cyril amarchand mangaldas
ahead of the curve

insight

Volume XVI | Issue II | September, 2023

Impact of Proxy Advisory Firms: Turning Tides and Failing Resolutions

Main Story_page 01

Main stories

Welcome to this issue of ***Insight***.

In the lead article of this issue of *Insight*, we have covered issues raised by proxy advisory firms in relation to resolutions proposed by listed companies in light of their increasing role and influence on shareholders decisions. In view of this, we have analysed the drawbacks of reports issued by proxy advisory firms in India and suggested mitigation steps and strategies.

Apart from the above, we have also captured the key notifications and orders issued by the Ministry of Corporate Affairs ("**MCA**") in relation to the Companies Act, 2013, as well as circulars and notifications issued by the Reserve Bank of India ("**RBI**") and the Securities and Exchange Board of India ("**SEBI**") for the period under review.

Any feedback and suggestions would be valuable in our pursuit to constantly improve Insight and ensure its continued success among readers. Please feel free to send them to cam.publications@cyrilshroff.com.

Regards,

CYRIL SHROFF

Managing Partner
Cyril Amarchand Mangaldas

India's leading law firm

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

Index

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

Index

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

Impact of Proxy Advisory Firms: Turning Tides and Failing Resolutions

- By Bharat Reddy and Abhishek Jain

I. *Increasing the role and relevance of 'Proxy Advisory Firms' in corporate governance*

Until very recently, the recommendations of proxy advisory firms did not impact companies much, as it did not have the power to influence or fail/ stop a resolution from being passed. However now, the recommendations of proxy advisory firms are becoming increasingly relevant given that many institutional investors are basing their positions while voting on resolutions on such advice. This is evidenced from the fact that proxy advisory firms have recently managed to prevent a resolution for granting employee stock options to employees of a group entity of a very large Indian bank from being passed due to the absence of *"any compelling reasons"*.[1] In another interesting case, a proxy advisory firm came very close to preventing a resolution pertaining to an increase in the remuneration of a director from being passed on account of this increase being *"skewed" and "guaranteed"*.[2]

It is paramount to note here that proxy advisory firms provide recommendations on *inter alia*, two key fronts, which are legal/ regulatory compliance and governance risks. The thresholds that proxy advisory firms use to map and check for governance compliance are non-legal thresholds, i.e., these do not have the binding force of law and are solely from the perspective of a 'good to have' as opposed to 'must have'. Ordinarily such thresholds are higher than the threshold prescribed under applicable law.

Given that proxy advisory firms are now influencing voting, the thresholds and standards used to evaluate corporate governance are now slowly taking the shape of 'must have'. Regardless of being legally compliant, if a company has a vast shareholder base or large public shareholding, it is more than likely that their resolutions will get rejected if they fail to adhere to the standards set by proxy advisory firms.

While proxy advisory firms are growing, some of the key players in the space are Institutional Investor Advisory Services ("**IiAS**"), InGovern, Stakeholder Empowerment Services ("**SES**") and Glass Lewis. The length and breadth of the companies they cover is expansive. With SES releasing more than 1,000 reports annually and IiAS covering more than 1,000 companies, it is safe to assume that apart from the large companies, even the new age companies would get covered and everyone would start paying attention to their recommendations.

II. *Regulations covering 'Proxy Advisory Firms'*

Proxy advisors are defined under Regulation 2(p) of the Securities and Exchange Board of India (Research Analysts) Regulations, 2014 ("**SEBI Research Analyst Regulations**"), as *"any person who provides advice, through any means, to institutional investor or shareholder of a company, in relation to exercise of their rights in the company including recommendations on public offer or voting recommendation on agenda items"*.

Proxy advisors in India are primarily regulated by the SEBI Research Analyst Regulations and the Procedural Guidelines for Proxy Advisors, dated August 3, 2020 ("**Procedural Guidelines**"), while their counterparts in other jurisdictions are largely unregulated.

III. *Drawbacks of reports on governance issues by proxy advisory firms in India*

Most proxy advisory firms have adopted western governance standards and hence are more suitable to cater to the requirements of companies operating in the West. It is imperative that these standards are revaluated from an Indian perspective before applying them to Indian companies, which often have different realities to deal with.

Since these standards are not legally mandated or required, implying that these effectively push the threshold of governance regulation. For instance, the separation of the 'MD/CEO' and 'chairperson' posts, while used as a corporate governance standard, is not legally mandated and SEBI has made it voluntary for companies to separate these posts under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015

[1] We note that based on recommendation by a proxy advisory firm, an ESOP scheme which was approved and adopted by a listed bank, was rejected in a shareholders meeting from being extended to the group companies with a 58-42% vote, primarily due to public shareholders voting against it due to the proxy advisory firm's recommendations.

[2] We note that the proxy advisory firm had recommended against allowing for an increased remuneration to be given to a director of a financial services company, which very narrowly got the 2/3 majority for approval by the shareholders. It is pertinent to note that the members voting against were primarily institutional investors, which shows that the report of the proxy advisory firms was in fact being given due weightage by them.

("**LODR Regulations**"). Another instance where the corporate governance standard differs is in relation to the term of independent directors. While under the LODR Regulations and the Companies Act, 2013, an independent director cannot be reappointed for more than two terms of five years each, it is important to note that this requirement came into effect from April 1, 2014, and hence any person who was already serving as an independent director prior to April 1, 2014, would have another 10 years to serve. Proxy advisory firms on the other hand take the view that upon completion of the 10-year mark, the director will lose their 'independence' and hence an independent director's term should not be extended beyond the 10-year mark.

