



## Recent Regulatory Updates and Developments in Ease of Doing Business in India

### Amendments to Significant Beneficial Ownership Rules

As an update, the Ministry of Corporate Affairs (“MCA”) has vide the Gazette notification dated February 8, 2019 notified the Companies (Significant Beneficial Owners) Amendment Rules, 2019 (“2019 Amendments”) significantly amending the Companies (Significant Beneficial Owners) Rules, 2018 (“SBO Rules”). The 2019 Amendments are in furtherance of MCA’s circular dated September 10, 2018 which stated that in light of the stakeholders concerns, Form No. BEN-1 under the SBO Rules would be revised.

In addition to revising the Forms prescribed under SBO Rules, the 2019 Amendments also clarify the definition of a significant beneficial owner (“SBO”), impose new obligations on the reporting companies and broaden the exemption provision. Following is a non-exhaustive summary of the said amendments.

#### Definition of a SBO

Under the 2019 Amendments, SBO is now defined as an individual referred to in Section 90(1) of the Companies Act, 2013 (“Act”) who acting alone or together or through one or more persons or trust, possesses one or more of the following rights or entitlements in a reporting company (a company under Section 2(20) of the Act required to comply with the requirements of Section 90 of the Act):

- holds indirectly, or together with any direct holdings, not less than 10% of the shares;
- holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
- has right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
- has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

However, if an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii) or (iii) above, he will not be considered a SBO.

- The term “significant influence” is defined as “the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies” and “control” is as defined in Section 2(27) of the Act.
- The 2019 Amendments further provide that, an individual will be considered to **hold a right or entitlement directly** in the reporting company, if the following criteria is satisfied:
  - the shares in the reporting company representing such right or entitlement are held in the name of the individual;

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- the individual holds or acquires a beneficial interest in the share of the reporting company under Section 89(2) of the Act, and has made a declaration in this regard to the reporting company.
- An individual will be considered to **hold a right or entitlement indirectly** in the reporting company, if any of the following criteria is satisfied in respect of a member of the reporting company:
  - where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the individual;
    - a) holds majority stake in that member; or
    - b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;

(The term “majority stake” is defined as “(i) holding more than one-half of the equity share capital in the body corporate; or (ii) holding more than one-half of the voting rights in the body corporate; or (iii) having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.”)

- where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), and the individual is the karta of the HUF;
- where the member of the reporting company is a partnership entity (through itself or a partner), and the individual,-
  - a) is a partner; or
  - b) holds majority stake in the body corporate which is a partner of the partnership entity; or
  - c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.
- where the member of the reporting company is a trust (through trustee), and the individual,-
  - a) is a trustee in case of a discretionary trust or a charitable trust;
  - b) is a beneficiary in case of a specific trust;
  - c) is the author or settlor in case of a revocable trust.
- where the member of the reporting company is a pooled investment vehicle or an entity controlled by the pooled investment vehicle, based in member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions, and the individual in relation to the pooled investment vehicle-
  - a) is a general partner; or
  - b) is an investment manager; or
  - c) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

(If the member of a reporting company is a pooled investment vehicle or an entity controlled by the pooled investment vehicle that is based in a jurisdiction which does not fulfil the abovementioned requirements, the provisions mentioned above for a body corporate, a HUF, a partnership firm and a trust, as the case may be, will apply.)

## Additional Obligations of the Reporting Company

The 2019 Amendments obligate every reporting company to take the necessary steps to find out if there is any individual who is a SBO in relation to that reporting company, identify him and cause the individual to make a declaration in Form No. BEN-1.

Without prejudice to the above, the reporting company is also required to give notice Form No. BEN-4 to members (other than an individual) who hold not less than 10% of its shares or voting

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rights or right to receive or participate in the dividend or any other distribution payable in a financial year and seek information in accordance with Section 90(5) of the Act.

## Other Amendments

- The 2019 Amendments provide that every individual who is a SBO on the date of the commencement of the 2019 Amendments (as opposed to the date of commencement of the SBO Rules) is required to file a declaration in Form No. BEN-1 to the reporting company within 90 days from such commencement.
- The SBO Rules and the 2019 Amendments are **not made applicable** to the extent the shares of the reporting company are held by:
  - the authority constituted under Section 125(5) of the Act;
  - its holding reporting company (provided that the details of such holding reporting company shall be reported in Form No. BEN-2).
  - the Central Government, State Government or any local Authority;
  - a reporting company, or a body corporate, or an entity, controlled by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments;
  - Investment Vehicles such as mutual funds, alternative investment funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InVITs) registered with and regulated by the Securities and Exchange Board of India;
  - Investment Vehicles regulated by Reserve Bank of India, or Insurance Regulatory and Development Authority of India, or Pension Fund Regulatory and Development Authority.

