ETERNITY:LAW APPRISE

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SEBI

Securities and Exchange Board of India (Buy-back of Securities) Regulations, 2018

The Securities and Exchange Board of India ("**SEBI**") has notified *the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018* **("Buy-Back Regulations 2018")** on September 11, 2018 to replace the SEBI (Buyback of Securities) Regulations, 1998. These Regulations are to be read with Section 68 of the Companies Act, 2013 pertaining to Power of a Company to Purchase its own Securities and can be summarized as follows:

1. Conditions for Buyback:

- The maximum limit of any buy-back shall be twenty-five per cent (25%) or less of the aggregate of paid-up capital and free reserves of the company; the ratio of the aggregate of secured and unsecured debts owed by the company after buy-back shall not be more than twice the paid-up capital and free reserves; all shares or other specified securities for buy-back shall be fully paid-up;
- Company shall not authorise any buy-back (whether by way of tender offer or from open market or odd lot) unless the buy-back is authorised by the company's articles and a special resolution has been passed at a general meeting

Bombay HC: 13 Prabhat Steel Traders Pvt Ltd v. Excel Metal Processors Pvt Ltd and Ors. Arbitration Petition No.619 of 2017

MERC: Order of 15 the Hon'ble Maharashtra Electricity Regulatory Commission in-case Nos. 192,193,195,196, 197,198,199 and 203 of 2018.

of the company authorising the buy-back;

- Buy-back shall be made only on stock exchanges having nationwide trading terminals;
- A company may buy-back its shares or other specified securities through the book-building process also;
- It is mandatory to make a public announcement within two (2) working days of its declaration of results of the postal ballot for special resolution/ board of directors;
- A company can undertake buyback of shares out of its free reserves and securities premium account, among others. However, buybacks cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

2. **Buyback Period:** The term 'buyback period' is defined in the Buy-Back Regulations 2018 , as *"the period between the board resolution/date of declaration of results for the special resolution authorizing the buyback, and the date on which consideration is paid to the shareholders."*

The detailed guidelines of the Buy-Back Regulations 2018 can be found in the link provided below:

The Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018

SEBI issued regulations called *Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements Regulations), 2018 on September 11, 2018* ("**SEBI Issue of Capital and Disclosure Regulations, 2018**") to replace the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations 2009, pertaining to the issue of prospectus, Initial Public Offers ("**IPO**"); etc. The primary objective of these SEBI Issue of Capital and Disclosure Regulations, 2018 is overhauling the laws governing IPOs and incorporate the changes made by the newer Companies Act, 2013. A summary of the amendments is as below:

1. Definitions

   The definitions of an Associate, Group Companies, Housing Finance Company, Infrastructure Sector, which relates to and includes transportation, agriculture, water management, telecommunication, power, services provided by stock exchanges and other miscellaneous services like mining and disaster management etc., Institutional Trading Platform, Institutional Investor, lead manager, main board, persons acting in concert, Qualified Institutions Placement, Relative etc. has been newly included in these Regulations. Some of these definitions have been borrowed from the *SEBI (Substantial Acquisition of Share and Takeovers) Regulations, 2011.*

2. IPO

- The definition of promoter and promoter groups now includes 'immediate relatives' and shall include such companies (other than promoter(s) and subsidiary(ies)) with which there were related party transactions, during the period for which financial information is disclosed (3 years), as covered under the applicable accounting standards and also other companies as considered material by the board of the issuer.
- A company may mention a price band in the offer document and determine the price at a later date before registering the prospectus with the Registrar of Companies. In case, the issuer opts not to make the disclosure of the price band in the red herring prospectus, the issuer will have to announce the floor price "at least two working days before the opening of the issue", instead of five (5) days as was the case in the Principal Regulation.

3. Rights Issue

Presently, for any rights issue where the aggregate value of the securities offered is Rs. 50 Lakh or more, the issuer is required to submit the draft offer document for SEBI's review, and carry out modifications suggested by SEBI. Under the new Regulations, for rights issues where the aggregate value of the securities offered is less than Rs. 10 Crore, the issuer shall be exempt from the requirement to submit the draft offer letter.

4. Disclosures:

- The disclosures about group companies has been restricted to only information on related party transactions in the offer documents.

The current norms wherein information about financials and litigations, among others, related to group entities to be disclosed at the time of public issues has been removed.

- Restated and audited financial disclosures in the offer document should be on a consolidated basis only i.e., as a consolidated financial statement of the issuer. Also, financial disclosures are required to be made for three (3) years as against the present duration of five (5) years.
- Additionally, the audited standalone financials of the issuer and material subsidiaries would need to be disclosed on the website of the issuer company.

5. Sub-brokers

Sub-brokers have been removed from the category of market intermediaries. No fresh registration shall be granted as sub-brokers. Registered sub-brokers shall migrate to authorised persons or trading members. Sub-brokers who do not choose to migrate, shall be deemed to have surrendered their registration as sub-broker.

6. Accounting principles

The new Regulations incorporate the principles governing disclosures of Indian Accounting Standards on Indian GAAP Financials.