It is essential to understand that a templatised minimum corporate governance threshold will only cause more governance issues as different companies have different requirements, depending upon their structure, growth and background. For instance, while a proxy advisory firm might make a recommendation that it is not justified for the company to grant ESOPs to certain class of employees at a discount or on more relaxed terms, it would also not be appropriate to link the vesting of ESOPs granted to a member of the support staff to the company's performance targets.

It is essential to understand that governance should not be hard coded upfront because it will be impossible to have a one structure/ framework to fit all. Further, by hard coding a minimum threshold for corporate governance, we take away the discretionary power that is vested *inter alia* in the Board of Directors and the Nomination and Remuneration Committee pursuant to Section 178 of the Companies Act, 2013, to make these decisions, which are likely more informed about the affairs of the company and other confidential information, which a proxy advisory firm may/ will not be privy to.

IV. *How can companies minimise the possibility of pushback by proxy advisory firms?*

Proactively making 'sufficient' disclosures

Section 102 of the Companies Act, 2013, mandates certain disclosures in the explanatory statement issued, along with the notice calling for the shareholders meeting/ postal ballot notice, which include:

- *A statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:—*
  - i) *The nature of concern or interest, financial or otherwise, if any, in respect of each items of— (i) every director and the manager, if any; (ii) every other key managerial personnel; and (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);*
  - ii) *Any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.*
- *Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him."*

From the above, it is evident that penalty is imposed on account of *"non-disclosure or insufficient disclosure"* and also the company is required to disclose *"the nature of concern or interest, financial or otherwise" and "any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon"*. While section 102(1), read with 102(4) of the Companies Act, 2013, creates a wide threshold of regulation, it is pertinent to note that a company is expected to ideally provide 'sufficient' reasons and information pertaining to why it is seeking to make certain decisions.

This is also evidenced from the fact that in most instances where proxy advisory firms have recommended to vote against a resolution, it has been on account of the company not providing a clear rationale for the proposal.

V. *Rectification upon intimation – late but not too late*

The Procedural Guidelines have put in place some guard rails to allow a company to correct any inadvertent errors/ omissions/ non-compliances that are flagged by proxy advisors through a mandatory consultation requirement between the proxy advisors and the company, under guideline no. 1(e), which states that *"Proxy Advisors shall share their report with its clients and the company at the same time. This sharing policy should be disclosed by proxy advisors on their website. Timeline to receive comments from company may be defined by proxy advisors and all comments/ clarifications received from the company, within*

timeline, shall be included as an addendum to the report. If the company has a different viewpoint on the recommendations stated in the report of the proxy advisors, then proxy advisors, after taking into account the said viewpoint, may either revise the recommendation in the addendum report or issue an addendum to the report with its remarks, as considered appropriate". The company should ensure that it uses this opportunity to respond to the proxy advisory firms that have recommended to vote 'against', as the best way to showcase that the company is being operated in a transparent manner and to provide their perspective on why the proposed resolution should be approved. However, companies must ensure that no material new information is provided to the proxy advisory firms, as this would raise questions on whether the explanatory statement disclosures were complete or not.

VI. *Conclusion*

Proxy advisory firms have become a means for shareholders to outsource key decision making to third party experts, and unlike the shareholders themselves, such firms may not have any skin in the game. Companies should ensure that prior to conducting shareholder meetings, they take into account corporate governance standards and ensure that the resolutions are as detailed as can be, without disclosing confidential information. It is crucial that companies start putting in place mitigation strategies to respond to unfavorable reports/ recommendations by proxy advisory firms.

(Mr. Bharat Reddy and Mr. Abhishek Jain had penned this article and the same was published by the firm on October 23, 2023)

1. ***MCA extends timeline for General Meetings through virtual means***

   The MCA has extended the timeline and has allowed companies to hold their Annual General Meetings ("**AGMs**") and Extraordinary General Meetings ("**EGMs**"), through video conference or other audio-visual means. The extension is for AGMs and EGMs held on or before September 30, 2024.

   (General Circular No. 9/2023 [F No. Policy-17/57/2021-CL-MCA] dated September 25, 2023)

2. ***Amendment to the Limited Liability Partnership Rules, 2009 for additional disclosures by LLPs***

   The MCA has substituted the existing Form 3 (which pertains to information regarding Limited Liability Partnership Agreement and any changes made therein) and Form 4 (which pertains to appointment, cessation or change in name/ address/ designation of partner or on consent being given to become a partner/ designated partner) with newer versions. The new forms require certain additional disclosures, including *inter alia* information regarding form of contribution by a partner, in case of amendment to an LLP Agreement the number of amendments and additional details regarding changes in the business activity.

   (MCA Notification G.S.R. 644E dated September 1, 2023)

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

FOREIGN EXCHANGE AND RBI UPDATES

1. ***Revised Regulatory Framework for Infrastructure Debt Fund-Non-Banking Financial Companies***

   In order to enable Infrastructure Debt Fund-Non-Banking Financial Companies ("**IDF-NBFCs**") to play a greater role in the financing of the infrastructure sector, a review of the guidelines applicable to IDF-NBFCs was undertaken by the RBI. Set out below are the key aspects of the revised regulatory framework for IDF-NBFCs.

