

Overseas investment norms to be rationalized | Regulatory framework for Independent directors, debt securities and non-convertible preference shares | MCA eases issuance of securities in IFSC by foreign companies

RBI, SEBI and MCA and have issued following set of changes:

A. RBI

RBI has proposed rationalisation of overseas investment regulations under Foreign Exchange Management Act, 1999 (FEMA), and has released following draft rules/regulations for public comments:

- (i) [Foreign Exchange Management \(Non-debt Instruments - Overseas Investment\) Rules, 2021;](#)
- (ii) [Foreign Exchange Management \(Overseas Investment\) Regulations, 2021.](#)

B. SEBI

1. [SEBI \(Issue and Listing of Non-Convertible Securities\) Regulations, 2021:](#) To streamline the regulatory framework dealing with issuance and listing of debt securities and non-convertible preference shares, SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021, have been notified to repeal: (a) SEBI (Issue and Listing of Debt Securities) Regulations, 2008 and the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013. SEBI has also issued the consolidated operational instructions for the issuance, listing and trading of Non-convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities and Commercial Paper.
2. [New regulatory framework for independent directors:](#) SEBI has implemented certain key decisions with respect to the regulatory framework for independent directors (**IDs**) which were taken at the SEBI board meeting dated June 29, 2021 ([available here](#)), which will be effective from January 1, 2022.
3. [Key decisions at SEBI Board Meeting:](#) SEBI has also taken certain significant decisions in its board meeting held on August 6, 2021 ([available here](#)), which include the following:
 - (i) Review of regulatory framework for promoter, promoter group and group companies
 - Relaxation of lock-in requirements;
 - Reducing of disclosure requirements in IPO;
 - Shift from concept of promoter to 'person in control' or 'controlling shareholders'
 - (ii) AIFs
 - PPMs to be filed through Merchant bankers;
 - Investment flexibility to Cat I AIF – VCFs;
 - Exemption to Accredited Investors from minimum grant amount requirement;
 - Issue of partly paid-up units to investors.
 - (iii) Introduction of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, as a result of the merger of SEBI (Issue of Sweat Equity) Regulations, 2002 and SEBI (Share Based Employee Benefits) Regulations, 2014;
 - Benefits to employees of the company/group company;
 - change in scheme administration made flexible;
 - extension of time period for unappropriated inventory;
 - no minimum vesting period in case of death/permanent incapacity;

- Maximum yearly limit that can be issued to be 15%.
- (iv) Relaxation in certain disclosure obligations under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Code**);
- (v) Proposals to facilitate the ease of doing business for market infrastructure institutions (**MIIs**).

C. MCA

With a view to promote transactions in International Financial Service Centre (**IFSC**) by foreign companies, MCA has excluded the application of certain provisions of Companies Act, 2013 (**CA2013**) with respect to matters relating to subscription of securities and requirements related to prospectus in the IFSC.

Aforementioned changes are analyzed below:

RBI

A. Rationalization of overseas investment regulations under FEMA

RBI has proposed rationalization of overseas investment regulations under FEMA. Overseas Investments and acquisition of immovable properties outside India by persons resident in India is presently governed by the provisions contained in Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 and Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations 2015. RBI has released following draft rules/regulations for public comments:

- (i) **Foreign Exchange Management (Non-debt Instruments - Overseas Investment) Rules, 2021:** Following are certain key features of the draft rules:
 - Rules will be administered by RBI;
 - Shall not apply to any investment made outside India by a unit set up in an “International Financial Services Centre (**IFSC**);
 - A recognized stock exchange in the IFSC in India shall be treated as a recognized stock exchange outside India;
 - No Objection Certificate (NOC) requirement from the Lender Bank(s)/Regulatory Body/Investigative Agency in certain cases
 - A person resident in India is prohibited from making ODI in a foreign entity engaged in real estate activity, gambling in any form, offering financial products linked to Indian Rupee except for products offered in an IFSC;
 - Overseas Investment by a person resident in India shall not be made in a foreign entity located in countries/ jurisdictions that are not FATF and IOSCO compliant country or any other country/jurisdiction as may be prescribed by the Central Government;
 - The rules have classified overseas investments into schedules which provide detailed guidelines on (i) Overseas Direct Investment by an Indian entity; (ii) Overseas Portfolio Investment by an Indian Entity; (iii) Overseas Investment by Resident Individuals; (iv) Overseas Investment by a Person Resident in India other than an Indian Entity and an Individual;
 - Separate provisions are incorporated to provide for acquisition of immovable property
- (ii) **Foreign Exchange Management (Overseas Investment) Regulations, 2021:** The regulations provide for conditions for undertaking financial commitment by modes other than equity capital, and include following:
 - The Indian entity should be eligible to make ODI, has made ODI by investment in equity capital in the foreign entity and has also acquired control in such foreign entity in terms of the conditions as contained in the Foreign Exchange Management (Non-Debt Instruments – Overseas Investment) Rules, 2021, and these regulations on or before the date of making any financial commitment by modes other than equity capital in such foreign entity;

