

Highlights:**Corporate Brief**

- *Prior Approval For Sale, Pledge Of Over 5 Percent Equity In Insurance Company Is Mandatory: IRDAI*
- *SEBI Introduces Additional Pricing Option for Preferential Issue of Frequently Traded Shares under the ICDR Regulations.*
- *RBI Introduces Fair Practices Code for Asset Reconstruction Companies*
- *SEBI Asks Depositories To Record All Types Of Encumbrances In Depository System*

RERA Brief

- *Public Notice issued by the Haryana Real Estate Regulatory Authority, Panchkula regarding Online registration of Real Estate Agents;*
- *Office Order issued by the Haryana Real Estate Regulatory Authority, Panchkula laying down the procedure for refund of amount deposited by the Appellant with the Haryana Real Estate Appellant Tribunal pursuant to Section 43(5) of the RERA Act, 2016;*
- *Public Notice issued by the Punjab Real Estate Regulatory Authority under Section 11(1) of Real Estate (Regulation and Development) Act, 2016 read with Rule 15(D) of the Punjab State Real Estate (Regulation and Development) Rules, 2017;*
- *Circular issued by the Maharashtra Real Estate Appellate Tribunal with respect to the functioning of the Tribunal;*
- *Letter issued by Uttar Pradesh Real Estate Regulatory Authority to the registered promoters, regarding information relating to Designated Separate Account for projects registered in U.P. RERA;*
- *Letter issued by Uttar Pradesh Real Estate Regulatory Authority to the promoters, regarding furnishing of project related details for forthcoming U.P. RERA Report.*

Litigation Brief

- *Whether the Monitoring Committee is empowered by the Court to seal the residential premises?*


SEBI Introduces Additional Pricing Option for Preferential Issue of Frequently Traded Shares under the ICDR Regulations.

On July 1, 2020, Securities and Exchange Board of India (SEBI) vide notification no. SEBI/LAD-NRO/GN/2020/21 came up with the SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2020 to float an alternate option to the existing pricing framework governing the preferential issues. A new regulation 164B for Optional Pricing in Preferential Issue has been added in the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations) as an alternate temporary pricing option to the existing pricing framework for preferential issues of frequently traded shares. The existing pricing framework continues to remain in force and issuers have now been given an extra option to choose from alongside the existing pricing framework.

Corporate Brief
Prior Approval For Sale, Pledge Of Over 5 Percent Equity In Insurance Company Is Mandatory: IRDAI

The Insurance Regulatory and Development Authority of India ("IRDAI") has via its circular no. IRDA/F&A/CIR/TRSH/195/07/2020 dated July 22, 2020, issued the following key guidelines:

- For acquisition of more than 1% and up to 5% of the paid up share capital along with the existing holding a fit and proper declaration as per IRDAI (Listed Indian Insurance Companies) Guidelines, 2016 shall be provided to the insurance company. Moreover, the transferor shall inform the insurer immediately on execution of such transactions.
- Where the transfer of shares by the transferor, cumulatively with his relatives, associate enterprises and

persons acting in concert is likely to exceed 5% of the paid up share capital, such transferor shall seek the prior approval of the IRDAI via an application filed through the concerned insurance company.

- Any proposal for acquisition whereby the transferee's holding is likely to exceed 5% of the paid up share capital of the insurance company, has to be submitted for prior approval to the IRDAI through the concerned insurance company.
- For the purpose of determining the quantum of transfer/acquisition of shares, the cumulative transfers made during a given financial year shall be considered.
- For determining the quantum of transfer/acquisition in listed companies, transfer includes Offer for Sale as per SEBI (ICDR) Regulations by the existing shareholders, whether such shareholder is part of the promoter/promoter group or not.
- For the creation of pledge or any other kind of encumbrance over shares of an insurance company by its promoters, provisions relating to transfer of shares as contained in Section 6A(a)(b) of the Insurance Act, 1938, and IRDAI (Transfer of Equity Shares of Insurance Companies) Regulations, 2015 shall apply mutatis-mutandis.
- In situation where transactions are executed beyond the stipulated threshold limits, without the prior approval of IRDAI, the transferee shall:
- Cease to have any voting rights in any of the meetings of the insurance company;
- Promptly dispose of the excess shares acquired, beyond the specified threshold limits.