   - **Provisions applicable to IDF-NBFCs are as follows:**

     i. **Definition:** An IDF-NBFC means a non-deposit taking NBFC which is permitted to:

        a. refinance infrastructure projects that have completed at least one year of satisfactory commercial operations, post commencement operations date; and

        b. finance toll operate transfer projects as the direct lender.

     ii. **Capital Requirement:** An IDF-NBFC will be required to have Net Owned Funds ("**NOF**") of at least INR 300 crore and capital-to-risk weighted assets ratio ("**CRAR**") of minimum 15 per cent (with minimum Tier 1 capital of 10 per cent). For the purposes of funding, an IDF-NBFC can raise funds through the following modes:

        a. issue of bonds (either rupee or dollar denominated) of minimum five-year maturity. IDF-NBFCs may also raise funds through shorter tenor bonds and commercial papers to the extent of up to 10% of their total outstanding borrowings; and

        b. through loan route under external commercial borrowings, subject to (i) a minimum tenor of 5 (five) years, (ii) loans not being sourced from foreign branches of Indian banks, and (iii) adherence to guidelines as may be specified by the Foreign Exchange Department of the RBI.

     iii. **Exposure limits:** The exposure limits for IDF-NBFCs will be (i) 30% of their Tier 1 capital for single borrower/ party, and (ii) 50% of their Tier 1 capital for single group of borrowers/ parties.

     iv. **Requirements of a sponsor and tripartite agreement:**

        a. Previously, an IDF-NBFC was required to be sponsored by a bank or an NBFC-Infrastructure Finance Company ("**NBFC-IFC**"). This requirement to have a sponsor for an IDF-NBFC has now been withdrawn and shareholders of IDF-NBFCs will be subjected to scrutiny as applicable to other NBFCs.

        b. Further, the earlier requirement of IDF-NBFCs to enter into a tripartite agreement with the concessionaire and the project authority for investments in public private partnership infrastructure projects, has now been made optional.

        c. All other regulatory norms, such as income recognition, asset classification and provisioning norms as applicable to NBFC-NBFC-Investment and Credit Companies, will be applicable to IDF-NBFCs.

   - **Provisions applicable to IDF-MFs (Infrastructure Debt Funds registered as a trust)**

     i. **Requirements for sponsorship:** All NBFCs will be eligible to sponsor IDF-MFs in terms of the SEBI

regulations for mutual funds, with the prior approval of the RBI subject to the following conditions (based on the audited financial statements) in addition to those prescribed by SEBI:

a. The NBFC is required to have a minimum NOF of INR 300 crore and CRAR of 15%.

b. Its net non-performing assets (NPAs) will be less than 3% of the net advances.

c. It is in existence for at least 5 (five) years.

d. It is earning profits for the last 3 (three) years and its performance is satisfactory.

e. The CRAR of the NBFC post investment in the IDF-MF will not be less than the regulatory minimum prescribed for it.

f. The NBFC will continue to maintain the required level of NOF after accounting for investment in the proposed IDF-MF.

g. There are no supervisory concerns with respect to the NBFC.

ii. NBFCs fulfilling the abovementioned eligibility criteria may approach the Department of Regulation of the RBI, for prior approval to sponsor IDF-MFs.

(RBI/2023-24/54 DoR.SIG.FIN.REC.31/03.10.001/2023-24 dated August 18, 2023)

2. ***RBI instructs Regulated entities who are secured creditors under SARFAESI to display information of secured assets taken in possession***

In order to bring in greater transparency, the RBI has issued a Circular directing its Regulated Entities ("**REs**"), which are secured creditors as per the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to display information of those borrowers whose secured assets have been taken into possession by the REs under the Act. Details regarding (i) the identities of the borrower and guarantor; (ii) the outstanding amount; (iii) the asset classification; (iv) the date of the asset classification; (v) the security possessed and (vi) the title of the security holder, are required to be uploaded in the format specified in the Annex of the Circular. The first of such list will be displayed on the website of the RE within six months from the date of the issuance of the circular, and thereafter, it will be updated monthly.

(RBI/2023-24/63 DoR.FIN.REC.41/20.16.003/2023-24 dated September 25, 2023)

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

SECURITIES LAW UPDATES

A. Master Circulars

1. ***Master Circular for compliance with the provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR")***

   SEBI issued a master circular for compliance with provisions of LODR. The Master Circular dated July 11, 2023, provides a chapter-wise framework for compliance with various obligations under LODR and consolidates all circulars issued till June 30, 2023.

   (SEBI Circular No. SEBI/HO/CFD/PoD2/CIR/P/2023/120 dated July 11, 2023)

B. Circulars

1. ***Appointment of Director nominated by the Debenture Trustee on board of issuers***

   - The Regulation 23(6) of the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("**NCS Regulations**") obligates an issuer to ensure that their articles of association require to appoint a person nominated by the debenture trustee(s) of the issuer as a director on the board of the issuer, in terms of Regulation 15(1)(e) of the SEBI (Debenture Trustees) Regulations, 1993 ("**Regulation 15(1)(e)**").
   - In this regard, SEBI has received the following representations from debenture trustees on problems faced by certain issuers:
     i. Issuers incorporated under different statutes have expressed their inability to make amendments to their boards as certain statutes (a) either do not provide for appointment of nominee directors by trustees or (b) require approval from the President of India.
     ii. Some issuers are unable to appoint nominee directors on their boards as their principal document/charter does not provide for the same and there is no statutory provision for amending their principal document.
   - Owing to the issues highlighted above, SEBI issued a circular to allow the above issuers to submit an undertaking to their debenture trustee, that in case of events mentioned in Regulation 15(1)(e), a non-executive/independent director/trustee/member of the governing body shall be designated as nominee director for the purposes of Regulation 23(6) of NCS Regulations, in consultation with the debenture trustee(s).

   (SEBI Circular No. SEBI/HO/DDHS/POD1/P/CIR/2023/112 dated July 4, 2023)

2. ***Introduction of Business Responsibility and Sustainability Report ("BRSR") Core for assurance by listed entities and ESG disclosures for value chain***

   SEBI has issued a circular to implement the BRSR Core, a subset of the BRSR that specifies the data and approach for reporting and assurance by listed entities. It also mandates the disclosures that listed entities must provide on their value chain. The circular provides the following:

   - The BRSR Core consists of a set of key performance indicators ("**KPIs**") or metrics under nine ESG attributes, which , *inter alia*, include greenhouse gas footprint, water footprint, enhancing employee wellbeing, etc. The BRSR Core also introduces certain new KPIs in the BRSR format,

such as openness of business, job creation in small towns, etc., and provides a revised BRSR format.