- The Indian entity may lend or invest in any debt instruments issued by a foreign entity or extend non-fund based commitments to or on behalf of a foreign entity including its step down subsidiary, within the prescribed financial commitment limit;
- Following shall be reckoned towards the financial commitment limit: (i) Financial commitment by way of Debt; (ii) Financial commitment by way of Guarantee; (iii) Financial commitment by way of pledge/charge;
- Mechanism provided for acquisition/transfer by way of deferred payment;
- A person resident in India who has made financial commitment in a foreign entity shall not make any further financial commitment, whether fund-based or non-fund-based, directly or indirectly, towards such foreign entity or transfer such investment till any delay in reporting is regularized.

SEBI

A. SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021

In a move to streamline the regulatory framework dealing with issuance and listing of debt securities and non-convertible preference shares, SEBI has notified the [SEBI \(Issue and Listing of Non-Convertible Securities\) Regulations, 2021 \(NCS Regulations\)](#). NCS Regulations will come into effect from on the seventh day from the date of its publication in the Official Gazette (date of publication is August 9, 2021). NCS Regulations will repeal the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (**ILDS Regulations**) and SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 (**NCRPS Regulations**).

The proposed shift to a single regulation will ensure that there is ease of reference and language and also remove redundancies which would entail following objectives:

- Simplify and align the existing regulations in line with the various circulars/guidance and various provisions of the regulations, issued by SEBI and improve the structure of the regulations in order to enhance readability;
- Identify policy changes in line with the present market practices and the prevailing regulatory environment and to ease doing business;
- Separate the chapters on the basis of type of issuance- public/private placement and instruments- debt securities/NCRPS/PNCPS/PDIs/Commercial Papers, so that all relevant information is sorted and are available at one place;
- Align the regulations with the amendment in the Companies (Share Capital and Debentures) Rules, 2014 and Companies (Prospectus and Allotment of Securities) Rules, 2014 etc.;
- Merge all the existing circulars into a single operational circular.

As a result of the notification of the notification of NCS Regulations, consolidation of related existing circulars into a single operational circular, with consequent changes, has also been done by SEBI. SEBI has issued operational circular dated August 10, 2021 ([available here](#)) which provides a chapter-wise framework for the issuance, listing and trading of Non-convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities or Commercial Paper. The aforementioned SEBI circular will be effective from August 16, 2021.

B. Amendments to the framework for independent directors

Key changes introduced under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR Regulations**) are as follows:

1. **Shareholders' approval to be earliest for appointment of all directors**: Shareholder approval for appointment of all directors shall be taken at the next general meeting, or within 3 months of the appointment on the Board, whichever is earlier.
2. **Composition of audit committee**: It has been clarified that at least 2/3rd of the members of the audit committee to be IDs.
3. **Composition of nomination and remuneration committee (NRC)**: The composition of nomination and remuneration committee has been modified to 2/3rd IDs instead of existing requirement to have at least 50% directors as IDs.
4. **Approval of related party transactions (RPTs) only by IDs on the audit committee**: All RPTs to be approved by only IDs on the audit committee.
5. **Special resolution required for appointment, re-appointment, and removal of IDs**: The appointment, re-appointment or removal of IDs will require approval of the shareholders by way of a special resolution.
6. **Additional process to be followed by nomination and remuneration committee for appointment of IDs**: The role of the committee, while selecting candidates for appointment as IDs, has been elaborated and made more transparent. Now, for every appointment of an ID, the committee is required to evaluate the balance of skills, knowledge, and experience on the board and on the basis of such evaluation, prepare a description of the role and capabilities required of an ID. The person recommended to the board for appointment as an ID to have the capabilities identified in such description.

For the purpose of identifying suitable candidates, the committee may: (a) use the services of an external agencies, if required; (b) consider candidates from a wide range of backgrounds, having due regard to diversity; and (c) consider the time commitments of the candidates.