The highlights of the new regulation are as follows:

- This temporary option can be utilized for preferential issues made during the period of 01.07.2020 and 31.12.2020;
- Lock-in period of 3 years will apply on specified securities allotted in a preferential issue relying upon the temporary pricing option;
- All allotments made under a preferential issue relying upon this temporary option floated via a single shareholders' resolution must follow the same pricing framework.
- Pricing of equity shares will be at least the higher of the average weekly high and low of the volume-weighted average price during either (i) 12 weeks, or (ii) 2 weeks preceding the relevant date.

⇒ **RBI Introduces Fair Practices Code for Asset Reconstruction Companies**

The Reserve Bank of India ("RBI") has vide Circular No. DOR.NBFC(ARC) CC. NO. 9/26.03.001/2020-21 dated July 16, 2020, laid down the fair practice code for Asset Reconstruction Companies ("ARCs"). Asset Reconstruction Companies registered with the RBI have been advised to adopt this 'Fair Practices Code' to ensure transparency and fairness in their operation.

As per the Fair Practices Code, Asset Reconstruction Companies shall:

- Follow transparent practices maintaining arm's length distance to acquire assets;
- Release all securities on repayment of dues or on realisation of the outstanding amount of loan, subject to any legitimate right or lien for any other claim they may have against the borrower;
- Give notice to the borrower if the right of set off is to be exercised along with full particulars about the remaining claims and the conditions under which ARCs are entitled to retain the securities till the relevant claim is settled/paid;
- Put in place a reasonable and transparent Board approved policy on the management fee, expenses and incentives, if any, claimed from trusts under their management;

- Constitute grievance redressal machinery to deal with internal as well as external issues relating to outsourced/recovery agents and communicate the name and contact number of designated grievance redressal officer of the ARC to the borrowers;
- Keep all information including customer information they acquire in course of their business, strictly confidential and not disclose the same to anyone including other companies in the group except when required by law or there is duty towards public to reveal information or only with the borrower's prior permission;
- Refrain from harassing the debtor and ensure that the staff including recovery agents are adequately trained to deal with customers in an appropriate and sensitive manner;
- Put in place a Board approved Code of Conduct for Recovery Agents, obtain their undertaking to abide by that Code and assume responsibility for the agent's actions;
- Enhance transparency in the process of sale of secured assets by:
 - i. Ensuring invitation for participation in auction is publicly solicited and enables participation of as many prospective buyers as possible;
 - ii. Allowing terms and conditions of such sale to be decided in wider consultation with investors in the security receipts as per SARFAESI Act 2002;
 - iii. Complying with spirit of Section 29A of Insolvency and Bankruptcy Code, 2016 in dealing with prospective buyers.

⇒ **SEBI Asks Depositories To Record All Types Of Encumbrances In Depository System**

Securities and Exchange Board of India ("SEBI") has via its circular no. SEBI/HO/MRD2/DDAP/CIR/P/2020/137 dated July 24, 2020, mandated depositories to establish a system for capturing and recording all types of encumbrances, which are specified under Regulation 28(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Additionally, SEBI has clarified that, depositories will need to follow processes and other norms similar to those stipulated

August, 2020

July Updates

for the purpose of capturing and recording non-disposal undertakings in depository system.

The circular advises the Depositories to ensure the following:

- Amendments are made to the relevant bye-laws, rules and regulations for the implementation of the above decision, as may be applicable/necessary;
- System changes, if required, are carried out to implement the above;
- Provisions of this circular are disseminated on their website;
- Communication is made to SEBI regarding the status of implementation of the provisions of this circular in their Monthly Development Report.

The circular also lays down the following key points:

- Freeze and unfreeze instructions executed by the Participant for recording all encumbrances will be subject to 100% concurrent audit.
- Depository Participants shall not facilitate or be party to any type of encumbrance outside the Depository system as outlined in this circular.
- Depositories shall implement the provisions of this circular within one month from the date of this circular.

RERA Brief

Public Notice issued by the Haryana Real Estate Regulatory Authority, Panchkula regarding Online registration of Real Estate Agents

- Haryana Real Estate Regulatory Authority, Panchkula ("HRERA. Panchkula") vide a public notice dated 07.07.2020, notified that it has commenced online receipt of applications for the registration of Real Estate Agents and that henceforth no offline application will be accepted by the Authority. The applicants who wish to register themselves as Real Estate Agents pursuant to Section 9 of the Real Estate (Regulation & Development) Act, 2016 can do so by clicking the icon 'Agent Registration' on the home page of HRERA Panchkula (www.haryanarera.gov.in - HRERA Panchkula – Agent Registration) and following the given steps:
 - a. The applicants have to first get themselves registered on the website of HRERA Panchkula;
 - b. Fill the online application form REA-I;
 - c. Upload the requisite documents;
 - d. Remit the prescribed fees;
 - e. After making the online submission, the applicants are required to submit a printed copy of the application along with the annexed documents.