- From Fiscal 2023-24, the top 1,000 listed entities (by market capitalisation) shall be required to make disclosures as per the revised BRSR format in their annual reports. Further, listed entities shall mandatorily undertake reasonable assurance of the BRSR Core in a phased manner with effect from: (i) Fiscal 2023-24 (for top 150 listed entities), (ii) Fiscal 2024-25 (for top 250 listed entities), (iii) Fiscal 2025-26 (for top 500 listed entities), and (iv) Fiscal 2026-27 (for top 1,000 listed entities).
- Listed entities are required to make disclosures for value chain as per the BRSR Core as part of their annual reports. The value chain shall encompass the top upstream and downstream partners of a listed entity, cumulatively comprising 75% of its purchases or sales (by value), respectively. This disclosure requirement shall be applicable to the top 250 listed entities on a comply-or-explain basis from Fiscal 2024-25, and the limited assurance of such disclosures shall be applicable on a comply-or-explain basis from Fiscal 2025-26.

(SEBI Circular No. SEBI/HO/CFD/CFD-SEC-2/P/CIR/2023/122 dated July 12, 2023)

3. ***Circular on disclosure of material events or information by listed entities under the LODR***

- Through its circular no. CIR/CFD/CMD/4/2015, dated September 9, 2015 ("**2015 Circular**"), SEBI specified details that listed entities were required to submit while disclosing events under Part A of Schedule III of the LODR and provided guidance on when an event / information was said to have occurred. Pursuant to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023, SEBI revised the regulatory framework on continuous disclosure obligations of listed entities under the LODR. Accordingly, to provide clarity in relation to the revised disclosure requirements under Regulations 30 and 30A read with Schedule III of the LODR, SEBI issued this circular. The 2015 Circular is partially modified and now forms part of this circular.
- In addition to specifying details that need to be provided by listed entities while disclosing events / information under Part A of Schedule III of the LODR, this circular also provides further guidance on (i) the applicable timelines for disclosing such events to the stock exchanges, (ii) when an event / information is said to have occurred for such disclosure, and (iii) criteria for determination of the quantitative threshold for materiality of events or information under Regulation 30(4) of the LODR.
- Further material on the various issues under the amendments to the LODR in relation to Regulations 30 and 30A are covered in our blogs titled - Proposed Amendments to LODR on Agreements Affecting Listed Companies – Swatting Flies with a Sledgehammer?, Market Rumours: SEBI's New Prescription and India Inc's Dilemma and SEBI Amendments to the LODR – An Overview of Key Changes.

(SEBI Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/123 dated July 13, 2023)

4. ***Mandating Legal Entity Identifier ("LEI") for all non – individual Foreign Portfolio Investors ("FPIs")***

- SEBI has now mandated non-individual FPIs to provide LEI details (a unique global 20-character code to identify legally distinct entities that engage in financial transactions).
- To ensure transparency, non-individual borrowers having aggregate exposure of above INR 25 crore have to obtain LEI code as per the RBI directions. All existing FPIs (including those applying for renewal) that have not yet provided their LEIs, are required to do so within 180 days from the date of issuance of this circular, failing which their account shall be blocked for making further purchases.

(SEBI Circular No. SEBI/ HO/ AFD/ AFD– PoD–2/ CIR/ P/ 2023/0127 dated July 27, 2023)

5. ***Online Resolution of Disputes in the Indian Securities Market***

SEBI, *vide* its circular dated July 31, 2023, and corrigendum cum amendment dated August 4, 2023, has streamlined existing dispute resolution mechanism in the Indian securities market under the aegis of Stock Exchanges and Depositories (collectively referred to as "**Market Infrastructure Institutions**" or "**MIIs**") by expanding their scope and by establishing a common online dispute resolution ("**ODR**") portal. The portal facilitates online conciliation and online arbitration for resolution of disputes arising in the Indian Securities Market. Thereafter, SEBI has released a master circular on online dispute resolution on August 11, 2023 ("**Master Circular**").

Some of the key highlights of the ODR Circulars are set out below:

- **Envisages two categories of disputes:**

  i. Disputes between investors/ clients and listed companies (including their registrar and share transfer agents) or any of the specified intermediaries/ regulated entities in securities market (as specified in the Master Circular) arising out of latter's activities in the securities market, will be resolved in accordance with the Master Circular and by harnessing online conciliation and/ or online arbitration.

  ii. Institutional or corporate clients have the option of resolving disputes with specified intermediaries / regulated entities in securities market (specified in the Master Circular).

- The circulars specifies the process for initiation of the dispute resolution and the mode of dispute resolution, which includes conciliation or arbitration through the online dispute resolution portal.

  The Master Circular also set out the norms for empanelment and continuing obligations of the ODR institutions, the roles and responsibilities of MIIs and the responsibilities of the market participants. The provisions of ODR framework will be implemented in two phases. Further details on the ODR Mechanism are specified in our blog titled Resolving Securities Disputes in the Digital Age: A Primer on SEBI's Master Circular for Online Resolution of Disputes in the Indian Securities Market.

(SEBI Circular No. SEBI/HO/OIAE/OIAE_IAD-1/P/CIR/2023/131 dated July 31, 2023 and SEBI Circular No. SEBI/HO/OIAE/OIAE_IAD-1/P/CIR/2023/135 dated August 4, 2023 and SEBI Master Circular No. SEBI/HO/OIAE/OIAE_IAD-1/P/CIR/2023/145)

6. ***Offer for Sale framework for sale of units of Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs)***

- SEBI by way of its circular dated January 10, 2023, bearing reference no. SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/10 ("**January Circular**"), has specified a comprehensive framework on the offer for sale ("**OFS**") of shares and units of REITs and InvITs through the stock exchange mechanisms.