Failure to comply with the aforesaid requirements or suppression of any material information would attract both monetary and penal consequences as prescribed in the Act.

## Revised Framework for External Commercial Borrowing

The RBI has started the new year with welcome changes to the 2019 ECB policy which has liberalised the extant ECB guidelines a good degree. This note seeks to briefly capture the essential changes to note in relation to the ECB policy. Note that, the ECB policy, as it has in the past, will supplement the extant ECB guidelines and therefore amendments to the extant master direction on ECBs is expected to be carried out by the RBI in the near future.

**Recognised Lender:** The term 'recognised lender' has been significantly widened under the new ECB Policy. The erstwhile definition had a clear delineation of the lenders depending on the track under which the ECB was proposed to be availed. The revised definition now permits any entity to extend an ECB provided it is in a FATF **or** IOSCO compliant jurisdiction. The revised definition opens up the ECB route as an avenue for many different entities, such as hedge funds. Individuals have been permitted to lend foreign currency denominated ECBs (**FX-ECBs**) as well provided they are foreign equity holders of the borrower, earlier an individual could only lend under the ECB guidelines under track 3 (i.e. INR denominated ECBs).

**Eligible Borrower:** The term 'eligible borrower' has also been significantly widened, while the erstwhile ECB regulations permitted specific entities listed thereunder to avail ECBs, now, the ECB regulations permit any entity who is eligible to receive foreign direct investment (**FDI**) under the FDI Policy to also borrow by way of ECBs.

**Convergence of FX-ECB tracks & revision of Minimum Average Maturity (MAM):** The earlier ECB Policy of November 2015 had introduced the concept of tracks under which an ECB could be lent depending on the MAM of the ECB. The 3 tracks which earlier existed have now been reduced to 2 basis the denomination of the ECB instead of the MAM. The first track pertains to FX-ECBs and the second track pertains to INR denominated ECBs. The MAM in relation to all FX-ECBs has been revised to 3 years, except (i) ECBs availed from foreign equity holders proposed to be utilised for working capital / general corporate / repayment of Rupee loans, in which case the

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MAM is 5 years, (iii) manufacturing sector companies for ECBs upto USD 50 million, in which case the MAM is 1 year.

**Widening of the forms of INR denominated ECB instruments:** The earlier framework in relation to INR denominated ECBs earlier was unclear on the nature of instruments which could be issued thereunder. It has now been stipulated that, entities are permitted to avail of INR denominated ECBs by way of instruments such as bank loans, floating / fixed rate notes / bonds / debentures / preference shares (other fully and compulsorily convertible instruments), trade credits beyond 3 years and financial lease. While Rupee denominated bonds were dealt with separately under the ECB regulations, it has now been stipulated that Rupee denominated bonds are a part of the INR denominated ECBs track and therefore be regulated accordingly. It is expected that the separate provisions pertaining to Rupee denominated bonds in the main master direction may therefore be done away with.

**Aggregate Limits of ECB:** The aggregate limit for a company to borrow ECBs in a year was earlier fixed at USD 500 million<sup>1</sup> under the automatic route, in the event the amount of ECB borrowed by a borrower within a year was in excess of this limit, RBI approval would have to be sought. The aforementioned limit has now been increased to USD 750 million.

**Definition of Real Estate:** Investment of funds real estate has been a negative end use for a long time under the ECB regulations. However, the term 'real estate' had never been defined within the ECB regulations itself which gave rise to ambiguity at times. The definition has now been inserted in the master direction which sets out what comprises real estate activity<sup>2</sup>.

**Late Submission Fees:** There was a lack of clarity in relation to penalties under the earlier regime in relation to late reporting of drawdown / monthly reporting of an ECB. It has now been specifically provided that where there is a delay in relation to delay in drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns may be regularised by the borrower by payment of late submission fees. Clarification has been sought from RBI as to whether the fees payable for the delayed period of up to 30 days is INR 5,000 per day or a one-time fee. The fees payable beyond 30 days up to 3 years from due date of submission / drawdown and beyond 3 years from such date is Rs. 50,000 / year and Rs. 1,00,000 / year respectively. The fees have to be accompanied by the form. The market view in relation to the LSF is that it is permitted to be applied retrospectively, however clarification is awaited in this regard.

