companies. Any issue of debentures should necessarily be secured. Security creation is a must for a public or rights issue of debentures and this has been done for protection of interest of debenture holders.

Unsecured Non-Convertible Debentures (NCD): Are the ones which are not backed by any assets and in case a company is in financial crunch, there can be an issue in paying back the bond holders. Only after the payment is made to every entity which has some security, the unsecured NCD bond holders have any chance of getting back their money. So that's the reason why these NCD's have high interest rates. The Features of the Unsecured NCDs are –

- They are listed on stock exchanges. Hence, provides liquidity to holder.
- The tenure of NCDs can be anywhere between two (2) years and twenty (20) years.
- NCDs are rated by rating agencies such as CRISIL.
- If you buy a NCD that pays interest then the interest will not attract TDS
- The debentures are generally offered in four options: monthly, quarterly, annual, and cumulative interest.

Convertible Debentures- A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption. The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting.

This means debenture may be NCD or convertible debenture. Convertible debenture may either be **FCD** or **Partly Convertible Debenture**. No company shall issue any debentures carrying any voting rights.

NCDs- Is a financial instrument issued by Corporates for specified tenure to raise resources/funds through public issue or private placement. This debt instrument cannot be converted into equity. It is a fixed income instrument same as bank fixed

deposit and can be traded on stock exchanges. Interest can be earned monthly/quarterly/annually/cumulative and on maturity principal amount is paid to the debenture holder.

A corporate shall be eligible to issue NCDs if it fulfils the following criteria -

a) The corporate has a tangible net worth of not less than Rs. four (4) crores, as per the latest audited balance sheet;
b) The corporate has been sanctioned working capital limit or term loan by bank/s or all-India financial institution/s; and
c) The borrower's account of the corporate is classified as a Standard Asset by the financing bank/s or institution/s.

Rating Requirement- An eligible corporate intending to issue NCDs shall obtain credit rating for issuance of the NCDs from one of the rating agencies, viz., the Credit Rating Information Services of India Ltd or the Investment Information and Credit Rating Agency of India Ltd or the Credit Analysis and Research Ltd or the FITCH Ratings India Pvt. Ltd or such other agencies registered with SEBI or such other credit rating agencies as may be specified by the RBI from time to time, for the purpose.

Maturity- NCDs shall not be issued for maturities of less than ninety (90) days or beyond validity period of the credit rating of instrument from the date of issue. The exercise date of option (put/call), if any, attached to the NCDs shall not fall within the period of ninety (90) days from the date of issue.

Denomination- NCDs may be issued in denominations with a minimum of rupees five (5) lacs (face value) and in multiples of rupees one (1) lac.

Limits and amounts of NCDs- The aggregate amount of NCDs issued by a corporate shall be within such limit as may be approved by the Board of Directors of the corporate or the quantum indicated by the Credit Rating Agency for the rating granted, whichever is lower.
The total amount of NCDs proposed to be issued shall be completed within a period of two weeks from the date on which the corporate opens the issue for subscription.

DEBENTURE REDEMPTION RESERVE (DRR)

The companies are required to create a DRR to which adequate amounts are to be credited out of its profits available for payment of dividend every year thus ensuring security and liquidity. SEBI regulations also require companies issuing debentures to provide for DRR as required under CoA. However, after conversion of debentures, the amount in the DRR may be transferred to general reserve or in such other manner as the Board thinks fit and proper. The amount credited to DRR cannot be utilized except for the redemption of debentures. DDR must be equivalent to at least twenty-five percent (25%) of the amount acting as the minimum reserve requirement raised through debenture issue before debenture redemption commences and all companies that are required to create DDR shall, before April 30 of each year, be required to reserve or deposit at least fifteen percent (15%) of the amount of its debentures that are due to mature on March 31 of the following year. These funds, which may either be deposited in a scheduled bank or invested in corporate or government bonds, are to be used to settle interest or principal payments on debentures maturing during the year.

The Ministry of Corporate Affairs had amended the Companies (share Capital & Debentures) Rules by removing DRR requirement for Listed Companies. NBFC's and HFC's. In case of Unlisted Companies, the DDR requirement has been reduced to ten percent (10%) from twenty five percent (25%) of the outstanding debentures and the changes will be applicable for public issue as well as private placements.

MCA vide its Notification No. G.S.R. 335(E) dated. 04th May, 2022 has notified Companies (Share Capital and Debentures) Amendment Rules, 2022 to amend the existing Companies (Share Capital and Debentures) Rules, 2014. The amendment pertains to insertion of a declaration in form SH-4 (form for transfer of shares) with regards to whether transferee is required to obtain Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to

transfer of shares or not. In case no such approval is required then the transfer will take place in the normal course of action whereas if such an approval is required to be obtained then it is mandatory to enclose the approval letter with form SH-4.

PUBLIC DEPOSITS

Section(s) 73 to 76 of the CoA read with Companies (Acceptance of Deposits) Rules, 2014 made under Chapter V of the CoA regulate the invitation and acceptance of deposits. It prohibits acceptance of deposits except from the members through Ordinary Resolution or acceptance deposits by "eligible company" being a public company, subject to conditions specified in the rules.

Exceptions- Section 73(1) of the CoA prohibition, does not apply to — (i) a banking company; and (ii) non- banking financial company as defined in the RBI Act, 1934; and (iii) to such other company as the Central Government may, after consultation with the RBI, specify in this behalf.

"**Eligible company**" means a public company, having a net worth of not less than one hundred (100) Crore rupees or a turnover of not less than five hundred (500) Crore rupees and which has obtained the prior consent of the company in general meeting by means of a Special Resolution and also filed the said Resolution with the RoC and wherever applicable, with the RBI before making any invitation to the Public for acceptance of Deposits.

Excluding the money received from debentures and shares, any money received by a company through the deposits or loans collected from the public. The Government in consultation with RBI has prescribed the upper limits, the manner, and the conditions subject to which, deposits may be invited or accepted by a company from the public/members of that company. Companies are not permitted to raise unlimited amounts of fund through public deposits. No Company can accept or renew deposit whether, secured or unsecured, which is repayable on demand or upon receiving a notice within a period of less than six (6) months or more than thirty-six (36) months from the date of acceptance or renewal of such deposit. An Eligible Company is allowed to accept deposit from members which shall not exceed ten percent (10%) of the aggregate of paid-up share capital and free reserves. However, deposit from others shall not exceed twenty-five percent (25%) of the aggregate of paid-up share capital and free reserves which excludes deposits from members.

It is an easier method of mobilising funds. The administrative cost of deposits for the company is lower than that involved in the issue of shares and debentures. The procedure of inviting public deposits is also simpler and involves lesser formalities. There is no dilution of shareholders' control as the depositors have no voting rights and cannot interfere with the internal management of the company.

The Ministry of Corporate Affairs ("MCA") vide its notification dated 22nd January 2019, made certain amendments to the Companies (Acceptance of Deposits) Amendment Rules, 2014 (Deposit Rules) wherein following are the key amendments relating to the return of deposits:

Annual Return (Rule 16): Every company (other than a government company) should use form DPT-3 (return of deposits) to file:
1. A return of deposit; or
2. Particulars of transactions by a company not considered as deposit as per Rule 2 (1) (c) of the Companies (Acceptance of Deposit) Rules, 2014; or
3. Both (If there are deposits as well as exempted deposits in the company).

This return should be filed with the Registrar of Companies ("ROC") on or before 30th June, of every year (comprising information contained therein as on 31st March of that year duly audited by the auditor of the company).

MEETINGS AND RESOLUTIONS

The CoA provides for the following meetings:

1. Shareholders Meetings –AGM and EGM;
2. Board Meetings

A. SHAREHOLDERS MEETINGS

AGM

An AGM[10] of the shareholders is required to be held by all companies (public and private) except a One Person Company, once every year. This meeting is in addition to any another meeting of the shareholders. There should not be a gap of more than fifteen (15) months between two (2) successive AGMs. First AGM is required to be held within a period of nine (9) months from the date of closing of the first financial year. In all other cases, it is to be held within a period of six (6) months from the date of closing of the financial year. As per the CoA, AGM should be held on any day except national holidays. If there is a default in holding a meeting, the officer responsible for such a default shall be punishable with fine which may extend to one (1) lakh rupees. A notice is required to be served twenty-one (21) days in advance which shall specify the day, date, place, and hour of the meeting. It shall also contain a statement of the transaction to be exacted at such meeting.

EGM

An EGM[11] is a meeting of the shareholders held at the behest of the BoD. The Board may call an EGM at any time that deems fit to them. However, the BoD would be statutorily required to hold such a meeting at the request of members holding not less than ten percent (10%) of voting power. If a requisition to hold an EGM has been made to the Board and it doesn't proceed within twenty-one (21) days to call a meeting, the people making the requisition may themselves call the meeting within a period of three months from the date of making such a requisition.

Given below are the types of resolution at a General Meeting for obtaining the approval of shareholders:

Ordinary Resolution

An Ordinary Resolution is a resolution where a notice has been duly served as per the requirements under CoA and the resolution is required to be passed by votes cast.

Special Resolution

A Special Resolution is a resolution where the intention to propose the resolution as a special resolution has been specifically mentioned in the notice calling for general meeting and votes cast in favour are not less than three times the number of votes cast against the resolution.

The CoA provides for the instances requiring special resolutions and in cases of listed companies, provision also needs to be made for an e-voting process.

[10] Under Section 93, Companies Act 2013
[11] Under Section 100, Companies Act 2013

B. BOARD MEETINGS

A Board Meeting is a meeting of the BoD of a company and there shall be at least four (4) meetings in a year. The company is required to hold a minimum of four meetings of its directors every year in such a manner there is not a gap of more than one hundred and twenty (120) days i.e., four (4) months between two (2) consecutive meetings. A notice is required to be sent to the directors seven (7) days in advance.

DIRECTORS/ KEY MANAGERIAL PERSONNEL

A company primarily acts through two (2) agencies, a general body of shareholders and BoD. The BoD is a managerial body and its accountability to shareholders must be assured. Only individuals can be appointed as directors. The Companies Act, 1956 specified that a private company should have at least two (2) directors and a public limited company should have at least three (3) directors. The CoA prescribes the provisions regarding appointment, removal, powers, duties, remuneration, etc of directors. The CoA has retained these provisions; however, the maximum number of directors has increased from twelve to fifteen (12-15). The requirement of seeking approval from the Central Government for raising the number directors above the prescribed limit has also been done away with. The CoA requires the BoD to devise mechanisms to ensure compliance with the applicable laws which should be effective and adequate.

INDEPENDENT DIRECTORS

Under the CoA, there is a mandatory requirement that one-third (1/3) of the BoD should consist of independent directors for listed public company.

Under the CoA, the independent directors are required to be completely unrelated to the company or its shareholders. If the director has a pecuniary relationship or is a part of any organization with which the company does business at the time of his appointment, then, he is disqualified from becoming an independent member. Even an independent director's relative should also not be an employee or be involved in any relationship or transaction with the company. These requirements have been brought in with the aim of increasing subjectivity in the functioning of the board.

WOMAN DIRECTOR

Appointment of a woman director within six (6) months of incorporation is a mandatory requirement of:

1. Every listed company; and
2. Every unlisted company with paid-up capital of on rupees hundred crore (Rs 1,00,00,000) or more or turnover of rupees three hundred crore (Rs 3,00,00,000) or more.

This requirement is introduced to facilitate the presence of women in the BoD room.

It is also required that at least one director of the company must have stayed in India for a period of at least one hundred and eighty-two (182) days in the previous calendar year. Their continued presence will not delay statutory action steps and will be a step forward towards meeting the timely corporate compliance requirements.
The CoA has focused on corporate compliance and a director will not be re-appointed if the company has failed to file its annual returns for three continuous years.

In case of every public company (and a private company, which is a subsidiary of a public company) at least two-thirds (2/3) of the total number of directors are liable to retire by rotation (one-third of such directors shall retire at every AGM). The remaining one-third (1/3) directors (non-rotational) may be appointed as provided in the company's AoA.

In the case of a private company, which is not a subsidiary of a public company, the appointment of directors may be as per the procedure specified in its AoA. Where the AoA do not provide otherwise, the directors are to be appointed in a general meeting. The provisions relating to rotational retirement of directors do not apply in case of a private company, which is not a subsidiary of a public company.

MANAGING DIRECTORS AND WHOLE TIME DIRECTORS

A company shall appoint any person as its managing director or whole-time director for a period not exceeding five (5) years at a time and re-appointment shall be made earlier than one (1) year before the expiry of his term.

COMPANY SECRETARY

Every listed public company with a paid-up capital of rupees ten crore (Rs 10,00,00,000) and above and every private company and any other company with a paid-up capital of rupees five crore (Rs 5,00,00,000) and above is required to have a whole-time Company Secretary who must be a member of the Institute of Company Secretaries of India.

The CoA[12] read with the Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014[13] provide that a secretarial audit is a compulsory practice for certain class of companies. They are as follows:

- All Listed Companies;
- Every public company having paid up share capital of fifty crore rupees or more; or
- Every public company having turnover of two hundred fifty crore rupees or more; or
- Every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more;

only a Member, who has registered himself/herself as a Company Secretary in Practice with the Institute of Company Secretaries of India, and holding the certificate for the same, can conduct such a secretarial audit**.**

Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2020:

In the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 (herein after referred to as said rules), for Rule 8A, the following shall be substituted as under:-

"8A. Every private company which has a paid up share capital of ten crore rupees or more shall have a whole-time company secretary."

In the said rules, in Rule 9 of the said rules, in sub-rule (1),

i. after clause (b), at the end the word "or" shall be inserted.

ii. after clause (b), the following clause shall be inserted, namely:- "(c) every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.".

iii. the following Explanation shall be inserted, namely:-

"Explanation :- For the purposes of this sub-rule, it is hereby clarified that the paid up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account."

[12] Section 204 of the Companies Act, 2013
[13] Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014

MANAGERIAL REMUNERATION

The salient features of the guidelines for managerial remuneration specified by the Government are:

- The person should be twenty-one (21) years and above and less than seventy (70) years, although, a person who is above the age of seventy (70) years can be appointed after passing a special resolution;

- A company with adequate net profits has full freedom to work out a suitable remuneration package for its managing director within the limit of five percent (5%) of its net profits, and ten percent (10%) of its net profits if it has a managing director and a manager. The total managerial remuneration must not exceed eleven percent (11%) of the net profits, however, a company in general meeting may, with the approval of the Central Government, authorise the payment of remuneration exceeding eleven percent (11%) of the net profits of the company subject to the conditions of the CoA.

- In the event of absence or inadequacy of net profits in any financial year, managerial remuneration is limited to amounts varying from rupees seventy-five thousand (Rs 75,000) to rupees two lakh (Rs 2,00,000) per month depending on the effective capital of the Company, the applicable scale, and other conditions. In the event of no profits or inadequate profits, a company may without the approval from Central Government, pay remuneration as follows:

Effective Capital	**Limit Of Yearly Remuneration Shall Not Exceed**
Negative or less than 5 crores	30 lakhs
5 crores-100 crores	42 lakhs
100-250 crores	60 lakhs
250 crores and above	60 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores

- If a person is managing director or manager of more than one company, remuneration can be drawn from one or more companies subject to applicable ceilings and other conditions;

- Government approval is required for the payment of managerial remuneration, where the terms of the guidelines are not met.

We may point out here that these guidelines do not apply to a private company.

Amendment of Section 197 of Companies Act , 2013 related to **'Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits'** vide Section 40 of Companies (Amendment) Act, 2020 with effect from 18.03.2021. Text of the amendment is as follows:-

40. Amendment of Section 197.
In Section 197 of the principal Act, in sub-section (3), after the words ***"whole-time director or manager,", the words "or any other non-executive director, including an independent director"*** shall be inserted.

INTER-CORPORATE LOANS AND INVESTMENTS

As per the CoA, inter-corporate investments need not be made through more than two (2) layers of investment companies[14] (layer in the context of a holding company means subsidiary or subsidiaries). However, a company may acquire any other company situated outside India if such other company has investment subsidiaries beyond two (2) layers as per the laws of such country. The exemptions earlier available to the private companies as well as loans or investments made by a holding company to its subsidiary company are no longer available. A company cannot make a loan to anybody corporate, or give guarantee/security vis à vis any loan made by any person to anybody corporate, invest in shares or optionally convertible debentures of any other body corporate or acquire by way of subscription, purchase or otherwise, the securities of any other body corporate:

- Exceeding sixty percent (60%) of its paid-up share capital-free reserves and securities premium account; or

- Hundred percent (100%) of its free reserves and securities premium account;

whichever is more, unless approved by a special resolution. The full particulars of the loan, investment made, guarantee given, or security provided and the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan shall have to be provided in the financial statement which shall have to be disclosed to the members. Any such loan or security given will not be allowed unless the resolution seeking the same is approved by consent of all the directors present at the meeting. The CoA also puts a restriction on a company which is in default of repayment of a loan to give any loan or guarantee, provide any security or make an acquisition till the subsistence of such default.

The BoD of the company may give a guarantee without being previously authorised by a special resolution of members if the requisite conditions are satisfied.

No investment /loan /guarantee/security may be made or given unless:

- The Board resolution sanctioning it is passed with the consent of all directors present at the meeting;
- Prior approval of the public financial institution (if any term loan is outstanding) is obtained (prior approval not required if the prescribed limit is not exceeded and no default in repayment of loan/interest);
- The company has not defaulted in repaying public fixed deposits or the fixed deposit and interest due are fully repaid.
- No loan to anybody corporate shall be made at an interest rate not lower than the bank lending rate prescribed by RBI.
- No company which has defaulted with the provisions of the CoA pertaining to "deposits not to be invited without issuing an advertisement" shall directly or indirectly (a) make any loan to anybody corporate, (b) give any guarantee, or provide security, in connection with a loan made by any other person, or to any other person by, anybody corporate, (c) acquire by way of subscription, purchase or otherwise the securities of any other body corporate, till such default is subsisting.

These provisions do not apply in the following cases:

- Any loan/guarantee/security made by:-

    - A banking company/an insurance company/a housing finance company in the ordinary course of its business or a company established with the object of financing industrial enterprises/providing infrastructural facilities;

[14] Section 186 of the Companies Act, 2013

- A company whose principal business is the acquisition of shares, stocks, debentures, or other securities;
- A private company unless it is a subsidiary of a public company.

➢ To any investment:

- Made by an investment company.
- Made in shares allotted by way of rights issued made by a body corporate.
- Investment made by an NBFC company whose main business is to invest in securities of the company.

➢ Every company giving a loan/guarantee/security shall have to maintain a register which shall contain all the particulars of the transaction. Any violation of these provisions shall be punishable with a fine of at least rupees twenty-five thousand (Rs 25,000) which may extend to rupees five lakh (Rs 5,00,000) and any officer of the company responsible for such a default shall be punishable with a term which may extend to two (2) years along with a fine of minimum rupees twenty-five thousand (Rs. 25,000) which may extend to rupees one lakh (Rs 1,00,000).

LOAN TO DIRECTORS

The CoA prohibits any company from giving loans, guarantees and securities in favour of its directors or to any other person in whom the director is interested in[15]. However due to amendment in the CoA, certain situations, companies are allowed to advance loan or provide guarantee/security, but such advancement of loan or guarantee or security is partly prohibitive and partly restrictive:

a) Prohibitive to :

- Directors of the company;
- Directors of a company which is its holding co; or
- Any partner of such director; or
- Relative of such director.

b) Restrictive to:

- Any private co. of which any such director is a director or member.
- Any body corporate at a general meeting of which not less than twenty-five percent (25%) of total voting power may be exercised or controlled by such director, or by two or more such directors, together;
- Any body corporate, the BoD, MD, or manager, whereof is accustomed to act in accordance with the directions or instructions of the BoD or of any director or directors, of the lending company.

➢ Exemption given to private companies:

The provisions of the Section shall not apply to those private companies-

- In whose share capital, no other body corporate has made an investment in such a company.
- The amount of borrowings from banks, financial institutions/any body corporate is less than 2 times of its paid-up share capital of INR fifty (50) crore'.

[15] Section 185 of the Companies Act, 2013

- The company should not be made any default in repayment of such borrowings subsist at the time of making transactions under the section.

➢ Other exceptions to this section are provided below:

c) The giving of any loan to a managing or whole-time director—

i. As a part of the conditions of service extended by the company to all its employees; or
ii. Pursuant to any scheme approved by the members by a special resolution.

d) A company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the RBI.

e) Loan made (or any guarantee or security) by holding company to its WOS.

f) Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company.

Section 185 which talks about Loan to Directors, etc., amended by the **Companies (Amendment) Act, 2017**:

- ➢ Limits the prohibition on loans, advances, etc., to Directors of the company or its holding company or any partner of such Director or any firm in which such Director or relative is a partner.
- ➢ Allows the company to give a loan or guarantee or provide security in connection with any loan to any person/entity in whom any of the Directors are interested, subject to: - Passing of the Special Resolution by the company in a General Meeting (Approval of at least 75% of the members is required). – Utilization of loans by the borrowing company shall be solely for its principal business activities.
- ➢ The penalty provisions as set out under Section 185 (4) of the Act, in addition to the Company, now extends to an officer in default of the company (which includes any Director, Manager or KMP or any person in accordance with whose directions BODs are accustomed to act)

DECLARATION OF DIVIDEND

Dividend means the profit of a company which is not retained in the business and is distributed among the shareholders in proportion to the amount paid-up on the shares held up by them. Dividends are usually payable for a financial year after the final accounts are ready and the amount of distributable profit is available. Final dividends are payable only if it has been declared at the annual general meeting at the recommendation of the Board of Directors. Interim dividends can be paid by the BoD between two annual general meetings without declaring them at an annual general meeting. Under the CoA, unless the Board recommends the payment of a dividend, the Company may not declare a dividend. Similarly, under its AoA the shareholders may, at the AGM, approve a dividend in an amount less than that recommended by the Board. The shareholders cannot increase the amount of dividend. The dividend recommended by the Board, if any, and subject to the limitations described above, is distributed, and paid to shareholders in proportion to the paid-up value of their shares within thirty (30) days from the date of the declaration by the Company after the approval by the shareholders at the AGM. Pursuant to its Articles, the Board has discretion to declare and pay interim dividends without shareholders' approval. However, the final dividend is required to be approved in the AGM of the Company. The Company's shares are compulsorily traded in dematerialised form and accordingly all shares including converted shares are entitled to a full dividend in any particular year. Under the CoA, dividends can only be paid to the registered shareholder at a record date fixed on or prior to the AGM in cash or to his order or his banker's order.

The CoA provides that any dividends that remain unpaid or unclaimed after the thirty (30) days period are to be transferred to a special bank account (the Unpaid Dividend Account) within seven (7) days of the expiry of the thirty (30) days period.

The Company is required to transfer any dividends that remain unclaimed for seven (7) years from the date of the transfer to the Unpaid Dividend Account to an Investor Education and Protection Fund created by the Government. After the transfer to this fund, no claim shall lie against the fund or against the Company in respect of unclaimed and unpaid dividends.

Under the CoA, dividends may be paid out of the profits of the Company in the year in which the dividend is declared or out of the undistributed profits of the previous fiscal years. Before declaring a dividend, the Company is required under the CoA to transfer to its reserves a minimum percentage of its profits for that year, depending upon the dividend percentage to be declared in such year. The CoA further provides that, in the event of an inadequacy or absence of profits in any year, a dividend may be declared for such year out of the Company's accumulated profits, subject to the following conditions:

- The rate of dividend to be declared shall not exceed ten percent (10%) of its paid-up capital or the average of the rate at which dividends were declared by the Company in the previous five (5) years, whichever is less;

- The total amount to be drawn from the accumulated profits earned in the previous years and transferred to the reserves shall not exceed an amount equivalent to ten percent (10%) of its paid up capital and free reserves, and the amount so drawn is to be used first to set off the losses incurred in the fiscal year before any dividends in respect of preference or equity are declared; and

- The balance of reserves after such withdrawals shall not fall below fifteen percent (15%) of its paid-up capital.

CORPORATE SOCIAL RESPONSIBILITY

CoA had *inter alia* introduced the concept of CSR. The requirements concerning CSR were completely unknown to both the regulator and the industry alike. That being said, the provisions being hailed by the social activists with two percent of the net profits of the corporate giants being allocated towards social initiatives. We illustrate below some of the key considerations vis-à-vis CSR.

Definition

In terms of Rule 2 (c) of CSR Rules, as amended from time to time, CSR means and includes:

- Projects or programs relating to activities specified in Schedule VII to the Act; or
- Projects or programs relating to activities undertaken by the BoD in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover activities, areas or subjects enumerated in Schedule VII of the Act.

Applicability

Every Indian company including its holding or subsidiary company and a foreign company (body incorporated outside India, which has a place of business in India whether by itself or through an agent, physically or through electronic mode, and which conducts any business activity in India in any other manner) having its branch or project office in India, would be required to constitute CSR committee from amongst the Board if its fulfils any one of the below mentioned criteria during the immediately preceding financial year:

a) Net worth of Rupees Five Hundred (500) Crores or more; or
b) Turnover of Rupees One Thousand (1000) Crores or more; or
c) Net Profit of Rupees Five Hundred(500) Crores or more.

Composition of the CSR Committee:

Every company satisfying any one of criteria as mentioned above would be required to constitute a CSR committee with three or more directors out of which at least one director shall be an independent director, barring in case of:

a) A company which is not required to appoint an independent director shall have its CSR committee with two or more directors.
b) A private company having only two directors on its Board shall constitute its CSR committee with such two directors.
c) A foreign company meeting the aforementioned criteria shall constitute a CSR committee with a least two persons of which one person shall be a resident Indian and another person shall be nominated by the foreign company.

CSR Policy

The CSR committee shall formulate and recommend to the Board, a CSR policy indicating the activities to be undertaken by the company in areas or subject as specified in Schedule VII of CoA and thereafter. The Board after considering the recommendations made by CSR committee, shall approve the policy for the company and disclose the contents of such policy in its report and also placed it on the Company's Website, if any.

A CSR policy shall be formulated by the company which shall include the activities to be undertaken and it is a responsibility of the Board to ensure that activities included by a company in its CSR policy are related to the activities included in Schedule VII of CoA.

CSR committee shall also recommend the amount of expenditure to be incurred on the activities referred as mentioned in the policy.

Recent Amendment

On August 24, 2020, MCA issued Companies (CSR Policy) Amendment Rules, 2020 and amended Schedule VII of the CoA vide a Circular and a Notification, respectively. Prior to the issue of CSR Rules, activities undertaken by a company (even if such activities are in areas and subjects listed in Schedule VII) in pursuance of its normal course of business were excluded from the ambit of definition of 'CSR Policy'. However, CSR Rules provide an exception to the aforesaid rule for companies engaged in R&D of new vaccine, drugs, and medical devices in their normal course of business.

Pursuant to the CSR Rules, companies that are engaged in R&D of new vaccine, drugs, and medical devices are permitted to undertake research and development activity of new vaccine, drugs and medical devices related to Covid-19 for financial years 2020-21, 2021-22 and 2022-23 subject to fulfilment of the following conditions: -

- Such research and development activities shall be undertaken in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII to the Act
- Details of such activity shall be disclosed separately in annual report on CSR included in board's report.

Accordingly, proviso appearing in Rule 6 of Companies (CSR Policy) Rules, 2014 which states that CSR activities do not include activities undertaken in pursuance of normal course of business of a company, has now been deleted.

Further contributions made by companies towards the following activities will now be counted as 'CSR':

- Incubators or research and development projects in the field of science, technology, engineering, and medical sector funded by the central or state government or any public sector entity; and

- Public funded universities; Indian Institute of Technology; National Laboratories and autonomous bodies established under Department of Atomic Energy; Department of Biotechnology; Department of Science and Technology; Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy; Ministry of Electronics and Information Technology and other bodies, namely Défense Research

and Development Organisation; Indian Council of Agricultural Research; Indian Council of Medical Research and Council of Scientific and Industrial Research, engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals.

Companies (CSR Policy) Amendment Rules, 2021:

Synopsis of Companies (CSR Policy) Amendment Rules, 2021

- From 1 April 2021, Entities carrying out CSR activities are required to file with the Central government, an e-form namely CSR -1to generate Unique registration number.
- To ensure transparency, The Board of Directors of the Company shall mandatorily disclose the composition of the CSR Committee, and CSR Policy and Projects approved by the Board on their website for public access
- Every company having average CSR obligation of Rs.10 Crore or more in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of One Crore rupees.
- The board shall ensure that the administrative overheads shall not exceed 5% of total CSR expenditure of the company for the financial year.
- The CSR amount may be spent by a company for creation or acquisition of a capital asset, which can be held by following 3 entities only.
- Mandatory transfer of unspent CSR amount is required.

Amendment in Rule 4: CSR Implementation

The board of the company will ensure that the CSR activities are undertaken by the company itself or through any of the following entity:

- A company established under Section 8 of the Act, or a registered public trust or a registered society, registered under Section 12A and 80G of the Income Tax Act, 1961 (43 of 1961), established by the company, either singly or along with any other company,
- A company established under Section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government;
- Any entity established under an Act of Parliament or a State legislature;
- A company established under Section 8 of the Act, or a registered public trust or a registered society, registered under Section 12A and 80G of the Income Tax Act, 1961, and has an established track record of at least three years in undertaking similar activities.