- Further, SEBI by way of its circular dated August 3, 2023, bearing reference no. SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/134 ("**SEBI Circular**"), has modified the January Circular to allow OFS of units of private listed InvITs.

- By way of the SEBI Circular, SEBI has permitted alignment of OFS trading lot for listed InvIts with the trading lot prescribed for such InvITs in the secondary market in accordance with the SEBI InvIT Regulations. Further, considering that there is no participation of retail investors in private listed InvITs, the provisions related to retail investors as specified in the January Circular will not be applicable in case of OFS for such InvITs and the OFS will remain open only for one day.

(SEBI Circulars No. SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/134 dated August 3, 2023)

7. ***Reduction of validity period of approval granted by SEBI to Alternative Investment Funds ("AIFs") and Venture Capital Funds ("VCFs") for overseas investment***

- SEBI has, *vide* circular dated August 04, 2023, reduced the time limit for making the allocated investments by AIFs/ VCFs in offshore venture capital undertakings, from six months to four months.

- In case the applicant AIF/VCF does not utilise the limits allocated within six months, SEBI may allocate such unutilised limit to other applicant AIF/VCF.

(SEBI Circular No. SEBI/HO/AFD/PoD/CIR/P/2023/137 dated August 04, 2023)

8. ***Reduction of timeline for listing of shares in Public Issue from existing T+6 days to T+3 days***

- SEBI has, *vide* its circular dated August 9, 2023 ("**Circular**"), reduced the timeline for listing of shares in

public issues from six days to three days, from the date of issue closure. The issuer entities will have to appropriately disclose the new timeline (i.e., T+3) in the offer documents of public issues. Further, the timelines for submission of application, allotment of securities, unblocking of application monies and listing will have to be prominently made a part of pre-issue, issue opening and issue closing advertisements issued in terms of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

- The provisions of the Circular was applicable on voluntary basis for public issues opening on or after September 1, 2023 and will be a mandatory requirement for public issues opening on or after December 1, 2023.

(SEBI Circular No.SEBI/HO/CFD/TPD1/CIR/P/2023/140 dated August 9, 2023)

9. *Procedure for seeking prior approval for change in control*

- SEBI had, *vide* its circular bearing reference number CIR/MIRSD/14/2011 dated August 2, 2011 ("**Circular 2011**") specified the procedure for seeking prior approval for change in control of certain intermediaries including merchant bankers and bankers to an issue. Further, Regulation 9A(1)(a) of Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992 and Regulation 8A(1)(a) of Securities and Exchange Board of India (Bankers to an Issue) Regulations, 1994 provide that merchant bankers and bankers to an issue respectively shall obtain prior approval of SEBI in case of change in control.
- SEBI, *vide* its circular dated August 10, 2023 ("**Circular 2023**"), has specified the procedure to streamline the process of obtaining approval for the proposed change in control of merchant bankers and Bankers to an Issue (intermediary). The intermediary will have to make an online application to SEBI for prior approval through the SEBI intermediary portal, accompanied by information/ declaration/ undertaking about itself, the acquirer(s)/ the person(s) who shall have the control and the directors/ partners of the acquirer(s)/ the person(s) who shall have control. The prior approval granted by SEBI shall be valid for a period of six months from the date of SEBI's approval within which the applicant shall file application for fresh registration pursuant to change in control.
- The Circular 2023 has also streamlined the process of granting approval to the proposed change in control of an intermediary in matters involving scheme(s) of arrangement, which needs sanction of the National Company Law Tribunal ("**NCLT**"). The application for approval of the proposed change in control of intermediary needs to be filed with SEBI prior to filing the application with NCLT. Within three months of receiving an in-principal approval from SEBI, relevant application is required to be made to the NCLT. The intermediary shall submit an online application within 15 days from the date of order of NCLT along with certain documents to SEBI for final approval.
- The provisions of the Circular 2023 shall be applicable with effect from September 1, 2023, and shall supersede the Circular 2011, to the extent they relate to merchant bankers and bankers to an issue.

(SEBI Circular No. SEBI/HO/CFD/PoD-2/P/CIR/2023/141 dated August 10, 2023)

10. *Mandating additional disclosures by Foreign Portfolio Investors ("FPIs") that fulfil certain objective criteria*

- SEBI has inserted Regulations 22(6) and 22(7) in the SEBI (FPI) Regulations, 2019 ("**FPI Regulations**") and has now required disclosure from certain FPIs of granular details of all entities holding any ownership, economic interest, or exercising control in the FPI, on a full look-through basis, up to the level of all natural persons, without any threshold.
- The FPIs that fulfil any of the criteria mentioned below are required to make such disclosures to the respective DDPs in the format that will be specified in a standard operating procedure, to be framed and adopted by all the DDPs/ Custodians, in consultation with the SEBI.
  i. FPIs holding more than 50% of their Indian equity Assets Under Management (AUM) in a single Indian corporate group.
  ii. FPIs that individually, or along with their investor group (in terms of Regulation 22(3) of the FPI Regulations), hold more than INR 25,000 crore of equity AUM in the Indian markets. *('economic interest' means returns from the investments made by the FPI and 'ownership interest' means ownership of shares or capital of the entity or entitlement to derive profits from the activity of the entity).*
- Certain kinds of FPIs such as government related investors, public retail funds, etc., have been exempted from making the disclosures.