**Standard Operating Procedures (SOPs) for Untraceable Entities:** The RBI has prescribed certain SOPs for untraceable entities<sup>3</sup> who are in contravention of reporting provisions for ECBs for past eight quarters or more. In cases of an untraceable entity, the AD Bank is required to file the revised Form ECB and the debt is treated as written off in the eyes of RBI (without preventing the lender from recovering the same), no fresh ECBs will be permitted to such borrower or inward remittance or debt servicing under the automatic route and the Directorate of Enforcement will be notified of such entity.

## Amendment of provisions governing Startups

On February 19, 2019, the Department for Promotion of Industry and Internal Trade ("DPIIT") notified provisions governing Start-Ups relating to, among others, the income tax exemption under Section 56(2)(viib) of the Income Tax Act, 1961 ("Act") for shares issued or proposed to be issued to an investor (commonly referred to as 'angel tax').

- An entity will be considered a Startup upto a period of 10 (ten) years from its date of incorporation / registration, as opposed to the previous limit of 7 (seven) years; if its turnover for any of the financial years has not exceeded INR 1,000,000,000 (Indian Rupees One Billion), as opposed to the previous limit of INR 250,000,000 (Indian Rupees Two Hundred and Fifty Million).
- For purposes of exemption under Section 56(2)(viib) of the Act, the following conditions must be fulfilled:

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- The aggregate amount of paid up share capital and share premium of the startup after the issue or proposed issue of shares does not exceed INR 250,000,000 (Indian Rupees Two Hundred and Fifty Million), as opposed to the previous limit of INR 100,000,000 (Indian Rupees One Hundred Million);  
Provided that
  - a) Shares issued to a non-resident or a venture capital company or venture capital fund shall not be included in computing such paid up capital and share premium; and
  - b) Consideration received by such startup for shares issued to a specified company shall also be exempt. "Specified company" means a company whose shares are frequently traded and whose net worth on the last date of the financial year preceding the year in which shares are issued exceeds INR 1,000,000,000 (Indian Rupees One Billion) or turnover exceeds INR 2,500,000,000 (Indian Rupees Two Billion and Five Hundred Million).
- The startup has not invested in certain specified assets such as a residential house, or land or building, other than that used by it for purpose of renting or stock-in-trade, in the ordinary course of business; any loans and advances, other than extended in the ordinary course of business, where lending of money is a substantial part of its business; capital contributions made to any other entity; shares and securities; etc. If the startup invests in these assets for a period of 7 (seven) years from the end of the financial year in which its shares have been issued at a premium, it will lead to revocation of the exemption under Section 56(2)(viib) of the Act with retrospective effect

These amendments come at the heel of DPIIT's notification on January 16, 2019, which, among others, has introduced the following changes in the approval process for obtaining the exemption under Section 65(2)( viib) of the Act:

- The investor/proposed investor shall have:
  - i) a returned income of INR 5,000,000 (Indian Rupees Five Million) or more for the financial year preceding the year of investment/proposed investment, as opposed to the previous limit of INR 2,500,000 (Indian Rupees Two Million Five Hundred Thousand) or more for the preceding 3 (three) financial years; and
  - ii) net worth exceeding INR 20,000,000 (Indian Rupees Twenty Million) or the amount of investment made/proposed to be made in the startup, whichever is higher, as on the last date of the financial year preceding the year of investment/proposed investment.
- The form for making an application for exemption has been revised. Further, the application shall now be required to be made to the DPIIT (instead of the Inter-Ministerial Board of Certification). The investor is now required to submit directly to the DPIIT, copies of its income tax return and net-worth certificate for the relevant financial year. The earlier requirement of a report from a merchant banker specifying the fair market value of shares has been done away with. Instead, only a justification for valuation of shares along with supporting documents is required to be submitted.
- Startups which have been issued tax assessment orders for the relevant financial year by the assessing officer will not be eligible to apply for exemption for that financial year.
- The application will be transmitted by the DPIIT to the Central Board of Direct Taxes, Income Tax Department, Government of India ("CBDT"), which may grant or decline approval within 45 (forty five) days of receipt of the application from DPIIT. The CBDT also has the right to revoke the approval under section 56(2)(viib) of the Act

## Amendments to the Companies Act, 2013

### Companies (Amendment) Ordinance, 2019

The 2013 Act had been amended by the Companies (Amendment) Ordinance, 2018 with effect from November 2, 2018. This ordinance has been re-promulgated on January 12, 2019 as the Companies (Amendment) Ordinance, 2019 with effect from November 2, 2018. Further, the Union Cabinet has given its approval on February 20, 2019 for the promulgation of the Companies (Second Amendment)