7. **Cooling-off period for IDs who resigns for certain appointments**: A cooling off period of 1 year has been prescribed for IDs who resigns from a listed entity for their appointment as an executive/whole time director on the board of the listed entity, its holding, subsidiary, or associate company or on the board of a company belonging to its promoter group.
8. **Vacancy of office of IDs to be filled mandatorily within 3 months**: Where an ID resigns or is removed from the board of directors, a new ID will now be required to be appointed at the earliest possible but not later than 3 months from the date of such vacancy. Earlier, the listed company had the option to fill such vacancy either immediate next meeting of the board of directors or three months from the date of such vacancy, whichever was later.
9. **Directors and Officers insurance for IDs for top 1000 companies**: The requirement of undertaking Directors and Officers insurance for IDs has been extended from existing 500 companies to the top 1000 companies (by market capitalization) with effect from January 1, 2022.
10. **Disclosure of additional information to shareholders for appointment/re-appointment of a director**: In addition to the existing requirement of providing names of listed entities in which the person who is proposed to be appointed/re-appointed as a director holds the directorship and the membership of committees of the board, the details of listed entities from which such person has resigned in the past 3 years will henceforth will also be required to be disclosed.

Further, where the appointment/re-appointment is of an ID, the skills and capabilities required for the role and the manner in which the proposed person meets such requirements, is also required to be disclosed.
11. **Disclosures in case of resignation by IDs**: Under the list of mandatory events that are required to be disclosed by listed company under Para A of Part A of Schedule III, it will now be mandatory to disclose the letter of resignation along with detailed reasons for the resignation by an ID. Further, the names of listed entities in which the resigning director holds directorships, indicating the category of directorship and membership of board committees, if any, to be additionally disclosed.
12. **Definition of 'Independent Director'**: The definition of independent director has been made more stringent to exclude persons holding position of key managerial position in promoter group companies or having material pecuniary interest in the listed company, its holding, subsidiary, or associate company during the 3 immediately preceding financial years, etc. The revised definition reads as follows:

Existing Regulation 16(1)(b)	Revised Regulation 16(1)(b)
<p><i>(b) "independent director" means a non-executive director, other than a nominee director of the listed entity:</i></p> <p>.....</p> <p><i>(iv) who, apart from receiving director's remuneration, has or had no material pecuniary relationship with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;</i></p> <p>...</p>	<p><i>(b) "independent director" means a non-executive director, other than a nominee director of the listed entity:</i></p> <p>.....</p> <p><i>(iv) who, apart from receiving director's remuneration, has or had no material pecuniary relationship with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, during the three immediately preceding financial years or during the current financial year;</i></p> <p>...</p>

Existing Regulation 16(1)(b)	Revised Regulation 16(1)(b)
<p><i>(v) none of whose relatives has or had pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed from time to time, whichever is lower, during the two immediately preceding financial years or during the current financial year;</i></p>	<p><i>(v) none of whose relatives :</i></p> <p><i>(A) is holding securities of or interest in the listed entity, its holding, subsidiary or associate company during the three immediately preceding financial years or during the current financial year of face value in excess of fifty lakh rupees or two percent of the paid-up capital of the listed entity, its holding, subsidiary or associate company, respectively, or such higher sum as may be specified;</i></p> <p><i>(B) is indebted to the listed entity, its holding, subsidiary or associate company or their promoters or directors, in excess of such amount as may be specified during the three immediately preceding financial years or during the current financial year;</i></p> <p><i>(C) has given a guarantee or provided any security in connection with the indebtedness of any third person to the listed entity, its holding, subsidiary or associate company or their promoters or directors, for such amount as may be specified during the three immediately preceding financial years or during the current financial year; or</i></p> <p><i>(D) has any other pecuniary transaction or relationship with the listed entity, its holding, subsidiary or associate company amounting to two percent or more of its gross turnover or total income:</i></p> <p><i>Provided that the pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company or their promoters, or directors in relation to points (A) to (D) above shall not exceed two percent of its gross turnover or total income or fifty lakh rupees or such higher amount as may be specified from time to time, whichever is lower.”</i></p>
<p><i>(vi) who, neither himself, nor whose relative(s):</i></p> <p><i>(A) holds or has held the position of a key managerial personnel or is or has been an employee of the listed entity or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;</i></p> <p>....</p>	<p><i>(vi) who, neither himself/herself, nor whose relative(s):</i></p> <p><i>(A) holds or has held the position of a key managerial personnel or is or has been an employee of the listed entity or its holding, subsidiary or associate company or any company belonging to the promoter group of the listed entity in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed.</i></p> <p><i>Provided that in case of a relative, who is an employee other than key managerial personnel, the restriction under this clause shall not apply for his/her employment.</i></p>

Aforementioned changes have been introduced vide the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 dated August 3, 2021 ([available here](#)), to be effective from **January 1, 2022** as per Corrigendum dated August 6, 2021 ([available here](#)).