(SEBI Circular No. SEBI/ HO/AFD/AFD–PoD–2/ CIR/ P/ 2023/148 dated August 24, 2023)

11. ***New format of abridged prospectus for public issues of non-convertible debt securities and/or non-convertible redeemable preference shares***

- In order to further simplify, provide greater clarity and consistency in the disclosures across various documents and to provide additional but critical information in the abridged prospectus, SEBI, *vide* its circular dated September 4, 2023 ("**Circular**"), issued a new format of abridged prospectus for public issues of non-convertible debt securities and/or non-convertible redeemable preference shares pursuant to Regulation 32(3) and Regulation 2(1)(a) of SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. Pursuant to the Circular, SEBI has directed the issuer or merchant banker to, *inter alia*, include a quick response code on the last page of the abridged prospectus and avoid inclusion of qualitative statements without substantiation.
- SEBI has also issued a format of application form for investors to complete. Further, SEBI has directed the issuer/ merchant bankers/ syndicate members like brokers who are involved in the public issue to disclose the formats on their websites during the period a public issue is kept open, as the case may be, for the implementation of the Circular. This Circular came into effect for all the public issues of non-convertible debt securities and/or non-convertible redeemable preference shares opening on or after October 1, 2023.

(SEBI Circular No. SEBI/HO/DDHS/PoD1/CIR/P/2023/1 dated September 4, 2023)

12. ***Board nomination rights to unitholders of Infrastructure Investment Trust (InvITs) and Real Estate Investment Trusts ("REITs")***

SEBI, by way of its circulars dated September 11, 2023, bearing reference nos. SEBI/HO/DDHS-PoD-2/P/CIR/2023/153 and SEBI/HO/DDHS-PoD-2/P/CIR/2023/154 has notified the framework pursuant to which eligible unitholders of InvITs and REITs may exercise their board nomination rights on the investment manager, or manager, respectively.

(SEBI Circular No. SEBI/HO/DDHS-PoD-2/P/CIR/2023/153 dated September 11, 2023, and SEBI Circular No. SEBI/HO/DDHS-PoD-2/P/CIR/2023/154 dated September 11, 2023)

13. ***Extension of timeline for verification of market rumours by listed entities***

- One of the provisos to Regulation 30(11) of the LODR requires (i) top 100 listed entities by market capitalisation with effect from October 1, 2023; and (ii) top 250 listed entities by market capitalisation with effect from April 1, 2024, to mandatorily verify and confirm, deny or clarify market rumours. SEBI, *vide* its circular dated September 30, 2023, has extended the effective date of implementation of the aforesaid proviso to February 1, 2024, for top 100 listed entities by market capitalisation, and to August 1, 2024, for top 250 listed entities by market capitalisation.
- To give effect to this, SEBI, *vide* Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2023, has omitted the specific dates previously mentioned under Regulation 30(11). The requirement to mandatorily verify, confirm, deny or clarify market rumours will now be effective from the date as may be specified by SEBI.

(SEBI Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/162 dated September 30, 2023 and SEBI Notification No. SEBI/LAD-NRO/GN/2023/155 dated October 09, 2023)

C. Board Meeting

1. ***SEBI Board Meeting held on September 21, 2023***

SEBI approved, *inter alia*, the following key proposals in relation to changes to the extant SEBI regulations:

- **Flexibility in the framework for Large Corporates ("LCs") for meeting incremental financing needs through issuance of debt securities:** SEBI approved the proposal to provide flexibility in the framework for LCs for meeting their financing needs from the debt market through the following measures:
  i. A higher monetary threshold has been specified for defining LCs, thereby reducing the number of entities qualifying as Lcs.
  ii. Removal of penalty on LCs which are not able to raise a certain percentage of incremental borrowing from the debt market.
  iii. Introduction of incentives and moderated disincentives.
- **Streamlining the framework for credit of unclaimed amounts of investors in listed entities other than companies, real estate investment trusts ("REITs") and infrastructure investment trusts ("InvITs") to the investor protection and education fund ("IPEF") and process of refund from the IPEF:** The SEBI has approved amendments to IPEF, LODR, REIT and InvIT regulations to

simplify the credit framework for unclaimed amounts. The objective is to prescribe a uniform and streamlined process for investors to claim such amounts as well as to create a regulatory framework for segregating unclaimed amounts in IPEF.

- **SEBI extends timeline for compliance with enhanced qualification and experience requirements for investment advisers:** Pursuant to the SEBI (Investment Advisers) (Amendment) Regulations, 2020, investment advisers, principal officers of non-individual investment advisers and persons who are with the investment advisers and associated with investment advice were required to comply with enhanced qualification and experience requirements by September 30, 2023. The deadline for such compliance has been extended to September 30, 2025.

(SEBI Press Release No. 21/2023 dated September 21, 2023)

D. Amendments

1. ***Amendments to the Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("SEBI NCS Regulations")***

SEBI has, pursuant to a notification dated July 3, 2023, amended the SEBI NCS Regulations to provide for, *inter alia*, (i) common disclosures to be made for public issues and private placement of non-convertible debt securities proposed to be listed, and (ii) introduction of a general information document ("**GID**") and key information document ("**KID**") instead of filing of a shelf placement memorandum. Some of the key amendments are set out below:

- **Parity in disclosures for public issue and private placement:** A common schedule (i.e. Schedule I) has been included to provide details of the disclosures required to be made by issuers seeking to list their non-convertible securities on the stock exchanges, whether by way of a public issuance or private placement of such securities.

- **Filing of GID and KID:** An issuer seeking to make a private placement of non-convertible securities that are proposed to be listed shall be required to file a GID with the stock exchanges. The GID shall contain *inter alia* disclosures specified under the newly inserted Schedule I of the SEBI NCS Regulations, the Companies Act, 2013 as applicable and shall be valid for one year from the date of opening of the offer. Subsequently, if the issuer makes a private placement of a second or subsequent set of non-convertible securities during the validity of the GID, such issuer shall only be required to file a KID for each such second or subsequent offer of non-convertible securities. The KID shall contain, *inter alia*, details of the offer and material changes in the information provided in the GID. This filing requirement shall be applicable on a comply-or-explain basis until March 31, 2024, and on a mandatory basis thereafter. Pursuant to this amendment, the requirement to file a shelf placement memorandum for private placements shall gradually cease to be applicable.