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Ordinance 2019 to further replace this ordinance. Some of the key amendments are as follows:"

- Central government approval would be required for adopting a financial year which is different from April to March. Earlier, approval of the National Company Law Tribunal ("NCLT") was required for this;
- The provision on commencement of business has been re-introduced, whereby relevant filings are required to be made by the company and the relevant director with the Registrar of Companies;
- Central government approval would be required (instead of the NCLT) for alterations to the articles of association of a company having the effect of conversion of a public company to a private company; and
- Regional Director or any other officer authorised by the central government may compound the offences where the maximum amount of fine which may be imposed is up to INR 2,500,000 (Indian Rupees Two Million Five Hundred Thousand Only). Further, NCLT may compound the offences where the maximum amount of fine is more than the aforementioned amount.

Further, the Ministry of Corporate Affairs, Government of India ("MCA") has issued a list of proposed amendments to the 2013 Act with the objective of strengthening the corporate government and enforcement framework. The MCA has sought public comments on the same by November 20, 2018. Some of the key amendments are as follows:

- If an individual is a significant beneficial owner in relation to the company, then the company is required to identify him and require him to make the relevant declaration to the company;
- If a company has not completed a period of three years from the date of its incorporation, such company would be required to spend at least two percent of its average net profits made during such period on corporate social responsibility ("CSR"); and
- Any unspent amount for CSR activities would be required to be transferred to the Unspent Corporate Social Responsibility Account within 30 days from the end of the financial year. Such amount would be required to be spent within a period of three financial years from the date of such transfer.

## Ease of Doing Business Reforms

The central government as well as the state governments in India have been taking a number of initiatives to ease the doing of business in India / the relevant State. Some of the key initiatives are as follows:

### Starting a business

- E-Form Simplified Proforma for Incorporating Companies electronically (SPICe) has been introduced for availing five services - name reservation, company incorporation, Director Identification Number, Permanent Account Number, Tax Deduction and Collection Account Number;
- Requirement of minimum capital requirement (mainly relevant at the time of incorporation) has been eliminated;
- Simple and easier process has been brought through common online registration for employee provident fund and employee state insurance; and
- Registration process has been made faster under Goods and Service Tax ("GST") law.

### Paying taxes

- Corporate tax rate has been cut down from 30% to 25% for mid-sized companies with effect from April 1, 2017 (if the total turnover/ gross receipts of the previous year 2015-16 does not exceed INR 500 Million). Reduction in corporate tax rate will reduce effective 'total tax and contribution rate' calculated as a percentage of profit;
- GST law has replaced all indirect taxes with effect from July 1, 2017. There will be common procedures for registration, return filing and payment of taxes, seamless flow of credit from manufacturers/ supplier to user/ retailer, which are expected to help in eliminating cascading effect of taxes and one commodity will have same rate across India;

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- Effective contribution by employer to social security for employee as the administrative charges on provident fund has been reduced from 0.85% to 0.65% with effect from April 1, 2017. Consequently, the effective tax rate computed as percentage of commercial profit will go down; and
- Income-tax department now provides taxpayers facility of convenient return filing with enhanced technology usage. Consequently, there will be reduction in time taken to prepare, pay and file the corporate tax return form.

## Resolving insolvency

- Fast Track Corporate Insolvency Resolution Process has been introduced for small companies with effect from June 14, 2017. By reducing time for which the money remains tied up in insolvency proceedings, the reform will substantially improve the recovery rate.
- As per Section 2(85) of Companies Act, 2013 (“**2013 Act**”), a ‘small company’ means a company (other than a public company) with a paid-up share capital of up to INR 5,000,000 (Indian Rupees Five Million Only) or a higher prescribed amount of up to INR 100,000,000 (Indian Rupees One Hundred Million Only); and with a turnover of up to INR 20,000,000 (Indian Rupees Twenty Million Only) for the immediately preceding financial year or such higher prescribed amount of up to INR 1,000,000,000 (Indian Rupees One Billion Only). Nothing in this clause applies to a holding company or a subsidiary company; a company registered under Section 8; or a company or body corporate governed by any special Act.