- The applicants can check the status of their applications by signing into their registered accounts on the HRERA website.

Office Order issued by the Haryana Real Estate Regulatory Authority, Panchkula laying down the procedure for refund of amount deposited by the Appellant with the Haryana Real Estate Appellant Tribunal pursuant to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 ("RERA Act, 2016")

- The Haryana Real Estate Regulatory Authority, Panchkula has issued an office order dated 08.07.2020 bearing no. HRERA-PKL/ED/2020/3417-23 for laying down the procedure for refund of amount deposited by the Appellant with the Haryana Real Estate Appellant Tribunal pursuant to Section 43(5) of the RERA Act, 2016. As per Section 43(5) of the RERA Act, 2016, any person aggrieved by a direction, decision or order of the Authority can prefer an appeal before the Haryana Real Estate Appellant Tribunal. However, in cases where a promoter of a project files an appeal, the appeal will not be entertained till the promoter deposits with the Appellate Tribunal, at least 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal or the total amount to be paid to the allottee, as the case may be.
- In this regard and pursuant to the decision taken in its 97th meeting held on 15.06.2020 vide item no. 97.12; the Authority has opened a separate dedicated bank account with Axis Bank, Sector 10, Panchkula for depositing the amount so received from the Appellate Tribunal. On the expiry of the stipulated period for filing appeals, the Authority will release the said amount to the complainant/respondent, as per the directions of the Haryana Real Estate Appellate Tribunal and in the following manner:
 - a. An application shall be filed by the person claiming the refund of the deposited amount in the format provided in 'Proforma P-1' of this Office Order, along with a copy of the order of the Appellate Tribunal. The application shall also be accompanied by an affidavit stating that there is no adverse order against the claimant and shall contain the bank particulars, PAN number and a proof of identity of the claimant.
 - b. The application so filed shall be then uploaded on the web portal of the Authority by the concerned law associate by registering a suo-moto complaint and the law associate shall issue a 15 (fifteen) days' notice to both parties.

- c. The application filed by the complainant shall be summarily disposed of by the Authority on the date fixed and thereafter the amount shall be released by the Accounts section through the RTGS, as per orders of the Authority.

➤ **Public Notice issued by the Punjab Real Estate Regulatory Authority under Section 11(1) of Real Estate (Regulation and Development) Act, 2016 read with Rule 15(D) of the Punjab State Real Estate (Regulation and Development) Rules, 2017**

- The Punjab Real Estate Regulatory Authority has issued a public notice dated 22.07.2020 bearing no. RERA/Pb.FIN/2020No.5326 under Section 11(1) of the RERA Act, 2016 read with Rule 15(D) of the Punjab State Real Estate (Regulation and Development) Rules, 2017, stating that every promoter registered with RERA shall upload the quarterly updates of the project on the web page of the Authority within 15 (fifteen) days from the expiry of each quarter.
- As per the notice, the facility to submit the quarterly update in online mode has been activated on the website of the Authority under the tab "Manage Projects".
- The promoters are therefore directed to upload the quarterly update of the project in online mode in order to be RERA compliant. Any offline submission of the quarterly updates will not be treated as compliance of the RERA Act, 2016.

➤ **Circular issued by the Maharashtra Real Estate Appellate Tribunal ("Tribunal") with respect to the functioning of the Tribunal**

- The Maharashtra Real Estate Appellate Tribunal issued a circular dated 14.07.2020 bearing no. MahaREAT/Admin/329/2020, with respect to the functioning of the Tribunal.
- In continuation of the office circular dated 05.06.2020 and in view of the response to situation due to Covid-19 and the lockdown declared by the government of Maharashtra, the Tribunal through this circular has informed the advocates, litigants and representatives that the Maharashtra Real Estate Appellate Tribunal, Mumbai is functioning on every Monday, Wednesday and Friday from 11:00 a.m. to 5:00 p.m.
- The advocates, litigants and representatives are also informed that those who are willing to take up the matters which are Part heard, Final Hearing and other matters, may mention the same to enable the office to prepare the Cause List accordingly.