- **Inclusion of definitions of 'key managerial personnel' and 'senior management':** The definitions of the terms 'key managerial personnel' and 'senior management' have been included in the SEBI NCS Regulations to align with the definitions provided in the LODR and the SEBI ICDR Regulations, as amended.

(SEBI Notification No. SEBI/LAD-NRO/GN/2023/135 dated July 3, 2023)

2. ***Securities and Exchange Board of India (Infrastructure Investment Trusts) (Second Amendment) Regulations, 2023 and Securities and Exchange Board of India (Real Estate Investment Trusts) (Second Amendment) Regulations, 2023***

   - SEBI, by way of the SEBI (Infrastructure Investment Trusts) (Second Amendment) Regulations, 2023 and Securities and Exchange Board of India (Real Estate Investment Trusts) (Second Amendment) Regulations, 2023 dated August 16, 2023 (collectively, the "**InvIT and REIT Amendment Regulations**"), has notified amendments to enhance the governance, transparency, and functioning of infrastructure investment trusts ("**InvITs**") and real estate investment trusts ("**REITs**") operating in India.
   - The key amendments include addition of new definitions, prescription of minimum unitholding requirement and exit option, introduction of stewardship code, specification of lock-in period by the sponsor and sponsor group and provision for board nomination rights.

   (SEBI Notification No. SEBI/LAD-NRO/GN/2023/145 dated August 16, 2023, and Notification No. SEBI/LAD-NRO/GN/2023/144 dated August 16, 2023)

3. ***Introduction of Securities and Exchange Board of India (Facilitation of Grievance Redressal Mechanism) (Amendment) Regulations, 2023 ("Grievance Redressal Mechanism Regulations")***

   - SEBI has notified the Grievance Redressal Mechanism Regulations, pursuant to which it has introduced and/or amended the grievance redressal mechanism in the regulations applicable to intermediaries and market participants.
   - Pursuant to the Grievance Redressal Mechanism Regulations, SEBI has introduced a timeline of 21 days for redressal of investor grievances and has provided that it may recognise a body corporate for handling and monitoring the process of grievance redressal within such time and in such manner as may be specified.

   (Notification No. SEBI/LAD-NRO/GN/2023/146 dated August 16, 2023)

4. ***Second Amendment to the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018 ("SEBI Depositories and Participants Regulations")***

   SEBI has, *vide* notification dated August 22, 2023, amended the SEBI Depositories and Participants Regulations to provide for stringent fit and proper criteria for depositories and their key stakeholders to cover the entity, depository, its shareholders, directors and key managerial personnel.

   (Notification No. SEBI/LAD-NRO/GN/2023/147 dated August 22, 2023)

5. ***Third Amendment to the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018***

   SEBI has, *vide* notification dated August 22, 2023, amended the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 to provide for stringent fit and proper criteria for recognised stock exchanges and recognised clearing corporations, and their key stakeholders to maintain utmost integrity to cover recognised stock exchanges, recognised clearing corporations, their shareholders, directors, and key management personnel.

   (Notification No. SEBI/LAD-NRO/GN/2023/148 dated August 22, 2023)

6. ***Amendment to the LODR in relation to non-convertible debt securities ("NCDS") and non-convertible redeemable preference shares ("NCRPS")***

   SEBI has, *vide* notification dated August 23, 2023, amended the SEBI LODR Regulations, to introduce the framework for voluntary delisting of NCDS or NCRPS and obligations of the listed entity on such delisting. Some of the salient features of the framework are set out below:

   - **Applicability:** These provisions are applicable to voluntary delisting of all listed NCDS or NCRPS from all or any of the stock exchanges where such NCDS or NCRPS are listed except in circumstances where (a) a listed entity has outstanding listed NCDS or NCRPS issued by way of a public issue; or (b) a listed entity has more than 200 securities holders excluding qualified institutional buyers in any International Securities Identification Number relating to listed NCDS or NCRPS; or (c) NCDS or NCRPS have been delisted by the stock exchanges as a consequence of any penalty or action initiated against the listed entity or on any grounds as specified under Rule 21 of the Securities Contracts (Regulation) Rules, 1957; or (d) NCDS or NCRPS have been delisted by the stock exchanges pursuant to redemption of such securities or shares; or (e) NCDS or NCRPS have been delisted pursuant to a resolution plan as per Section 31 of the Insolvency and Bankruptcy Code, 2016.

- **In-principle approval of the stock exchanges:** The listed entity is required to make an application to the relevant stock exchange(s) for seeking in-principal approval in the form specified by such stock exchange, not later than 15 working days from the date of passing of the board resolution to that effect or of receipt of any other statutory or regulatory approval, whichever is later.
- **Obligations of the listed entity:** The obligations of the listed entity *inter alia* include (a) to ensure that the process of obtaining necessary approval from all holders of NCDS or NCRPS commences within three working days of the grant of in-principal approval; and (b) all the events in respect of the proposal of delisting for NCDS or NCRPS shall be disclosed as material information to the stock exchanges as per Regulation 51 of the LODR. Additionally, SEBI has also provided a list of information which will have to be disclosed by the listed entity on its website as well as to the stock exchanges, within two working days from the date of receipt of in-principal approval from the stock exchanges.
- **Notice of delisting:** Notice of delisting has to be sent within three working days from the date of receipt of in-principal approval from the stock exchanges, which shall contain disclosures as specified in the LODR.
- **Approval from the holders and no-objection letter from the debenture trustee:** The listed entity shall obtain approval from all the holders within 15 working days from the date of the notice of delisting.
- **Failure of delisting proposal:** In case of failure of the delisting proposal for reasons including (a) non-receipt of in-principal approval from any of the stock exchanges, (b) non-receipt of requisite approval from the holders, and (c) non-receipt of no-objection letter from the debenture trustee, the listed entity shall intimate the same to the stock exchanges within one working day from the date of event of failure.
- **Final application to the stock exchange:** The listed entity has to make the final application for delisting to the stock exchange in the form specified by such stock exchange within five working days from the date of obtaining the requisite approval from the holders of NCDS / NCRPS.
- **Monitoring of compliance by the stock exchanges:** The relevant stock exchanges shall monitor compliance by the listed entity in accordance with the LODR.