Amendment in Rule 4: CSR Implementation

As per the Companies (CSR Policy) Amendment Rules, 2021, CSR Committee will formulate and recommend to the company's Board, an annual action plan in pursuance of its CSR policy, which shall include the following.

- The list of CSR projects or programmes that are approved to be undertaken;
- The manner of execution of such projects or programmes;
- The modalities of utilization of funds and implementation schedules for the projects or programmes;
- Monitoring and reporting mechanism for the projects or programmes;
- Details of need and impact assessment, if any, for the projects undertaken by the company:

Note: The board may alter such plan at any time during the financial year, as per the recommendation of its CSR Committee

Amendment in Rule 7: CSR Expenditure

According to the Companies (CSR Policy) Amendment Rules, 2021, the administrative overheads should not exceed five per cent of the total CSR expenditure of the company for the financial year.

If a company spends an amount above requirement, such excess amount may be set off against the requirement to spend up to immediate succeeding three financial years subject to the following conditions:

- The excess amount available for set-off should not include the surplus arising out of the CSR activities.
- The Board of the company shall pass a resolution to that effect.

The CSR amount may be spent by a company for the creation or acquisition of a capital asset, which shall be held by the following firms:

- A company established under Section 8 of the Act
- Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number
- Beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities
- A public authority

Amendment in Rule 8: CSR Reporting

The Board's Report of a company about any financial year shall include an annual report on CSR containing particulars as specified in the Annexure.

- In case of a foreign company, the Balance Sheet shall contain an annual report on CSR.
- Every company having average CSR obligation of Rs. 10 Crore or more in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of Rs.1 Crore or more, and which have been completed not less than one year before undertaking the impact study.
- The impact assessment reports need to be placed before the Board and shall be annexed to the annual report on CSR.
- A Company undertaking impact assessment may book the expenditure towards Corporate Social Responsibility for that fiscal year, which shall not exceed 5% of the total CSR expenditure for that financial year or Rs. 50 lakh, whichever is less.

Amendment in Rule 9: Website Disclosure

The Board of Directors of the Company need to mandatorily disclose the composition of the CSR Committee, and CSR Policy and Projects approved by the Board on their website for public access.

Amendment in Rule 10: Transfer of unspent CSR

The unspent CSR amount will be transferred by the company to any fund included in Schedule VII of the Companies Act.

BUY BACK SHARES

As per CoA, the company can purchase its own securities out of its:

i) Free reserves;
ii) The securities premium account; the proceeds of any shares or other specified securities.

The shares or securities must be fully paid-up. The BoD is empowered to buy back not more than ten percent (10%) of the aggregate of the paid up capital and free reserves.

Buy-back has to be is authorised by its articles and a special resolution has to be passed in general meeting of the company authorising the buy-back. Every buy-back must be completed within one year from the date of passing of the special resolution.

A Special Resolution is not required when:

i) The buy-back is ten percent (10%) or less of the total paid-up equity capital and free reserves of the company; and
ii) Such buy-back has been authorized by the Board by means of a resolution passed at its meeting.

There are two limits for the buy back. Firstly, the overall limit is restricted to twenty five percent (25%) of the company's paid up capital and free reserves and, secondly, buy back of equity shares in any financial year shall not exceed twenty five percent (25%) of its paid-up equity capital. The buy-back debt-equity ratio should be within the permissible range of 2:1.

The buy-back can be from:

a) From the existing shareholders or security holders on a proportionate basis;
b) From the open market;
c) By purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

Where a company completes a buy-back of its shares or other specified securities, it shall not make a further issue of the same kind of shares or other securities including allotment of new shares or other specified securities within a period of six (6) months. The calculations related to buy-back of shares should be done on the basis of accounts not more than six months old and in the scenario where those accounts are unaudited, then the buy-back calculations can even be done on the basis of unaudited accounts.

NOT FOR PROFIT COMPANIES

An individual person or an association of persons can be registered under Section 8 of the CoA if:

a) It has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
b) Intends to apply its profits, if any, or other income in promoting its objects; and
c) Intends to prohibit the payment of any dividend to its members.

As per the Section, where it is proved to the satisfaction of the Central Government that a person or an association of persons want to register themselves under Section 8 as a limited company for the furtherance of above-mentioned objects, the Central Government may, by licence issued in prescribed manner allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this Section.

Further, the Central Government may, by order, after giving the company a reasonable opportunity of being heard, revoke the licence granted to a company registered under this Section if the company contravenes any of the requirements of this Section or any of the conditions subject to which a licence is issued or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited".

WINDING UP

Companies registered under CoA can be dissolved in the following manner:

- Winding up;

- Being declared a defunct company. A defunct company is one which has either not commenced business activity or operation since its operation, or the company is not carrying on its business since last one (1) year.

A company may be wound up in the following manner:

- Voluntarily (by the shareholders/ by the creditors);
- By the NCLT.

Winding up is a means by which a company is dissolved, and its assets are realised and applied to payment of its debts. Once the debts are satisfied, the balance amount is paid back to the members in proportion to their contribution to the capital of the company. For the purpose of winding up a company:

i) A special resolution may be passed;

ii) If the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period of its duration, if any, fixed by its AoA or on the occurrence of any event in respect of which the AoA provides that the company should be dissolved.

In case the RoC is of the view that a company is not carrying on business or is not in operation, he may strike off the company's name from the RoC, only after providing the company with an opportunity to be heard.

The following are the steps for initiating a voluntary winding up of a Company:

Step 1: Convene a Board Meeting with directors of the company as per the Section 173 of CoA within five (5) weeks immediately preceding the date of resolution for winding up and make sure that the company can pay its debt in full within a period of three years if put into liquidation.

Step 2: Every officer of the company whose duty is to give notice of the board meeting and who fails to do so will be punishable with a fine of Rs. 25,000.

Step 3: Ensure that the aforesaid declaration is accompanied by-

(a) The audited Balance Sheet and the Profit and Loss Account commencing from the date of the last audited Balance Sheet and the Profit and Loss Account ending with the latest practicable date before the date of declaration.
(b) A statement of the company's assets and liabilities as at that date
(c) A copy of the report of the auditors of the company on the above two documents.

Step 4: On the same day or the next day of passing of resolution of winding up of the Company, conduct a meeting of the Creditors. If two thirds in value of creditors of the company are of the opinion that it is in the interest of all parties to wind up the company, then the company can be wound up voluntarily. If the company cannot meet all its liabilities on winding up, then the Company must be wound up by a Tribunal.

Step 5: Within ten (10) days of passing of resolution for winding up of company, file a notice with the Registrar for appointment of liquidator.

Step 6: Within fourteen (14) days of passing of resolution for winding up of company, give a notice of the resolution in the Official Gazette and also advertise in a newspaper with circulation in the district where the registered office is present.

Step 7: Within thirty (30) days of General Meeting for winding up of company, file certified copies of the ordinary or special resolution passed in the General Meeting for winding up of the company.

Step 8: Wind up affairs of the company and prepare the liquidators account of the winding up of the company and get the same audited.

Step 9: Call for final General Meeting of the Company.

Step 10: Pass a Special Resolution for disposal of the books and papers of the company when the affairs of the company are completely wound up and it is about to be dissolved. If the company files a Special Resolution within thirty (30) days or within the extended time allowed under Section 403 with payment of fees, the company will be liable for fine.

Step 11: Within two weeks of final General Meeting of the Company, file a copy of the accounts and file and application to the Tribunal for passing an order for dissolution of the company.

Step 12: If the Tribunal is satisfied, the Tribunal shall pass an order dissolving the company within sixty (60) days of receiving the application.

Step 13: The company liquidator would then file a copy of the order with the Registrar.

Step 14: The Registrar, on receiving the copy of the order passed by the Tribunal then publishes a notice in the Official Gazette that the company is dissolved.

The Companies (Winding Up) Rules, 2020:

Part V of Companies (winding up) Rules, 2020 provides the Summary Procedure for Liquidation.

As per Rule 190 of Companies (winding up) Rule, 2020 provides the Powers and functions of the official liquidator.

- The official liquidator shall exercise the powers and perform the duties as provided under the act.
- The official liquidator shall maintain the registers and books of accounts.
- The official liquidator shall dispose of all the assets.
- The class of the companies as mentioned below can wind up the companies with the approval of the Central Government.

Companies which accepts deposit and which is having total outstanding deposit	Up to INR 25 lakhs
Companies which is having total outstanding loans and including secured loan	Up to INR 50 lakhs
Companies whose total turnover	Up to INR 50 crore
Companies which is having paid up capital	Up to INR 1 crore

FAST TRACK EXIT SCHEME

It is an expeditious provision for winding up of defunct companies, having a nil balance sheet was introduced wherein within (30) days of filing for winding up the name of such company shall by struck down. A thirty (30) day, time limit has been provided for any creditor to raise any objection on the same. However, this provision is not applicable for listed companies.

Chapter 6

CAPITAL MARKETS AND SEBI

MARKET FOR SECURITIES

Indian stock markets are some of the oldest in Asia. Their existence dates back to nearly two hundred (200) years ago. However, the earliest records of security dealings in India are meagre and obscure. The East India Company was the dominant institution in those days and business in its loan securities used to be the primary transaction in the markets towards the close of the eighteenth century.

The capital market provides an important source of long-term funds for many borrowers. Financial institutions, such as banks, insurance companies and pension funds supply the bulk of long-term funds to industry and charge interest thereon. These funds are beneficial in the construction of public property, schools, highways, factories, and homes. By bringing together the units with cash surpluses and those with cash deficits, the market promote a more intensive use of cash balances held in the economy on a long-term basis.

The much talked about economic liberalisation in 1990 brought about change in the capital markets in India. The transition of the Indian economy from a closed and regulated to an open and market driven economy revolutionized the capital markets in India. The abolition of the 'Controller of Capital Issues' and introduction of 'Free Pricing' of capital offerings brought a major boom in the capital markets. However, a large number of issues promoted by fly by night operators and gullibility of investors resulted in investors losing their hard-earned money.

Among the emerging markets, India stands a better chance owing to factors such as high growth rates of GDP and industrial production, attractive price earnings multiples and the sharp drop in interest and inflation rates.

Nonetheless, despite frequent political upheavals, as history has indicated in the past, it would be unwise to write off the inherent ability of the Indian stock market to bounce back when least expected.

CAPITAL MARKETS AND SEBI

SEBI regulates the securities market in India and companies generally have the freedom to decide the price of the issue being offered to the public. SEBI, which was set up as an administrative body in April 1988 and was given statutory status on 30 January 1992 by promulgation of the SEBI Ordinance, which has since become an Act of the Parliament. SEBI has made a considerable impact in the capital markets in India through its various developments and regulatory initiatives. The objective of setting up SEBI was to protect the interests of the investors, promote the development of the security market in India and act as a regulator in the chaotic world of securities. SEBI has kept pace with the times and put into place guidelines for dematerialised trading. The spurt of investment in the information technology sector witnessed norms for VC funds/companies being revised. It would be fair to say that SEBI has emerged as an indisputable authority vis-à-vis all aspects of trading in securities.

Brief overview of the key Regulations formulated by SEBI are provided in this Chapter.

SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2009

INITIAL PUBLIC OFFER

To encourage initial public offers, eligibility norms have been relaxed by SEBI, without diluting the disclosure standards.

Eligibility norms

- The company must have net tangible assets valued at least rupees three (3) Crore in last three(3) years (of which not more than 50% are held in monetary assets)
- Minimum average pre-tax operating profit of rupees fifteen (15) Crore in three (3) most profitable years out of last five (5) years.
- Rupees one (1) Crore (Net Worth) in each of the preceding three (3) years
- Distributable profits for three (3) years in last five (5) years
- In case of change of name of the company, fifty percent (50%) revenues must have accrued from activity suggested by new name for preceding one (1) full year.
- Aggregate of all issues in one financial year not to exceed five (5) times issuer's pre issue net worth.

However, SEBI also has provided for exceptions to the conditions to be fulfilled before an IPO can be made:

- In case Eligibility Criteria is not satisfied then, the issue can be made through Book Building process, subject to seventy five percent (75%) of the net offer being made to QIBs.
- Refund of full subscription money if above requirement is not fulfilled.

Pricing of equity shares in IPO's

- Pricing of stock can be done in consultation with lead manager (merchant banker involved) or through book building process.
- Issuer can determine the coupon rate and conversion price for the convertible debt securities that are being issued in consultation with lead manager (merchant banker involved) or through book building process.
- However, it is important that the Price band needs to be specified in the prospectus before it is registered with the RoC.
- Issuer company is free to fix face value of the shares offered subject to:

    - If price of share is rupees five hundred (Rs 500) or more, then face value can be less than rupees ten (Rs 10) but must be more than rupee one (Re 1)
    - If price of share is less than rupees five hundred (Rs 500) then face value of share must be rupees ten (Rs 10) (not applicable to Govt. co., statutory authority engaged in infrastructure sector)

- Disclosure about the face value of equity shares required to be made in the ads, offer document, application forms.
- Pricing can also be done by differential pricing guidelines available in Regulation 29 of the ICDR Regulations.

RIGHTS ISSUE

'Rights Issue' means an offer of equity shares and convertible securities by a listed issuer to the shareholders of the issuer as on the 'record date' fixed for the said purpose.

Requirements of Rights Issue

- A listed issuer shall announce the record date in order to list the eligible shareholders for application of the specified securities.

- A compulsorily convertible debenture holder must be issued securities reserved for him/her on the same terms on which rights issue was made.
- Rights issue to be made after securing board of director's approval at the Board meeting.
- The issue price need not be valued by registered valuers.
- Letter of offer along with application form to be dispatched through registered post/speed post at least three (3) days before the opening of the issue.
- Listed Companies whose shares are listed should adhere to the requirement set out under ICDR Regulations.
- A rights issue shall be open for subscription for a minimum period of fifteen (15) days and a maximum of thirty (30) days.
- Regulation 59 of the ICDR Regulations also prohibits the offer of any kind of incentives, whether in cash or kind or services to any person in order to facilitate an application for specified securities being issued under rights issue.

PREFERENCE SHARES

Conditions for issue of Preference Shares

- The Issue of Preference Shares has been authorized by passing of Special Resolution in the General Meeting of company. Pursuant to the passing of such Special Resolution, an allotment for such purposes must be made within fifteen (15) days.
- Further, the allottee to whom the specified securities are being issued to hold equity, if any should be in dematerialised form.
- The issuer of specified securities should also be in compliance with the listing agreement of the recognised stock exchanged where the securities have been listed.
- The PAN of the proposed allottees must be known to the issuer.
- As per Regulation 70 of the ICDR Regulations and Section 55 of the CoA, a company can issue only redeemable preference shares i.e., a company is not allowed to issue irredeemable preference shares.
- It is mandatory for every company issuing preference shares to redeem it within a period of twenty (20) years from the date of issue.
- The provisions under the ICDR Regulations shall not apply to the share capital further issued and governed by the provisions under Section 62 of the CoA. They also do not apply to securities issued pursuant to any scheme approved by the High Court or Board of Industrial and Financial Reconstruction as under the Sick Industrial Companies (Special Provisions) Act, 1985.
- The tenure of issued convertible securities must not exceed eighteen months from the date of their allotment.

Pricing of Shares Under Preferential Issue

- The pricing of the shares being issued will depend on the time duration of their being listed on a recognized stock exchange. In case the shares have been listed on a recognized stock exchange for a period which is more than twenty-six (26) weeks:

    - The shares will be issued at a price which would be higher of the average of the weekly high and low price of the related shares on the recognized stock exchange, for the previous twenty-six (26) weeks or the previous two (2) weeks, as quoted on the recognized stock exchange.

- In case the shares have been listed on a recognized stock exchange for a period of less than twenty-six (26) weeks, then the shares shall be issued at higher of:

- At the price at which they were listed on the stock exchange during the initial public offer, or the price arrived at during a scheme as approved by the High Court under Section(s) 391-394 of the Companies Act, 1956.

- The average of the weekly high and low price of the related shares on the recognized stock exchange, for the previous weeks when the shares have remained registered on the recognized stock exchange, or the previous two weeks prior to the date of issue of specified securities.

The securities issued to the promoters on a preferential basis shall be in a lock in period for three (3) years from the date of their allotment. Further, the said securities in a lock in period of three (3) years shall not exceed twenty percent (20%) of the total capital of the issuer. In case, the shares in lock in exceed twenty percent (20%), the lock in period shall be reduced to one (1) year instead of three (3) years.
Transferability of shares issued on a preferential basis shall be governed by Regulation 79 of the ICDR Regulations. Securities that are held by promoters may be transferred to other promoters or new promoters as the case may be. Such transfer would be subjective to SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (now SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011).
In case, the relevant securities are still in a lock in period, the lock in period shall be continued on the shares until the date on which such lock in period expires, irrespective of new or old promoter owning the shares.

QUALIFIED INSTITUTIONS PLACEMENT

QIP's are a listed issuer's securities that are eligible for allotment to qualified institutional buyers or issued through private placement. These placements are governed by the provisions of the ICDR Regulations (Chapter VIII).

Conditions for issue of QIP's

- A special resolution for such issue is to be passed by the shareholders.

- The equity shares that are to be issued through this mechanism must have been listed on a recognized stock exchange for a period no less than a year (prior to date on which notice is being served to shareholders for convening a meeting to pass the special resolution) and have a nation-wide trading terminal. The same time frame of a year shall be applicable to all shares that are proposed to be issued as QIP's pursuant to a scheme of demerger, merger, amalgamation scheme that has been approved by the High Court under Sections 391-394 of the Companies Act, 1956 (now Sections 230 – 234 of the CoA).

- The listed issuer must be in compliance with the minimum public shareholding requirements as specified under the Securities Contracts (Regulation) Rules, 1957.

Restrictions on Allotment

- The first restriction on allotment under the QIP shall be that a minimum of ten percent of the relevant securities being issued through QIP's must be allotted to mutual funds. In case this requirement is not met, the same can be allotted to other qualified institutional buyers interested.
- A promoter or a relative of the promoter, of the issuer shall not be issued any securities directly or indirectly any securities as a qualified institutional buyer.
- The minimum number of allottees in case securities are being issued through this mechanism should be two (2) if the issue size is equal to or less than rupees two hundred and fifty crore (Rs 250,00,00,000). Whereas the minimum number of allottees will be five (5) in case the issue size is more than rupees two hundred and fifty crore (Rs 250,00,00,000)
- Further, there is a restriction on the issuer that the issue size of all the issuances as QIP's should not exceed five times the net worth of the issuer company's net worth as specified on the audited balance sheet of the previous year.

SEBI (FOREIGN PORTFOLIO INVESTORS) REGULATIONS, 2019

The introduction of the FPI Regulations repeal the FII Regulations and significantly revise the regulation of foreign portfolio investments into India. SEBI has merged the FII, sub-account and QFI regimes into a single investor class termed as foreign portfolio investors and provided a single window clearance through Designated Depository Participants. The FPI route gives a favoured route for foreign investors who wish to make portfolio investments and trade in Indian listed stocks in the stock exchange.

Foreign Portfolio Investor has been defined to mean a person who satisfies the eligibility criteria prescribed under the FPI Regulations and has been registered under the FPI Regulations.

Eligibility Criteria: [16]

(a) The applicant is not a resident Indian.

(b) The applicant is not a non-resident Indian or an overseas citizen of India.

(c) Non-resident Indians or overseas citizens of India or resident Indian individuals can be constituents of the applicant provided they meet conditions specified by the Board from time to time.

(d) The applicant is a resident of the country whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral MOU (Appendix A Signatories) or a signatory to the bilateral MOU with the Board.

Provided that an applicant being Government or Government related investor shall be considered as eligible for registration, if such applicant is a resident in the country as may be approved by the Government of India.

(e) The applicant being a bank is a resident of a country whose central bank is a member of Bank for International Settlements: Provided that a central bank applicant need not be a member of Bank for International Settlements.

(f) The applicant or its underlying investors contributing twenty five percent (25%) or more in the corpus of the applicant or identified on the basis of control, shall not be the person(s) mentioned in the Sanctions List notified from time to time by the United Nations Security Council and is not a resident in the country identified in the public statement of Financial Action Task Force as:

(i) A jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
(ii) A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

(g) The applicant is a fit and proper person based on the criteria specified in Schedule II of the SEBI (Intermediaries) Regulations, 2008;

(h) Any other criteria specified by the Board from time to time.

Provided that clause (a), (d) and (e) shall not apply to an applicant incorporated or established in an International Financial Services Centre.

[16] Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019

Classification by way of eligibility

There are following two categories:-

(i) Category I FPIs – Government and Government related investors such as central banks, Governmental agencies, sovereign wealth funds or international or multilateral organizations or agencies Appropriately regulated broad based funds, appropriately regulated persons, broad-based funds that are not appropriately regulated, university funds and pension funds, university related endowments already registered with SEBI as FIIs or sub-accounts.

(ii) Category II FPIs – Includes all eligible FPIs who are not eligible under Category I, such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.

Broad Based Fund

On 23rd September 2019, the SEBI issued revised FPI regulations (SEBI (FPI) Regulations, 2019) designed to rationalise and simplify the FPI Regime. The new regulations are effective as from the date of issue and replace the SEBI (FPI) Regulations, 2014.

The revised regulations have removed the broad basing requirement, previously one of the key requirements to obtain a Category II registration of FPI's. Fund was regarded as a broad-based fund if it had at least twenty (20) investors (directly or on a look through basis) with no investor holding more than forty-nine percent (49%) of the shares of the fund. Alternatively, the fund could be deemed as a broad-based fund if more than fifty percent (50%) of the fund was held either by a bank, sovereign wealth fund, insurance/reinsurance company or pension fund.

The removal of the broad-based criteria provides significant relief not only to the newly established funds but also existing funds, as follows :

- Regulated non-broad-based funds set up in FATF[17] member countries are eligible for category I registration;
- Categorization of an FPI is based purely on its regulated status and country of residence, not on the basis of the number of investors in the fund;
- Declarations and undertakings associated with broad-based regulation no longer are required; and
- Ongoing compliance obligations related to broad-based regulation (e.g., monitoring the number of investors in the fund, recategorization of FPIs if the number of investors falls below or exceeds 20, etc.) no longer are required.

SEBI (ALTERNATIVE INVESTMENT FUNDS) REGULATIONS, 2012

The AIF Regulations were published in the Gazette of India on 21 May 2012.

Under Regulation 2(1)(b) of the AIF Regulations, Alternative Investment Fund has been defined as any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which:

a) Is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors; and

b) Is not covered under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 or any other regulations of the Board to regulate fund management activities.

[17] Financial Action Task Force member countries

The Venture Capital Funds which have been regulated by the SEBI (Venture Capital Funds) Regulations, 1996 will continue under those regulations till that existing fund is wound up and any specific Venture Capital Fund can register under these regulations with the Board subject to two-thirds investor approval by value of their investments.

Classifications

Alternative Investment Funds have been classified into three separate categories:

(i) Category I AIFs - Which invests in start-up or early-stage ventures or social ventures or SMEs or infrastructure or other sectors or areas which the government or regulators consider as socially or economically desirable and shall include venture capital funds, SME Funds, social venture funds, infrastructure funds and such other Alternative Investment Funds as may be specified. These funds usually have a positive outcome towards the economy and the Government of India may usually provide concessions.

(ii) Category II AIFs - Which does not fall in Category I and III and which does not undertake leverage or borrowing other than to meet day-to-day operational requirements and as permitted under these regulations. Alternative Investment Funds such as private equity funds or debt funds that are not provided any specific incentive by the Government.

(iii) Category III AIFs - Which employs diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. These include hedge funds or any other funds that allow making a quick short-term return or funds that are open ended.

Raising Funds

Funds shall be raised through private placement for a corpus. Corpus refers to the total amount of funds committed by investors to the Alternative Investment Fund by way of a written contract or any such document as on a particular date.

Qualifications

Alternative Investment Funds can have investors from India or outside India as foreigners and Non-Resident Indians investing in a corpus of at least rupees twenty crore (Rs 20,00,00,000) and where each investor shall make a minimum investment of rupees one crore (Rs 1,00,00,000). An exception being directors and employers of the Alternate Investment Fund or the Manager whose minimum investment is of rupees twenty-five lakh (Rs 25,00,000). Maximum number of investors in an Alternative Investment Fund can be rupees one thousand (Rs. 1,000).

Continuing Interest

The Manager or Sponsor shall have a continuing interest of either rupees five crore (Rs 5,00,00,000) or two and a half percent of the corpus, whichever is lower. Category III Managers or Sponsors will require a continuing interest of either rupees ten crores (Rs 10,00,00,000) or five percent (5%) of the corpus, whichever is lower.

Length

The term of a Category I and II Alternative Investment Funds will be for a minimum of 3 years and shall be close ended. Category III Alternative Investment Funds can be open ended or close ended.

Investment Conditions

Alternative Investment Funds will have various requirements and conditions that need to be fulfilled such as:

a. AIFs may invest in securities of companies incorporated outside India subject to such conditions/guidelines that may be set by SEBI or the RBI.
b. Co-investment in an investee company by a Manager/Sponsor should not be on more favourable terms than those offered to the AIF.
c. Category I and II AIFs are only permitted to invest twenty five percent (25%) of investable funds in a single investee company and Category III AIFs can only invest ten percent (10%) of investable funds in a single investee company.
d. AIFs should not invest in associates except with the approval of seventy five percent (75%) of investors by value of their investments in the AIF.
e. The un-invested portion of the investible funds may be invested in liquid mutual funds or bank deposits or other liquid assets of higher quality such as Treasury Bills, Collateralized Borrowing and Lending Obligations (CBLOs), commercial papers, certificates of deposits, etc. till deployment of funds as per the investment objective.

Furthermore, there are specific conditions for each Alternative Investment Fund Categories which are listed respectively in Regulations 16, 17 and 18 of the AIF Regulations.

SEBI (Alternative Investment Funds) (Amendment) Regulations, 2013 were enacted on 16 September 2013 with minor insertions in various regulations. One major insertion was the addition of Chapter III-A after Chapter III, it referred to Angel Funds which are classified as a sub-category of Venture Capital Funds under Category I – Alternative Investment Fund.

SEBI (Payment of Fees) (Amendment) Regulations, 2014 which was issued on 23 May 2014 and regarded changes in the Second Schedule, Part A with the amount of fees to be paid were amended.
SEBI (Alternative Investment Funds) (Amendment) Regulations, 2015 were notified on 14 August 2015 regarding an insertion in Regulation 15(1) as sub part (h) and referred to investments made in unlisted securities.

CORPORATE GOVERNANCE

Corporate Governance is an important instrument of investor protection and is therefore a priority on SEBI's agenda. The development of the capital market is dependent on good corporate governance without which investors do not repose the confidence in companies. It is imperative for companies to maximise the shareholder's value and wealth. Hence, to further improve the level of corporate governance, a need was felt for a comprehensive approach at this stage for development of the capital markets, to accelerate the adoption of globally acceptable practices of corporate governance. This would ensure that the Indian investors are in no way less informed and protected as compared to their counterparts in the best developed capital markets.

In the above context, SEBI appointed a committee on corporate governance under the chairmanship of Kumar Manglam Birla, Member, SEBI Board. The draft report of the committee was made public through the media and was also put up on the web site of SEBI.

The report of the committee was considered and adopted by SEBI Board in its meeting held on 25 January 2000. The recommendations are to be implemented through the amendment to listing agreement of the stock exchanges. Internationally, listing agreement has been used in most markets to implement corporate governance in the listed companies. Accordingly, today SEBI has issued directions to stock exchanges to amend the listing agreement in this regard. It was advised that a new clause 49, be incorporated in the listing agreement as under, which has been done accordingly.

Guidelines as per Clause 49

1. Board of Directors

Composition of Board

The BoD of the company shall have an optimum combination of executive and non-executive directors with at least one-woman director and not less than fifty percent (50%) of the BoD comprising non-executive directors.

Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise independent directors and in case the Chairman is an executive director, at least half of the Board should comprise independent directors.

Provided that where the regular non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent directors.

A Director shall not be a member of more than ten (10) committees or act as a Chairman of more than five (5) committees across all companies in which he is a Director.

2. Audit Committee

A. Qualified and Independent Audit Committee

A qualified and independent audit committee shall be set up, giving the terms of reference subject to the following:

i. Minimum three directors as members. Two-thirds(2/3) of the members of audit committee shall be independent directors;
ii. All members to be financially literate and at least one member shall have accounting or related financial management expertise;
iii. The Chairman to be an independent director;
iv. The Company Secretary will be the secretary to the committee.

B. Meeting of Audit Committee

The Audit Committee should meet at least four times in a year and not more than four months shall elapse between two meetings. The quorum shall be either two (2) members or one third of the members of the audit committee whichever is greater, but there should be a minimum of two (2) independent members present.

C. Powers of Audit Committee

The Audit Committee shall have powers, which should include the following:

i. To investigate any activity within its terms of reference.
ii. To seek information from any employee.
iii. To obtain outside legal or other professional advice.
iv. To secure attendance of outsiders with relevant expertise if it considers necessary.

