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JANUARY, 2014

FOREWORD

Dear Readers,

It gives me immense pleasure to launch our monthly news-letter. It is our endeavour to provide you with recent legal updates in crisp form with relevant hyperlinks. We welcome your valuable inputs to help us meet your expectations. If you are interested in receiving updates only in respect of specific area of law, do write to us. Also, in case you do not wish to receive our monthly update, please send us email on legalupdates@eternitylegal.com with the subject as "unsubscribe".

Warm Regards,
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OPTIONS NOW PERMITTED IN RESPECT OF FOREIGN DIRECT INVESTMENT

The Reserve Bank of India ("**RBI**") considered the options included in transaction documents in favor of a non-resident requiring an Indian resident to purchase the shares held by the non-resident as violation of the foreign direct investment policy ("**FDI Policy**") issued by the Department of Industrial Planning and Promotion, Government of India ("**DIPP**") the Government of India ("**GOI**"). The RBI vide its A.P. (DIR Series) Circular No. 86 dated January 9, 2014 has now amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**Transfer of Security Regulations**") and permitted that equity shares, fully and mandatorily convertible preference shares and debentures ("**FDI Instruments**") containing an optionality clause can be issued as eligible instruments to foreign investors. However, the Circular specifies that such an option / right when exercised should not entitle the non-resident investor to exit at an assured return. In addition, the RBI has prescribed certain conditions as follows:

1. FDI Instruments shall be subject to a minimum lock-in period of one year or such other lock-in period prescribed by the FDI Policy, whichever is higher. Such lock-in shall be effective from the date of allotment;

2. The non-resident investor exercising option/right shall be eligible to exit without any 'assured return' as under:

   2.1 In case of listed company, at the market price determined on the floor of the recognized stock exchanges;

   2.2 In case of unlisted equity shares, at a price not exceeding that arrived on the basis of Return on Equity ("**RoE**") as per latest audited balance sheet. RoE is defined as the Profit after Tax divided by the net worth (defined to include all free reserves and paid up capital)

   2.3 In case of preference shares or debentures, at a price determined by a Chartered Accountant or a SEBI registered Merchant Banker as per any internationally accepted methodology.

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3. Any agreement permitting return linked to equity, as above, shall not be treated as violation of FDI Policy/ Transfer of Security RegulationsFurther, the Circular clearly sets out that all the existing contracts must comply with the conditions set out in this circular to qualify as being FDI compliant. It is pertinent to note that if the existing terms of the contract provides for options with assured returns then the contracts may need to be amended as per the conditions set out in the circular. However, if the contract already provides that the exit price shall be subject to law, then it may be considered to have been amended by the law and may be considered valid as per the aforesaid amendment.

REVIEW OF EXISTING POLICY ON FOREIGN DIRECT INVESTMENT IN THE PHARMA SECTOR

The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India vide Press Note No. 1 of 2014 dated January 8, 2014, has amended the Foreign Direct Investment policy in the Pharmaceutical Sector and provided that 'non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board. The aforesaid amendment to come into effect from the date of notification i.e. January 8, 2014.

SEBI – INFORMAL GUIDANCE

In a recent informal guidance issued by the Securities and Exchange Board of India (SEBI), the questions pertaining to the intersection of the SEBI Takeover Regulations of 2011 and the process of complying with the minimum public shareholding in listed companies have been addressed.

In the case involving R Systems International Limited, the acquirer acquired certain shares of the target company so as to hold 34.82% shares, whereas, the promoters of company held 50.17%.

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Consequently, leaving the public shareholding at 15% which is lesser than the required minimum of 25%. An additional point of significance was that the acquirer was in no way associated with or acting in concert with the promoters.

But pursuant to Reg. 7(4) of the SEBI Takeover Regulations, was the acquirer required to reduce its shareholding so as to ensure that the target company complies with the minimum public shareholding norms? SEBI concluded that the acquirer was to be treated as part of the "public", thereby fulfilling the minimum public shareholding norms and was not required to reduce its shareholding in the target.

Furthermore, the question that still remains unanswered is whether such a large shareholding (through which negative control can be exercised by blocking special resolutions) would amount to "control". Although SEBI appears to depart from its stance taken in other cases like Subhkam Investments, one can infer from the result of this informal guidance that a shareholder holding a significant percentage of shares may not have much control if that persons shares in the shadow of much larger group of shareholders such as the promoters.

SECURITIES AND EXCHANGE BOARD OF INDIA (FOREIGN PORTFOLIO INVESTORS) REGULATIONS, 2014

The Securities and Exchange Board of India ("SEBI") has ***vide notification dated January 7, 2014*** notified the SEBI (Foreign Portfolio Investors) Regulations 2014 ("**FPI Regulations**") which repealed the SEBI (Foreign Institutional Investors), 1995 and rescinded the SEBI Circulars on QFIs. However, all the existing FIIs or QFIs who hold a valid certificate of registration are automatically deemed to be FPI Regulations till the expiry of block of 3 years for which the fees have been paid under the FII regulation. The notification has significantly changed the scenario of foreign portfolio investments into India and few key changes from the prior regulations are summarized below:

1. All the FIIs (Foreign Institutional investors) and QFIs (Qualified Foreign Investor) are merged together into a new investor category i.e (FPIs) Foreign Portfolio Investors.