➤ **Letter issued by Uttar Pradesh Real Estate Regulatory Authority ("U.P. RERA") regarding information relating to Designated Separate Account for projects registered in U.P. RERA**

- The Uttar Pradesh Real Estate Regulatory Authority issued a letter dated 16.07.2020 bearing no. 5301/Finance_Division/UPRERA/2020-21, to all the promoters of projects registered in U.P. RERA regarding submitting information relating to designated separate account for projects registered in U.P. RERA.
- The RERA Act, 2016 lays down certain obligations on the promoter of a project to ensure fairness and transparency in their dealings with the allottees and also empowers the Real Estate Regulatory Authority to ensure compliance of such obligations by promoters and providing for punishment by way of stringent penal consequences for defaults.
- In view of the numerous complaints received by the Authority regarding non-compliance of the provisions of Section 4(2)(1)(D) of the RERA Act, 2016 by the promoters, the Authority has decided to undertake a verification audit of the designated separate accounts opened for projects registered with the U.P. RERA.
 - a. Section 4(2)(1)(D) of the RERA Act, 2016 provides:
 - i. That 70% (seventy percent) of the money realized from the allottees of the project from time to time shall be deposited in a designated separate account to be maintained in a scheduled bank to cover the construction and land cost only;
 - ii. That withdrawal of amounts from the designated separate account, shall cover the cost of the project, to be in proportion to the percentage completion of the project;
 - iii. That such withdrawal of amounts from the designated separate account shall be supported by certificates from an Engineer, an Architect, and a Chartered Accountant in practice.
 - b. Further, Regulation 3 of The Uttar Pradesh Real Estate Regulatory Authority (General) Regulations, 2019 obligates the promoter to submit these certificates, as per the prescribed forms REG-1, REG-2 and REG-3 respectively, to the banks for getting money released from the designated separate account of the project.
 - c. It is also mandatory for the promoter of a project to adhere to the Act, rules and regulations made thereunder in respect to operation and management of the designated separate account. Further, Section 38 of the RERA Act, 2016 empowers the Authority to impose penalty, in regard to any contravention of obligations cast upon the promoters. The punishment

August, 2020

July Updates

for violation of Section 4 of the RERA Act, 2016 has been provided under Section 60 and Section 63 of the RERA Act, 2016.

- Accordingly, for the purposes of the verification audit, the promoters of all the projects registered in U.P. RERA are directed to submit online information regarding the details of RERA Project Account and/or any other bank accounts being utilized for depositing the sale proceeds or project finance availed. The information can be submitted on the online format provided- "Format for Information on Designated Separate Account of the Project" by logging in on the U.P. RERA website.
- The promoters are also directed to provide the requisite information within 15 (fifteen) days of the issuance of this letter. Any non compliance of the above instructions will lead to imposition of penalty under Section 63 of the RERA Act, 2016.

➤ **Letter issued by Uttar Pradesh Real Estate Regulatory Authority to the promoters, regarding furnishing of project related details for a forthcoming U.P. RERA Report**

- The Uttar Pradesh Estate Regulatory Authority issued a letter dated 28.07.2020 bearing no. 5506/Technical Cell/UPRERA/2020, to all the promoters regarding furnishing of project related details for a forthcoming U.P. RERA Report.
- U.P. RERA intends to publish project-wise details of all the projects registered with U.P. RERA in the form of a Report to be published on 04.09.2020, for dissemination amongst various stakeholders such as the home buyers, the promoters, the real estate agents, the competent authorities, the development authorities, the banks and financial institutions, concerned departments of the government and all the RERAs across the country.
- For the purpose of the said report, the Authority has decided to collect the up-to-date, complete, non-erroneous and error free information with respect to all the projects registered with U.P. RERA, through an online form on the website called 'Promoter's Form for furnishing Project related vital details' which is accessible on the dashboard of the promoters.
- The promoters are directed to provide the requisite information correctly and in time by 10.08.2020 positively.
- However, it is clarified that the project details being collected through this online form will be utilized solely for the purpose of the said report and that the existing project details available on the registered page of the U.P. RERA portal will not be modified.

Litigation Brief

➤ **Whether the Monitoring Committee is empowered by the Court to seal the residential premises?**

IN THE MATTER OF: M.C. Mehta vs. Union of India & Ors.
(Decided by Hon'ble Supreme Court of India on 14.08.2020)

Issue:

Issue relating to the jurisdiction and authority of the "Monitoring Committee to seal the residential premises on the private land" particularly when they are not being used for the "commercial purpose".