D. Role of Audit Committee

The role of the Audit Committee shall include the following:

i. 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;
ii. Recommendation for appointment, remuneration and terms of appointment of auditors of the company;
iii. Approval of payment to statutory auditors for any other services rendered by the statutory auditors;

iv. Reviewing, with the management, of:

   a. The annual financial statements and auditor's report before submission to the board for approval
   b. Quarterly financial statements before submission to the board for approval;
   c. Statement of uses/application of funds raised through an issue (public issue, rights issue, preferential issue, etc.);
   d. 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 or rights issue, and making appropriate recommendations to the Board to take up steps in this matter;
   e. Auditor's independence and performance, and effectiveness of audit process.

v. Approval or any subsequent modification of transactions of the company with related parties;
vi. Scrutiny of inter-corporate loans and investments;
vii. Valuation of undertakings or assets of the company, wherever it is necessary;
viii. Evaluation of internal financial controls and risk management systems;
ix. Discussion with internal auditors of any significant findings and follow up there on;
x. Reviewing the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board;
xi. Discussion with statutory auditors before the audit commences, about the nature and scope of audit as well as post-audit discussion to ascertain any area of concern;
xii. To look into the reasons for substantial defaults in the payment to the depositors, debenture holders, shareholders (in case of non-payment of declared dividends) and creditors.

3. Disclosure

A. Accounting Treatment

Where in the preparation of financial statements, a different treatment from that prescribed in an Accounting Standard has been followed, then the fact shall be disclosed in the financial statements, with an explanation as to why it believes such alternative treatment is more representative of the true and fair view of the underlying business transaction in the Corporate Governance Report.

B. Board Disclosures

The company shall lay down procedures to inform Board members about the risk assessment and minimization procedures. These procedures shall be periodically reviewed to ensure that executive management controls risk through means of a properly defined framework.

C. Proceeds from public issues, right issues, preferential issues etc.

When money is raised through an issue (public issues, rights issues, preferential issues etc.), it shall disclose to the Audit Committee, the uses/applications of funds by major category (capital expenditure, sales, and marketing, working capital, etc), on a quarterly basis as a part of their quarterly declaration of financial results.

D. Remuneration of Directors

All pecuniary relationship or transactions of the non-executive directors vis-à-vis the company shall be disclosed in the Annual Report and shall include:

i. All elements of remuneration package of individual directors summarized under major groups, such as salary, benefits, bonuses, stock options, pension etc.
ii. Details of fixed component and performance linked incentives, along with the performance criteria.
iii. Service contracts, notice period, severance fees.
iv. Stock option details, if any – and whether issued at a discount as well as the period over which accrued and over which exercisable.
v. Number of shares and convertible instruments held by non-executive directors in the annual report.
vi. Non-executive directors shall be required to disclose their shareholding (both own and held by/for other persons on a beneficial basis) in the listed company in which they are proposed to be appointed as directors, prior to their appointment. These details should be disclosed in the notice to the general meeting called for appointment of such director.

E. Management

Management discussion and analysis report should form part of the annual report to the shareholders. This management discussion & analysis should include discussion on the following matters within the limits set by the company's competitive position:

i. Industry structure and developments.
ii. Opportunities and Threats.
iii. Segment–wise or product-wise performance.
iv. Outlook
v. Risks and concerns.
vi. Internal control systems and their adequacy.
vii. Discussion on financial performance with respect to operational performance.
viii. Material developments in Human Resources/Industrial Relations front, including number of people employed.

F. Shareholders

i. In case of the appointment of a new director or re-appointment of a director the shareholders must be provided with the information.
ii. Disclosure of relationships between directors inter-se shall be made in the annual report, notice of appointment of a director, prospectus, and letter of offer for issuances and any related filings made to the stock exchanges where the company is listed.
iii. A board committee under the chairmanship of a non-executive director shall be formed to be designated as 'Shareholders/Investors Grievance Committee.'
iv. To expedite the process of share transfers, the Board of the company shall delegate the power of share transfer to an officer or a committee or to the registrar and share transfer agents. The delegated authority shall attend to share transfer formalities at least once in a fortnight.

4. Report on Corporate Governance

There should be a separate section on Corporate Governance in the Annual Report of the company, with a detailed compliance report on Corporate Governance. Non-compliance of any mandatory requirement i.e., which is a part of the listing agreement with reasons thereof, and the extent to which the non-mandatory requirements have been adopted should be specifically highlighted.

5. Compliance

It is the duty of the company to obtain a certificate from either Auditors or practicing Companies' secretaries regarding the compliance of conditions of corporate governance and to annexe with the Director's report, to all the shareholders and shall also be sent to the Stock Exchange along with the Annual report filed by the company.

SEBI (SHARE BASED EMPLOYEE BENEFITS) REGULATIONS, 2014

SEBI has notified new regulations, SEBI (Share Based Employee Benefits) Regulations, 2014 for share-based employee benefits which have replaced the SEBI (Employee stock option scheme and employee stock purchase scheme) guidelines, 1999 which were the erstwhile ESOP guidelines.

These Regulations of 2014 cover ESOS, ESPS, stock appreciation rights schemes; general employee benefits schemes; and retirement benefit schemes. The provisions of these regulations only apply to a company whose shares are listed on a recognized stock exchange in India and has a scheme for direct or indirect benefit of employees which involves dealing in or subscribing to or purchasing securities of the company, directly or indirectly; and is, directly or indirectly, either set up funded or guaranteed; or controlled/managed by the company or any other company in its group.

EMPLOYEE STOCK OPTION SCHEMES

ESOS is defined as a scheme under which a company grants employee stock option directly or through a trust. In other words, it is an incentive for the employees to get the share in the stock pool of the company.

Compensation committee:

- Mandatory requirement of a company to constitute compensation committee for the purpose of administration and superintendence of the schemes.

- Members to be made from the board of directors of the company consisting of 3 or more non-executive directors out of which at least one half should be independent directors.
- Formulate the detailed terms and conditions of the schemes.
- Frame suitable policies and procedures to ensure that there is no violation of securities laws.
- Empowers the compensation committee of the Company to determine the eligible employee. However, cannot be offered unless the shareholders of the company approve it by way of passing special resolution in the General Meeting.

Rules applicable to schemes:

Variation: The Company cannot vary the terms of the schemes, which may be detrimental to the interests of the employees. However, considering the interests of the employees, the variation can be made only with the approval of the shareholders of the company by way of passing special resolution.

Winding up: The excess monies or shares remaining with the trust after meeting all the obligations would be required to be utilized for repayment of loan or by distribution to employees as recommended by the compensation committee, in case of winding up of the schemes.

Non transferability: The transferability of the scheme shall be restricted. Benefit granted to the employee cannot not be pledged, hypothecated, mortgaged, or otherwise alienated in any manner. The benefit of the scheme, in case of death of the employee, shall vest in the legal heirs or nominees of the deceased employee.

Accounting Policies

Issuance of a certificate confirming the scheme to have been implemented in accordance with regulation and also the resolution passed in the general meeting. Such certificate shall be placed before the members in the Annual General Meeting.

Mandatory compliance of 'Guidance Note on Accounting for employee share-based Payments' (**Guidance Note**) or Accounting Standards as prescribed by Institute of Chartered Accountants of India from time to time.

Specific regulations vis-a-vis ESOS

- ESOS can be offered only after disclosures are made by the company to the prospective grantee, as specified by Board.
- Pricing: The company can determine the exercise price subject to conforming to the accounting policies
- Vesting period: minimum vesting period of one year in case of ESOS:
- No right of employee to receive any dividend or to vote in respect of option granted to him, till shares are issued upon exercise of option.
- In case of failure to exercise option then the amount payable by the employee, if any, at the time of grant of option can be forfeited by the company if the option is not exercised by the employee within the exercise period; or refunded if the options are not vested due to non-fulfilment of conditions relating to vesting of option as per the ESOS.

SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS , 2011.

SEBI enacted the Takeover Code which laid down the procedure to be followed by an acquirer for acquiring majority shares or control in another company to make sure that the process of takeover is carried out in a fair and transparent manner.

The takeover activities have significantly diminished since the outbreak of the pandemic, in addition to the added challenge of uncertainty posed to buyers, target company and investors by COVID-19. However, SEBI being a regulatory body for listed companies, has taken steps to temporarily liberalizing regulations relating to raising of capital from securities market, facilitate fund raising and resultantly ease up the process of raising capital by companies during the crisis.

2020 Amendments to the takeover code:

A. Raising market activity and funds: SEBI vide notification dated 16th June 2020 made the first Amendment to the regulations and had relaxed the obligation on promoters for making an open offer under Regulation 3(2) of the Takeover Code by increasing the permissible thresholds of acquiring fresh shares. Consequently, a relaxation allowing acquisition of ten percent (10%), instead of the existing five percent (5%) by promoters of listed company has come into effect for financial year 2020-2021. It is to be noted, that such relaxations have been specific to acquisition in form of preferential issue of equity shares, resultantly excluding acquisitions in form of transfers, block, and bulk deals.

B. Pricing norms of preferential issue under ICDR Regulations: With regards to the first amendment, the relaxation is conditional to investments being undertaken by way of preferential issue. The pricing norms of such preferential issue is laid down Regulation 164 of ICDR Regulations:

   If the issuer's equity shares have been listed on recognised stock exchange for twenty-six weeks or more, the price of such preferential issue shall be higher of the average of weekly high and low of volume weighted average price in recognised stock exchange during the preceding-

   i. Twenty-six (26) weeks, or
   ii. Two(2) weeks.

   Due to the economic challenges posed by Coronavirus, leading to a stock market crisis has resultantly lowered the prices of shares of most companies, which has currently dropped severely as compared to the prices at the beginning of twenty-six weeks. Therefore, the promoters may be discouraged to subscribe for additional shares if made to pay at the price determined by the above-mentioned regulation, despite of forgoing costs involved in a public offer.

   In order to combat the issue caused by the pandemic, SEBI had decided to provide an additional option to the existing pricing methodology for preferential issuance as temporary relaxation due to COVID-19.

   Consequently, the price of the equity shares to be allotted pursuant to the preferential issue shall not be less than higher of the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognized stock exchange during the preceding-

   i. Twelve (12) weeks (Instead of twenty-six (26) weeks), or;
   ii. Two (2) weeks

   The new rule shall be in force till December 31, 2020 along with a lock-in period of three (3) years, which would bring stability for upcoming years.

   Enhanced deposit in escrow account for offers in lieu of indirect acquisition : SEBI in board meeting held on 25th June 2020 has made further amendments to the Takeover Code and have vide Regulation 17(1) by mandating

deposit of the amount equivalent to one hundred percent (100%) of the consideration payable for the open offer, subsequent to an indirect acquisition and a public announcement of an open offer, within two working days before public statement Further, the new rule has effectively aligned the treatment of open offer which has been triggered by either direct or an indirect acquisition, since the requirement was deposit has always been one hundred percent (100%) for direct acquisition

SEBI (PROHIBITION OF INSIDER TRADING) REGULATION, 2015

Insider trading is the trading of a company's stocks or other securities by individuals with access to confidential or non-public information about the company. Taking advantage of this privileged access is considered a breach of the individual's fiduciary duty. SEBI being the sole authority not only acts as a watchdog and has repealed the SEBI (Prohibition of Insider Trading) Regulations of 1992 and brought in its place SEBI (Prohibition of Insider Trading) Regulations, 2015 which seeks to strengthen the position by providing a more comprehensive set of regulations.

According to the definition "insider" means a person who is either a connected person or in possession of or having access to unpublished price sensitive information. When such a person in possession of this information is "trading" which includes subscribing, buying, selling, dealing, or agreeing to subscribe, buy, sell, deal in any securities.

Communication or procurement of unpublished price sensitive information:

While understanding the necessity of communicating information, all insiders, who are essentially persons in possession of unpublished price sensitive information, are required to handle such information with care and to deal with the information with them when transacting their business strictly on a need-to-know basis. Organizations developing practices based on need-to-know principles for treatment of information in their possession.

It also imposes a prohibition on unlawfully procuring possession of unpublished price sensitive information. Inducement and procurement of unpublished price sensitive information not in furtherance of one's legitimate duties and discharge of obligations is illegal.

Trading when in possession of unpublished price sensitive information:

When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be presumed to have been motivated by the knowledge and awareness of such information in his possession. The reasons for which he trades are not intended to be relevant for determining whether a person has violated the regulation. The burden of proof will lie on the insider.

Trading plans:

Persons who may be perpetually in possession of unpublished price sensitive information need to trade in securities in a compliant manner by formulating trading plans (details of securities and the timeline) which enable to plan for trades to be executed in future after a cool off period of six (6) months. This way the insider had pre-decided even before the unpublished price sensitive information came into being. However, this does not grant absolute immunity if malafide intentions are found.

In any case, a statutory cool-off period and would not grant immunity from action if the insider were to be in possession of the same unpublished price sensitive information both at the time of formulation of the plan and implementation of the same.

Frequent announcements of trading plans for short periods of time would render meaningless unless a reasonable time gap of twelve (12) months between the decision to trade and the actual trade.

Review by compliance officer:

Once satisfied with the declarations made by the insider, the Compliance Officer may approve the trading plan, which would then have to be implemented in accordance with these regulations and publicly disseminate and further notify to stock exchanges.
Other investors in the market, too, would factor the impact of the trading plan on their own trading decisions and in price discovery. Therefore, insider cannot deviate from the trading plan based on which others in the market have assessed their views on the securities.

Disclosures

General
Disclosure of trades would need to be done by the person concerned but also by the immediate relatives and of other persons for whom the person concerned takes trading decisions and shall be maintained by the company, for a minimum period of five years, in such form as may be specified.

By certain persons

1. Initial Disclosures: (Omitted by Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2021 (w.e.f. April 26, 2021))

2. Continual Disclosures

Every person on appointment as key managerial personnel or a director of the company or upon becoming a promoter or member of the promoter group shall disclose his holding of securities of the company as on the date of appointment to the company within seven days of such appointment or becoming a promoter.

Disclosure to be made to the company the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of ten lakh rupees or such other value as may be specified.

Every company shall notify the particulars of such trading to the stock exchange on which the securities are listed within two trading days of receipt of the disclosure or from becoming aware of such information.

3. Disclosures by other connected persons:

Any company whose securities are listed on a stock exchange may, at its discretion require any other connected person or class of connected persons to make disclosures of holdings and trading in securities of the company in such form and at such frequency as may be determined by the company in order to monitor compliance with these regulations.

Code of Conduct

The board of directors of every listed company and market intermediary shall formulate a code of conduct to regulate, monitor and report trading by its employees and other connected persons towards achieving compliance with these regulations and any contravention with effect to the same will be dealt by the BoD.

SME LISTING GUIDELINES

Conditions precedent to listing[18]:

The Issuers on SME platform shall have adhered to conditions precedent to listing as emerging, inter-alia, from;

1. Securities Contracts (Regulations) Act 1956,
2. Companies Act 1956,
3. Securities and Exchange Board of India Act 1992,
4. Any rules and/or regulations framed under foregoing statutes, as also any circular, clarifications, guidelines issued by the appropriate authority under foregoing statutes.

Eligibility criteria for listing on NSE Emerge Platform:

The following criteria should be complied with as on the date of filing the Public Offer Document with NSE as well as when the same is filed with RoC and SEBI.

PARAMETER	LISTING CRITERION
INCORPORATION	The Issuer should be a company incorporated under the Companies Act 1956/CoA India.
POST ISSUE PAID UP CAPITAL	The post issue paid up capital of the company (face value) shall not be more than rupees twenty-five (25) crores.
TRACK RECORD	Track record of at-least three years of either • The applicant seeking listing; or • The promoters****/promoting company, incorporated in or outside India or • Proprietary/Partnership firm and subsequently converted into a Company (not in existence as a Company for three years) and approaches the Exchange for listing. ****Promoters mean one or more persons with minimum three (3) years of experience in the same line of business and shall be holding at least twenty (20%) of the post issue equity share capital individually or severally. • The company/entity should have operating profit (earnings before interest, depreciation, and tax) from operations for at least any two (2) out of three (3) financial years preceding the application and its net-worth should be positive.

[18] https://www.nseindia.com/companies-listing/raising-capital-public-issues-emerge-eligibility-criteria

PARAMETER	LISTING CRITERION
OTHER LISTING CONDITIONS	• The applicant company has not been referred to erstwhile Board for Industrial and Financial Reconstruction (BIFR) or No proceedings have been admitted under Insolvency and Bankruptcy Code against the issuer and Promoting companies. • The company has not received any winding up petition admitted by a NCLT/Court. • No material regulatory or disciplinary action by a stock exchange or regulatory authority in the past three (3) years against the applicant company.
DISCLOSURES	The following matters should be disclosed in the offer document: 1. Any material regulatory or disciplinary action by a stock exchange or regulatory authority in the past one (1) year in respect of promoters/promoting company(ies), group companies, companies promoted by the promoters/promoting company(ies) of the applicant company. 2. Defaults in respect of payment of interest and/or principal to the debenture/bond/fixed deposit holders, banks, FIs by the applicant, promoters/promoting company(ies), group companies, companies promoted by the promoters/promoting company(ies) during the past three years. 3. The applicant, promoters/promoting company(ies), group companies, companies promoted by the promoters/promoting company(ies) litigation record, the nature of litigation, and status of litigation. 4. In respect of the track record of the directors, the status of criminal cases filed, or nature of the investigation being undertaken with regard to alleged commission of any offence by any of its directors and its effect on the business of the company, where all or any of the directors of issuer have or has been charge-sheeted with serious crimes like murder, rape, forgery, economic offences.

Chapter 7

E-COMMERCE

With massive investment in e-commerce space, companies call for greater oversight of the legal framework governing the e-commerce activities. Legal issues of e-commerce in India vary as per different business models. For instance, electronic trading of medical drugs in India requires more stringent e-commerce and legal compliances as compared to other e-commerce activities. Though no consolidated law is notified in respect of this sector, lately the government has been notifying various rules and regulations under various related laws.

I. INVESTMENT

Investment in an entity can be in form of equity and loan though various instruments such as equity shares, preference shares, debentures, bonds etc., The government has not notified any specific regulation in respect of domestic investment, through certain provisions were notified under consolidated FDI policy for e-commerce business in accordance with:

a. E-commerce activities refer to the activity of buying and selling by a company through the e-commerce platform[19].
b. The First Major FDI policy decision affecting e-commerce came through the sector specific guidelines for FDI contained in Press Note 2 (2000 series)[20] which allowed hundred percent (100%) FDI under the automatic route (i.e., no FIPB approval is required). Such companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter-alia implying that existing restrictions on FDI in domestic trading would be applicable to ecommerce as well.
c. In 2012, the DIPP stated that retail through e-commerce platforms i.e., B2C e-commerce was barred for companies with FDI regardless of whether they were engaged in (MBRT) or single brand retailing (SBRT)[21]. However, in 2015, the DIPP released press note 12 of the 2015 series in which it permitted FDI in e-commerce for SBRT entities which operated through physical stores in India[22]. According to the press note, Indian manufacturers could sell their own single brand products online, provided that seventy percent (70%) of the total value of the product was in-house and thirty percent (30%) was outsourced.
d. By 2016, the Indian e-commerce industry had grown but was full of restrictions. Recognizing the evasive methods which were being used by companies to circumvent the existing policies on e-commerce by employing novel means like promotional funding, cashbacks and other such methods to reduce prices to attract customers, the government via press note 3 of the 2016 series expanded the definition of e-commerce to include "buying and selling of goods and services including digital products over digital and electronic networks". Under the new regulations, e-commerce entities were permitted to provide support services to sellers but were barred from exercising ownership over the inventory or influencing sale prices of goods and services. Moreover, specific guidelines restricting e-commerce platforms from influencing sale prices or from deriving more than 25% sales from a single seller. [23]

e. In Press Note 2 of the 2018 series, it was stated that an e-commerce entity would be deemed to adopt the inventory-based model if it exercises control or ownership over the inventory.[24] The notification also barred ecommerce entities from requiring. Merchants to sell goods exclusively on their platform. he government in its clarificatory

[19] Department of Industrial Policy & Promotion, *Consolidated FDI Policy 2010,* Ministry of Commerce & Industry
[20] Department of Industrial Policy & Promotion, *Press Note No. 2 (2000 Series),* Ministry of Commerce & Industry
[21] Department of Industrial Policy & Promotion, *Press Note No. 4 (2012 Series),* Ministry of Commerce & Industry.
[22] Department of Industrial Policy & Promotion, *Press Note No. 12 (2015 Series),* Ministry of Commerce & Industry
[23] Swetha Prashant & Divya Sinha, *FDI in e-commerce: everything you need to know,* My Law Blog, May 17, 2016
[24] Department of Industrial Policy & Promotion, *Press Note No. 2 (2018 Series),* Ministry of Commerce & Industry

notification of 04 January 2019,[25] reasoned that rules under Press Note 2 of the 2018 series were necessary to ensure that e-commerce entities did not circumvent rules and to ensure proper implementation of the policy.

f. As per the recent amendments introduced in Press Note 3 of 2020 series [26], to the existing consolidated FDI, a non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

II. E-contracts

E-contract is one of the divisions of e-business. It holds a similar meaning of traditional business wherein goods and services are switched for a particular amount of consideration. The only extra element it has is that the contract here takes place through a digital mode of communication like the internet. It provides an opportunity for the sellers to reach the end of consumer directly without the involvement of the middlemen. There was primarily a fear between the legislatures to identify this modern technology, but now many countries have legislated laws to recognize electronic contracts. The conventional law involving to contracts is not satisfactory to address all the issues that arise in electronic contracts. There was initially a hesitation amongst the legislatures to recognize this modern technology, but now many countries have passed laws to recognize electronic contracts. The Laws governing E-contracts in India are:

1. Indian Contract Act, 1872
2. Consumer Protection Act, 1986
3. Information Technology Act, 2000
4. Indian Copyright Act, 1957

The Indian Contract Act, 1872 governs all the e-contracts in India which mandates certain pre-requisites for a valid contract such as free consent and a lawful consideration lawful purpose etc. The main issue which needs to be answered is how the requirements of Indian Contract Act would be fulfilled in relation to e-contracts. Essentials of a contract as per Indian Contract Act, 1872 are:

a) Offer should be made.
b) Acknowledgment of offer
c) Consideration
d) Intention to create lawful relations.
e) Ability to Contract.
f) Free and unaffected consent
g) Lawful object
h) Conviction and possibility of performance

The provisions of the Information Technology Act, 2000 (**IT Act**) give legal recognition to an electronic (**E - Contract)** particularly Section 10-A of the IT Act which states:

[25] Department of Industrial Policy & Promotion, *DIPP Clarification regarding Press Note No. 2 (2018 Series),* Ministry of Commerce & Industry.
[26] Department of Industrial Policy & Promotion, *Press Note No. 3 (2020 Series),* Ministry of Commerce & Industry

"Section 10-A: Validity of contracts formed through electronic means. –

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."
The above provision was introduced by the Information Technology (Amendment Act), 2008 after recognizing the growing dependence on electronic means to reach commercial agreements. This applies where contract formation, communication of the proposal and acceptance is carried out electronically.

Signature Requirements: There is no compulsion under the Indian Contract Act to have written contracts physically signed. However, in some specific statues there could be certain signature requirements. For example, the Indian Copyright Act, 1957 states that an assignment of copyright needs to be signed by the assignor. In such cases the information technology Act equates electronic signature with physical signatures although an electronic signature is supposed to be issued by the competent authorities under the IT Act.

Stamping Requirements: The Stamping laws in India requires that every instrument under which rights are created or transferred needs to be stamped under the respective stamp duty legislations enacted by different states in India. An instrument that is not appropriately stamped may not be admissible as evidence before a competent authority unless the requisite stamp duty and the prescribed penalty have been paid. In some instances, criminal liability is associated with intentional evasion of stamp duty. However, the manner of paying stamp duty as contemplated under the stamp laws is applicable in case of physical documents and is not feasible in cases of e-contracts.

III. Data Protection and Privacy:

Right to privacy has long been read into Article 21 (right to life and personal liberty) of the Constitution of India, 1950. However, with the proliferating use of the internet and the exorbitant rise in transfer of data through multiple technologies, the concepts of 'data privacy' and 'data protection' have started demanding greater attention than ever before. Therefore, such concepts were introduced in the Information Technology Act, 2000 (Act) through Section 43-A (Compensation for failure to protect data) and Section 72-A (Punishment for disclosure of information in breach of lawful contract).

Section 43-A primarily deals with compensation for negligence in implementing and maintaining reasonable security practices and procedures in relation to sensitive personal data or information. Section 72-A deals with personal information and provides punishment for disclosure of information in breach of lawful contract or without the information provider's consent.

Later in 2011, after the enactment of the European Union's strict and stringent Data Protection Laws, the Government of India also felt the need for the same in our country. Consequently, a new set of rules named the "Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011" or IT (RSPPSPDI) Rules, 2011 came into picture. These rules have provisions for three groups- Body Incorporates, Information Providers (Data Subjects) and the Government. The key features of the Rules are as follows:

1. Sensitive personal data which includes passwords, credit or debits card information, medical and biometric records etc.[27]

2. Privacy Policy: Mandates a Body Corporate to provide a privacy policy for dealing with personal information and sensitive data and it also requires that the policy should be available on its website. The policy shall include all the

[27] Rule 3 of IT (RSPPSPDI) Rules, 2011

necessary details for e.g., type of personal data collected, statements of practices, purpose of collection, provisions related to disclosure and security practices etc. [28]

3. Collection of Information: Provisions for collecting information by a body corporate through are as follows:[29]

   i. Body Corporate shall not collect sensitive personal data without obtaining consent in writing or by fax or e-mail form the provider regarding the purpose for which the data is being collected.
   ii. Any personal information or sensitive data shall not be collected unless and until it is for a lawful purpose and the collection is necessary for the fulfillment of that particular purpose.
   iii. The provider shall be made aware of the facts as to the information collected, its purpose, its recipients and the agencies that are collecting and retaining the information.
   iv. The information collected shall be used only for the purpose for which it is collected and shall not be retained for a period longer than which is required.
   v. However, the Body Incorporate shall not be responsible for the authenticity and reliability of any personal data or sensitive information.
   vi. The provider shall be given an option to opt out of providing such information along with an option to withdraw his consent to the collection at any later stage as well.
   vii. The Body Corporate shall keep the data secured and it shall designate a grievance redressing body for any discrepancies arising in future.

4. Consent for disclosure: Body Corporate shall seek the consent of the concerned provider before disclosing the sensitive data to a third party unless such disclosure was agreed by the parties through any contract. However, such information can be shared without any prior consent with government agencies mandated under law or any other third party by an order under the law, who shall be under a duty not to disclose it further.[30]
5. A body corporate shall be considered to have complied with reasonable security practices if they have implemented and documented the standards of these security practices. However, any person or agency that are following any code of best practice other than that mentioned in rule 8(2) shall get their code duly approved by the Central Government. Body Corporate and agencies who have implemented either ISO standards or any other standard duly approved by the central government shall be considered to have implemented security measures provided that such codes have been audited on a yearly basis by independent auditors approved by the government.[31]

IV. PAYMENT SYSTEMS:

RBI notified Payment and Settlement Systems Act, 2007 in order to regulate the Payment System. The Act defines the Payment system as below:

"payment system" means a system that enables payment to be affected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange; Explanation. - For the purposes of this clause, "payment system" includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;

[28] Rule 4 of IT (RSPPSPDI) Rules, 2011
[29] Rule 5 of IT (RSPPSPDI) Rules, 2011

[30] Rule 6 of IT (RSPPSPDI) Rules, 2011
[31] Rule 8 of IT (RSPPSPDI) Rules, 2011

The Payment and Settlement Systems Regulations, 2008 covers matters like form of application for authorization for commencing/carrying on a payment system and grant of authorization, payment instructions and determination of standards of payment systems, furnishing of returns/documents/other information, furnishing of accounts and balance sheets by system provider etc. The Act also provides the legal basis for "netting" and "settlement finality". This is of great importance, as in India, other than the Real Time Gross Settlement (RTGS) system all other payment systems function on a net settlement basis.

V. Regulation of Intermediaries/Merchants in Payment System

RBI has issued direction under Section 18 of Payment and Settlement Systems Act, 2007[32] for opening and operation of Accounts and settlement of payments for electronic payment transactions involving intermediaries, with a view to safeguard the interests of the customers and to ensure that the payments made by them using Electronic/Online Payment modes are duly accounted for by the intermediaries receiving such payments and remitted to the accounts of the merchants who have supplied the goods and services without undue delay.

In most existing arrangements involving such intermediaries, the payments made by customers (for settlement of e-commerce/m-commerce/bill payment transactions), are credited to the accounts of these intermediaries before the funds are transferred to the accounts of the merchants in final settlement of the obligations of the paying customers. Any delay in the transfer of the funds by the intermediaries to the merchants account will not only entail risks to the customers and the merchants but also impact the payment system.

The direction defined Intermediaries and Merchants as below:

"Intermediaries would include all entities that collect monies received from customers for payment to merchants using any electronic/online payment mode, for goods and services availed by them and subsequently facilitate the transfer of these monies to the merchants in final settlement of the obligations of the paying customers".
"Merchants shall include all Electronic commerce/Mobile commerce service providers and other persons (including but not limited to utility service providers) who accept payments for goods and service provided by them, through Electronic/Online Payment modes."
Further RBI through its direction mandated that banks shall implement the following "settlement cycle" for all final settlements to merchants: -

i. All payments to merchants which do not involve transfer of funds to nodal banks shall be affected within a maximum of T+2 settlement cycle (where T is defined as the day of intimation regarding the completion of transaction).
ii. All payments to merchants involving nodal banks shall be affected within a maximum of T+3 settlement cycle.