C. Key decisions taken at the SEBI Board Meeting dated August 6, 2021

Decision	Details
<p>Share Based Employee Benefits and Sweat Equity</p> <ul style="list-style-type: none"> - Benefits to employees of the company/group company; - change in scheme administration made flexible; - extension of time period for unappropriated inventory; - no minimum vesting period in case of death/permanent incapacity; - Maximum yearly limit that can be issued to be 15%. 	<p>SEBI has approved the merger of the SEBI (Issue of Sweat Equity) Regulations, 2002 and SEBI (Share Based Employee Benefits) Regulations, 2014 into a single regulation called the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021.</p> <p>Key proposals approved:</p> <ul style="list-style-type: none"> ▪ Companies to be allowed to provide share based employee benefits to employees, who are exclusively working for such company or any of its group companies including its subsidiary or its associate; ▪ Subject to the condition that the switch is not prejudicial to the interest of the employees, companies to have flexibility in switching the administration of their schemes from the trust route to the direct route and vice versa with the approval of the shareholders; ▪ Subject to the approval of the Compensation/Nomination and Remuneration Committee, as the case may be, time period for appropriating the unappropriated inventory of the trust to be extended from existing 1 year to 2 years; ▪ Minimum vesting period and lock-in period for all share benefit schemes in the event of death or permanent incapacity (as defined by the company) of an employee to be done away with; ▪ Maximum yearly limit of sweat equity shares that can be issued by a company listed on the main board to be 15% of the existing paid up equity share capital within the overall limit not exceeding 25% of the paid-up capital at any time; ▪ In case of companies listed on the Innovators Growth Platform (IGP), the maximum yearly limit to be 15% and overall limit to be 50% of the paid-up capital at any time. This enhanced overall limit for IGP shall be applicable for 10 years from the date of company's incorporation.
<p>Review of regulatory framework for promoter, promoter group and group companies</p> <ul style="list-style-type: none"> - Relaxation of lock-in requirements; - Reducing of disclosure requirements in IPO - Shift from concept of promoter to 'person in control' or 'controlling shareholders 	<p>Basis the SEBI consultation paper dated May 11, 2021, SEBI has decided to provide relaxations in the lock-in requirements as follows:</p> <ul style="list-style-type: none"> ▪ With the purpose of demonstrating skin in the game by promoters, lock-in requirements have been revised for the following cases: <ul style="list-style-type: none"> – If the object of the issue involves only offer for sale; – If the object of the issue involves only raising of funds for other than for capital expenditure for a project (more than 50% of the fresh issue size); – In case of combined offering (Fresh Issue + offer for sale), the object of the issue involves financing for other than capital expenditure for a project (more than 50% of the issue size excluding OFS portion) <p>In the aforementioned cases, the lock-in requirements shall be as follows:</p>