7. Anchor Investors

- The minimum application value for anchor investors to the IPO of a Small and Medium Enterprise (SME) has been reduced from Rs. 10,00,00,000 (Rupees Ten Crores) to Rs. 2,00,00,000 (Rupees Two Crores)

- Anchor investors now also includes: (a) Insurance Companies and Foreign Portfolio Investors (except for Category III), promoted by entities related to the lead manager; and (ii) mutual funds promoted by the lead manager.

8. Equity Shares

The threshold for roll over of non-convertible portion of partly convertible debt instruments has been changed from Rs. 50,00,000 (Rupees Fifty Lakhs) to Rs. 10,00,00,000 (Rupees Ten Crores), more than one warrant can now be attached to a specified security, and an issuer of securities to make a bonus issue of equity shares from the securities premium account as well as the capital redemption reserve account in addition to the issue from the free reserves which was previously there.

These Regulations will become effective after sixty (60) days of the publication i.e. November 11, 2018.

Amended Eligibility conditions for Foreign Portfolio Investors

SEBI vide its *Circular dated September 21, 2018* has notified eligibility norms for the April 10, 2018 circular on Know Your Client ("**KYC**") requirements for Foreign Portfolio Investors ("**FPIs**") has prescribed a set of eligibility conditions for FPIs. It was decided that the Beneficial Ownership ("**BO**") criteria in Prevention of Money-laundering (Maintenance of Records) Rules, 2005 would not be made applicable for determining eligibility. Therefore, the following important eligibility norms have been laid down :

> "...
>
> ***2.2 NRIs/ OCIs/ Resident Indians (RIs) shall be allowed to be constituents of FPIs subject to the following conditions:*** *- (a) Contributions by Non -Resident Indians* ***(NRI)****/ Overseas Citizen of India* ***(OCI)****/ Resident India* ***(RI)*** ***i****ncluding those of NRI/ OCI/ RI controlled Investment Manager should be below 25% from a single NRI/ OCI/ RI and in aggregate should be below 50% to corpus of FPI; and (b) NRI/ OCI/ RI should not be in control of FP* (Not applicable to FPIs controlling offshore funds or those investing only in mutual funds).

2.3 FPIs can be controlled by investment managers (IMs) *if following conditions are satisfied: -*

(i) IM is appropriately regulated in its home jurisdiction and registers itself with SEBI as non-investing FPI; or (ii) IM is incorporated or setup under Indian laws and appropriately registered with SEBI.

2.7 Existing FPIs and new applicants shall be given a time period of two years *from the date of coming into force of the amended regulations or from the date of registration, whichever is later in order to satisfy these eligibility conditions.*

2.8 In case of temporary breach, a time period of 90 days *will be given to ensure compliance with above conditions."*

The detailed contents of the circular can be found in the link provided below:

Eligibility conditions for Foreign Portfolio Investors (FPIs)- September 21, 2018 Circular.

Amended Know Your Client Requirements for Foreign Portfolio Investors

SEBI vide its *Circular dated September 21, 2018* has notified certain amendments Know Your Client (KYC) requirements for FPIs. Some of the amendments are given below: -

1. Clause 1 describes the criteria for Identification and verification of BOs. The procedure for Periodic KYC Review has been explained under Clause 2. Clause 3 contains information pertaining to KYC Documentation and describes what constitutes 'Financial Data'. Under Clause 4, the list of documents that are exempted from being furnished for investigation has been mentioned. Clause 5 and 6 pertain to Data Security norms for preserving personal information pertaining to the BOs as well the period of retention, which is five (5) years from the date of recession of contracts, subject to pending litigation. Clause 7 prescribes timelines for Compliance. In case the FPI remains non-compliant with this requirement even after 180 days from the said deadline, its FPI registration will no longer be valid and it would need to disinvest its holdings immediately.

2. The Circular also contains two Annexures, Annexure A of which pertains to the filing of details of a BO, and Annexure B of which pertains to filing of Information for an Intermediate Material shareholder. The detailed amendments can be found in the link below

   Amended Know Your Client Requirements for Foreign Portfolio Investors– September 21, 2018 Circular

MINISTRY OF CORPORATE AFFAIRS

Amendment to Schedule V of the Companies Act, 2013

The following amendment has been made to Schedule V of the Companies Act, 2013 ("**Schedule V**") vide the *Notification dated September 12, 2018*, namely:

1. In PART I of Schedule V, which deals with the conditions to be fulfilled for the appointment of a managing or whole-time Director or a Manager without the approval of the Central Government, under title 'APPOINTMENTS', in para (a) after the item (xvi), the following items shall be inserted namely:

> *"(xvii) the Insolvency and Bankruptcy Code, 2016 (31 of 2016);*
>
> *(xviii) the Goods and Services Tax Act, 2017 (12 of 2017);*
>
> *(xix) the Fugitive Economic Offenders Act, 2018 (17 of 2018);"*

2. Para (d) of Schedule V has been omitted. Para (d) of Schedule V reads as follows:

> *"(d) where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II;"*

3. In PART II, under the heading of 'REMUNERATION', in Section II the phrase *"without Central Government approval"* has been omitted at all places. The amendment has also prescribed enhanced remuneration for the managerial person depending on certain conditions that the Company subscribes to.