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2. All existing FIIs and Sub Accounts may continue to buy, sell or otherwise deal in securities under the FPI regime until the lapse of their existing registration.
3. All existing QFIs may continue to buy, sell or otherwise deal in securities till the period of one year from the date of notification of the Regulation.
4. Prior to making investments, prospective FPIs will have to seek registration in any one of the following categories:
   - 4.1 Category I FPI: This category would include Government and Government related foreign investors such as central banks, Governmental agencies, sovereign wealth funds and international or multilateral organizations or agencies;
   - 4.2 Category II FPI: This category would include appropriately regulated broad based funds, other appropriately regulated entities, broad based funds whose investment manager is appropriately regulated, university funds, university related endowments, pension funds etc;
   - 4.3 Category III FPI: This category would include all others not eligible under Category I and II FPI.
5. The above categories of FPIs are formulated on the basis of the risks affiliated with each category and accordingly determine the KYC requirement.
6. New Investment Limits: Regulation 21(7) of the FPI Regulations states that a single FPI or an investor group shall purchase below 10% of the total issued capital of a company. Rules for holding Offshore derivative instrument: Regulation 22 of the FPI Regulations provides that Category I FPIs and Category II FPIs (which are directly regulated by an appropriate foreign regulatory authority) are permitted to issue, subscribe and otherwise deal in ODIs. However, those Category II FPIs which are not directly regulated (which are classified as Category-II FPI by virtue of their investment manager being appropriately regulated) and all Category III FPIs are not permitted to issue, subscribe or deal in ODIs.

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RECENT JUDGEMENTS

Ajanta Limited vs. Maharashtra State Electricity Distribution Company Limited

In ***Case no 152 of 2013 -*** ***Ajanta Limited vs. Maharashtra State Electricity Distribution Commission (MSEDCL)***, the Hon'ble Maharashtra Electricity Regulatory Commission (**MERC**) vide its Order dated January 16, 2014, MSEDCL had refused renewal of open access permission to the Petitioner for sale of wind energy to third party (Empire Malls Pvt. Ltd.) on the ground that Open Access permission cannot be processed for third party sell to commercial complexes/malls. MSEDCL cited the reason for refusal as that in case of commercial complexes / malls, single point HT supply is availed and it is extended to other entities in same premise. Section 12 of the Electricity Act 2003 does not allow such extension of supply to other entities was contention of MSEDCL. Hon'ble MERC noted that the issue that is to be dealt with in this case was regarding the supply by distribution licensee on a single point connection to commercial premises such as multiplexes, malls etc. Hon'ble MERC had in its Order dated May 24, 2010 in Case No. 62 of 2009, had directed that the dispensation to become a Franchisee of the Distribution Licensee in the State was available to commercial complexes, Multiplexes and Malls. The issue of supply on single point to commercial building / industrial complexes for mixed load was again dealt with by Hon'ble MERC in its Order dated June 1, 2010 in Case No. 75 of 2007. Hon'ble MERC had observed that the dispensation as set out in the Commission's Order dated May 24, 2010 in Case No. 62 of 2009 may also be applied in toto in all such cases. Hon'ble MERC therefore held that the dispensation to become a Franchisee of the Distribution Licensee in the State is available to commercial complexes, Multiplexes and malls. Therefore, Empire Malls Pvt. Ltd. needs to enter into Distribution Franchisee Agreement with MSEDCL. Operations of Empire Malls Pvt. Ltd. as a Distribution Franchisee and its rights and responsibilities shall be governed by the terms and conditions of

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Distribution Franchisee Agreement. MERC directed MSEDCL to expeditiously issue the circular governing such distribution franchisee arrangement and pending issuance thereof grant Open Access permission to the Petitioner.

The abovementioned Order has been reiterated by the Hon'ble Commission in ***M/s B.S.Channabasappa & Sons & Anr vs. MSEDCL & Anr. vide order dated January 16, 2014 in Case no. 135 of 2013***.

Glaxo SimthKline vs. Union of India

In ***Civil Appeal no.1939 of 2004 - Glaxo SmithKline vs. Union of India***, the Hon'ble Supreme Court of India on December 9, 2013, delivered its long awaited judgement in consolidation with five other appeals, by way of special leave, thereby deciding on the contrary views held by the Delhi and Karnataka High Courts.

The question before the Hon'ble Supreme Court was whether the prices fixed under the Drugs (Prices Control) Order (for short, '**DPCO**') in respect of drugs/formulations would be operative in respect of all sales subsequent to 15 days from the date of the notification by the Government in the official gazette/receipt of the price fixation order by the manufacturer.

The Hon'ble Supreme Court, in consonance with the Order of the Karnataka High Court dated November 12, 2002 held that that every manufacturer and distributor is duty bound to issue a revised price list within 15 days from the date of the notification issued by the Government under the DPCO. It is also clear that manufacturers, distributors and retailers will be liable to sell formulations from the date of such revised price list (which is required to publish within 15 days from the date of notification) at the revised prices and not the prices mentioned on the label of the container or pack. In view of it, the contention that revised prices will not apply to the existing stocks but only to new batches of drugs and formulations to be manufactured after 15 days of the notification was rejected.

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Furthermore, the Hon'ble Supreme Court gave the rationale that the price fixation by the Central Government under DPCO is in the nature of legislative measure and the dominant object and purpose of such price fixation is the equitable distribution and availability of commodities at fair price. The whole idea behind such price fixation is to control hoarding, cornering or artificial short supply and give benefit to the consumer. In view of it, the purpose of the DPCO was to protect the consumer from being sold the same formulations at two different prices. The formulations must be sold at the reduced prices, to which the consumers are entitled. Thus it was held that the period of 15 days is simply a grace period allowed to manufacturers to adjust their business to make appropriate arrangements regarding the unsold stocks in the distribution chain. In light of the above, the Hon'ble Supreme Court accepted the appeals of the Union of India, and upheld the decision taken by the Karnataka High Court.

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