(Notification No. SEBI/LAD-NRO/GN/2023/149 dated August 23, 2023)

7. ***Fourth Amendment to the LODR in relation to debt securities***

SEBI has, *vide* notification dated September 19, 2023, amended the SEBI Listing Regulations to enhance transparency and investor protection. These changes will impact listed entities issuing non-convertible debt securities:

- **Mandatory Listing of Non-Convertible Debt Securities:** Listed entities whose non-convertible debt securities are listed shall list all such non-convertible, that are proposed to be issued on or after January 1, 2024. The entity may also choose to list an unlisted non-convertible debt security made on or before December 31, 2023, which are outstanding on that date.

- **Listing of Outstanding Unlisted Debt Securities:** Listed entities planning to list non-convertible debt securities on or after January 1, 2024, must also list all outstanding unlisted non-convertible debt securities on or after that date within three (3) months from the date of listing the proposed securities.
- **Exemption:** Certain debt securities such as bonds issued under Section 54EC of the Income Tax Act, securities issued under agreements with multilateral institutions, and those issued as per court orders or regulatory requirements as stipulated by a financial sector regulator such as SEBI, RBI, IRDAI or PFRDA.
- **Lock-In:** The debt securities in the exemption category (except bonds issued under s. 54EC of the Income Tax Act), shall be locked in and held till maturity by the investors and shall be unencumbered.
- **Disclosure Requirements:** A listed entity proposing to issue debt securities under the exempted categories shall disclose to the stock exchanges on which its non-convertible debt securities are listed, all key terms of such securities, including embedded options, security offered, interest rates, charges, commissions, premiums, period of maturity and any details as required by SEBI from time to time.

(Notification No. SEBI/LAD-NRO/GN/2023/151 dated September 19, 2023)

E. Consultation Papers

1. ***Consultation paper on mechanism for fee collection by SEBI registered investment advisers and research analysts***

By way of a consultation paper issued on August 25, 2023, SEBI has invited comments from the public on the proposal to create a closed ecosystem for fee collection by SEBI-registered investment advisers ("**IAs**") and research analysts ("**RAs**") from their clients in order to help investors ensure that their payments are reaching only registered IAs and RAs, while avoiding unregistered entities. This would also help investors identify, isolate, and avoid unregistered entities, who would be unable to access this closed ecosystem.

(Consultation paper on mechanism for fee collection by SEBI registered investment advisers and research analysts dated August 25, 2023)

F. Informal Guidance

1. ***Informal Guidance by way of an Interpretive Letter received from Gujarat Gas Limited ("Company") under SEBI (Informal Guidance) Scheme, 2003***

- Regulation 3(2) of the LODR provides that it is applicable to listed entities on the basis of market capitalisation criteria, even if they fall below the prescribed thresholds. Further, in terms of Regulation 44(5) of the LODR, the top 100 listed entities by market capitalisation are not permitted to hold their annual general meeting ("**AGM**") within five months of the date of closing of the financial year. In this regard, the Company sought a guidance whether it will still be bound to convene an AGM within five months of the new financial year, i.e, on or before August 31, 2023, given its inclusion in the list of top 100 listed entities by market capitalisation as on March 31, 2021, before Regulation 3(2) of the LODR came into effect and its removal from top 100 listed entities compilation as on March 31, 2023.
- Against this backdrop, SEBI stated in its informal guidance that since the determination of the Company as one of the top 100 listed entities by market capitalisation was made prior to the date on which Regulation 3(2) of the LODR came into effect and since the Company was not included in the list as on March 31, 2022, and March 31, 2023, the compliance with Regulation 44(5) of the LODR would not be applicable to the Company.

(SEBI Informal Guidance No. SEBI/HO/CFD/PoD2/OW/P/2023/30606/1 dated July 31, 2023)

insight
Volume XVI | Issue II | September, 2023

cyril amarchand mangaldas
ahead of the curve

List of Contributors

Cyril Shroff
Managing Partner

Yash Ashar
Partner (Head-Capital Markets)

Bharath Reddy
Partner

Devaki Mankad
Partner

Aditya Prasad
Partner

Janhavi Seksaria
Partner

Ramgovind Kuruppath
Partner

Megha Krishnamurthi
Principal Associate

Archit Bhatnagar
Principal Associate

Amitpal Singh
Senior Associate

Nayana Dasgupta
Senior Associate

Akshay Singh Ralhi
Senior Associate

Rishav Buxi
Senior Associate

Surabhi Saboo
Senior Associate

Mrudul Desai
Senior Associate

Cyril Amarchand Mangaldas
Advocates & Solicitors

100⁺ years of legacy | **1000** Lawyers | **Over 170** Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai – 400 013, India
T +91 22 2496 4455 **F** +91 22 2496 3666 **E** cam.mumbai@cyrilshroff.com **W** www.cyrilshroff.com
Presence in Mumbai | Delhi-NCR | Bengaluru | Ahmedabad | Hyderabad | Chennai | GIFT City | Singapore