VI. Consumer Protection

In the light of ever-changing online business structures and startup environment, it is vital to remember consumer security issues. The Consumer Protection Act 2019, one of the major changes which have been included in the amended Act has been to the definition of "Consumer". While CPA retains its definition of who consumer is from the 1986 consumer protection Act, it has introduced a new explanation providing that when a consumer [33]*'buys any good' and 'hires or avails of any service'* this includes *"online transactions through electronic means..."*, potentially bringing e-commerce platforms/ aggregators within the new CPA. *E-commerce'* is defined as *"buying and selling of goods/services, including digital products over the*

[32] Notification No. DPSS.CO. PD. No.1102 /02.14.08/ 2009-10 dated November 24, 2009
[33] The Consumer Protection Act,2019 § 7,

digital/electronic network" and an 'electronic service provider' means *"a person who provides technologies/ processes to enable a product seller to engage in advertising/selling goods/services to customer and includes online marketplace."*

1. The New Act has introduced the concept of product liability and brings within its scope, the product manufacturer, product service provider and product seller, for any claim for compensation. The term 'product seller' is defined to include a person who is involved in placing the product for a commercial purpose and as such would include e-commerce platforms as well. The defense that e-commerce platforms merely act as 'platforms' or 'aggregators' will not be accepted. There are increased liability risks for manufacturers as compared to product service providers and product sellers, considering that under the New Act, manufacturers will be liable in product liability action even where he proves that he was not negligent or fraudulent in making the express warranty of a product. Certain exceptions have been provided under the New Act from liability claims, such as, that the product seller will not be liable where the product has been misused, altered or modified.

2. For quality control, e-commerce entities must ensure that advertisements for goods/services are consistent with the actual characteristics of the goods advertised. On being informed of any counterfeit product(s) being sold on its platform, an e-commerce entity must notify the seller of the same. If the seller cannot prove the genuineness of the product, the listed product will be removed, and consumers notified. In cases of late delivery or delivery of defective goods, the concerned e-commerce entity is required to accept the return of goods and effect all payments towards accepted refund requests within 14 days. Additionally, e-commerce entities must ensure that personally identifiable information of customers is protected, and that data collection, storage, and use is compliant with the Information Technology (Amendment) Act, 2008[34].

3. Under the new CPA the Central Government can introduce rules/notifications to prevent unfair trade practices in 'e-commerce' space, i.e., retaining flexibility to issue "bespoke" rules in future aimed at e-commerce platforms/aggregators (covering both goods and services) from a consumer protection standpoint[35].

4. Revised Pecuniary Jurisdiction: The district forum can now entertain consumer complaints where the value of goods or services paid does not exceed INR 10,000,000 (Indian Rupees Ten Million). The State Commission can entertain disputes where such value exceeds INR 10,000,000 (Indian Rupees Ten Million) but does not exceed INR 100,000,000 (Indian Rupees One Hundred Million), and the National Commission can exercise jurisdiction where such value exceeds INR 100,000,000 (INR One Hundred Million).

5. Alternate Dispute Resolution: Mediation as an Alternate Dispute Resolution mechanism has been introduced making dispute adjudication simpler and quicker. This would further reduce pressure on consumer courts.

6. Establishment of CCPA: CPA proposed the establishment of the Central Consumer Protection Authority (CCPA), a regulatory authority with wide powers of taking suo-moto action, recall products, order reimbursement of the price of goods/services, cancellation of licenses, and filing action suits if consumer complaint affects more than one individual and powers of enforcement. The CCPA will have an investigation wing, headed by a Director-General, which may conduct inquiry or investigation into consumer law violations.

   With respect to misleading advertisements the CCPA may impose a penalty of up to rupees ten lakh (Rs.10,00,000) on a manufacturer or an endorser, for a false or misleading advertisement, or imprisonment for up to two (2) years. A subsequent offence would result in fine which may extend to rupees fifty lakh (Rs.50,00,000) and imprisonment of up to five (5) years. This lays accountability on them to verify the claims made in the advertisements. Further, the CCPA can prohibit the endorser of a misleading advertisement from endorsing that particular product or service for a period of up to one (1) year and for every subsequent offence three (3) years.

[34] *No discounting consumer protection*, financial express.com, December 27,2019
[35] Stuti Galiya, *consumer protection act-key highlights*, Mondaq, August 20,2019

Consumer Protection (E-Commerce) Regulations 2020

The Consumer Protection Act also provides for the Consumer Protection E-commerce Rules, 2020. The Rules apply to all e-commerce businesses, including entities adopting both models of e-commerce, marketplace as well as the inventory-based, encompassing both multi-brand and single brand retail carried online. The Rules also encompass the duties and liabilities of all models of e-commerce, an 'inventory e-commerce entity' (one that owns the inventory of goods and services and sells directly to the consumers) and a 'marketplace e-commerce entity' (provision of information technology on a digital platform for facilitation of transactions occurring between the buyer and seller). However, the Rules are not applicable to any activity carried out by a natural person, which does not form a part of his professional or commercial activities undertaken on a regular or systematic basis. Further, the rules prohibit any e-commerce entity to run as a sole proprietorship or a partnership or in any other business form in India.

1. Duties of E-Commerce Entities:

- Mandated to provide platform details of the seller and grievance officer and address to all branches and mainly, the headquarters.

- Prohibition from resorting to unfair trade practices which is inclusive of manipulation of prices or discrimination of consumers on the basis of class and from imposing cancellation charges on consumers unless charges are borne by e-commerce entities as a result of cancellations occurring unilaterally.

- Required to record explicit consent for each purchase of the consumer. Further prohibition with respect to automatic recording of consent for purchase via pre-ticked checkboxes.

- Requisite to establish speedy grievance redress mechanism.

Additionally, the rules prescribe certain duties and obligations over the marketplace and inventory e-commerce entities and the sellers.

2. Duties of the marketplace e-commerce entities include furnishing basic information on the portal and displaying terms and conditions governing transactions between the sellers and further details with respect to product, guarantee, warranty, return, refund, payment methods enabling informed choice on the part of the consumer, including the address and contact information of the seller. The same confers upon the consumer, a right to information, in order to facilitate dispute resolution.

3. Duties of the seller and inventory e-commerce entities includes not refusing to take back goods or discontinuing services purchased or agreed to be purchased if such goods or services were defective or were delivered late. Further, there includes a restriction from adopting posting false reviews by representing itself as a consumer, or the advertisement of goods and services that represent an inaccurate picture. The further duties applicable to the marketplace e-commerce entities are on similar lines with the duties of inventory e-commerce entities.

Chapter 8

LABOUR LAWS IN INDIA

LABOUR LAWS IN INDIA

India is an active member of the ILO. The labour laws in India provide harmonious working environment and social security benefits to the labour force. Most of the labour laws are equally applicable to part time workers. The only fringe benefit not available to part time workers is gratuity, which requires a minimum of five (5) years of continuous employment.

INDIAN CONSTITUTION

Indian Constitution sets out several safeguards regarding labour in India. Apart from the fundamental rights enshrined in Part III of the Constitution of India, there are articles that specifically concern labour laws. Articles 14 and 15 set out the principles regarding equality before law and non-discrimination, respectively. Article 16 incorporates the principal of equality of opportunity in employment to all the citizens of India. Article 19 gives right to all the citizens to form associations or unions. Article 23 prohibits human trafficking and any form of forced labour like beggar whereas Article 24 specifically prohibits child labour in India. It prohibits employing children in any factory, mine, or hazardous employment. Apart from these fundamental rights, Articles 39 and 41-43A also deal with labour laws in the form of directive principles of state policy. Article 39 sets out certain principles of policy which are to be followed by the state like ensuring that both men and women have equal rights to an adequate means of livelihood and equal wages are paid for equal work to men and women. Article 41 talks about ensuring effective provisions for securing the right to work. Article 42 talks about effective provisions for securing just and humane conditions of work and maternity relief. Article 43 puts a threshold on the state to make efforts towards ensuring a living wage and proper conditions of work ensuring a decent standard of life. Article 43A was inserted in the year 1976, state should make efforts to secure participation of workers in the management of undertakings, establishments, or other organizations in any industry.

LABOUR CODES 2020

The Parliament of India has passed four new labour Codes:

1. The Industrial Relations Code, 2020.
2. The Code on Social Security, 2020
3. Occupational Safety, Health and Working Conditions Code, 2020.
4. Code on Wages, 2019

This step has been taken towards amalgamating 44 Central Labour Acts into Codes in order to simplify India's labour law regime and ease of doing business in the respective market(s). These 4 Codes are a part of the Government's reformative drive to bring in transparency to the system to support the constant changes occurred in the business environment.

1. Industrial Relations Code 2020:

1.1 The newly introduced Industrial Relations Code 2020, seeks to replace three existing labour laws in India:

a) The Industrial Disputes Act, 1947.
b) The Trade Unions Act, 1926.
c) The Industrial Employment (Standing Orders) Act, 1946.

1.2 Trade unions: The Code has now mandated that seven or more members of a trade union can now apply for registration. Trade unions with minimum of ten percent (10%) of workers or hundred (100) workers, whichever is less will be registered. The Central or State Government may recognise such trade union or a federation of trade unions as Central or State trade unions.

1.3 Negotiating unions: The Code provides for a negotiation union in an industrial establishment having registered unions, for carrying out negotiations with the employer. In case of a single trade union, the employer is liable to recognise such trade union as the sole negotiating union of the workers. In places where multiple trade unions exist, the trade union with support of at least fifty one percent (51% of workers on the muster roll will be recognised as the sole negotiating union by the employer.

1.4 Strike: The Code has amended the definition of strike to bring mass casual leave" under its ambit. Under the Code if over 50% of an establishment's workers take concerted casual leave it will be deemed as a strike and a worker cannot go on a strike without providing at least, a sixty (60) day notice and not whole proceedings before a Tribunal or a National Industrial Tribunal are taking place. Following the conclusion of such proceedings, workers are disallowed from going on strike.

1.5 Unfair labour practices: The Code enlists unfair labour practices listed in a Schedule to the Code from being committed by either the employer, workers and/or trade unions. These include:

a) Restriction on workers from forming trade unions;
b) Establishment of employer sponsored trade union of workers;
c) Coercion of workers into joining trade unions;
d) Any kind of damage inflicted to employer's property;
e) Prevention of any worker from attending work.

Any person who commits such unfair labour practices would be punishable with a fine between ten thousand rupees to two lakh rupees.

1.6 Standing orders: All industrial establishments with at least three hundred (300) workers have to prepare standing orders on certain matters. These include the following:

a) Classification of workers;
b) Manner of informing working about hours of work, holidays, paydays, and wage rates;
c) Termination of employement;
d) Suspension for misconduct and;
e) Grievance redressal mechanisms for workers.

1.7 Notice of change: Employers mustn't change the conditions of services in certain matters including wages, contribution, allowances, working hours and leaves without giving prior notice of the proposed changes to the workers being affected, or within twenty-one (21) days of giving such notice.

1.8 Lay off and retrenchment: Employers of industrial establishments such as mines, factories, and plantations with fifty (50) to three hundred (300) workers must;

a) Pay fifty percent (50%) basic wages and dearness allowance to a worker who has been laid off;
b) Give one month's notice or wages for the notice period to the retrenched worker.

Industrial establishments with at least three hundred (300) workers must take prior permission of the Central or State Government before lay-off, retrenchment or closure. The Central or State Government may increase this threshold by notification. Such establishments must pay fifty percent (50%) of basic wages and dearness allowance to a worker who has been laid off. In case of retrenchment, the employer must either give three months' notice or pay the

retrenched worker for the notice period. Any employer violating these provisions would be punishable with a fine between one lakh rupees (Rs. 1,00,000) to ten lakh rupees (Rs. 10,00,000)

1.9 Voluntary arbitration: The Code allows for industrial disputes to be voluntarily referred to arbitration by the employer and workers through a written agreement. The arbitrator is to submit the arbitration award to the government after due investigation of dispute. Industrial disputes include disputes relating to terms of employement, non-employment and dismissal, retrenchment, or termination of workers.

1.10 Disputes relating to termination of Individual worker: The Code classifies any dispute in relation to discharge dismissal, retrenchment, or termination of services of an individual worker to be classified as an industrial dispute. The worker may apply to the Industrial Tribunal for adjudication of the dispute. The worker may apply to the Tribunal 45 days after the application for the conciliation of the dispute was made.

1.11 Resolution of Industrial disputes: The Central or State Governments may appoint conciliation officers may appoint conciliation officers to mediate and promote settlement of industrial dispute. In case no settlement is arrived at, then either party to the dispute can make an application to the Industrial Tribunal, constituted under the Code. The Central Government may also constitute National Industrial Tribunals for settlement of industrial dispute which;

a) Involves questions of national importance or;
b) Could have an impact on industrial establishments situated in more than one state.

2. The Code on Social Security 2020:

2.1 The Social Security Code 2020 replaces nine labour laws related to social security including the following:

a) The Employees Compensation Act, 1923,
b) The Employees State Insurance Act, 1948,
c) The Employees Provident Fund and Miscellaneous Provisions Act, 1952,
d) The Employees Exchange (Compulsory Notification of Vacancies) Act, 1959,
e) The Maternity Benefit Act, 1961,
f) The Payment of Gratuity Act, 1972,
g) The Cine Workers Welfare Fund Act, 1981,
h) The Building and Other Construction Workers Cess Act, 1996, and
i) The Unorganized Workers' Social Security Act, 2008).

2.2 Social Security Schemes: Under the Code, the Central Government may notify various security schemes for the benefit of workers, these include an EPF Scheme, EPS and Employees Deposit Linked insurance scheme. The government may also notify:

a) ESI Scheme to provide sickness, maternity, and other benefits;
b) Gratuity to workers on completing five (5) years of employment (less than five years for journalists and fixed term workers)
c) Maternity benefits to woman employees
d) Cess for welfare of building and construction workers
e) Compensation to employees and their dependents in case of the occupational injury or disease.

2.3 Coverage and Registration: The Code specifies different applicability thresholds for the schemes. The EPF scheme will be applicable to establishments with twenty (20) or more employees. Similarly, the ESI scheme will be applicable to certain establishments with ten (10) or more employees and to all establishments which carry out hazardous or life-threatening work notified by the Central Government. All eligible establishments are required to register under the Code unless they are an already registered establishment under any other labour law.

2.4 Social Security Organisations: The Code provides for establishment of several bodies to administer the social security schemes. These include the following:

a) A Central Board of Trustees, headed by the Central Provident Fund Commissioner, to administer the EPF, EPS and EDLI schemes.
b) An Employee State Insurance Corporation headed by a Chairperson appointed by the central government to administer the ESI Scheme.
c) National and State Social Security Boards, headed by the Central and State ministers for labour and employment, respectively to administer schemes of unorganised workers.
d) State Level Building Worker's Welfare Boards headed by a Chairperson nominated by the State Government to administer schemes for building workers.

2.5 Contributions: The EPF, EPS, EDLI and ESI schemes will be finances through a combination of contributions from the employer to the employee. In case of EPF scheme, the employer and employee will each make matching contributions of ten percent (10%) wages or such other rate as notified by the government. All contributions towards payment of gratuity maternity benefit, cess for building workers and employee compensation will be borne by the employer.

For the purpose of schemes for gig and platform workers, the Code specifies a list of aggregators including ride sharing services and food delivery services. Any contribution from an aggregator may be at a rate notified by the government falling between one to two percent (1-2%) of the annual turnover of the aggregator, subject to a cap of five percent (5%) of the amount paid or payable by an aggregator to the gig and platform workers.

2.6 Inspections and Appeals: The appropriate government may appoint inspector-cum-facilitators to inspect establishments covered by the Code and provide advisory services to employers and employees on compliance with the Code. The Code also specifies judicial bodies which may hear appeals from the orders of the administrative authorities.

3. The Occupational Safety, Health and Working Conditions Code 2020:

3.1 The Occupational Safety ,Health and Working Conditions Code 2020 amalgamates 13 existing Acts regulation health, safety and working conditions. These include the following:

a) The factories Act, 1948.
b) The Mines Act, 1952.
c) The Contract Labour (Regulation and Abolition) Act, 1970.

3.2 Coverage: The Code is applicable to establishments employing at least ten (10) workers. It is applicable to all mines, docks and establishments carrying out any hazardous or life-threatening activity as notified by the Central government.

3.3 Exemptions: The appropriate government may exempt any workplace or activity from the Code in case of public emergency, disaster, or pandemic up to a year. Further, the State Government can exempt new factories from the Code for the specified period for creating more economic activity and employment.

3.4 Registration and License: Establishments covered by the Code are required to be registered with sixty (60) days of commencement of the Code with registering officers, appointed by the Central or State Government. The Code requires hiring workers such as beedi and cigar workers and contract labourers to obtain licenses.

3.5 Inter-state Migrant Workers: The Code has provided that provisions related to inter-state migrant workers would be applicable to establishments where at least (10) or more migrant workers are employed or were employed on any day of the preceding twelve months and also provide that an inter-state migrant may register himself as asian inter-state migrant worker on the portal on the basis of self-declaration and Aadhaar.

An interstate migrant worker has been provided with the possibility to avail benefits in the destination state in respect of ration and availing benefits of building and other construction worker cess.

3.6 Penalty: The Code enables the courts to give a portion of monetary penalties up to fifty percent (50%) to the worker who is a victim of accident or to the legal heirs of such victim in case of his death.

3.7 Work Hours: No worker will be required or allowed to work in any establishment for more than eight (8) hours in a day. For overtime work, workers must be paid twice the rate of daily wages. Prior consent of workers is required for overtime work. Women are now allowed to work past seven (7) pm and before six (6) am, subject to any safety-related or other such conditions prescribed by the government.

3.8 Leave: Workers cannot be required to work for more than six days a week. Further, they must receive one day of leave for every twenty (20) days of work per year.

3.9 Welfare Conditions: Welfare facilities such as canteens, first aid boxes, creches may be provided as per standards notified by the central government. Additional facilities may be specified for factories, mines, docks, building, and construction works, such as welfare officers and temporary housing.

The Code includes three schedules containing lists of:

a) Twenty-nine (29) diseases that the employer is required to notify the authorities of, in case workers are exposed to them;
b) Seventy-three (73) safety matters that the government may regulate and;
c) Forty (40) industries involving hazardous processes.

These lists may be amended by the Central Government.

3.10 Advisory Boards: The Central and State Governments would be setting up Occupational Safety and Health Advisory Boards at national and state level. These Boards will be advising the respective governments on the standards, rules, and regulations to be framed under the Code.

3.11 Safety Committees: The Government may require certain establishments to constitute safety committees in case of certain class of workers. The committees will be composed of representatives of the employer and workers and will function as a liaison, however the number of representatives of workers in the committee must not be less than those of the employer.

4. Code on Wages, 2019:

The Code on Wages, 2019 is an act of the Parliament of India that consolidates four major labour laws of India concerning wages and bonus payments etc. The Acts have been amalgamated under one Code in order to make the provisions for minimum wages and timely payment of wages for all workers in India, universal in nature.

4.1 The Wage Code repealed and replaced:

a) The Payment of Wages Act, 1936
b) The Minimum Wages Act, 1948
c) The Payment of Bonus Act, 1965
d) Equal Remuneration Act, 1976.

4.2 Uniform Applicability: The Code has envisaged a uniform applicability of the Provisions of timely payments of wages and minimum wages to all employees irrespective of the wage ceiling and/or sector, which is quite the change from the regressive laws put forth by the Payment of Wages Act, which was only applicable too workers who drew salaries below the statutory limit or the Minimum Wages Act, which was only applicable to employees engaged in scheduled establishments.

4.3 Definitions:

I. The term "wages" have been variously interpretated across labour legislations prior to the establishment of the Code. The Code now has provisions for a uniform definition of wages which is applicable to minimum wages, payment of wages and payment of bonuses. As per the Code, the following additions have been, posing as components of the term wages:

a) Basic pay
b) Dearness allowance
c) Retaining allowance

The Code has also provided for exclusions to the definition of wages. The following shall be excluded as components to the same:

a) Bonus payments
b) Value of house-accommodation, supply of light, water, medical attendance, or any other amenity or of any service excluded from the computation of wages by the appropriate Government.
c) Employer contributions to any pension or provident fund
d) Conveyance allowances
e) House rent allowance.
f) Overtime allowance
g) Commission payable to employees
h) gratuity payable on the termination of employment;
i) Retrenchment compensation or other retirement benefit payable to the employee or any ex-gratia payment made on termination of employment:

It is vital to note that the Code prescribes that, if the sum total of the excluded components (apart from gratuity and retrenchment compensation) exceeds fifty percent (50%) of the total remuneration, then that portion of the amount exceeding fifty percent (50%) is also to be calculated as 'wages' under the Code.

II. The Code also provides for separate definitions of 'worker' and 'employee'. The definition is broader than that of 'worker' as it includes persons carrying out managerial and administrative work. The definition of 'worker', however, expressly includes working journalists and sales promotion employees.

III. By making the Equal Remuneration of employees consistent, the Code, includes provisions prohibiting discrimination on grounds of gender ;

a) with respect to wages by employers, with respect to same work or work of a similar nature done by employees and;
b) with respect to recruitment of employees for same work or work of a similar nature.

4.4 Changes brought forward with respect to minimum wages:

I. The Code has introduced a concept of 'floor wage', which is to be determined by the Government by taking into account the minimum living standards of workers in a manner to be prescribed which may differ for different geographical areas, although it is pertinent to remember that any minimum wage, under no circumstances can be lower than the floor rate which would be determined by the Central Government.

II. Code prohibits employers from paying wages less than the minimum wages. Minimum wages will be notified by the Central or State Governments. This will be based on time, or number of pieces produced. The

minimum wages will be revised and reviewed by the central or state governments at an interval of not more than five years. While fixing minimum wages, the Central or State Governments may consider factors such as:

a) skill of workers and;

b) difficulty of work.

4.5 Overtime: The Central or State Government may fix the number of hours that constitute a normal working day. In case employees work in excess of a normal working day, they will be entitled to overtime wage, which must be at least twice the normal rate of wages.

4.6 Determination of Bonus: All employees whose wages do not exceed a specific monthly amount, notified by the Central or State Government, will be entitled to an annual bonus. The bonus will be at least: a) eight point three-three (8.33%) of his wages, or b) rupees hundred (Rs. 100), whichever is higher. In addition, the employer will distribute a part of the gross profits amongst the employees. This will be distributed in proportion to the annual wages of an employee. An employee can receive a maximum bonus of twenty percent (20%) of his annual wages.

4.7 Gender Discrimination: The Code prohibits gender discrimination in matters related to wages and recruitment of employees for the same work or work of similar nature. Work of similar nature has been defined as work for which the skill, effort, experience, and responsibility required are the same.

4.8 Offences: The Code has specified penalties for offences committed by an employer, such as (i) paying less than the due wages, or (ii) for contravening any provision of the Code. Penalties vary depending on the nature of offence, with the maximum penalty being imprisonment for three months along with a fine of up to one lakh rupees.

4.9 Single Authority for implementation of Code: The Code prescribes for the appointment of a single authority namely the Inspector-cum-facilitator for the effective implementation of the Code. The Inspector-cum-facilitator shall be assigned by the State Government for establishments in a given geographical area and has been granted powers to advice employers and workers regarding the various compliances under the Code and would also be liable for inspection of establishments for ensuring conformity with the provisions of the Code and examination of persons found in premises of such an establishment.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

The POSH Act, 2013 has been enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. Sexual harassment is considered as a violation of the fundamental right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade, or business under Article 19(1)(g) of the Constitution, which includes a right to a safe environment free from harassment.

Sexual harassment has been defined in this Act to include any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature.[36]

This Act states that a woman shall not be subjected to sexual harassment at the workplace. As per POSH Act, presence, or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.[37]

[36] Section 2(n), Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013.
[37] Section 3, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013.

The Act makes it mandatory for the employer to constitute a Sexual Harassment Committee called ICC at every office/branch of an entity employing more than 10 people to deal with sexual harassment complaints.[38] The Government is also required to set up LCC at district level to deal with sexual harassment complaints coming from the employees where ICC has not been set up.

The POSH Act empowers ICC and LCC to recommend employer to transfer the women at any other workplace, grant leave for a period of up to three months on receiving a complaint from a women employee. The complaint needs to be filed within 3 months of the date of the incident.[39] Also, the Act provides for action against false and malicious complaints to avoid misuse of the POSH Act.[40]

As per POSH It is the duty of the ICC to submit an annual report, which includes the number of cases filed/disposed of every calendar year to the employer and district office.[41] The employer too has a statutory obligation to ensure this report is included in the annual report of the organization filed to the Registrar of Companies[42]

SHOPS & ESTABLISHMENTS ACT

The S&E Act has been enacted by every state in India to regulate conditions of work and to provide for statutory obligations of the employers and rights of the employees in un-organized sector of employment and other commercial establishments in their jurisdiction. The rules and guidelines vary from state to state in accordance with their own gazetted S&E Act. It is mandatory for every commercial establishment to obtain registration under the S&E Act and act in accordance with the rules set out thereunder.

In terms of the S&E Act, a Commercial Establishment includes the following:

- A commercial or trading or banking or insurance establishment, or
- An establishment or administrative service in which persons employed or mainly engaged in office work, or
- A hotel, restaurant, boarding or eating house, a cafe, or any other refreshment house or
- A theatre, cinema or any other place of public amusement or entertainment.

S&E Act lays down the following rules:

a) Working hours per day and week. For example, under The Delhi Shops and establishment Act, any adult will be able to work at an establishment for a total of nine (9) hours per day, extending to a total of forty-eight (48) hours of work for a single week[43].
b) Guidelines for spread-over, rest interval, opening and closing hours, closed days, national and religious holidays, overtime work.
c) Rules for employment of children and young persons. No young person shall be required or allowed to work in the business of an establishment for more than six (6) hours a day. [44]
d) The Act states that no women or young person shall be allowed to work in a shop or establishment during the hours of 9 PM-7 AM during summer and from 8 PM-8AM during the winter season[45].
e) Rules for annual leave, maternity leave, sickness, and casual leave, etc.
f) Rules for employment and termination of service.
g) Maintenance of registers and records and display of notices.
h) Obligations of employers as well as employees.

[38] Section 4, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013.
[39] Section 6, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013.
[40] Section 14, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013.
[41] Section 21, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013
[42] Section 22, Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act,2013
[43] Section 8, Delhi Shops & Establishment Act 1954
[44] Section 13, Delhi Shops & Establishment Act 1954
[45] Section 14, Delhi Shops & Establishment Act 1954

Chapter 9

INCOME TAX

I. INTRODUCTION

The IT Act was enacted to regulate the taxation of income. For the purposes of computation of total income of an assessee (i.e., a person liable to be taxed), the word income has been classified by this IT Act into several broad categories such as salaries, income from house property, profits and gains from business or profession, capital gains and other sources. Taxable income of an assessee in India is determined after making permitted deductions from the income and tax is payable in advance by the prescribed date depending upon the status of the assessee.

II. THE CONCEPT OF INCOME

The term 'income' has been defined under this IT Act. The definition is inclusive and not exhaustive and merely lists out the items, which that are to be treated as 'income' for the purposes of this IT Act. In India, taxes are levied on all income received or accrued or deemed to have been received or accrued during a financial year.

III. TAXATION OF INCOME

Income tax is leviable on taxable income. The term 'taxable income' is distinguishable from 'income' in as much as the former represents only net income, which is arrived at after deducting the related expenses incurred in connection with earning such income. The term total income is defined as the income from whatever source derived, which:

- Is received or is deemed to be received in India; or
- Accrues or arises or is deemed to accrue or arise in India; or
- Accrues or arises outside India.

IV. INCOME RECEIVED IN INDIA

Where the income is received in India, it is wholly taxable in India, irrespective of residential status of the taxpayer. A receipt may be in money or money's worth. A constructive receipt is generally made by an adjustment of crossclaims or by an adjustment of the books, or through an agent, trustee, or other authorised person of the non-resident. It is to be noted that what is taxed is the first receipt; that is, the receipt at the earliest point in time. Thus, when a payment is received outside India, and remitted to India, it is not treated as income received in India because it was first received outside India.

V. INCOME ACCRUING OR ARISING IN INDIA

Income which accrues or arises in India, is chargeable to tax for all categories of persons, whether 'resident' or 'NRI'.

In case of dividend, only net dividend received from a foreign company will be taxed in India because that part of dividend, which is withheld as tax, does not accrue to the recipient.

VI. INCOME DEEMED TO ACCRUE OR ARISE IN INDIA

Like income accruing in India, income which is deemed to accrue or arise in India is also chargeable to tax for all categories of persons, whether 'resident' or 'NRI.'[46]

Generally speaking, the following income is deemed to accrue or arise in India:

- Capital gain arising on transfer of property situated in India.
- Income from business connection in India.
- Income from salary in respect of services rendered in India.