Facts:

- Writ Petition (C) No.4677 of 1985 was filed before Hon'ble Supreme Court regarding environment in Delhi, shifting of heavy industries, noxious industries, stopping of all mining in Aravali hills in and around Delhi including demolition of colonies built on forest land, misuse of premises (misuse includes unauthorized construction), i.e., construction without sanction, lack of civic amenities and the need for their up gradation, etc. Pursuant to the aforesaid Petition, the Court appointed the Monitoring Committee in the year 2006.
- This Monitoring Committee was constituted for the limited purpose of preventing commercial misuse of the residential properties. The subsequent orders passed by this Hon'ble Court indicate that it was authorized to deal with the encroachment and unauthorized colonies on public land only. Thereafter, a Special Task Force was constituted under section 5(3) of the Delhi Development Act, 1957, as per the order, dated 24.04.2018, to remove the encroachments on public roads, public streets, and pedestrian street, and it was for the Monitoring Committee to suggest to the Special Task Force the areas where immediate action was required to be taken concerning aforesaid aspect. The Special Task Force, being a statutory body, has the task of overseeing the implementation of the applicable laws regarding illegal constructions, encroachment on public land, public parks, parking places, roads, pavements, etc.
- The Monitoring Committee had submitted that a letter was received from the Sub Divisional Magistrate, Mehrauli on 22.2.2019 regarding unauthorized construction in Vasant Kunj, Delhi. Subsequently, Report No.149, dated 02.04.2019 was submitted by the Monitoring Committee concerning specific unauthorized constructions allegedly carried out in the Vasant Kunj and Rajokari area. These constructions were not on public land.

4. A reply was filed on behalf of the residents that various residential premises were sealed by the Monitoring Committee, where constructions were made long back. There was no authority with the Monitoring Committee to seal purely residential premises. It was also pointed out that compounding has been made in some cases. The structure should not be demolished, given the provisions of the applicable acts, by-laws, and policy.

Court's Observations:

- While discussing Sections 334 and 335 of the Delhi Municipal Corporation Act, 1957 ("the Act"), the learned senior counsels appearing for the parties submitted that the DMC Act is a complete code by itself as it provides how the sealing is to be done, when it is to be enforced, and in case of its failure, the remedy is provided under section 490. It was submitted that this Hon'ble Court appointed the Monitoring Committee only to prevent misuse of residential premises for commercial use and not with respect to residential premises used for residential purposes. Once the Monitoring Committee does the sealing, no statutory appeal lies before the Appellate Tribunal constituted under section 347(A) and 347(B) of the Act. In the present case, the Statutory Appeals were transferred to the Monitoring Committee, which ordered the sealing of the premises thus, no principle of natural justice was followed. The Monitoring Committee to seal the residential premises used for the residential purposes that too situated on private land is unwarranted and illegal. The appointment of the Monitoring Committee was for limited purpose and power exercised by it was under Article 142 of the Constitution.
- Another learned counsel argued that under Article 300A of the Constitution, a person cannot be deprived of its property otherwise than the due procedure of law, which is supported by series of judgments of the Hon'ble Apex Court. When the Monitoring Committee is not empowered to deal with such residential premises, it could not have acted. The Monitoring Committee, unless specifically authorized by this Court, could not violate the procedure under the DMC Act.
- The Court observed that the power of sealing of property carries civil consequences and a person can be deprived of the property by following a procedure in accordance with law. The Monitoring Committee is

not authorized to take action concerning the residential premises situated on the private land. If there is unauthorized construction or in case of deviation, the requisite provisions are under the DMC Act, such as sections 343, 345, 347(A), 347(B). The mode of action and adjudication under the Act is provided including appellate provisions and that of the Tribunal. It would not be appropriate for the Monitoring Committee to usurp statutory powers and act beyond authority conferred upon it by the Court. The Monitoring Committee could not have sealed the residential premises, which were not misused for the commercial purpose as done vide Report No.149, nor it could have directed the demolition of those residential properties. The Court also observed that Article 300A of the Constitution provides that nobody can be deprived of the property and right of residence otherwise in the manner prescribed by law. When the statute prescribes a mode, the property's deprivation cannot be done in other modes since this Court did not authorize the Committee to take action in the matter.

- The Court was also of the opinion that the Monitoring Committee could not have acted based on letter written by the Sub Divisional Magistrate. It is apparent that its action of the Committee was beyond the purpose for which it had been appointed. Therefore, the Hon'ble Court quashed Report No.149 and other reports submitted subsequently in connection with Report No.149 and entire action of sealing pursuant thereto. The Court further directed that the property sealed as per Report No.149 be de-sealed, and possession be restored to the owners forthwith. This order is to be complied with within three days.

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