## Trading across borders

- Central Board of Indirect Taxes and Customs (“**CBITC**”) has provided a facility of filing of Advance Bill of Entry (Advance Import Declaration) and started imposing late charges for delayed filing of Bill of Entry;
- Enhanced facilitation through risk management system (facilitated bill of entry) by simplification of risk management system inspection process resulting in reduced time taken for clearance;
- E-Sanchit (an online processing application for traders) allows traders to file all documents electronically;
- Single Window Interface for Facilitation of Trade (SWIFT) initiated to facilitate the Trading Across Borders in India; and
- CBITC has implemented Electronic Sealing for Containers by exporters under self-sealing procedure.

## Enforcing contracts

- New cases to be assigned to judges randomly through an automated system;
- Electronic case filing introduced in District Courts of Delhi and Mumbai; and
- Creation of dedicated courts for adjudication of commercial disputes in Mumbai City Civil & Sessions Courts.

## Construction permits

- An online single window system has been implemented, integrating internal and external departments, removing requirement of visiting them individually;
- Time taken to process all approvals during the construction lifecycle has been reduced from 185.9 to 94.8 days;
- Deemed approvals have been introduced if approvals are not granted within defined timelines (for example, 30 days from the date of filing the application in Delhi); and
- Risk based classification of buildings has been introduced for fast-tracking building plan approval, inspection and grant of occupancy-cum-completion certificate.

## Specifically for Delhi

- Unified Building Bye Laws have been introduced in Delhi; liability of certain professionals for any defects in buildings on plot area more than 750 sq. mts; joint site inspection by concerned departments before issuing occupancy cum completion certificate; introduction

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of Online Building Permission System; introduction of risk based classification of buildings; and all departments concerned with issuing construction permit integrated with a single window clearance system.

## Getting electricity

- Tariff has been reduced to make it simpler to obtain electricity connection;
- Process of getting a new commercial electricity connection has been made online;
- Cost to obtain electricity connection has been reduced from 487.7% to 29.5% (% of income per capita); and
- Time taken for obtaining an electricity connection has been reduced from 105 to 55 days.

## Specifically for Delhi

- Charges associated with and time required to obtain electricity connection has been reduced.

## Getting credit

- Since May 9, 2017, Central Registry of Securitisation Asset Reconstruction and Security Interest of India also provides for search by debtor's name.

## Registering property (Mumbai)

- All property cards maintained by City Survey office are fully digitized and available online; and
- Department of Registration and Stamps, Maharashtra has made 16 model deeds available online on the website of department.

## World Bank's Ease of Doing Business rankings

The World Bank has recently released its annual ease of doing business report, 2019 (for the year 2018). India has ranked 77 out of 190 countries. Last year, India stood at rank 100.

It is pertinent to note that India's ranking in the World Bank's 'Ease of Doing Business' rankings has improved from 142 (out of 189 countries) in 2014 to 77 (out of 190 countries) in 2018.

Provided below is a graphical representation of India's ranking from the year 2009 to 2018:



Source: [http://dipp.nic.in/sites/default/files/DB19\\_Ppt\\_V13.3.pdf](http://dipp.nic.in/sites/default/files/DB19_Ppt_V13.3.pdf)

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Indicator wise improvement over last year is as follows:

Indicator	Rank in 2017	Rank in 2018	Improvement in ranking
Construction Permits	181	52	129
Trading Across Borders	146	80	66
Starting a Business	156	137	19
Getting Credit	29	22	7
Getting Electricity	29	24	5

Key Highlights for India are as follows:

- 23 rank improvement in current year;
- 65 rank improvement over four years;
- Highest improvement (53 rank) in two years by any large country since 2011; and
- Recognized among top 10 improvers for second consecutive year.

- 1 Unless such ECB was being availed for the following, in which case, the limits were:
  - i) Up to USD 750 million or equivalent for the companies in infrastructure and manufacturing sectors, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies;
  - ii) Up to USD 200 million or equivalent for companies in software development sector;
  - iii) Up to USD 100 million or equivalent for entities engaged in micro finance activities;
- 2 Any real estate activity involving own or leased property for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate. However, this would not include construction/development of industrial parks/integrated township/SEZ, purchase/long term leasing of industrial land as part of new project/modernisation of expansion of existing units or any activity under 'infrastructure sector' definition.
- 3 Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:
  - i) Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorized by the AD bank for the purpose;
  - ii) Entities have not submitted Statutory Auditor's Certificate for last two years or more

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- Enforcing contracts
- Construction permits
- Specifically for Delhi
- Getting electricity
- Specifically for Delhi
- Getting credit
- Registering property (Mumbai)

### World Bank's Ease of Doing Business rankings