- Salary received by an Indian national from Government of India in respect of service rendered outside India. However, allowances and perquisites are exempt in this case.
- Income from any property, asset or other source of income located in India.
- Dividend paid by an Indian company.
- Interest received from Government of India.
- Interest received from a resident is treated as income deemed to have accrued or arisen in India in all cases, except where such interest is earned in respect of funds borrowed by the resident and used by resident for carrying on business/profession outside India or is in respect of funds borrowed by the resident and is used for earning income from any source outside India.
- Interest received from a non-resident is treated as income deemed to accrue or arise in India if such interest is in respect of funds borrowed by the non-resident for carrying on any business/profession in India.
- Royalty/fees for technical services received from Government of India.
- Royalty/fees for technical services received from resident is treated as income deemed to have accrued or arisen in India in all cases, except where such royalty/fee relates to business/profession/other source of income carried on by the payer outside India.
- Royalty/fees for technical services received from non-resident is treated as income deemed to have accrued or arisen in India if such royalty/fee is for business/profession/other source of income carried by the payer in India.

It should be noted that the income, which is deemed to accrue or arise in India is wholly, taxed in India.

VII. BUSINESS CONNECTIONS

The term Business Connection includes any business activity carried out through a person who, acting on behalf of the NRI (a) has and habitually exercises in India, an authority to conclude contracts on behalf of the NRI, unless his activities are limited to the purchase of goods or merchandise for the NRI; or (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the NRI; or (c) habitually secures orders in India, mainly or wholly for the NRI or for that NRI and other NRI s controlling, controlled by, or subject to the same common control, as that NRI. In cases where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c), only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

However, such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business and in case where such broker, general commission agent or any other agent works mainly or wholly on behalf of a principal NRI or on behalf of such NRI and other NRIs which are controlled by the principal NRI or have a controlling interest in the principal NRI or are subject to the same common control as the principal NRI, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.

VIII. RESIDENTIAL STATUS

A. INDIVIDUAL

The residential status of an individual determines his taxability under this IT Act. A person is said to be resident in India in any previous year if he has stayed in India:

- either for one hundred and eighty-two (182) days or more; or
- for, at least sixty (60) days during the financial year and has been in India for a total period of three hundred and sixty-five (365) days or more in the previous four (4) years.

Not-ordinarily resident

If an individual qualifies as a resident, the next step is to determine if he/she is a Resident ordinarily resident (ROR) or an RNOR. He will be a ROR if he meets both of the following conditions:

1. Has been a resident of India in at least 2 out of 10 years immediately previous years and

2. Has stayed in India for at least 730 days in 7 immediately preceding years

Therefore, if any individual fails to satisfy even one of the above conditions, he would be an RNOR.

From F.Y. 2020-21, a citizen of India or a person of Indian origin who leaves India for employment outside India during the year will be a resident and ordinarily resident if he stays in India for an aggregate period of 182 days or more. However, this condition will apply only if his total income (other than foreign sources) exceeds Rs 15 lakh. Also, a citizen of India who is deemed to be a resident in India (w.e.f F.Y. 2020-21) will be a resident and ordinarily resident in India.

NOTE: Income from foreign sources means income which accrues or arises outside India (except income derived from a business controlled in India or profession set up in India).

B. STATUS OF A COMPANY

The IT Act recognises the following types of companies:

- Domestic Company: An Indian company or any other company is a domestic company which, in respect of its income is liable to tax, has made the prescribed arrangement for the declaration and payment, within India, of the dividends payable out of such income liable to tax.

- Foreign Company: It is a company that is not incorporated in India, and which has not made prescribed arrangements for declaration and payment of dividends within India.

- A Company is a resident of India if:

    - it is a domestic (Indian) company; or

    - In case of a foreign company, a company shall be considered a resident if it has place of effective management in India any time during the year. The term place of effective management has been defined to mean a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole area in substance are made.

This may mean the undertaking of the principle and essential affairs or policy, finance, utilisation of profits and other important matters concerning the management of the company. Thus, in case the essential matters of a foreign company are conducted in India any time in the previous year, the said company would be resident in India for the relevant previous year. Usually control and management of a company's affairs is situated at the place where meetings of its board of directors are held.

Domestic companies are subject to taxation as per the following table:

Particulars	Turn-Over Up to 400 Crore in PY	Turn-Over Exceed 400 Crore in PY	Section 115BA	Section 115BAA	Section 115BAB
AY	-	-	2017-18	2020-21	2020-21
Applicability	All domestic companies	All domestic companies	Manufacture or production of any article or thing and research **AND** set-up and registered on or after the 1st day of March, 2016	All domestic companies	Set-up and registered on or after 1t day of October 2019 **AND** commenced manufacturing or production of an article or thing on or before the 31st day of March, 2023
Tax Rate	25%	30%	25%	22%	15%
Surcharge	7% or 12% (if applicable)	7% or 12% (if applicable)	7% or 12% (if applicable)	10% (mandatory)	10% (mandatory)
HEC	4%	4%	4%	4%	4%
MAT	15%	15%	15%	N.A.	N.A.

IX. TAX PAYABLE BY FOREIGN COMPANIES

As per the IT Act, any company which is not a domestic company, is a foreign company. Generally speaking, a company, which is registered outside India, will be treated as a foreign company. Business operations of a foreign company in India may be carried out in any of the following manners:

- As a foreign company without carrying out any business activities within India i.e., through supply of plant and machinery, providing technical know-how or by lending money;

- Through a project office in India i.e., when a foreign company takes- up a project in India and opens a project office, its income will be taxed as a foreign company;

- Through a branch office in India i.e., where a foreign company conducts its business through its branch office in India, the profits of the branch will be taxed in the normal way;

- Through a liaison office in India. Generally, a liaison office of a foreign company is not permitted to carry out any business activities in India. Therefore, it is unlikely for such an office to have any income in India. However, if any income arises to a liaison office, it will be taxed at the rates applicable to foreign companies.

- Taxation rates of Foreign companies:
  - Non resident or foreign companies are taxed at 40% of the total income
  - Plus: An additional surcharge @2% of tax where total income exceeds INR 10 million but do not exceed INR 100 million or additional surcharge @5% of tax if total income exceeds INR 10 million
  - Plus: Health & Education Cess: An additional cess of 4% of such tax and surcharge shall be added.

X. ADVANCE RULING

A foreign company/NRI can seek an advance ruling from the AAR to confirm the Indian tax implications of a transaction, which it has undertaken, or in planning to undertake. An advance ruling cannot be obtained for an issue that is already pending before the tax authorities or which relates to a transaction, which is prima facie, designed for tax avoidance.

XI. ROYALTIES AND FEES FOR TECHNICAL SERVICES

Where the gross total income of an assessee, being an Indian company or a person (other than a company) who is resident in India, includes any income received by the assessee from the Government of a foreign State or foreign enterprise in consideration for the use outside India of any patent, invention, design or registered trade mark and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of an amount equal to—

(*i*) forty per cent(40%) for an assessment year beginning on the 1st day of April 2001;
(*ii*) thirty per cent (30%) for an assessment year beginning on the 1st day of April 2002;
(*iii*) twenty per cent(20%) for an assessment year beginning on the 1st day of April 2003;
(*iv*) ten per cent (10%) for an assessment year beginning on the 1st day of April 2004.

of the income so received in, or brought into, India, in computing the total income of the assessee and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April 2005 and any subsequent assessment year.

XII. TAX CONCESSIONS FOR NRI'S

The IT Act provides for a tax concession in the case of a NRI, subject to fulfilment of the following conditions:

- The income must be derived by NRI (not being a company) or a foreign company;
- The nature of income must be other than salary, royalty, or fees for technical services;
- The income must be derived in pursuance of an agreement entered into by the Government with the government of a foreign state or an international organisation;
- The tax on the income must be payable by Government or the Indian concern under the terms of that agreement or any other related agreement approved by the Central Government. However, such tax liability may be discharged by the Indian concern for a maximum period of four (4) years.

In order to avail the aforesaid benefits, the agreement under which the income is derived should be approved by the Government. Further, the tax paid will not be treated as the income of a NRI or foreign company.

XIII. TRANSFER PRICING

The Indian Law, in the context of transfer pricing in respect of international transactions, has been substantially amended. Wide-ranging provisions have been introduced in order to effectively curb tax avoidance through transfer pricing in international transactions. The existing provisions contained in Section 92 of the IT Act empower the Assessing Officer to determine the amount of profit in international trading where it is felt that due to close connection between a resident and non-resident the proper amount has not been offered to tax. It has been substituted by a new section to provide that any income arising from an international transaction shall be computed having regard to ALP. It further provides the costs or expenses allocated or apportioned between two or more associated enterprises shall be at ALP.

Transfer pricing provisions apply in the calculation of taxable income if the following circumstances exist:

- There are two (2) or more enterprises;
- The enterprises are associated enterprises;
- The associated enterprises enter into a transaction;
- The transaction is an international transaction;

Where the circumstances discussed above exist:

- The income arising from the international transaction must be calculated on the basis of the ALP;
- Every person or entity entering into the international transaction has to maintain the prescribed documents and information; and
- Every person or entity entering into the international transaction has to obtain and provide a report from an accountant.

The provisions are not applicable, however, in a case where the application of ALP results in a downward revision of the taxable income in India.

XIV. ENTERPRISE

The term 'enterprise' means a person (including a permanent establishment of such person) who is, or has been engaged in an activity, relating to the production, storage, supply, distribution, acquisitions or control of articles and goods, or know-how, patents, copyrights of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights. It includes almost every type of business or activity. It also includes activities carried on by permanent establishment, which is defined to "include a fixed place of business through which the business of the enterprise is wholly or partly carried on. This is intended to ensure that transfer pricing provisions are also applicable to transactions between a head office and its branch or other permanent establishments.

XV. ASSOCIATED ENTERPRISE

The term 'associated enterprises', in relation to other enterprises, means an enterprise which participates directly or indirectly or through one or more enterprises, in the management or control or capital of other enterprise; or in respect of which one or more persons who participate directly or indirectly, or through one or more intermediaries, in the management or control or the capital of other enterprise. The two (2) enterprises shall be deemed to be associated enterprises if at any time during the fiscal year they satisfy any one (1) of certain specified criteria. These criteria include:

- One enterprise holds, directly or indirectly, at least twenty six percent (26%) of the voting right shares in the other enterprise;
- Any person holds, directly or indirectly, at least twenty six percent (26%) of the voting right shares in both the enterprises;
- A loan advanced by one enterprise to the other enterprise constitutes at least fifty one percent (51%) of the book value of the total assets of that enterprise;
- One enterprise guarantees at least ten percent (10%) of the total borrowings of the other enterprise;
- More than half of the BoD or at least one (1) executive director of one (1) enterprise are/is appointed by the other enterprise;
- More than half of the BoD or at least one (1) executive director of the enterprises are appointed by the same person[s];
- The manufacture or processing of goods or articles or business carried out by (1) one enterprise is wholly dependent upon the use of know-how, patents, or other specified intangibles of which the other enterprise is the owner or holds exclusive rights to;
- (1) one enterprise or person specified by it, supply and influence the prices and other conditions relating to ninety percent (90%) or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by the other enterprise; or
- The goods or articles manufactured or processed by (1) one enterprise are sold to the other enterprise, or to person specified by the other enterprise, and the prices and other conditions relating to such sales are influenced by such other enterprise.

Mere participation by one enterprise in the management, control or capital of the other enterprise, or the participation of one (1) or more persons in the management, control, or capital of both the enterprises does not make them associated enterprises unless one of the conditions discussed above is also fulfilled.

XVI. INTERNATIONAL TRANSACTION

A transaction would constitute an international transaction if:

- It is between two (2) or more associated enterprises, at least one of whom is a non-resident;
- It is in the nature of :
  - Purchase, sale, or lease of property;
  - Provision of services;
  - Lending or borrowing money;
- It has a bearing on profits, income, losses, or assets of such enterprises; or
- It is an agreement or arrangement for cost sharing.

XVII ARMS LENGTH PRICE (ALP)

The consequence of an international transaction is that any income or expenditure arising from the transaction will be calculated on the basis of the ALP. In other words, the actual income or expenditure on the basis of contracted values shall be substituted by the derived income/expenditure having regard to the ALP. ALP has been defined as a price, which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions.

The ALP shall be determined by any one of the following methods:

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional net margin method; or
- Such other method as may be prescribed by the Central Board of Direct Taxes.

Where the application of the five specific methods is not possible either due to difficulties in obtaining comparable data or due to uniqueness of transactions, any other method can be used. Possible methods of determining arm's length price under other methods are third party quotations, valuation reports, tender/bid documents, documents relating to negotiations, standard rate cards, commercial and economic models etc. A company may opt for the most appropriate method, but where more than one price is determined by the most-appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices. The second proviso to Section 92C(2) of the Income Tax Act provides that if the variation between the arm's length price so determined and the price at which the international transaction or specified domestic transaction has actually taken place does not exceed such percentage not exceeding 3% of the latter, as may be notified by the Central Government, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price.

XVIII. PENALTY

Understatement of profits on account of the non-application of the ALP, non-maintenance of documents and information, etc. is subjected to imposition of penalty.

XIX. INDIRECT TRANSFER

Taxation as capital gains on indirect transfer of assets is with respect to transactions involving indirect transfer of assets in India where the value of such assets (tangible or intangible) situated in India exceed INR 100 million and comprise at least fifty percent (50%) of value of total assets of the foreign company as on the valuation date. This has been made applicable to such scenarios wherein transfer of shares of a foreign company deriving substantial value from shares of Indian company is made between foreign companies.

Exception to such applicability is made where:

- Firstly, the non-resident transferor does not hold right to management, control, voting power or share capital exceeding five percent (5%) at any time immediately preceding the twelve (12) month period, in the company directly holding shares in the Indian company,

- Secondly, the non-resident transferor does not hold right of management, control in such company, nor does he hold any right in such other company which would entitle him to right of management, control, voting power or share capital exceeding five percent (5%) in direct holding company.

- Thirdly, indirect transfer shall also not imply transfer of shares of a foreign company deriving substantial value from shares of Indian company, in a scheme of amalgamation or de-merger between two foreign companies, subject to prescribed conditions.

- For a non-resident transferor, only that part of income shall be deemed to accrue or arise in India, which is reasonably attributable to assets located in India i.e., gains arising from transfer of share or interest in a foreign company/entity shall be taxable to the extent as such share or interest derives its value from the Indian assets.

XX. WITHHOLDING TAX BEFORE REMITTANCE OF INCOME

Indian tax law provides for deduction of tax at source on various types of income. Deducting Tax at source is popularly known as Withholding Tax. The various types of income where tax can be deducted at the time of making the payment or at the time of crediting in the book of accounts of the payer are salary; interest on securities; dividends; interest other than "Interest on Securities"; winnings from lottery or crossword puzzle; winnings from horse race; insurance commission; payment to NRI sportsmen or sports commission; payment to contractors and sub-contractors; payment in respect of deposits under National Savings Scheme, etc; payments on account of repurchase of units by Mutual Fund or UTI; commission etc. on the sale of lottery tickets; commission, brokerage etc.; rent; fee for professional or technical services; income in respect of units; payment on compensation on acquisition of capital asset; income from units; income from foreign currency bonds or shares of Indian company; income of FIIs from securities; income in respect of units of NRIs; Interest or dividend or other sums payable to Government, RBI or certain corporations; on income payable "Net of Tax" (Section 195A of Income Tax Act, 1961); any other sum payable to a NRI which is chargeable to tax under the provisions of Income tax Act.(Section 195 of Income Tax Act, 1961).

NRIs can remit their income from India after submitting to the authorised dealer, an undertaking and a Chartered Accountant's Certificate in the format prescribed by CBDT.

XXI. FOREIGN COLLABORATOR'S TAX LIABILITY

The liability of foreign collaborators for payment of tax can be in respect of lump sum payment, supply of drawings and designs, royalty, and fees for technical services, allotment of shares, dividend/share of profit, profit on sale of plant and machinery.

A. Taxation of Business

Any income from business and profession is taxable when it accrues or is received in India. Any income, which accrues or arises from any business connection in India, is deemed to arise in India.

The income of individuals in India for the financial year AY 2021-22 is subject to taxation at the following rates:

Type of Company	Corporate Tax Rate	Surcharge on Net Income Less than Rs. 1 crore	Surcharge on Net Income greater than Rs. 1 Crore and less than Rs. 10 Crore	Surcharge on Net Income greater than Rs. 10 Crore
Domestic with annual turnover up to Rs 400 Crore	25%	Nil	7%	12%
Domestic Company with turnover more than Rs 400 Crore	30%	Nil	7%	12%
Foreign Companies	40%	Nil	2%	5%

- For resident individuals (below sixty (60) years at any time during the previous year)

Taxable income slabs	Income tax rates
Up to Rs 2,50,000	Nil
Rs 2,50,001 to Rs 5,00,000	5%
Rs.5,00,001 to Rs.7,50,000	10%
Rs.7,50,001 to Rs.10,00,000	15%
Rs. 10,00,001 to Rs. 12, 50,000	20%
Rs. 12,50,001 to Rs. 15,00,000	25%
Above Rs.15,00,000	30%

- Surcharges to be levied:

Taxable Income	Surcharge (%)
Income above Rs 50 lakh but below Rs 1 crore	10
Income above Rs 1 crore but below Rs 2 crore	15
Income above Rs 2 crore but below 5 crores	25
Income above Rs 5 crore	37

Chapter 10

REGULATORY ENVIRONMENT

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

FEMA pertains to all aspects of dealing and holding of foreign exchange, current and capital account transactions, the export of goods and services, realisation, and repatriation of foreign exchange. Under FEMA, the most noticeable aspect is that there is no imprisonment prescribed for contraventions of the law, as all offences under FEMA are civil offences punishable with a fine. FEMA is much more liberal law and in tune with the new economic thinking and policies of the Government. FEMA has introduced the following significant changes -

- The definition of 'person resident in India' has been modified. A person who stays in India for more than one hundred and eighty-two (182) days in a financial year is treated as a person resident in India;
- Current account transactions are allowed without much restriction;
- Capital account transactions are regulated by RBI;
- Offences under FEMA are treated as civil wrongs, contravention invites fines & penalties.
- No criminal prosecution or imprisonment under FEMA for contravention of its provisions;
- There are two appellate authorities under FEMA, namely the appellate authority under FEMA is Special Director (Appeals) and the appeal against an order of Special Director (Appeals) lies with "Appellate Tribunal for Foreign Exchange".
- The concept of 'authorised person' has been widened to include banks, moneychangers, offshore banking units etc.

THE COMPETITION ACT, 2002

The Competition Act, 2002 is in the nature of anti-trust laws and seeks to protect the interest of consumers against monopolies so that the benefits of competition are available to one and all. The Competition Act, 2002 replaces the MRTP Act to put in place a legal framework, which is more in line with the economic development of the country in synergy with international economic developments. The Competition Act, 2002 also entails the dissolution of the MRTP Commission and the formation of the CCI. Competition Act, 2002 seeks to prevent anti-competitive practices with minimal Government intervention. It also prevents artificial entry barriers in order to facilitate access to market and thus, compliments other competition promoting activities too. Since it curtails abuse of power, it results in a better and more efficient allocation of resources.

Competition Commission of India

The CCI is a quasi-judicial body which shall inter alia look into the violations of the Competition Act based on its own knowledge, or on information or complaints received/ references made by the Central/ State Governments or Statutory Authorities and is empowered to grant interim relief or any other appropriate relief/ compensation/ order imposing penalties etc. (an appeal from its orders shall lie to the Supreme Court of India) and direct the Director General of the Commission to initiate investigation. In addition, it is also empowered to levy penalty for contravention of its orders, failure to comply with its directions, making false statements, and omission to furnish material information.

The main objective of this Act is to ensure fair competition in India by prohibiting trade practices causing appreciable adverse effect on competition in Indian markets; to create awareness and impart training on competition issues by undertaking competition advocacy and to curb negative aspects of competition through the medium of CCI. This Act lays

down provisions regulating combination and prohibiting anti-competitive agreements and the abuse of dominant position by business enterprises. The CCI basically serves three purposes:

i. Eliminates those practices which adversely affect the competition.
ii. It promotes and sustains competition.
iii. It also protects the interests of the consumers.

The commission has regulatory and quasi-judicial powers.

A. Anti-competitive Agreements

The Competition Act, 2002 deals with anti-competitive agreements[47] and provides that any agreement entered into by business entity(s) engaged in identical or similar trade of goods or provision of services, regarding any aspect(s) of business which has the effect of causing an appreciable adverse effect on competition within India is regarded as anti-competitive agreement and is consequently considered void.
Also, agreements amongst enterprises/ persons at different stages of the production chain in different markets with regard to production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance may be considered anti-competitive if they similarly cause or are likely to cause appreciable adverse effect on competition in India.

This legislation retains the right of a person to restrain any infringement of his IPR.

B. Abuse of dominant position

The Competition Act, 2002 prohibits abuse of dominant position[48]. Such an abuse is said to occur if an enterprise directly or indirectly imposes unfair or discriminatory condition in purchase or sale of goods or services; or unfair or discriminatory price in purchase or sale (including predatory price) of goods/service. Dominant per se isn't illegal but abuse of dominance is illegal.

Similarly, unfair, or discriminatory restriction/limitation on production of the goods or provision of services or market thereon; or on technical/scientific development relating to goods/services to the prejudice of consumers amounts to an abuse of dominant position. Further, indulgence in practices resulting in denial of market access, using the dominant position in one relevant market to enter into/protect another relevant market and other like activities are said to amount to such abuse.

C. Regulation of combinations

With a view to preventing combinations, which would cause an appreciable adverse effect on competition in India, the Government has made suitable provisions in the Competition Act, 2002, regulating mergers and acquisitions of enterprises (with exceptions in the case of public financial institutions/FIIs/Banks or VC funds), and provided for adequate Governmental scrutiny[49].

A combination is defined under three (3) heads. Firstly, as an acquisition where the parties participating in the transaction of acquisition have either, in India, assets worth more than rupees thousand (Rs.1000) crores, or turnover more than rupees three thousand (Rs.3000) crores, or in India or outside India, in aggregate, assets worth more than US $ 500 million or turnover more than US $ 1500 million, or the group to which the acquired entity would belong, would jointly have, either in India, assets worth more than Rs. 4000 crores or turnover more than rupees twelve thousand (Rs.12000) crores; or, in India or outside India, in aggregate, assets worth more than US $ 2 billion or turnover more than US $ 6 billion.

[47] Section 3, Competition Act 2002
[48] Section 4, Competition Act 2002
[49] Section5, Competition Act 2002

Secondly, as acquiring of control by a person over an enterprise when such person already has direct or indirect control over another enterprise engaged in production, distribution or trading of similar/ identical/ substitutable goods or provision of a similar/ identical service, if the two enterprises jointly have, in India, assets worth more than Rs. 1000 crores or turnover more than rupees three thousand (Rs. 3000) crores, or in India or outside India, in aggregate, assets worth more than US $ 500 million or turnover more than US $ 1500 million. or, the group, to which the acquired enterprise would belong, would jointly have, in India, assets worth more than rupees four thousand (Rs. 4000) crores or turnover more than rupees twelve thousand (Rs. 12000) crores, or in India or outside India, in aggregate, assets worth more than US $ 2 billion or turnover more than US $ 6 billion.
Thirdly, as any merger or amalgamation in which the resulting enterprise has, either in India, assets worth more than Rs.1000 crores or turnover more than Rs.3000 crores, or in India or outside India, in aggregate, assets worth more than US $ 500 million or turnover more than US $ 1500 million. or the group to which the resulting enterprise would belong, would have either in India, assets worth more than Rs.4000 crores or turnover more than Rs.12000 crores, or in India or outside India, assets worth more than US $ 2 billion or turnover more than US $ 6 billion.

No person or enterprise shall enter into a combination, which causes or is likely to cause an appreciable adverse effect on competition in the relevant market in India. The enterprise/person proposing to enter into a combination may, at his option, give notice to the CCI. The CCI then inquiries into the accuracy of the disclosure, and whether the combination has or is likely to have an appreciable adverse effect on competition, and take appropriate steps to permit, modify or prevent such combination.

FOREIGN TRADE POLICY 2015-2021

This Policy came into force with effect from 1 April 2015 and was valid up to 31 March 2020, but the existing foreign trade policy which had to retire on 31st March 2020, but was extended to March 31st, 2021, amid the Coronavirus outbreak in India according to the Notification provided by the Directorate General of Foreign Trade.[50] The primary aim is to cater and to encourage both the manufacturing and services sector, but particularly focusing on increasing the efficiency at which business is carried out. The purpose is not the mere earning of foreign exchange, but the stimulation of greater economic activity.
With a view to doubling our percentage share of global trade within five (5) years and expanding employment opportunities, especially in semi urban and rural areas, certain special focus initiatives have been identified for the agriculture, handlooms, handicraft, gems and jewellery and leather sectors. Government of India shall make concerted efforts to promote exports in these sectors by specific sectoral strategies that shall be notified from time to time.

Merchandise Exports from India Scheme (MEIS)

This Scheme concerns the export of specified goods to specified markets. The main aim of this Scheme is to increase India's export competitive edge by negating the infrastructural inefficiencies and linked costs incurred in the export of products made in India; with particular regards to products that have high export intensity and employment prospects. In the process, it will allow for an equal playing field amongst exporters. Under this Scheme, "Duty Credit Scrip" will be given as rewards, and the export of goods through courier or foreign post offices using e-commerce will be entitled for these above-mentioned rewards.

Services Exports from India Scheme (SEIS)

The main aim of this Scheme is to stimulate the export of notified services from India. The latter services will be rewarded under this Scheme but subject to certain conditions. The rate of reward is dependent on the net foreign exchange earned. For example, to gain eligibility for Duty Credit Scrip, the minimum net fee foreign exchange earnings for service providers and individual service providers should be US$15,000 and US $10,000, respectively. Also, only if the IEC holder has an active IEC at the time of discharging such services, will he be entitled to a reward.

[50] Ministry of Commerce and Industry, *Notification No.57/2015-2020,* March 31st,2020

Common provisions for Exports from India Schemes (MEIS and SEIS)

The schemes take effect from the date of notification of this policy, 1 April 2015. Therefore, the rewards granted under the scheme will be applicable for exports made and services offered on and after the above-mentioned date. However, as with both the Schemes there are several categories that are ineligible for receiving the rewards. In the interest of the public, the Government also maintains the right to specify products or services or markets that will not be entitled to duty credit scrip.

Export Promotion Capital Goods Scheme

A number of improvements have been made to the Export Promotion Capital Goods Scheme like additional flexibility has been introduced for fulfilment of export obligation in order to reduce difficulties of exporters of goods and services. Technological upgradation has been facilitated and incentivised. Under this Scheme, the customs duty for the import of capital goods for pre-production, production and post-production are eliminated. Transfer of capital goods is permitted to group companies and managed hotels. In case of movable capital goods in the service sector, the requirement of installation certificate from Central Excise has been done away with. Export obligation for specified projects will be equal to six (6) times of duty saved on capital goods and to be achieved in six (6) years starting from the date of issue of authorisation. It shall be calculated based on concessional duty permitted to them. This would improve the viability of such projects.

Duty Exemption / Remission Schemes

Duty Exemption Schemes enable duty free import of inputs required for export production. It consists of both Advance Authorisation and Duty-Free Import Authorisation. An Advance Authorisation Licence is issued as a Duty Exemption Scheme. A Duty Remission Scheme enables post export replenishment/ remission of duty on inputs used in the export product. An Advance Licence Authorisation is issued to allow duty free import of inputs, which are physically incorporated in the export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts etc. which are consumed in the course of their use to obtain the export product, may also be allowed under the Scheme. Advance Authorisation Licence may be issued for physical exports including exports to SEZ to a manufacturer exporter or merchant exporter tied to supporting manufacturer(s) for import of inputs required for the export product. Advance Authorisation Licence may also be issued for intermediate supply to a manufacturer-exporter for the import of inputs required in the manufacture of goods to be supplied to the ultimate exporter/deemed exporter holding another Advance Authorisation Licence. Advance Licence Authorisation can be issued for deemed export also. Advance Authorisation is issued on minimum value addition is fifteen percent (15%) except for items in the Gems & Jewellery Sector.

Duty Free Import Authorisation Duty Free Replenishment Certificate (DFRC) is issued to a merchant-exporter or manufacturer-exporter for the import of inputs used in the manufacture of goods without payment of basic customs duty.

Star Export Houses

A new rationalized Scheme of categorization of status holders as Star Export Houses has been introduced, designating them from One (1) Star to Five (5) Star, depending on their total imports during the current and previous three (3) years.

Export Oriented Unit Scheme

EOUs perform important role in boosting exports. EOUs are now exempted from Service Tax in proportion to their exported goods and services. EOUs are permitted to retain hundred percent (100%) of export earnings in Exchange Earners' Foreign Currency Account. Income Tax benefits on plant and machinery have been extended to DTA units which convert to EOUs. Import of capital goods is on self-certification basis for EOUs. For EOUs engaged in Textile and Garments manufacture leftover materials and fabrics up to two percent (2%) of CIF value or quantity of import are allowed to be disposed of on payment of duty on transaction value only.

Free Trade and Warehousing Zones

A new Scheme to establish FTWZ has been introduced to create trade-related infrastructure to facilitate the import and export of goods and services with freedom to carry out trade transactions in free currency. This is aimed at making India

into a global trading hub. Foreign Direct Investment is permitted up to hundred percent (100%) in the development and establishment of the zones and their infrastructural facilities. Each zone would have minimum outlay of rupees hundred crore (Rs 100 crores) and five (5) lakh sq. mts. built up area. Units in the FTWZs would qualify for all other benefits as applicable for SEZ units.