Decision	Details		
		Existing requirement	Revised requirement
	Lock-in of promoters shareholding to the extent of minimum promoters contribution (i.e. 20% of post issue capital)	3 years	18 months from the date of allotment in initial public offering (IPO)/further public offering (FPO)
	Lock-in of promoter shareholding in excess of minimum promoter contribution	1 year	6 months
	<ul style="list-style-type: none"> ▪ Lock-in of pre-IPO securities held by persons other than promoters to be locked-in for a period of 6 months from the date of allotment in IPO instead of existing 1 year; ▪ Period of holding of equity shares for Venture Capital Fund or Alternative Investment Fund (AIFs) of Category I or Category II or a Foreign Venture Capital Investor shall be reduced to 6 months from the date of their acquisition of such equity shares instead of existing 1 year. <p>Additionally, with the objective of reducing the disclosure requirements at the time of IPO, the following measures have been approved:</p> <ul style="list-style-type: none"> ▪ Definition of promoter group to exclude companies having common financial investors in case where the promoter of the issuer company is corporate body; ▪ Disclosure requirements in the offer documents, in respect of Group Companies of the issuer company to exclude disclosure of financials of top 5 listed/unlisted group companies; such information to be made available on the website of the group companies. <p>SEBI has also agreed in-principle to the proposal for shifting from the concept of promoter to 'person in control' or 'controlling shareholders'. Accordingly, SEBI to draft amendments to securities market regulations and analyze impact of the same, and develop an implementation plan for the same.</p>		
AIFs <ul style="list-style-type: none"> - Merchant bankers to play greater role - Investment flexibility to Cat I AIF – VCFs; - Exemption to Accredited Investors from minimum grant amount requirement; 	<p>SEBI has approved amendments to the SEBI (Alternative Investment Funds) Regulations, 2012 (AIF Regulations) which include the following:</p> <ul style="list-style-type: none"> ▪ AIFs will be required to file private placement memorandum with SEBI through registered Merchant Bankers. The role of merchant bankers is not clarified and the amendment when introduced in the AIF Regulations, will be interesting to note. ▪ With the view of providing investment flexibility to Category I AIF – Venture Capital Funds (Cat I AIF- VCFs), SEBI has approved that such Cat I AIF- VCFs shall invest at least 75% of investable funds in unlisted equity shares and equity linked instruments of venture capital undertakings or in companies listed or proposed to be listed on a SME exchange or SME segment of an exchange; ▪ The minimum amount of grant of INR 25 Lakhs stipulated for Category I AIFs – Social Venture Funds shall not apply to grants received from Accredited Investors; ▪ AIFs may also issue partly paid up units to investors to represent the portion of committed capital invested. 		

Decision	Details
- Issue of partly paid-up units to investors.	
Relaxation in certain disclosure obligations under Takeover Code	<p>SEBI has decided to do away with certain disclosure obligations for the acquirer/promoters pertaining to acquisition or disposal of shares aggregating to 5% and any change of 2% thereafter, annual shareholding disclosures and creation/invocation/release of encumbrance registered in depository systems under the Takeover Code with effect from <u>April 1, 2022.</u></p> <p>These relaxations have been provided on account of implementation of the System Driven Disclosures (SDD) whereunder relevant disclosures are disseminated by the stock exchanges based on aggregation of data electronically.</p> <p>The obligation for physical disclosures would be done away with effect from <u>April 1, 2022.</u></p>
Proposals to facilitate the ease of doing business for market infrastructure institutions (MIIs)	<p>With a view to facilitate the ease of doing business for Market Infrastructure Institutions (MIIs), SEBI approved of the following proposals for amendments to the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 and SEBI (Depositories and Participants) Regulations, 2018:</p> <ul style="list-style-type: none"> ▪ Criteria to determine ‘fit and proper’ status of persons acquiring less than 2% of its shareholding to also be made applicable to unlisted stock exchanges/depositories. ▪ The existing requirement of seeking post-facto approval of SEBI for acquisitions between 2%-5% shareholding to discontinue for all eligible shareholders.

Aforementioned amendments and proposals were made by SEBI at its board meeting held on August 6, 2021 ([available here](#)).

MCA

A. Benefits in IFSC – Exemptions under CA2013

MCA has vide MCA notification dated August 5, 2021 ([available here](#)) exempted (a) foreign companies and (b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish a place of business in India, from the application of the following provisions of CA2013 insofar as they relate to the offering for subscription in securities, requirements related to the prospectus and all matters incidental thereto in IFSC:

Section 387 Dating of prospects and particulars to be contained therein	Section 388 Provisions as to expert's consent and allotment	Section 389 Registration of prospectus	Section 390 Offer of Indian Depository Receipts
Section 391 Application of Sections 34 to 36 (relating to liability for mis-statement in Prospectus or fraudulently inducing persons to invest) and Chapter XX (relating to Winding Up)		Section 392 Punishment for Contravention of Chapter XXII (Section 379 to Section 393A)	

In another similar change, MCA has clarified that electronic based offering of securities, subscription thereof or listing of such securities in the IFSC will not be construed as "electronic mode" for the purposes of Section 2(42) of CA2013 (*definition of "foreign company"*). In terms of Section 2(42), a company or body corporate incorporated outside India which inter alia has a place of business in India whether by itself or through an agent, physically or through electronic mode, is a foreign company. To give effect to the said change, amendment has been introduced vide the Companies (Registration of Foreign Companies) Amendment Rules, 2021 dated August 5, 2021 ([available here](#)), and the Companies (Specification of Definition Details) Third Amendment Rules, 2021 dated August 5, 2021 ([available here](#)).

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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