3. In Item (B), in second proviso, for clause (ii), the following shall be substituted, namely: -

> *"(ii) the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, and in case of default, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting."*

Companies Act, 2013 – Sections coming into force

Section	Particulars	In Effect From
Sections 66 to 70 (both inclusive)	Reduction in Share Capital, Restrictions on giving loans to members for purchase of shares, Power of company to purchase own securities and Prohibition on buy-back of shares.	12th September, 2018
Sections 132 (1) to (11)	National Financial Reporting Authority Constitution.	1st October, 2018
Section 37	Action by persons affected (by misleading prospectus).	19th September, 2018

BOMBAY HIGH COURT

Prabhat Steel Traders Pvt Ltd v. Excel Metal Processors Pvt Ltd and Ors.

Arbitration Petition No.619 of 2017

The Hon'ble Bombay High Court in the matter of *Prabhat Steel Traders Pvt Ltd.* v. *Excel Metal Processors Pvt. Ltd. & Ors.*, in Arbitration Petition No.619 of 2017, through a judgment dated August 31, 2018 has decided that third parties are allowed to file an appeal against an arbitral award under Section 37 of the Arbitration and Conciliation Act, 1996 ("**Act**").

1. Background

The issue of maintainability was raised by the counsel on the grounds that neither of the Appellants are parties to the original arbitration agreement and thus, do not fall under the meaning of 'party' as defined under Section 2 (1)(h) of the Act.

2. Decision

There is no dispute about the proposition of law that a third party cannot appear before the arbitral tribunal and seek any interim measures under Section 17 of the Act or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party. Section 34 of the Act also refers to the expression "party" which is absent in Section 37 of the Act. The fact that the expression "party" is absent in Section 37 of the Arbitration Act makes the legislative intent clear that the said expression

"party" is deliberately not inserted so as to provide a remedy of an appeal to a third party who is affected by any interim measures granted by the arbitral tribunal or by the Court in the proceedings filed by and between the parties to the arbitration agreement. Therefore, aggrieved Third Parties may file an appeal.

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

Order of the Hon'ble Maharashtra Electricity Regulatory Commission, Case Nos. 192,193,195,196,197,198,199 and 203 of 2018.

The Hon'ble Maharashtra Electricity Regulatory Commission (**"MERC/ Hon'ble Commission**") vide its Combined Order dated September 28, 2018 passed its Order in Case Nos. 192,193,195,196,197,198,199 and 203 of 2018, asking MSEDCL to expeditiously make payments towards Principal amounts for pending invoices, alongwith Delayed Payment Charges ("**DPC**").

1. Background:

Certain Wind Energy Generators ("**Generators**") in the state of Maharashtra were not receiving payments for various wind projects for more than a year from Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"). MSEDCL had entered into various Energy Purchase Agreements ("**EPA**") with such Generators. The Generators approached the Hon'ble Commission seeking relief against MSEDCL for such non-payment of principal amounts, alongwith DPC, for the outstanding amounts.

The Petitioners in all the above cases mentioned that the EPAs contained standard clauses for payment of the invoices raised within forty-five (45) days or sixty (60) days as the case may be. Also, the EPAs contained clauses for payment of DPC at the rate of 1.25% per month or 2% per annum above the State Bank of India ("**SBI**") short term lending rates, as the case may be.

MSEDCL in all the above cases had not expressly denied their liability towards the payments for the invoices raised but had argued that timely payments were not made on account of non-payments by the consumers of MSEDCL and certain other liabilities which resulted in financial difficulties and affected their cash flows gravely. Also, while admitting their liability in relation to payments for over-injected units to Sahyadri Industries Limited, in Case No. 199 of 2018, MSEDCL stated that the pending payments would be released chronologically as per the invoices received and subject to the availability of funds considering its precarious financial position.

2. Decision:

The Hon'ble Commission held that MSEDCL was liable to make payments to the Petitioner in the above cases for the principal amounts of the invoices and DPC and directed MSEDCL to make the payments expeditiously. Additionally, the Commission observed that there was a difference between the outstanding amounts claimed by the Petitioners and projected by MSEDCL, and hence directed the parties involved to sit together and reconcile the statement of account within two weeks from date of this Order and conciliation report be submitted to the Commission within two days thereafter. MSEDCL was also directed to submit its Compliance Report at the soonest.

The Petitioners in each of the above cases were represented by Eternity Legal at the Hon'ble Commission.

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Warm Regards,

Dipali Sarvaiya Sheth

Founder

ETERNITY LEGAL
Advocates & Solicitor
Patent & Trademark Attorneys

D-226, Neelkanth Business Park,

Vidyavihar (West), Mumbai– 400086

Email: contact@eternitylegal.com

Tel no.: +91 22 2515-9001