INTELLECTUAL PROPERTY LAWS

IPR in India are governed by the following Acts:

1. The Patents Act, 1970
2. Trade and Merchandise Marks Act, 1999
3. Copyright Act, 1957
4. Patents And Designs Act, 1911

The aforesaid Acts are discussed briefly, in the paragraphs below:

A. The Patents Act, 1970

The history of Patent law in India starts from 1911 when the Indian Patents and Designs Act, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals, and microorganisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition have been also introduced.

An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section 3 and 4 of the (Indian) Patents Act, 1970.

In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee[51].

The term of every patent in India is twenty years from the date of filing the patent application[52], irrespective of whether it is filed with provisional or complete specification. However, in case of applications filed under the Patent Cooperation Treaty (PCT), the term of twenty years begins from the international filing date.

If the grant of the patent is for a product, then the patentee has a right to prevent others from making, using, offering for sale, selling or importing the patented product in India. If the patent is for a process, then the patentee has the right to prevent others from using the process, using the product directly obtained by the process, offering for sale, selling or importing the product in India directly obtained by the process.

Before filing an application for grant of patent in India, it is important to note "What is not Patentable in India?" Following i.e., an invention which is (a) frivolous, (b) obvious, (c) contrary to well established natural laws, (d) contrary to law, (e) morality, (f) injurious to public health, (g) a mere discovery of a scientific principle, (h) the formulation of an abstract theory, (i) a mere discovery of any new property or new use for a known substance or process, machine or apparatus, (j) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance, (k) a mere arrangement or rearrangement or duplication of known devices, (l) a method of agriculture or horticulture and (m) inventions relating to atomic energy, are not patentable in India[53].

[51] Section 6(2), Indian Patents act 1970
[52] Section 53, Indian Patents act 1970
[53] Section 3, Indian patents Act.

Patents (Amendment) Rules 2020

The Government in exercise of the powers conferred upon it under the Patents Act, 1970[54] had passed the Patents (Amendment) Rules of 2020 (the "Rules") on 9th October 2020. These Rules have modified Form 27 of the Act through which statements regarding the working of patent invention on a commercial scale have to filed by Patentees or Licensees in India. The statement of commercial working of a patented invention will be filed by every patentee and licensee for every financial year within 6 months from the start of the following financial year i.e., by 30th September of the following year.

Patent (2nd Amendment) Rules, 2020: The Patent (2nd Amendment) Rules, 2020 ("Revised Rules 2020") had been issued on 4th November 2020 with immediate effect. The key highlights of the Revised Rules are as follows:

- The fees applicable for filing and prosecuting Indian patent applications for small entities have been reduced and made at par with natural persons/start-ups.
- There is no difference in scale of fees which shall be payable in case the small entity ceases to be a small entity after filing of the patent application.
- Request for expediated examination filed by small entities shall not be questioned merely on the grounds that it cases to be a small entity due to crossing of financial threshold limit as notified by the competent authority.

Patents (Amendments) Rules 2021

The Ministry of Department for Promotion of Industry and Internal Trade notified the Patents (Amendments) Rules 2021 (Patent Amendment) which have come into force on 21 September 2021.

Amendment

The definition of educational institutions has been introduced under the Patent Amendment. The Patent Amendment includes educational institution along with natural person, start-up and small entity in the category of applicants.

An educational institution has been defined as "…a university established or incorporated by or under Central Act, a Provincial Act, or a State Act, and includes any other educational institution as recognized by an authority designated by the Central Government or the State Government or the Union territories in this regard;"

The educational institution category can be claimed by filing supporting documentary evidence to this effect. Though, the nature of documentary evidence has not been specified it may be inferred that the recognition under a statute or any other document issued by the Central/State Government may be submitted as documentary evidence.

The Government of India by a press release dated 23 September 2021 has extended the 80% rebate on patent filing fees to educational institutions. This should encourage educational institutions to file for more patents to foster innovation and facilitate the commercialization of new technologies.

B. The Trademarks Act, 1999

Under the TradeMarks Act, 1999, the most noticeable aspect is the recognition of service marks; earlier trademarks only in respect of "goods" were permitted to be registered in India. The Trademarks Act, 1999, recognises and provides for registration of service marks in India. This Trade Marks Act seeks to classify goods and services pertaining to International Standards. The said Trademarks Act also envisages the concept of "Collective Marks" owned by an association to distinguish between the goods and services of one person from the other. However, the same must not be misleading in character or cause deception of any kind. The final authority for registration of certification of a trademark has been shifted from the Central Government to the Registrar of Trademarks.

[54] Section 159 of the Patents Act 1970

A trademark is a visual symbol in the form of a word, device or label applied to articles of commerce, indicating to the purchasing public that they are goods manufactured or otherwise dealt in by a particular person, as distinguished from similar goods manufactured or dealt in by other persons[55].

An application for registration of a foreign trademark may be made at any time. The trademark authorities are located in Delhi, Mumbai, Kolkata, and Chennai. Any person claiming to be the proprietor of a trademark used or proposed to be used by him may apply in writing in prescribed manner for registration. The application should contain the trademark, the goods/services, name and address of applicant and agent (if any) with power of attorney, period of use of the mark and signature. The first step is to make a search at the Registrar's office whether the trademark is registered already. Thereafter, an application may be filed for registration. The application should be in English or Hindi. It should be filed at the appropriate office. The registration process generally takes a long time.[56]

In the case of unregistered trademarks, the common law remedy of action against 'passing off' is available. The remedies against infringement of a registered trademark include an injunction under the civil law for damages, rendition of account of profits and delivery-up of the offending article for erasure or destruction. A suit may also be filed by the licensee/the licensor depending upon the terms of the license agreement. Action for 'passing off' can be taken by the owner of the unregistered foreign trademark if the owner can prove that the foreign trademark is a well-known trademark in India, and it has a "spill-over reputation" in India.[57]

Infringement of a trademark is a cognizable offence and also entails criminal liability. The licensor has the first right to file the suit for infringement[58]. However, in case the licensor does not take action within three (3) months of the licensee informing the licensor of the infringement, the licensee may also take action. The Trademark Rules, 2002 were amended in 2014 wherein the fee required for registration of trademark has been increased.

Trade Mark (Amendment) Act, 2010

The Trade Marks (Amendment) Bill was passed by the Parliament and assented to by the President on 21stSeptember 2010. The Trade Marks (Amendment) Rules, 2013 have been made to give effect to the Trade Mark (Amendment) Act 2010.By notification dated 8th July 2013, the Trade Marks (Amendment) Act 2010 and the Trade Marks (Amendment) Rules, 2013 came in to force to enable India to accede to the Madrid Protocol. The Madrid Protocol is a simple, facilitative and cost effective system for registration of international trade marks. India's membership of the protocol has enabled Indian companies to register their trade marks in Member Countries of the Protocol through filing a single application in one language and by paying one-time fee in one currency.

Amendment of Section 11:

The explanation for clause (a) under Section 11 is substituted as follows:

"(a) a registered trade mark or an application under Section 18 bearing an earlier date of filing or an international registration referred to in Section 36E or convention application referred to in Section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trademarks;"

One of the major changes brought about by the amendments include Section 23(1) (b) wherein the registration process for a mark is to be completed in a time bound manner "within eighteen months of the filing of the application". This change will challenge every aspect of the registration process within the Trademark Office in India, forcing deadlines at every stage of the registration procedure laid out under the Trademarks Act and supplemented by the Trademark Rules in India.

[55] 2(zb), Trademark Act 1999
[56] Section 18, trademarks Act 1999
[57] Section 135, The Trademarks Act 1999
[58] Section 75, The Trademarks Act 1999

A four month period has been given by the new amendment in Section 21 & in Rule 47(1) of the Act and Rules for filing notice of opposition from the date of the advertisement or re-advertisement. The sub-Rule (6) of Rule 47 & Form TM-44 have been omitted.

Under the new amendments, the concept of textile goods and textile trade marks (consisting exclusively of numerals or letters) has come to an end by omitting Chapter X of the principal Act & Part IV and Part VI of Chapter VII of the Trade Marks Rules, 2002 have also been omitted along with Form TM-22 and Form TM-45.

Another major amendment is the insertion of a new Chapter IVA in the principal Act and Chapter IIIA in the Rules in light of international applications and registrations under the Madrid Protocol which have following major elements:

- A new interpretation/definition clause has been inserted in accordance with the Madrid Protocol (S.36B read with Rule 67A).
- Applicant or registered proprietor of trademark under Section 18 or under Section 23 ('basic application' or 'basic registration') of the Act may make an international application in Form MM2 (E) along with prescribed fees in Swiss francs. The Registrar shall certify & forward it to the International Bureau within two months from the date of receipt of the said application & for this, a fee of INR 2000 is payable to the Registrar towards handling charges (S. 36D read with Rule 67E & 67F).
- A separate record for international registration where India has been designated shall be kept by the Registrar called the 'Record of Particulars of International Registration (S. 36E read with Rule 67G).
- For a period of five years from the date of an international registration, if the initial basic national application/registration ceases to have effect, through a withdrawal, refusal, cancellation following a decision of the Office of origin, or Court, or voluntary cancellation, or non-renewal, the international registration will no longer be protected. After the expiry of a period of five years from the date of international registration, the registration becomes independent of the basic registration or basic application (S.36D & S.36E).
- Provided that, where an appeal is made against the decision of registration nd an action requesting withdrawal of application or an opposition to the application has been initiated before the expiry of the period of five years of an international registration, any final decision resulting in withdrawal, cancellation, expiration or refusal shall be deemed to have taken place before the expiry of five years of the international registration. (Provision of Sub-section 5 of Section 36D).
- The Registrar shall examine the application within 2 months where India has been designated. If grounds for objection are found during the examination by the Registrar, or if an opposition is filed, the Registrar can declare a provisional refusal (within 18 months of receipt of the application's notification from the International Bureau for India) for protection of the mark in that member country (S.36E read with Rule 67H).
- When the protection of an international registration has not been opposed and the time for notice of opposition has expired, the Registrar shall within a period of eighteen months of the receipt of advice under sub-section (1) notify the International Bureau its acceptance of extension of protection of the trade mark under such international registration and, in case the Registrar fails to notify the International Bureau, it shall be deemed that the protection has been extended to the trade mark (S.36E).
- The international registration of a trade mark at the International Bureau shall be for a period of ten years and may be renewed for a period of ten years from the expiry of the preceding period and subject to payment of a surcharge prescribed by the rules, a grace period of six months shall be allowed for renewal of the international registration (s. 36G).

C. The Copyright Act, 1957

The object of copyright law is to encourage authors, composers, artists, and designers, to create original works by rewarding them with exclusive right for a limited period to exploit the work for monetary gains. The term of copyright in respect of published literary, dramatic, musical, or artistic work subsists during the lifetime of the author and until sixty (60) years from the calendar year following the year of the author's death. [59]

Registration of a copyright is not compulsory. The advantage of copyright registration is that it is prima facie evidence of copyright admissible in a court of law. Copyrights can be registered at the copyright office in Delhi. In case a brand name or logo is to be registered as a copyright, the Registrar will ask for a trademark registration before granting a copyright. In such cases, registration can take up to two (2) years[60].

Besides the civil liability, copyright infringement is a criminal offence too. In view of the requirements of the software industry, among others, more stringent measures for the enforcement of copyright provisions are currently being undertaken.

India is a signatory to the Berne Convention and the United Nations Copyright Convention. Therefore, under the Indian Copyright Order, 1991, any work that is protected in a member country to those conventions is granted automatic protection in India.

The Copyright Act, 1957 was latest amended in the year 2017. The amendments may be categorized as:

- Amendments to rights in artistic works, cinematograph films and sound recordings - clarify the rights in artistic works, cinematograph films and sound recordings, by providing that the right to reproduce an artistic work, to make a copy of a cinematograph film or embodying a sound recording now includes 'storing' of it in any medium by electronic or other means. It also creates liability for the internet service providers.[61]

- WCT and WPPT related amendment to rights - This Copyright Act has upheld performers' rights. The amended Copyright Act enables performers to be entitled for royalties in case their performances are subjected to commercial use[62]. This is a welcome development as earlier the performers were not entitled to royalties because they only had a negative right to prohibit 'fixation' of their live performances.

- Author-friendly amendments on mode of Assignment and Licenses – This amendment strengthen the position of the author if new modes of exploitation of the work come to exist.

- Amendments facilitating Access to Works – following have been made compulsory under the amended Copyright Act[63]:

    i. Grant of compulsory licenses.
    ii. Grant of statutory licenses.
    iii. Administration of copyright societies.
    iv. Fair Use provisions.
    v. Access to Copyrighted works by the disabled.
    vi. Relinquishment of Copyright.

- Strengthening enforcement and protecting against Internet piracy - As a result of the amendment, any person who circumvents an effective technological measure applied for the protection of any of the rights, with the intention of infringing such rights, shall be punishable with imprisonment, which may extend to two (2) years and shall also be liable to fine. The rationale is to prevent the possibility of high-rate infringement (digital piracy) in the digital media.

[59] Section 22, The Copyright Act 1957
[60] Section 10 The Copyright Act 1957
[61] Section 13, The Copyright Act 1957
[62] Section 18, The Copyright Act 1957
[63] Section 22, The Copyright Act 1957

- Reform of Copyright Board and other minor amendments - Considering the diverse nature of issues being dealt with by the Copyright Board, Section 11 of the Copyright Act, 1957 relating to the constitution of the Copyright Board has been amended to make it a body consisting of a Chairman and two (2) members.

COPYRIGHT (AMENDMENT) RULES, 2021

- The amendments have harmonised the Copyright Rules with the provisions of Finance Act, 2017 whereby the Copyright Board has been merged with Appellate Board.
- To reinforce transparency in working of copyright societies a new rule has been introduced, whereby the copyright societies will be required to draw up and make public an Annual Transparency Report for each financial year.
- The compliance requirements for registration of software works have been largely reduced, as now the applicant has the liberty to file the first 10 and last 10 pages of source code.
- The time limit for the Central Government to respond to an application made before it for registration as a copyright society is extended to 180 days, so that the application can be more comprehensively examined.
- It aims to ensure smooth and flawless compliance in the light of the technological advancement in digital era by adopting electronic means as primary mode of communication and working in the Copyright Office.
- A new provision regarding publication of a copyrights journal has been incorporated, thereby eliminating the requirement of publication in the Official Gazette.
- In order to encourage accountability and transparency, new provisions have been introduced, to deal with the undistributed royalty amounts and use of electronic and traceable payment methods while collection and distribution of royalties.

D. The Designs Act, 2000

The Designs Act, 2000 covers registration of some special shape or configuration, a special look, which may have an aesthetic appeal. Application for registration of a design should be for a new or original design not previously published[64]. The process of registration of design or license is the same as for patents. It generally takes six to eight (6-8) months for registration and the registration is valid for upto ten (10) years, which can be extended by another five (5) years. The office of the Registrar is located in Calcutta.

A design registered under Designs Act, 2000 is not eligible for protection under the Copyright Act, 1957. The copyright shall subsist for a period of ten (10) years from the date of registration, which can be extended by a term of another five (5) years. The remedies available against infringement of copyright in a design are[65]:

- An injunction;
- Damages and compensation;
- Delivery up of the pirated copies of articles;
- Sum of rupees twenty-five thousand (Rs 25,000) recoverable as contract debt, which shall not exceed rupees fifty thousand (Rs 50,000) in respect of one (1) design.

[64] Section 3, The Designs Act 2000
[65] Section 22 & 23, The Designs Act 2000

DESIGNS (AMENDMENT) RULES, 2021

"The Amendment Rules" were notified in the Official Gazette on January 25, 2021 and are deemed to be in effect from that date.

The Amendment Rules have sought to streamline the process of applying for and prosecuting industrial designs in India. The notable features of the Amendment Rules are:

1. **Recognition of startups**

   The Amendment Rules have recognized startups as a category of applicant and have also extended a rebate on the official fees payable for such entities. In order to claim startup status, an entity must satisfy the following criteria:

   - Indian entities must be recognised as a startup by the competent authority under the Union Government's Startup India initiative
   - In the case of foreign entities, the following criteria must be satisfied:
     a) The entity must be a private limited company, limited liability partnership, or partnership firm.
     b) Its turnover at any point during the course of its business (from inception) should not exceed INR 100 crores (approximately USD 13.7 million as on date)
     c) The entity would be considered a startup only for a period of 10 years from the date of incorporation.
     d) An entity formed by splitting up or reconstruction of an existing business shall not be considered a "Startup"

   For a foreign entity to claim the benefit of being a startup, an affidavit (which under Indian practices would need to be notarized, although this has not been explicitly mentioned in the Amendment Rules) along with supporting documents must be submitted at the time of filing the application.

2. **Reduction in fees for small entities & simplification of fee structure**

   Under the previous Designs Rules, the official fees payable varied depending on whether the applicant entity was a natural person, small entity, or any other type of entity. The fees for a small entity were higher than those applicable for a natural person but less than for other entities. Under the 2021 Amendment Rules, all-natural persons, small entities, and startups shall pay the same fees. This has led to a nearly 50% reduction in the fees payable for small entities (for most actions).

   In order to claim startup status, an entity must satisfy the following criteria:

   a. Indian entities must be registered under the MSME Act, 2006.
   b. Foreign entities must produce "any document as evidence of eligibility"

   Notably, the text of the Amendment Rules does not require an affidavit to claim small entity status, as it does for startups. It may be likely that some clarifications will be issued shortly in this regard.

3. **Service by email and mobile phone**

   Keeping the recent global trend of moving to digital communications, the Amendment Rules now mandate an Indian cell phone number to be provided at the time of recording an address for service of documents.

4. **The difference in fees to be paid in cases of transfer of rights**

In case an application processed by a natural person, startup or small entity is fully or partly transferred to any entity not within the ambit of any of these three categories, the difference, if any, in the scale of fees between the fees charged from the natural person, startup or small entity and the fees applicable for the new entity are to be paid by the new applicant along with the request for transfer.

Notably, this provision does NOT apply in cases where a startup or small entity ceases to be so due to the lapse of the period during which it is recognised by the competent authority, or its turnover subsequently crosses the financial threshold limit as notified by the competent authority.

5. **Adoption of the current Locarno classification system**

The Amendment Rules also formally mark India's adoption of the prevailing edition of the Locarno Classification published by WIPO. Earlier, the Indian Designs Office maintained its own Classification system. While this was almost entirely in line with the Locarno Classification system earlier as well, the new Amendment Rules have eliminated any discrepancies that existed previously.

6. **Changes to costs allowed in proceedings before the Controller**

The Fourth Schedule of the 2001 Rules, which lays down the amount of the costs allowed in proceedings before the Controller, has been modified with the advent of the 2021 Rules. The revised Schedule now provides for differences in costs which may be imposed depending on the nature of the entities involved in proceedings.

On the whole, the changes implemented in the Amendment Rules are fairly positive, as they would likely have the effect of streamlining and simplifying the process of protecting industrial designs in India. It should be noted however that at the time of writing this post, the reduction in fees payable for small entities was not reflected in the Designs Office's e-filing portal. It is likely that this change will be implemented shortly.

THE ENVIRONMENT PROTECTION ACT, 1986

The Environment Protection Act, 1986, the ("**EP Act**") has been enacted for protection and preservation of the environment and continuous improvement thereof. The term 'environment' has been defined in the EP Act to include water, air and inter-relationships existing among and between water, air, land, human beings, other living creatures, plants, micro-organisms, and property[66].

The Government has wide powers to ensure the protection of the environment and its continuous improvement by controlling and preventing environmental pollution. The Government is empowered to prescribe guidelines and make rules on the quality standards of air, water and soil for different areas and the maximum permissible level of pollution caused by them[67].

Further, persons engaged in industrial activities are required to adhere to the standards prescribed for emission of various pollutants, effluents etc.

[66] Section 2, The Environment Protection Act 1986
[67] Section 3,4,5,6, The Environment Protection Act 1986

LAW RELATING TO FOOD BUSINESS AND LABELING

The food business in India is governed by the FSSA Act, 2006 enacted on August 24, 2006, which mandated setting up of an independent autonomous body Food Safety & Standards Authority of India[68].

Each and every Food Business Operator in India must either be registered (Petty food business) or licensed (based on the scale and amount of business as stipulated in the Licensing & Registration Regulations 2010). Registration and licensing will be regulated by the State Food Safety Authority and Central Licensing respectively[69].

Registration is necessary for a Food Business Operator who produces or sells any item of food himself.

Licenses will be granted for hundred percent (100%) Export Oriented Units and all importers importing food for commercial use. Only a single license is required for one or more food items and for different places of business in the same location. For new licenses, the term will be for one to five (1-5) years and shall subsequently be renewed within a month before expiration of the license[70].

Fees for registration and fees for license granted by the Central Licensing Authority are rupees hundred (Rs. 100) and rupees seven thousand five hundred (Rs. 7500) respectively[71].

Upon receipt of an application for licensing, the designated licensing authority will carry out an inspection of the premises to ensure the appropriateness of issuing a license that is in accordance with the FSSA Act. Furthermore, where necessary, the licensing authority may provide a notice to the applicant containing guidelines to observe the general safety, hygiene and sanitary conditions set out in the regulations. To ensure that food safety is adhered to, inspections will be carried out regularly for both registered and licensed food businesses[72].

Hygiene practices and labelling

Good Manufacturing practices should be carried out by firms to ensure that their products are safe and of good quality. Some of these include ensuring the cleanliness and hygiene of personnel dealing with food, general maintenance, and sanitation of facilities, inspecting ingredients, and ensuring their suitability for being used and providing clean, secure storage and distribution facilities.

The labelling guidelines of the FSSAI are mandatory on all food products, whether manufactured or imported. The FSSAI guidelines are available as per the nature of product and whether it is manufactured or imported, and it is imperative to display correct FSSAI code or license on the packaging relevant to that food product of the licensee[73].

Companies that fail to adhere to such practices can incur heavy penalties[74]. List of Punishable Offenses under the Act:

i. Penalty for Selling Food, not of the demanded Nature or Substance or Quality
ii. Penalty for Sub-Standard Food
iii. Penalty for Misbranded Food
iv. Penalty for Misleading Advertisement
v. Penalty for Food containing Extraneous Matter
vi. Penalty for Running the Business without a License
vii. Penalty for Failure to Comply with the Directions by the Food Safety Officer
viii. Penalty for Processing/Manufacturing of food under an Unhygienic/Unsanitary condition

[68] Section 4, Food Safety and Standards Act 2006
[69] Section 31, Food Safety and Standards Act 2006
[70] Section 31, Food Safety and Standards Act 2006
[71] Section 82(2) Food Safety and Standards Act 2006
[72] Section 38, Food Safety and Standards Act 2006
[73] Section 23, Food Safety and Standards Act 2006
[74] Section 48 to 67, Food Safety and Standards Act 2006

ix. Penalty for Possessing Adulterant
x. Penalty for Contraventions
xi. Penalty for Unsafe Food
xii. Penalty for False Information
xiii. Penalty for Interfering with Seized Items
xiv. Penalty for Obstructing or Impersonating Food Safety Officer
xv. Penalties for Subsequent Offenses
xvi. Compensation for the occurrence of Injury or Death to the Consumer
xvii. Penalty for Contravention of Provisions of FSS Act in case of Import of Food Articles

INSOLVENCY AND BANKRUPTCY CODE 2016

IBC 2016 aims to consolidate the laws relating to insolvency resolution into a single one. The main focus of this legislation is to offer a uniform legislation providing resolution in a time bound manner. An important feature of the Code is that it does not distinguish between the rights of international and domestic creditors or between classes of financial institutions.

The Code repeals the following -

- Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Indian Partnership Act, 1932
- The Companies Act, 2013
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- Limited Liability Partnership Act, 2008,
- Sick Industrial Companies (Special Provisions) Repeal Act, 2003

The insolvency resolution process is described herein below:

APPLICATION OF THE CODE:

The IBC 2016 applies to (a) any Company incorporated under theCoA; (b) any other company incorporated by any special statute; (c) any Limited Liability Partnership firm registered under the Limited Liabilities Partnership Act, 2008; (d) any partnership registered under the Partnership Act, 1932; and (e) any individual person.

The creditor can initiate an insolvency resolution process in the event there is a minimum default of INR 1,00,000 (which may be increased up to INR 10,000,000 by the Government), of a creditor's debt by the debtor. Such an application can be filed by an operational creditor or a financial creditor before the NCLT of the relevant jurisdiction.

'Debt' means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

A 'debtor' is any entity or an individual who owes any liability with respect to a claim which is due from any person and includes a financial debt and operational debt. If the debtor is either a company or an LLP, then such a debtor is referred to as a corporate debtor.

'Default**'** is defined as non-payment of debt, i.e., when whole or any part of the amount of debt has become due and payable but has not been repaid by the debtor.

CATEGORIES OF CREDITORS UNDER THE IBC

1. Financial Creditors:

A financial creditor is any person to whom a financial debt is owed to, hence, the relationship between such creditor and debtor is purely financial.

A financial debt is a debt along with interest, if any, which is disbursed against the consideration for the time value of money (time value of money refers to the concept that money acquired sooner or held onto longer has a greater worth or potential worth due to the possible accumulation of interest or return on investment). A financial debt may include money borrowed against repayment of interest or any amount raised through transactions like forward sale or purchase agreements.
Financial creditors may either be secured creditors or unsecured creditors. In the event of liquidation and asset distribution proceedings, secured creditors are given a higher priority than unsecured creditors. Furthermore, secured financial creditors are given the same priority of repayment as workmen and employee dues and are given a higher priority that other operational creditors, who are treated as unsecured creditors for the purposes of liquidation.

2. Operational creditor:

The term operational creditor has been defined as any person to whom operational debt is owed or to whom such debt has been assigned. Operational debt is further defined as a claim in respect of the provision of goods or services, including employment or dues payable to any governmental authority.

CORPORATE INSOLVENCY RESOLUTION PROCESS ("CIRP")

During this process, the financial creditors assess the viability of the debtor's business to continue and investigation of options of rescue and revival. The procedure for the same is as follows –

- The operational creditor shall give demand notice of a period of ten (10) days to the corporate debtor. A failure to repay dues would give confer a remedy to the creditor to approach NCLT.

- Application to the NCLT: The financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e., corporate debtor itself; or an authorised member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) will need to file an application with the NCLT for initiating insolvency resolution proceedings in response to the default of the debtor. The NCLT shall be required to either accept or reject the application within 14 days of filing the application.

- Initiation of the insolvency process: The acceptance of the application by NCLT leads to the appointment of the interim insolvency resolution professional who now takes over the management and collects financial information, which leads to suspension of the management of the debtor for the remainder of the CIRP. The aim is to allow a shift of control with the creditors driving the business of the debtor and the insolvency resolution profession who acts as their agent.

- Appointment of the committee of creditors: The interim resolution professional investigates the claims made by the creditors and constitutes a creditors committee. The same is within thirty (30) days of the NCLT admitting the application for CIRP. Operational creditors can be a part of the committee if their aggregate dues are not less than 10% of the debt and they do not retain voting rights. Further, the decisions of the committee are binding on the corporate debtor and all its creditors. Once a resolution is passed, the creditors' committee decides on whether to opt for revised repayment plan for the company, or liquidation of the assets of the company. In case of no decision made during the

resolution process, the debtor's assets are liquidated to repay the debt. The same must be approved by creditors holding at least 75% of the debt of the corporate debtor.

- Time Period: Upon application to NCLT, the creditors claim is frozen for one hundred and eighty (180) days and hence, the insolvency process must be completed within one hundred and eighty (180) days starting from the admission of application by NCLT. However, the NCLT can grant a one-time extension of ninety (90) days.

Liquidation

Liquidation occurs due to the following reasons -

- Failure to submit the resolution plan to the NCLT within the prescribed period, or
- Rejection of resolution plan for non-compliance with the requirements of the Code, or
- Decision of creditors' committee based on vote of majority, or
- Contravention of resolution plan by the debtor.

The Resolution Professional acts as the liquidator unless, replaced, who forms the liquidation estate which is an estate of all assets of corporate debtor. The same may be rejected or admitted within 14 days. Assets are distributed by the liquidator in the manner of priorities of debts provided in the Code. Individual claimants or those claiming to have any special rights on assets of the debtor will form part of the liquidation process. However, all dues to workman or employee from the provident fund, the pension fund and the gratuity fund shall constitute as priorities and hence, not included in the estate of liquidation and bankrupt. Upon liquidation, the NCLT shall pass an order resulting in dissolution of the corporate debtor.

FAST TRACK INSOLVENCY RESOLUTION PROCESS

Fast Track Insolvency Resolution Process provides for the completion in ninety (90) days (extendable by maximum 45 days). The same gives rise to a quicker process for start-ups and small and medium enterprises for completion of the resolution process.

VOLUNTARY LIQUIDATION OF CORPORATE PERSON

Corporate persons who opt for liquidation itself without the commission of any default and are fully capable of paying off its debts from proceeds of liquidation of its assets are required to submit a declaration stating that the same is not in an effort to defraud any person. This should be approved by the creditors representing 2/3rd of the company's debts. Upon liquidation of assets, the NCLT passes an order for its dissolution.

INSOLVENCY RESOLUTION & BANKRUPTCY FOR INDIVIDUALS & PARTNERSHIP FIRMS

If the default is above rupees one thousand (Rs.1000) (may be increased up to Rs.1 lakh by the Government, by notification), the Code applies to such individuals and partnerships, as a corporate person can be liquidated but an individual cannot, unless declared bankrupt. The following are the process of insolvencies -

A. **Automatic fresh start process:** Wherein the eligible debtor is discharged of qualifying debts thereby facilitating the debtor to start afresh.

B. Insolvency Resolution Process: The process involves the preparation of a repayment plan by the debtor which is then approved by the creditors. Upon approval, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, then bankruptcy proceeding can be initiated.

C. Bankruptcy: The process is similar to liquidation of corporate person. The DRT passes an order indicating the commencement of bankruptcy proceeding. A bankruptcy trustee is appointed by the DRT with who vests the estate of bankruptcy. Further, a committee of creditors shall be formed. Creditors are mandated to submit proof of debt within 14 days of preparing list of creditors. If a creditor does not file a proof of security within thirty (30) days of notice, then with DRT's leave the bankruptcy trustee may sell or dispose of any property that was subject to a security charge, free of that security charge. The Bankruptcy trustee shall conduct the distribution of bankrupt's estate to the creditors in instalment or in totality as per the availability of funds, or in case of availability, as per the list of priority.

D. Order of priority of payment of debts : The priority is with respect to distribution of proceeds following liquidation of the company or bankruptcy of individual or partnership as below:

i. Insolvency resolution cost and liquidation cost

ii. Workmen's dues (for 24 months before commencement) and debts to secured creditor (who have relinquished their security interest)

iii. Wages and unpaid dues to employees (other than workmen) (for 12 months before commencement)

iv. Financial debts to unsecured creditors and workmen's dues for earlier period

v. Crown debts and debts to secured creditor following enforcement of security interest

vi. Remaining debts

vii. Preference shareholders

viii. Equity Shareholders or partners

Any surplus remaining after payment of debts shall be applied in payment of interest accrued since commencement date.

E. Moratorium: The Adjudicating Authority shall declare moratorium for prohibiting the following:

i. Any legal action against debtor by way of the institution of suits, continuation of pending suits or proceedings including execution of judgement, decree, or order in any court of law, tribunal, arbitration panel or other authority;
ii. Transferring, encumbering, alienating, or disposing debtor's assets;
iii. Any action to enforce or deal with security interest created by the debtor in respect of its property including under SARFAESI Act, 2002;
iv. The recovery by an owner or lessor of any property in the possession of the debtor.
v. The supply of essential goods or services to the debtor shall not be interrupted during moratorium period.

F. Adjudicating Authority under the Code: Under Part II, Chapter VI of the Code, National Company Law Tribunal (NCLT) would be adjudicating authority for insolvency resolution and liquidation of Companies, LLPs, any entity with limited liability under any law and bankruptcy of personal guarantors thereof. An appeal will lie to National Company Law Appellate Tribunal (NCLAT) within thirty (30) days (15 days' extension if there is sufficient ground). Jurisdiction is territorial based on location of registered office of corporate person. Orders of NCLAT are appealable on a question of law to the Supreme Court within forty-five (45) days.

Under Part III, Chapter VI of the Code, DRT would be the adjudicating authority for insolvency resolution and bankruptcy of individuals, unlimited partnerships, and partner/s thereof. Appeal can be made to DRAT within thirty (30) days (15 days' extension if there is sufficient ground). Further appeal from DRAT would be within forty-five (45) days before the Supreme Court only on question of law. Jurisdiction would be based on place of residence or works for gain or carries on business.

THE IBC (SECOND AMENDMENT) ACT:

The IBC (Second Amendment) Act, 2020 received the assent of the President on the 23rd of September 2020 and deemed to have come into force on June 5, 2020. The following are the key amendments -

A. Insertion of Sec. 10A: Which suspends the initiation of corporate insolvency resolution process of a corporate debtor, for any default arising on or after 25th March 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf, notwithstanding anything contained in Sections 7, 9 and 10.

Its further states that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. — For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March 2020.

B. Amendment to Section 66, which includes the insertion of sub section (3) to Sec. 66 of the Code, 2016 which states that: No application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

C. Repeal and savings, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 stands repealed, and any action taken in furtherance of the same shall be deemed to have been done or taken under the above-mentioned Act.

Recent Amendments to the IBC:

1. The time limit of two hundred and seventy (270) days for the resolution is now substituted with three hundred and thirty (330) days. The process remains the same, upon completion of the period, the company's assets will go for liquidation. The amendment was brought in light of several court directions to extend the time making the provision redundant, as litigation takes a lot of time. The extension of time ensures the mandatory completion of the process within the stipulated time.
2. Sec. 53 has been amended which states that the distribution of assets or proceeds from the sale shall be in order of priority. In that regard, the powers of the Committee of Creditors have been broadened, wherein, the committee now has the powers to make decisions regarding the distribution of funds to various categories, further, to decide how the claims would be distributed. However, in the case of Standard Chartered Bank v. Essar ltd, a different view was taken.
3. Further, the voting threshold for the committee of creditors has been reduced to fifty percent (50%) as compared to the previous seventy five percent (75%). However, certain key decisions with respect to approval of the plan, increase in the time limit, appointment of resolution professional shall have the voting threshold at sixty-six percent (66%).
4. The plan would be binding on all stakeholders which is inclusive of the central government, state government, and any local authority which has dues from a corporate debtor.
5. Finally, the amendment aims to enhance flexibility by stating that a resolution plan may include corporate restructuring programmes such as mergers, amalgamations, and demergers.

Extension to Moratorium Period due to COVID-19:

The Ministry of Corporate Affairs on 24th September 2020[75], extended the moratorium against filing of applications for commencement of CIRP against corporate debtors for any defaults arising post 25th March 2020 by a further period of three (3) months, i.e., 25th December 2020. The Moratorium which came into effect in June, was originally announced for a period of six (6) months i.e., from 25th March 2020 to 25th September 2020. The MCA is authorized to further extend the moratorium until March 2021.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2021

On August 12, 2021, the Central Government has notified the Insolvency and Bankruptcy Code Amendment Act, 2021 which has brought Pre-packaged Insolvency Resolution Process for MSMEs. The Act repeals Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 and amends the provisions of IBC Act, 2016. It shall be deemed to have come into force on the 4th day of April 2021.

Key Highlights of the Act:

Application for initiating Prepacked Insolvency Resolution Process may be filed in the event of a default of at least one lakh rupees. The Central Government may increase the threshold of minimum default up to one crore rupees through a notification.

Definitions of 'Pre-packed Insolvency has been inserted.

"pre-packaged insolvency resolution process costs" means

a) the amount of any interim finance and the costs incurred in raising such finance;

b) the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of Section 54F;

c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of Section 54J;

d) any costs incurred at the expense of the Government to facilitate the pre-packaged insolvency resolution process; and

e) any other costs as may be specified;

- **Chapter III A has been inserted on Prepacked Insolvency Resolution Process providing the following:**

A. **Corporate debtors eligible for pre-packaged insolvency resolution process**: Application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006

B. **Duties of Insolvency Professional before initiation of pre-packed insolvency resolution process**: The duties of Insolvency Professional are as follows:

- prepare a report, confirming whether the corporate debtor meets the requirements of Section 54A, and the base resolution plan conforms to the requirements referred to in 54A (4) (c).
- file such reports and other documents, with the Board, as may be specified.

[75] Circular F.No. 30/33/2020-insolvency

C. **Application to initiate pre-packaged insolvency resolution process:** Where a corporate debtor meets the requirements of Section 54A, a corporate applicant thereof may file an application with the Adjudicating Authority for initiating pre-packaged insolvency resolution process.

D. **Time-limit for completion of pre-packaged insolvency resolution process:** The pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.

E. **Declaration of moratorium and public announcement during pre- packaged insolvency resolution process:** The Adjudicating Authority shall, on the pre-packaged insolvency commencement date, along with the order of admission declare a moratorium and appoint an insolvency professional.

F. **Duties and powers of resolution professional during pre- packaged insolvency resolution process:** The resolution professional shall perform the following duties, namely:—

- confirm the list of claims submitted by the corporate debtor under Section 54G;
- inform creditors regarding their claims;
- maintain an updated list of claims;
- monitor management of the affairs of the corporate debtor;
- inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this Chapter and the rules and regulations made thereunder;
- constitute the committee of creditors and convene and attend all its meetings;
- prepare the information memorandum on the basis of the preliminary information memorandum submitted under Section 54G;
- file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI.

G. **List of claims and preliminary information memorandum:** The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolution professional the list of claims along with the details of the respective creditors, their security interests and guarantees, updated as on that date and a preliminary information memorandum containing information relevant for formulating a resolution plan.

H. **Termination of pre- packaged insolvency resolution process:** Where the resolution professional files an application with the Adjudicating Authority, the Adjudicating Authority shall, within thirty days of the date of such application, by an order terminate the pre-packaged insolvency resolution process and provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under Section 66 and Section 67A.

I. **Initiation of corporate insolvency resolution process:** The committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan by a vote of not less than sixty-six per cent. of the voting shares, may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.

- Insertion of new provision Section 67 A relating to Fraudulent management of corporate debtor during pre-packaged insolvency resolution process:

On and after the pre-packaged insolvency commencement date, where an officer of the corporate debtor manages its affairs with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating

Authority may, on an application by the resolution professional, pass an order imposing upon any such officer, a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

- Insertion of a new provision on Punishment for offences related to pre- packaged insolvency resolution process.

Schedule 1

Foreign Investment Cap and FDI Entry Routes and Requirements:

Sl. No.	Sector/Activity	Foreign Investment Cap (%)	Entry Route
AGRICULTURE			
1.	**Agriculture & Animal Husbandry**		
	(a) Floriculture, horticulture, Apiculture and Cultivation of vegetables & mushrooms under controlled conditions; (b) Development and production of seeds and planting material; (c) Animal Husbandry (including breeding of dogs), Pisiculture, Aquaculture, Apiculture (d) Services related to agro and allied sectors.	100%	Automatic
	Note :Besides the above, FDI is not allowed in any other agricultural sector/activity		
1.1	The term 'under controlled conditions' covers the following: (i) 'Cultivation under controlled conditions' for the categories of Floriculture, Horticulture, Cultivation of vegetables and Mushrooms is the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially. Control in these parameters may be affected through protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically.		
2.	**Plantation Sector**		
2.1	(i) Tea sector including tea plantations (ii) Coffee plantations (iii) Rubber plantations (iv) Cardamom plantations (v) Palm oil tree plantations (vi) Olive oil tree plantations Note: Besides the above, FDI is not allowed in any other plantation sector/activity	100%	Automatic
	2.2 Other Condition Prior approval of the State Government concerned is required in case of any future land use change		
3.	**MINING**		
3.1	Mining and Exploration of metal and non-metal ores including diamond, gold, silver, and precious ores but excluding titanium bearing minerals and its ores; subject to the Mines and Minerals (Development & Regulation) Act, 1957.	100%	Automatic
3.2	**Coal and Lignite**		
	(1) Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the provisions of Coal Mines (Special Provisions) Act, 2015 and the Mines and	100%	Automatic

	Minerals (Development and Regulation) Act, 1957		
	(2) Setting up coal processing plants like washeries, subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.	100%	Automatic
	(3) For sale of coal, coal mining activities including associated process sing infrastructure subject to the provisions of Coal Mines (Special Provisions) Act, 2015and the Mines and Minerals (Development and Regulation) Act, 1957 as amended from time to time and other relevant Acts on the subject.	100%	Automatic
3.3	**Mining and mineral separation of titanium bearing minerals and ores, its value addition, and integrated activities**		
3.3.1	Mining and mineral separation of titanium bearing minerals & ores, its value addition, and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation) Act, 1957.	100%	Government
3.3.2	(i) FDI for separation of titanium bearing minerals & ores will be subject to the following additional conditions viz. : (A) value addition facilities are set up within India along with transfer of technology; (B) disposal of tailings during the mineral separation shall be carried out in accordance with regulations framed by the Atomic Energy Regulatory Board such as Atomic Energy (Radiation Protection) Rules, 2004 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987. (ii) FDI will not be allowed in mining of 'prescribed substances' listed in the Notification No. SO 61(E), dated 18-1-2006 issued by the Department of Atomic Energy. (iii) Associated Processing Infrastructure" as contained at Para 3.2.3 above includes coal washery, crushing, coal handling, and separation (magnetic and non-magnetic)		
	Clarification: (1) For titanium bearing ores such as Ilmenite, Leucoxene and Rutile, manufacture of titanium dioxide pigment and titanium sponge constitutes value addition, Ilmenite can be processed to produce Synthetic Rutile or Titanium Slag as an intermediate value-added product. (2) The objective is to ensure that the raw material available in the country is utilized for setting up downstream industries and the technology available internationally is also made available for setting up such industries within the country. Thus, if with the technology transfer, the objective of the FDI Policy can be achieved, the conditions prescribed at (I) (A) above shall be deemed to be fulfilled.		
4.	**Petroleum & Natural Gas**		
4.1	Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector, subject to the existing sectoral policy and regulatory framework in	100%	Automatic

	the oil marketing sector and the policy of the Government on private participation in exploration of oil and the discovered fields of national oil companies.		
4.2	Petroleum refining by the Public Sector Undertakings (PSUs), without any disinvestment or dilution of domestic equity in the existing PSUs.	49%	Automatic
5.	Manufacturing		
5.1	Subject to the provisions of the FDI policy, foreign investment in 'manufacturing' sector is under automatic route. Manufacturing activities may be either self-manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract, whether on Principal to Principal or Principal to Agent basis. Further, a manufacturer is permitted to sell its products manufactured in India through wholesale and/ or retail, including through e-commerce, without Government approval		
5.2	Notwithstanding the FDI policy provisions on trading sector, 100% FDI under Government approval route is allowed for retail trading, including through e-commerce, in respect of food. products manufactured and/or produced in India.		
6.	**Defence**		
6.1	Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951	100%	Automatic upto 74%
	Manufacturing of small arms and ammunitions under Arms Act, 1959	100%	Government route beyond 74% wherever it is likely to result in access to modern technology or for other reasons to be recorded
6.2	**Other Conditions**		
	(i)	FDI up to 74% under automatic route shall be permitted for companies seeking new industrial licenses.	
	(ii)	Infusion of fresh foreign investment up to 49%, in a company not seeking industrial licence or which already has Government approval for FDI in Defence, shall require mandatory submission of a declaration with the Ministry of Defence in case change in the equity / shareholder pattern or transfer of stake by existing investor to new foreign investor for FDI up to 49% within 30 days of such change. Proposal for raising FDI beyond 49% from such companies will require Government approval.	
	(iii)	Licence applications will be considered by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.	
	()(iv	Foreign investor in the sector is subject to security clearance by the Ministry of Home Affairs and as per guidelines of the Ministry of Defence.	

	(v)	Investee should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.		
	(vi)	Foreign Investments in the Defence Sector shall be subject to scrutiny on grounds of National Security and Government reserves the right to review any foreign investment in the Defence Sector that affects or may affect national security.		
Service Sector				
Information Services				
7	**Broadcasting**			
7.1	**Broadcasting Carriage Services**			
7.1.1	(1) Teleports (setting up of up-linking HUBs/Teleports); (2) Direct to Home (DTH); (3) Cable Networks [Multi System Operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability]; (4) Mobile TV; (5) Headend-in-the Sky Broadcasting Service (HITS)		100%	Automatic Beyond 49% Sectoral ministry approval in case of infusion of fresh foreign investment in a company not seeking license/ permission from sectoral ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval.
7.1.2	**Cable Networks** (Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs)).		100%	Automatic Beyond 49% Sectoral ministry approval in case of infusion of fresh foreign investment in a company not seeking license/ permission from sectoral ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor will require Government approval.
7.2	**Broadcasting Content Services**			
7.2.1	**Terrestrial Broadcasting FM (FM Radio),** subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations.		49%	Government
7.2.2	**Up-linking of 'News & Current Affairs' TV Channels**		49%	Government
7.2.3	**Up-linking a Non-'News & Current Affairs' TV Channels/Down-linking of TV Channels**		100%	Automatic
7.2.4	**Uploading/Streaming of News & Current Affairs through Digital Media**		26%	Government
7.3	FDI for Up-linking/Down-linking TV Channels will be subject to compliance with the relevant Up-linking/Down-linking Policy notified by the Ministry of Information & Broadcasting from time to time.			

7.4	Foreign Investment (FI) in companies engaged in all the afore stated services will be subject to relevant regulations and such terms and conditions, as may be specified from time to time, by the Ministry of Information and Broadcasting.
7.5	The foreign investment (FI) limit in companies engaged in the afore stated activities shall include, in addition to FDI, Foreign Portfolio Investors (FPIs), Non-Resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entities.
7.6	Foreign investment in the afore stated broadcasting carriage services will be subject to the following security conditions/terms: **Mandatory Requirement for Key Executives of the Company** (i) The majority of Directors on the Board of the Company shall be Indian Citizens. (ii) The Chief Executive Officer (CEO), Chief Officer In-charge of technical network operations and Chief Security Officer should be resident Indian citizens **Security Clearance of Personnel** (iii) The Company, all Directors on the Board of Directors and such key executives like Managing Director/Chief Executive Officer, Chief Financial Officer (CFO), Chief Security Officer (CSO), Chief Technical Officer (CTO), Chief Operating Officer (COO), shareholders who individually hold 10% or more paid-up capital in the company and any other category, as may be specified by the Ministry of Information and Broadcasting from time to time, shall require to be security cleared. In case of the appointment of Directors on the Board of the Company and such key executives like Managing Director/Chief Executive Officer, Chief Financial Officer (CFO), Chief Security Officer (CSO), Chief Technical Officer (CTO), Chief Operating Officer (COO), etc., as may be specified by the Ministry of Information and Broadcasting from time to time, prior permission of the Ministry of Information and Broadcasting shall have to be obtained. It shall be obligatory on the part of the company to also take prior permission from the Ministry of Information and Broadcasting before effecting any change in the Board of Directors. (iv) The Company shall be required to obtain security clearance of all foreign personnel likely to be deployed for more than 60 days in a year by way of appointment, contract, and consultancy or in any other capacity for installation, maintenance, operation, or any other services prior to their deployment. The security clearance shall be required to be obtained every two years. **Permission vis-a-vis Security Clearance** (v) The permission shall be subject to permission holder/licensee remaining security cleared throughout the currency of permission. In case the security clearance is withdrawn the permission granted is liable to be terminated forthwith. (vi) In the event of security clearance of any of the persons associated with the permission holder/licensee or foreign personnel being denied or withdrawn for any reasons whatsoever, the permission holder/licensee will ensure that the concerned person resigns or his services terminated forthwith after receiving such directives from the Government, failing which the permission/license granted shall be revoked and the company shall be disqualified to hold any such Permission/license in future for a period of five years. **Infrastructure/Network/Software related requirement** (vii) The officers/officials of the licensee companies dealing with the lawful interception of Services will be resident Indian citizens. (viii) Details of infrastructure/network diagram (technical details of the network) could be provided on a need basis only, to equipment suppliers/manufactures and the affiliate of the licensee company. Clearance from the licensor would be required if such information is to be provided to anybody else. (ix) The Company shall not transfer the subscribers' databases to any person/place outside India unless permitted by relevant Law. (x) The Company must provide traceable identity of their subscribers.

	Monitoring, Inspection and Submission of Information (xi) The Company should ensure that necessary provision (hardware/software) is available in their equipment for doing the Lawful interception and monitoring from a centralized location as and when required by Government. (xii) The company, at its own costs, shall, on demand by the Government or its authorized representative, provide the necessary equipment, services, and facilities at designated place(s) for continuous monitoring or the broadcasting service by or under supervision of the Government or its authorized representative. (xiii) The Government of India, Ministry of Information & Broadcasting or its authorized representative shall have the right to inspect the broadcasting facilities. No prior permission/intimation shall be required to exercise the right of Government or its authorized representative to carry out the inspection. The company will, if required by the Government or its authorized representative, provide necessary facilities for continuous monitoring for any particular aspect of the company's activities and operations. Continuous monitoring, however, will be confined only to security related aspects, including screening of objectionable content. (xiv) The inspection will ordinarily be carried out by the Government of India, Ministry of Information & Broadcasting, or its authorized representative after reasonable notice, except in circumstances where giving such a notice will defeat the very purpose of the inspection. (xv) The company shall submit such information with respect to its services as may be required by the Government or its authorized representative, in the format as may be required, from time to time. (xvi) The permission holder/licensee shall be liable to furnish the Government of India or its authorized representative or TRAI or its authorized representative, such reports, accounts, estimates, returns or such other relevant information and at such periodic intervals or such times as may be required. (xvii) The service providers should familiarize/train designated officials of the Government or officials of TRAI or its authorized representative(s) in respect of relevant operations/features of their systems. **National Security Conditions** (xviii) It shall be open to the licensor to restrict the Licensee Company from operating in any sensitive area from the National Security angle. The Government of India, Ministry of Information and Broadcasting shall have the right to temporarily suspend the permission of the permission holder/Licensee in public interest or for national security for such period or periods as it may direct. The company shall immediately comply with any directives issued in this regard failing which the permission issued shall be revoked and the company disqualified to hold any such permission, in future, for a period of five years. (xix) The company shall not import or utilize any equipment, which are identified as unlawful and/or render network security vulnerable. **Other conditions** (xx) Licensor reserves the right to modify these conditions or incorporate new conditions considered necessary in the interest of national security and public interest or for proper provision of broadcasting services. (xxi) Licensee will ensure that broadcasting service installation carried out by it should not become a safety hazard and is not in contravention of any statute, rule or regulation and public policy.		
8.	**Print Media**		
8.1	Publishing of newspaper and periodicals dealing with news and current affairs	26%	Government
8.2	Publication of Indian editions of foreign magazines dealing with news and current affairs	26%	Government
8.2.1	**Other conditions** (i) 'Magazine', for the purpose of these guidelines, will be defined as a periodical publication, brought out on non-daily basis, containing public news or comments on public news.		

	(ii) Foreign investment would also be subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on 4-12-2008, as amended from time to time.		
8.3	Publishing/printing of Scientific and Technical Magazines/specialty journals/periodicals, subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting.	100%	Government
8.4	Publication of facsimile edition of foreign newspapers	100%	Government
8.4.1	**Other conditions:** (i) FDI should be made by the owner of the original foreign newspapers whose facsimile edition is proposed to be brought out in India. (ii) Publication of facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, as applicable. (iii) Publication of facsimile edition of foreign newspaper would also be subject to the Guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile edition of foreign newspapers issued by Ministry of Information & Broadcasting on 31-3-2006, as amended from time to time.		
9.	**Civil Aviation**		
9.1	The Civil Aviation sector includes Airports, Scheduled and Non-Scheduled domestic passenger airlines, Helicopter services/Seaplane services, Ground Handling Services, Maintenance and Repair organizations; Flying training institutes; and Technical training institutions.		
	For the purposes of the Civil Aviation sector: (i) "Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934; (ii) "Aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers, and other structures thereon or pertaining thereto; (iii) "Air transport service" means a service for the transport by air of persons, mails, or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights; (iv) "Air Transport Undertaking" means an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward; (v) "Aircraft component" means any part, the soundness and correct functioning of which, when fitted to an aircraft, is essential to the continued airworthiness or safety of the aircraft and includes any item of equipment; (vi) "Helicopter" means a heavier than air aircraft supported in flight by the reactions of the air on one or more power driven rotors on substantially vertical axis; (vii) "Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published timetable or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public; (viii) "Non-Scheduled air Transport service" means any service which is not a scheduled air transport service; "Cargo airlines" would mean such airlines which meet the conditions as given in the Civil Aviation Requirements issued by the Ministry of Civil Aviation;		

	(ix) "Seaplane" means an aeroplane capable normally of taking off from and alighting solely on water; (x) "Ground Handling" means (i) ramp handling, (ii) traffic handling both of which shall include the activities as specified by the Ministry of Civil Aviation through the Aeronautical Information Circulars from time to time, and (iii) any other activity specified by the Central Government to be a part of either ramp handling or traffic handling.		
9.2	**Airports**		
	(a) Greenfield projects	100%	Automatic
	(b) Existing projects	100%	Automatic[76]
9.3	**Air Transport Services**		
	(1) (a) Scheduled Air Transport Service/Domestic Scheduled Passenger Airline (b) Regional Air Transport Service	(100%	Automatic up to 49% (up to 100% and automatic for NRIs), Government route beyond 49%.
	(2) Non-Scheduled Air Transport Service	100%	Automatic
	(3) Helicopter services/seaplane services requiring DGCA approval	100%	Automatic
9.3.1	**Other Conditions**		
	(a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non-Scheduled Air Transport Services, helicopter, and seaplane services. (b) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter, and seaplane services, as per the limits and entry routes mentioned above. (c) Foreign airlines are also allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions: (i) It would be made under the Government approval route. (ii) The 49% limit will subsume FDI and FII/FPI investment. (iii) The investments so made would need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations. (iv) All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security viewpoint before deployment and F(v) (v) All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation. (d) In addition to the above conditions, foreign investment in M/s Air India Ltd. shall be subject to the following conditions: (i) Foreign investment(s) in M/s Air India Ltd., including that of foreign airline(s) shall not exceed 49% either directly or indirectly except in case of those NRIs, who are Indian Nationals, where foreign investment(s) is permitted up to100% under automatic route. (ii) Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals as stipulated in Aircraft Rules, 1937.		

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	(e) FDI in Civil Aviation is subject to provisions of Aircraft Rules, 1937, as amended from time to time. **Note: (i) The FDI limits/entry routes, mentioned at paragraph 8.3(1) and 8.3(2) above, are applicable in the situation where there is no investment by foreign airlines. Any investment by foreign airlines in companies operating in Air Transport Services, including in M/s Air India Limited, shall be subject to para (b) and (c) above.** (ii) The dispensation for NRIs who Indian Nationals are regarding FDI up to 100% will also continue in respect of the investment regime specified at para (c) (ii) and (d) above.		
9.3.2	Foreign Airlines in the capital of the Indian companies, operating schedule, and non-scheduled air transport services	49% (100% for NRIs) under automatic route	Government
9.4	**Other services under Civil Aviation sector**		
	(1) Ground Handling Services subject to sectoral regulations and security clearance	100%	Automatic
	(2) Maintenance and Repair organizations; flying training institutes and technical training institutions	100%	Automatic
10.	**Construction Development: Townships, Housing, Built-up infrastructure**		
10.1	Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100%	Automatic
	Each phase of the construction development project would be considered as a separate project for the purposes of FDI policy. Investment will be subject to the following conditions: (A) (i) The investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e., roads, water supply, street lighting, drainage, and sewerage. (ii) Notwithstanding anything contained at (i)above, a foreign investor will be permitted to exit and repatriate foreign investment before the completion of the project under automatic route, provided that a lock-in period of three years, calculated with reference to each tranche of foreign investment has been completed. Further, transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor any Governmental approval. (B) The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/Municipal/Local Body concerned. (C) The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy "developed plots" will mean plots where trunk infrastructure i.e., roads, water supply, street lighting, drainage, and sewerage, have been made available. (D) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/Municipal/Local Body concerned. (E) The State Government/Municipal/Local Body concerned, which approves the building/development plans, will monitor compliance of the above conditions by the developer.		

	Note: (i) It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farmhouses and trading in transferable development rights (TDRs). "Real estate business means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further earning of rent/income on lease of income, not amounting to transfer, will not amount to real estate business. (ii) Conditions of lock-in period at (A) above, will not apply to Hotels & Tourist Resorts; Hospitals; Special Economic Zones (SEZs); Educational Institutions, Old Age Homes, and Investment by NRIs. (iii) Completion of the project will be determined as per the local bye-laws/rules and other regulations of State Governments. (iv) It is clarified that 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/shopping complexes and business centres. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted. However, there would be a lock in period of three years, calculated with reference to each tranche of FDI, and transfer of immovable property or part thereof is not permitted during this period. (v) "Transfer", in relation to FDI policy on the sector, includes, - a) the sale, exchange, or relinquishment of the asset; or b) the extinguishments of any rights therein; or c) the compulsory acquisition thereof under any law; or d) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882); or e) any transaction, by acquiring shares in a company or by way of an agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring or enabling the enjoyment of any immovable property. (vi) Notwithstanding anything contained in Para 10, it is clarified that real estate broking service does not amount to real estate business and 100% foreign investment is allowed in the activity under automatic route		
11.	**Industrial Parks - New and existing**	100%	Automatic
11.1	(i) "Industrial Park" is a project in which quality infrastructure in the form of plots of developed land or built-up space or a combination with common facilities, is developed and made available to all the allottee units for the purposes of industrial activity. (ii) "Infrastructure" refers to facilities required for functioning of units located in the Industrial Park and includes roads (including approach roads), railway line/sidings including electrified railway lines and connectivity to the main railway line, water supply and sewerage, common effluent treatment facility, telecom network, generation and distribution of power, air conditioning. (iii) "Common Facilities" refer to the facilities available for all the units located in the industrial park, and include facilities of power, roads (including approach roads), railway line/sidings including electrified railway lines and connectivity's to the main railway line, water supply and sewerage, common effluent treatment, common testing, telecom services, air conditioning, common facility buildings, industrial canteens, convention/conference halls, parking, travel desks, security service, first aid center, ambulance and other safety services, training facilities and such other facilities meant for common use of the units located in the Industrial Park. (iv) "Allocable area" in the Industrial Park means-		

	(a) in the case of plots of developed land - the net site area available for allocation to the units, excluding the area for common facilities. (b) in the case of built-up space - the floor area and built-up space utilized for providing common facilities. (c) in the case of a combination of developed land and built-up space - the net site and floor area available for allocation to the units excluding the site area and built-up space utilized for providing common facilities. (v) "Industrial Activity" means manufacturing; electricity; gas and water supply; post and telecommunications; software publishing, consultancy, and supply; data processing, database activities and distribution of electronic content; other computer related activities; basic and applied R&D on biotechnology, pharmaceutical sciences/life sciences, natural sciences, and engineering; business and management consultancy activities; and architectural, engineering, and other technical activities.		
11.2	FDI in Industrial Parks would not be subject to the conditionalities applicable for construction development projects etc. spelt out in para 11 above, provided the Industrial Parks meet with the undermentioned conditions: (i) it would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area; (ii) the minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area.		
12.	**Satellites - Establishment and operation**		
12.1	Satellites - Establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	100%	Government
13.	**Private Security Agencies**	74%	Automatic up to 49% Government route beyond 49% and upto 74%
14.	**Telecom services (including Telecom Infrastructure Providers Category-I)** All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, United Access Services, Unified License (Access services), Unified License, National/ International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP licenses, Voice Mail/Audiotex/UMS, Resale of IPLC, Mobile Number Portability services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.	100%	Automatic up to 49% Government route beyond 49%
14.1.1	Other Condition FDI in Telecom sector subject to observance of licensing and security conditions by licensee as well as investors as notified by the Department of Telecommunications (DoT) from time to time, expect "Other Service Providers", which are allowed 100% FDI on the automatic route.		
15.	**Trading**		

15.1	**(i) Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)**	100%	Automatic
15.1.1	Definition: Cash & Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional, or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business, and profession, as opposed to sales for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with export/ex-bonded warehouse business sales and B2B e-Commerce.		
15.1.2	**Guidelines for Cash & Carry Wholesale Trading/Wholesale Trading (WT):** (a) For undertaking 'WT', requisite licenses/registration/permits, as specified under the relevant Acts/Regulations/Rules/Orders of the State Government/Government Body/Government Authority/Local Self-Government Body under that State Government should be obtained. (b) Except in case of sales to Government, sales made by the wholesaler would be considered as 'cash & carry wholesale trading/wholesale trading' with valid business customers, only when WT are made to the following entities: (i) Entities holding applicable tax registration or (ii) Entities holding trade licenses i.e., a license/registration certificate/membership certificate/registration under Shops and Establishment Act, issued by a Government Authority/Government Body/Local Self-Government Authority, reflecting that the entity/person holding the license/registration certificate/membership certificate, as the case may be, is itself/himself/herself engaged in a business involving commercial activity; or (iii) Entities holding permits/license etc. for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies; or (iv) Institutions having certificate of incorporation or registration as a society or registration as public trust for their self-consumption. (v) **Note: An Entity, to whom WT is made, may fulfil anyone of the 4 conditions.** (c) Full records indicating all the details of such sales like name of entity, kind of entity, registration/license/permit etc. number, amount of sale etc. should be maintained on a day-to-day basis. (d) WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture. (e) WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations. (f) A wholesale/cash and carry trader can undertake a single brand retail trading subject to the conditions mentioned in para 15.3. An entity undertaking wholesale/cash and carry as well as retail business will be mandated to maintain separate books of accounts for these two arms of the business and duly audited by the statutory auditors. Conditions of the FDI policy for wholesale/cash and carry business and for retail business have to be separately complied with by the respective business arms		
15.2	**E-commerce activities**	100%	Automatic
	Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce. Definitions: i) E-commerce- E-commerce means buying and selling of goods and services including digital products over digital & electronic network.		

	ii)E-commerce entity- E-commerce entity means a company incorporated under the Companies Act 1956 or the CoAor a foreign company covered under section 2(42) of the CoAor an office, branch or agency in India as provided in section 2(v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting thee-commerce business. iii) Inventory based model of e-commerce- Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly. iv) Marketplace based model of e-commerce- Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller. Guidelines for Foreign Direct Investment on e-commerce sector: i) 100% FDI under automatic route is permitted in marketplace model of e-commerce. ii) FDI is not permitted in inventory-based model of e-commerce. Other Conditions: i) Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc. ii) Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis. iii) E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services. iv) E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e., Goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory-based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies. v) v) An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity. vi) In marketplace model goods/services made available for sale electronically on website should clearly provide name, address, and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller. vii) In marketplace model, payments for sale may be facilitated by the e-commerce entity inconformity with the guidelines of the Reserve Bank of India. viii) In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller. ix) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non--discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory. x) Guidelines on cash and carry wholesale trading as given in para 15.2 above will apply on B2B e-commerce.

	xi) E-commerce marketplace entity will not mandate ay seller to sell any product exclusively on its platform only. xii) E-commerce marketplace entity with FDI shall have to obtain and maintain a report of statutory auditor , by 30th of September of every year for the preceding financial year confirming compliance on the e-commerce guidelines. Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.		
15.3	**Single Brand product retail trading**	100%	Automatic
	(1) Foreign Investment in Single Brand product retail trading is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies, and management practices. (2) FDI in Single Brand product retail trading would be subject to the following conditions: (a) Products to be sold should be of a 'Single Brand' only. (b) Products should be sold under the same brand internationally i.e.; products should be sold under the same brand in one or more countries other than India. (c) 'Single Brand' product-retail trading would cover only products which are branded during manufacturing. (d) A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement, executed between the Indian entity undertaking single brand retail trading and the brand owner. (e) In respect of proposals involving FDI beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans, and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years; total value of the goods procured, beginning 1st April of the year of the commencement of SBRT business (i.e., opening of the first store or start of online retail, whichever is earlier). Thereafter, SBRT entity shall be required to meet the 30% local sourcing norms on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single-brand product retail trading (f) For the purpose of meeting local sourcing requirement laid down at para (e) above, all procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. SBRT entity is also permitted to set off sourcing of goods from India for global operations against the mandatory sourcing requirement of 30%. For this purpose, 'sourcing of goods from India for global operations' shall mean value of goods sourced from India for global operations for that single brand (in INR terms) in a particular financial year directly by the entity undertaking SBRT or its group companies (resident or non-resident), or indirectly by them through a third party under a legally tenable agreement. (g) An SBRT entity operating through brick-and-mortar stores can also undertake retail trading through e-commerce. However, retail trading through e-commerce can also be undertaken prior to opening of brick-and-mortar stores, subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail. **Note:**		

	(i) Conditions mentioned at para 15.2..3(b) &15.2..3(d) will not be applicable for undertaking SBRT of Indian brands. (ii) Indian brands should be owned and controlled by resident Indians citizens and/or companies which are owned and controlled by resident Indian citizens. (iii) Sourcing norms will not be applicable up to three years from commencement of the business i.e., opening of first store or start of online retail, whichever is earlier for entities undertaking single brand retail trading of products having `state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. Thereafter, provisions of Para 5.2.15.3 (2) (e) will be applicable. A Committee under the Chairmanship of Secretary, DPIIT, with representatives from NITI Aayog, concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology where local sourcing is not possible and give recommendations for such relaxation.		
15.4	**Multi Brand Retail Trading**	51%	Government
	(1) FDI in multi brand retail trading, in all products, will be permitted, subject to the following conditions: (i) Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery, and meat products, may be unbranded. (ii) Minimum amount to be brought in, as FDI, by the foreign investor, would be US $100 million. (iii) At least 50% of total FDI brought in the first tranche of US $100 million, shall be invested in 'back-end infrastructure' within three years, where 'back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of back-end infrastructure. Subsequent investment in the back-end infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements. (iv) At least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US $ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The 'small industry' status would be reckoned only at the time of first engagement with the retailer and such industry shall continue to qualify as a 'small industry' for this purpose, even if it outgrows the said investment of US $ 2.00 million during the course of its relationship with the said retailer. Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years total value of the manufactured/processed products purchased, beginning 1 April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis. (v) Self-certification by the company, to ensure compliance of the conditions at serial Nos. (i), (ii) and (iv) above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors. (vi) Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per the 2011 Census or any other cities as per the decision of the respective State Governments and may also cover an area of 10 kms. Around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal		

	Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking. (vii) Government will have the first right to procurement of agricultural products. (viii) The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy. The list of States/Union Territories which have conveyed their agreement is at (2) below. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department for Promotion of Industry and Internal Trade and additions would be made to the list at (2) below accordingly. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/regulations, such as the Shops and Establishments Act etc. (ix) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading. (2) List of States/Union Territories as mentioned in Paragraph 16.4. (1)(viii) 1. Andhra Pradesh 2. Assam 3. Delhi 4. Haryana 5. Himachal Pradesh 6. Jammu & Kashmir 7. Karnataka 8. Maharashtra 9. Manipur 10. Rajasthan 11. Uttarakhand 12. Daman & Diu and Dadra and Nagar Haveli (Union Territories)		
15.5	**Duty Free Shops**	100%	Automatic
	(i) Duty Free Shops would mean shops set up in custom bonded area at International Airports/International Seaports and Land Custom Stations where there is transit of international passengers. (ii) Foreign investment in Duty Free Shops is subject to the compliance of conditions stipulated under the Customs Act, 1962 and other laws, regulations, and rules. (iii) Duty Free Shop entity shall not engage into any retail trading activity in the Domestic Tariff Area of any country		
	FINANCIAL SERVICES Foreign investment in other financial services, other than those indicated below, would require prior approval of the Government:		
16.1	**Asset Reconstruction Companies**		
16.1.1	"Asset Reconstruction Company" (ARC) means a company registered with the RBI under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).	100%	Automatic
16.1.1.2	**Other Conditions** (i) Persons resident outside India can invest in the capital of Asset Reconstruction Companies (ARC's) registered with Reserve Bank of India, up to 100% on the automatic route.		

	(ii) Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of Securitizations and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time. Similarly, investment by institutional / non-institutional investors will also be governed by the said act, as amended from time to time. (iii) The total shareholding of an individual FPI shall be below 10% of the total paid up capital. (iv FPIs can invest in the Security Receipts (SRs) issued by ARCs FIIs/ FPIs may be allowed up to 100% of each tranche in SRs issued by ARCs, subject to directions / guidelines of Reserve Bank of India. Such investment should be within the relevant regulatory cap as applicable. (v) All Investments would be subject to provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time.		
17	**Banking - Private sector**		
17.2.1	**Banking - Private sector**	74%	Automatic up to up to 49%)
	.		Government route beyond 49% and up to 74%
17.2.2	**Other conditions:** **(1)** This 74% limit will include investment under the Portfolio Investment Scheme (PIS) by FPIs, NRIs and shares acquired prior to September 16, 2003, by erstwhile OCBs, and continue to include IPOs, Private placements, GDR/ADRs and acquisition of shares from existing shareholders. (2) The aggregate foreign investment in a private bank from all sources will be allowed - up to a maximum of 74 per cent of the paid-up capital of the Bank. At all times, at least 26 per cent of the paid-up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank. (3) The stipulations as above will be applicable to all investments in existing private sector banks also. (4 The permissible limits under portfolio investment schemes through stock exchanges for FIIs/FPIs and NRIs will be as follows: (i) . The total holding by each FPI or an investor group, shall be less than10 per cent of the total paid-up capital on a fully diluted basis or less than 10 per cent of the paid-up value of each series of debentures or preference shares or share warrants, aggregate limit for all /FPIs cannot exceed 24 per cent of the total paid-up capital on a fully diluted basis or paid-up value of each series of debentures or preference shares or share warrants. With effect from the 1st of April 2020, the aggregate limit shall be the sectoral caps applicable to the Indian company as laid out in sub-paragraph (b) of paragraph 3 of Schedule I of these rules, with respect to its paid-up equity capital on a fully diluted basis or such same sectoral cap percentage of paid-up value of each series of debentures or preference shares or share warrants. The aggregate limit as provided above may be decreased by the Indian company concerned to a lower threshold limit of 24% or 49% or 74% as deemed fit, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively before 31st March 2020. The Indian company which has decreased its aggregate limit to 24% or 49% or 74%, may increase such aggregate limit to 49% or 74% or the sectoral cap or statutory ceiling respectively as deemed fit, with the approval of its Board of Directors and its General		

	Body through a resolution and a special resolution, respectively. Once the aggregate limit has been increased to a higher threshold, the Indian company cannot reduce the same to a lower threshold. However, the aggregate limit with respect to an Indian company in a sector where FDI is prohibited shall be 24 per cent. (a) In the case of NRIs, as hitherto, individual holding is restricted to 5 per cent of the total paid-up capital on fully diluted basis or 5 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company both on repatriation and non-repatriation basis and the total holdings of all NRIs and OCIs put together shall not exceed 10 per cent of the total paid-up capital both on repatriation and non-repatriation basis. However, NRI holding can be allowed up to 24 per cent of the total paid-up capital both on repatriation and non-repatriation basis provided the banking company passes a special resolution to that effect in the General Body (a) (b) Applications for foreign direct investment in private banks having joint venture/subsidiary in insurance sector may be addressed to the RBI for consideration in consultation with the Insurance Regulatory and Development Authority (IRDA) in order to ensure that the 49 per cent limit of foreign shareholding applicable for the insurance sector is not being breached (The Government of India in the Union Budget 2021 has proposed to enhance the limit of FDI in Insurance to 74%) (c) Transfer of shares under FDI from residents to non-residents will continue to require approval of RBI and Government as per Regulation 14(5) as applicable. (d) The policies and procedures prescribed from time to time by RBI and other institutions such as SEBI, D/o Company Affairs and IRDA on these matters will continue to apply. (e) RBI guidelines relating to acquisition by purchase or otherwise of shares of a private bank, if such acquisition results in any person owning or controlling 5 per cent or more of the paid-up capital of the private bank will apply to non-resident investors as well. (ii) Setting up of a subsidiary by foreign banks (a) Foreign banks will be permitted to either have branches or subsidiaries but not both. (b) Foreign banks regulated by banking supervisory authority in the home country and meeting Reserve Bank's licensing criteria will be allowed to hold 100 per cent paid-up capital to enable them to set up a wholly-owned subsidiary in India. (c) A foreign bank may operate in India through only one of the three channels viz., (i) branches (ii) a wholly-owned subsidiary and (iii) a subsidiary with aggregate foreign investment up to a maximum of 74 per cent in a private bank. (d) A foreign bank will be permitted to establish a wholly-owned subsidiary either through conversion of existing branches into a subsidiary or through a fresh banking license. A foreign bank will be permitted to establish a subsidiary through acquisition of shares of an existing private sector bank provided at least 26 per cent of the paid-up capital of the private sector bank is held by residents at all times consistent with para (i) (b) above. (e) A subsidiary of a foreign bank will be subject to the licensing requirements and conditions broadly consistent with those for new private sector banks. (f) Guidelines for setting up a wholly-owned subsidiary of a foreign bank will be issued separately by RBI. (g) All applications by a foreign bank for setting up a subsidiary or for conversion of their existing branches to subsidiary in India will have to be made to the RBI. (iii) At present there is a limit of ten per cent on voting rights in respect of banking companies, and this should be noted by potential investor. Any change in the ceiling

	can be brought about only after final policy decisions and appropriate Parliamentary approvals.		
18	**Banking - Public Sector**		
18.3	Banking - Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Acts, 1970/80. This ceiling (20%) is also applicable to the State Bank of India and its associate banks.	20%	Government
19	**Commodity Exchanges**		
19.4.1	(i) Futures trading in commodities are regulated under the Forward Contracts (Regulation) Act, 1952. Commodity Exchanges, like Stock Exchanges, are infrastructure companies in the commodity futures market. With a view to infuse globally acceptable best practices, modern management skills and latest technology, it was decided to allow foreign investment in Commodity Exchanges. 2. For the purposes of this Chapter, (i) "Commodity Exchange" is a recognized association under the provisions of the Forward Contracts (Regulation) Act, 1952, as amended from time to time, to provide exchange platform for trading in forward contracts in commodities. (ii) "Recognized association" means an association to which recognition for the time being has been granted by the Central Government under section 6 of the Forward Contracts (Regulation) Act, 1952. (iii) "Association" means anybody of individuals, whether incorporated or not, constituted for the purposes of regulating and controlling the business of the sale or purchase of any goods and commodity derivative. (iv) "Forward contract" means a contract for the delivery of goods, and which is not a ready delivery contract. (v) "Commodity derivative" means— a contract for delivery of goods, which is not a ready delivery contract; or a contract for differences which derives its value from prices or indices of prices of such underlying goods or activities, services, rights, interests, and events, as may be notified in consultation with by the Central Government but does not include securities.		
20	**Commodity Exchange**	49%	Automatic
20.1	Other conditions: (i) FII/FPI purchases shall be restricted to secondary market only. (ii) No non-resident investor/entity, including persons acting in concert, will hold more than 5% of the equity in these companies. (iii) Foreign investment in commodity exchanges will be subject to the guidelines of the Central Government/Forward Markets Commission (FMC) from time to time.		
21	**Credit Information Companies (CIC)**		
21.1	Credit Information Companies	100%	Automatic
21.2	Other Conditions: (1) Foreign investment in Credit Information Companies is subject to the Credit Information Companies (Regulation) Act, 2005. (2) Foreign investment is permitted subject to regulatory clearance from RBI. (3) Such FII/FPI investment would be permitted subject to the conditions that: (a) A single entity should directly or indirectly hold below 10% equity; (b) Any acquisition in excess of 1% will have to be reported to RBI as a mandatory requirement; and (c) FPIs investing in CICs shall not seek a representation on the Board of Directors based upon their shareholding.		

22	**Infrastructure Company in the Securities Market**		
22.1	Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49%	Automatic
22.2	Other Conditions: (i) Foreign investment, including investment by FPIs, will be subject to the Securities Contracts (Regulations) (Stock Exchanges and Clearing Corporations) Regulations 2012, and Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 as amended from time to time, and other Guidelines/Regulations issued by the Central Government, SEBI and the Reserve Bank of India from time to time. (ii) Words and expressions used herein and not defined in these regulations but defined in the CoA(18 of 2013) or the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) or in the concerned Regulations issued by SEBI shall have the same meanings respectively assigned to them in those Acts/ Regulations.		
23	FII/FPI can invest only through purchases in the secondary market		
24	**Insurance**		
24.1	Insurance	49%	Automatic
	Insurance Company	74%	Automatic
	LIC (proposed)	20%	Approval
	The government is planning to change the FDI policy by restricting FDI in LIC to 20% under the approval route.		
	Intermediaries or Insurance Intermediaries including insurance brokers, re-insurance brokers insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time.	100%	Automatic
24.2	Other Conditions: (a) No Indian insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed 49 % of the paid-up equity capital of such Indian insurance company. (b) The foreign investment proposals upto of 49% of the total paid up equity of the Indian Insurance Company shall be allowed on the automatic route subject to verification by IRDAI. (c) Foreign investment in the sector is subject to compliance of the provisions of the Insurance Act, 1938 and the condition that Companies bringing in FDI shall obtain necessary license/approval from the Insurance Regulatory & Development Authority of India for undertaking insurance activities.		

(d) An Indian insurance company shall ensure that its ownership and control remain at all times in the hands of resident Indian entities as determined by Department of Financial Services/ Insurance Regulatory and Development Authority of India as per the rules/regulation issued by them from time to time.

(e) Foreign portfolio investment in an Indian insurance company shall be governed by the provisions contained in Chapter-IV, Rule 10 and 11 read with Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.

(f) Any increase of foreign investment of an Indian insurance company shall be in accordance with the pricing guidelines specified by RBI under the FEMA Regulations.

(g) The foreign equity investment cap of 100 per cent shall apply on the same terms as above to Insurance Brokers, re-insurance brokers, insurance consultants, corporate agents, Third Party Administrators, Surveyors and Loss Assessors and such other entities as may be notified by the Insurance Regulatory and Development Authority of India from time to time. However, the condition of Indian owned and controlled, as specified in clause (d) above, shall not be applicable to Intermediaries and insurance Intermediaries and composition of the Board of Directors and key management persons shall be specified by the concerned regulators from time to time.

(h) The foreign direct investment proposals shall be allowed under the automatic route subject to verification by the Authority and foreign investment in intermediaries or insurance intermediaries shall be governed by the same terms as provided under rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015, as amended from time to time.

Provided that where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 per cent of their total revenues in any financial year.

The insurance intermediary that has majority shareholding of foreign investors shall undertake the following:

3e incorporated as a limited company under the provisions of the Companies Act, 2013.

atleast one from among the Chairman of the Board of Directors or the Chief executive officer or Principal Officer or Managing Director of the Insurance intermediary shall be a resident Indian citizen.

ll take prior permission of the Authority for repatriating dividend.

ll bring in the latest technological, managerial, and other skills.

ll not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the Authority.

ll make disclosures in the formats to be specified by the authority of all payments made to its group or promoter or subsidiary or interconnected or associated entities.

nposition of the Board of Directors and key management persons shall be specified by the concerned regulators.

(i) The provisions of paragraphs 17.2.2 (3) (i) (c) & (e), relating to 'Banking-Private Sector', shall be applicable in respect of bank promoted insurance companies.

(j) Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investment', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. G.S.R. 115(E),

	dated 19th February, 2015 issued by the Department of Financial Services and regulations issued by Insurance Regulatory and Development Authority of India from time to time.		
25	**Non-Banking Finance Companies (NBFCs)**		
	F.8.1 Foreign investment in NBFC is allowed under the automatic route in only the following activities: (i) Merchant Banking (ii) Underwriting (iii) Portfolio Management Services (iv) Investment Advisory Services (v) Financial Consultancy (vi) Stock Broking (vii) Asset Management (viii) Venture Capital (ix) Custodian Services (x) Factoring (xi) Credit Rating Agencies (xii) Leasing & Finance (xiii) Housing Finance (xiv) Forex Broking (xv) Credit Card Business (xvi) Money Changing Business (xvii) Micro Credit (xviii) Rural Credit	100%	Automatic
25.1	Other Conditions		
	(1) Investment would be subject to the following minimum capitalisation norms: (i) US $ 0.5 million for foreign capital up to 51% to be brought upfront. (ii) US $ 5 million for foreign capital more than 51% and up to 75% to be brought upfront. (iii) US $ 50 million for foreign capital more than 75% out of which US $7.5 million to be brought upfront and the balance in 24 months. (iv) NBFCs (i) having foreign investment more than 75% and up to 100%, and (ii) with a minimum capitalisation of US $ 50 million, can set up step down subsidiaries for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital. The minimum capitalization condition as mandated by para 3.10.4.1 of DIPP Circular 1 on Consolidated FDI Policy, therefore, shall not apply to downstream subsidiaries. (v) Joint Venture operating NBFCs that have 75% or less than 75% foreign investment can also set up subsidiaries for undertaking other NBFC activities, subject to the subsidiaries also complying with the applicable minimum capitalisation norm mentioned in (i), (ii) and (iii) above and (vi) below. (vi) Non-Fund based activities: US $ 0.5 million to be brought upfront for all permitted non-fund based NBFCs irrespective of the level of foreign investment subject to the following condition: It would not be permissible for such a company to set up any subsidiary for any other activity, nor can it participate in any equity of an NBFC holding/operating company. Note: The following activities would be classified as Non-Fund Based activities: (a) Investment Advisory Services (b) Financial Consultancy		

	(c) Forex Broking (d) Money Changing Business (e) Credit Rating Agencies (vii) This will be subject to compliance with the guidelines of RBI. Note: (i) Credit Card business includes issuance, sales, marketing & design of various payment products such as credit cards, charge cards, debit cards, stored value cards, smart card, value added cards etc. (ii) Leasing & Finance covers only financial leases and not operating leases. FDI in operating leases is permitted up to 100% on the automatic route. (2) The NBFC will have to comply with the guidelines of the relevant regulator/s, as applicable.		
25.2	White Label ATM Operations	100%	Automatic
	Other Conditions: (i) Any non-bank entity intending to set up a WLAs should have a minimum net worth of Rs. 100 crores as per the latest financial year's audited balance sheet, which is to be maintained at all times. (ii) In case the entity is also engaged in any other 18 NBFC activities, then the foreign investment in the company setting up WLA, shall have to comply with the minimum capitalisation norms for foreign investment in NBFC activities, as provided in para-F.8.2. (iii) FDI in the WLAO will be subject to the specific criteria and guidelines issued by RBI vide Circular No. DPSS, CO.PD.No.2298/02.10.002/2011-12, as amended from time to time.		
26	**Power Exchanges**		
26.1	Power Exchanges under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010	49%	Automatic
26.2	Other conditions (i) No non-resident investor/entity, including persons acting in concert, will hold more than 5% of the equity in these companies; and (ii) The foreign investment would be in compliance with SEBI Regulations; other applicable laws/regulations; security and other conditionalities.		
27	**Pension Sector**	49%	Government
	Other Conditions (i) Foreign investment in the Pension Funds is allowed as per the Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013. (ii) Foreign Investment in Pension Funds will be subject to the condition that entities bringing in foreign equity investment as per Section 24 of the PFRDA Act shall obtain necessary registration from the Pension Fund Regulatory and Development Authority and comply with other requirements as per the PFRDA Act, 2013 and Rules and Regulations framed under it for so participating in Pension Fund Management activities in India. (iii) An Indian pension fund shall ensure that its ownership and control remain at all times in the hands of resident Indian entities as determined by the Government of India/PFRDA as per the rules/regulation issued by them from time to time.		
28.	**Pharmaceuticals**		
281	Greenfield	100%	Automatic
16.2	Brown Field	100%	Automatic upto 74% Government route beyond 74%
16.3	Other Conditions (i) 'Non-compete' clause would not be allowed in automatic or government approval route except in special circumstances with the approval of the Government		

	(ii) The prospective investor and the prospective investee are required to provide a certificate along with the application for foreign investment (iii) Government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval. (iv) FDI in brownfield pharmaceuticals, under both automatic and government approval routes, is further subject to compliance of following conditions: (a) The production level of National List of Essential Medicines (NLEM) drugs and/or consumables and their supply to the domestic market at the time of induction of FDI, being maintained over the next five years at an absolute quantitative level. The benchmark for this level would be decided with reference to the level of production of NLEM drugs and/or consumables in the three financial years, immediately preceding the year of induction of FDI. Of these, the highest level of production in any of these three years would be taken as the level. (b) R&D expenses being maintained in value terms for 5 years at an absolute quantitative level at the time of induction of FDI. The benchmark for this level would be decided with reference to the highest level of R&D expenses which has been incurred in any of the three financial years immediately preceding the year of induction of FDI. (c) The administrative Ministry will be provided complete information pertaining to the transfer of technology, if any, along with induction of foreign investment into the investee company. (d) The administrative Ministry (s) i.e., Ministry of Health and Family Welfare, Department of Pharmaceuticals or any other regulatory Agency/Development as notified by Central Government from time to time, will monitor the compliance of conditionalities. Note: (i) FDI up to 100% under the automatic route is permitted for manufacturing of medical devices. The abovementioned conditions will, therefore, not be applicable to greenfield as well as brownfield projects of this industry. (ii) Medical device means:— (a) Any instrument, apparatus, appliance, implant, material, or other article, whether used alone or in combination, including the software, intended by its manufacturer to be used specially for human beings or animals for one or more of the specific purposes of :— (aa) Diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder; (ab) diagnosis, monitoring, treatment, alleviation of, or assistance for, any injury or disability ; (ac) investigation, replacement or modification or support of the anatomy or of a physiological process; (ad) supporting or sustaining life; (ae) disinfection of medical devices; (af) control of conception; and which does not achieve its primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means; (b) an accessory to such an instrument, apparatus, appliance, material, or other article; (c) In-vitro diagnostic device, which is reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment, or system whether used alone or in combination thereof intended to be used for examination and providing information for medical or diagnostic purposes by means of examination of specimens derived from the human body or animals.		
17.	**Railway Infrastructure**		
	Construction, operation and maintenance of the following: (i) Suburban corridor projects through PPP, (ii)	100%	Automatic

	speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signalling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/ and connectivity to main railway line and (x) Mass Rapid Transport Systems.		
	Note:— (i) Foreign Direct Investment in the abovementioned activities open to private participation including FDI is subject to sectoral guidelines of Ministry of Railways. (ii) Proposals involving FDI beyond 49% in sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security (CCS) for consideration on a case-to-case basis.		

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Our Practice areas include Foreign Investment in India, Mergers & Acquisitions, Private Equity, Corporate Commercial Laws, Capital Markets, Cross Border and Non-Resident Taxation Issues, Banking and Finance, Regulatory & Policy, Information Technology, Intellectual Property and Litigation & Dispute Resolution.

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At Lex Favios, we believe that thorough knowledge of the law is not enough. Our experience shows that outstanding and effective legal counsel requires a combination of this knowledge along with a firm grasp of our client's business and a sharing of their goals.

The members of the Firm have significant experience in advising major corporates, banks and financial institutions on some of their most complicated and largest transactions involving project financing, corporate financing, lending, asset financing, external commercial borrowings, corporate debt restructuring, banking and financial regulation(s) compliances and disputes, ranging from domestic to complex cross border transactions.

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