



Memorandum

August 2022

This memorandum briefly discusses the applicable guidelines issued by the Securities and Exchange Board of India (**SEBI** and such guidelines, the **SEBI Guidelines**), circulars and guidance issued by the stock exchanges, the Foreign Exchange Management Act, 1999 (**FEMA**), regulations and notifications issued by the Reserve Bank of India (**RBI**) under FEMA and provisions of the Companies Act, 2013, as amended (the **Companies Act**) in connection with the possible sale by an overseas investor of equity shares held by it in an Indian listed company.

1. Executive Summary

1.1. A sale of equity shares by an overseas investor may be structured as an “on-exchange” sale through a recognised stock exchange, or an “off-exchange” sale through an offer for sale to investors.

1.2. A secondary sale of equity shares held by the overseas investor pursuant to an off-exchange transaction will not be subject to the SEBI Guidelines for public issues / offers. However, we

note that certain public sector enterprises, notably the Oil and Natural Gas Corporation, in their offers for sale to the public of listed shares have voluntarily adopted a process that is substantially similar to the process specified in the SEBI Guidelines. If the overseas investor wishes to implement an off-exchange transaction, it would be advisable to consult SEBI on the offering procedure proposed to be adopted.

1.3. The overseas investor may also sell the equity shares held by it pursuant to an on-exchange transaction either through a “bulk deal” through the normal trading window of the stock exchanges in the normal market segment by a simultaneous match of the price and the quantity to be sold, or a “block trade” in a single synchronised transaction on a special trading window of the stock exchanges.

1.4. Transactions on Indian stock exchanges are denominated in Indian National Rupee (INR). Bulk deals or block trades entered into by the overseas investor for the sale of equity shares on the stock exchanges will need to be denominated in INR. If a sale of equity shares by the overseas

investor pursuant to an off-exchange transaction to a person resident outside India is executed outside India, there will be no price restriction on such a sale and the consideration may be denominated in a foreign currency. However, a sale by the overseas investor to a person resident in India must comply with the INR denominated pricing restrictions applicable to a sale of Indian securities by a person resident outside India to a person resident in India. No statutory or governmental approvals are necessary for the sale proceeds to be remitted to the overseas investor.

1.5. Both on-exchange and off-exchange secondary sales by the overseas investor will be subject to certain disclosure requirements under the Takeover Code (*as defined below*), including disclosure of any change in the overseas investor's shareholding where such change exceeds 2% of the total shareholding or voting rights in the Indian listed company. Such sales by the overseas investor will also be subject to the closure of "trading windows" by the Indian listed company, during which time the overseas investor will not be permitted to trade in securities of the Indian listed company. Such sales will also be subject to compliance with Insider Trading Regulations (*as defined below*).

1.6. If the overseas investor has held the equity shares for more than a year at the time of sale, the long-term capital gains tax applicable to the overseas investor in an off-exchange transaction will be 20% and in an on-exchange transaction will be 10%.

2. Method of Sale

2.1. Any sale of equity shares held by an overseas investor in an Indian listed company will need to

comply with certain transfer restrictions described in "Foreign Exchange Restrictions" (see para 11 below). A possible sale of equity shares by the overseas investor may be structured as an "on-exchange" sale through a recognised stock exchange, or an "off-exchange" sale through an offer for sale to investors.

3. On-Exchange Sale

3.1. Subject to the disclosure requirements described below, an overseas investor may sell equity shares held by it in an Indian listed company by way of a "bulk deal" through the normal trading window of the stock exchanges in the normal market segment by a simultaneous match of the price and the quantity to be sold. Alternatively, provided that the overseas investor proposes to sell more than a specified minimum quantity or value of the equity shares, it may sell the equity shares held by it through a "block trade" in a single synchronised transaction on a special trading window of the stock exchanges. The advantage of a block trade on the special trading window is that the possibility of a "leak" is minimised, although the trade is subject to pricing limitations discussed below. A "leak" on the normal trading window may occur since orders with the same price and quantity are matched on a time priority basis, which means that orders that come into the system earlier will be matched first.

3.2. Although bulk deals and block trades occur in the normal course of the market, SEBI has consistently adopted a cautious approach with respect to all types of synchronised transactions, including bulk deals and block trades. Pursuant to a letter dated 1 December 2004, SEBI provided certain informal guidance with respect to

synchronised transactions. SEBI has stated that while such transactions are not *per se* illegal or a violation of applicable SEBI circulars, they may be examined by SEBI or the stock exchanges for the motive or intent behind such transactions, or their manipulative effect, to confirm that these transactions complied with all applicable laws, regulations and bye-laws, including the Securities and Exchange Board of India Act, 1992, as amended (**SEBI Act**), and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, as amended. Further, through a Master Circular dated 5 July 2021, SEBI clarified that negotiated deals are not permitted except for those which are executed on the screens of the exchanges in the price and order matching mechanism of the exchanges just like any other normal trade.

4. Off-Exchange Sale

4.1. An off-exchange offer for sale of the equity shares of an Indian company is essentially a private arrangement between the selling shareholder and the investor. The SEBI Guidelines for public issues / offers do not apply to a listed company facilitating one of its shareholders to dispose of its shareholding pursuant to an offer for sale to the public. In the context of an offering to the public, we note that certain public sector enterprises, notably the Oil and Natural Gas Corporation, in their offers for sale of listed shares have voluntarily adopted a process that is substantially similar to the process specified in the SEBI Guidelines. As stated in the offer document for the offer of sale by the Oil and Natural Gas Corporation, the offer document did not constitute an offer document or prospectus for the purposes of the SEBI Guidelines. These transactions also need to be

understood in the context of the partial privatisation by the Government of India of certain public sector units and we believe specific approvals and exemptions had been sought from SEBI in order to complete such transactions.

4.2. Pursuant to SEBI Circular No. SEBI/HO/MIRSD/DOP/CIR/P/2020/158 dated 27 August 2020, off-market transactions are required to have delivery instructions that are signed by the clients.

5. Bulk Deals and Block Trades

5.1. Pursuant to SEBI Circular No. SEBI/MRD/SE/Cir-7/2004 dated 14 January 2004 (**Bulk Deals Circular**), a bulk deal was defined as a transaction in a scrip where the total quantity of shares bought or sold is more than 0.5% of the number of equity shares of the company listed on the stock exchange.

5.2. On 2 September 2005, SEBI issued Circular No. MRD/DoP/SE/Cir-19/05 (**Block Trades Circular**), which explained block trades and set forth guidelines for the execution of such trades. According to the Block Trades Circular, a block trade is distinguished from a bulk deal as being a trade with a minimum quantity of 500,000 shares *or* a minimum value of INR 50 million, executed through a single transaction on a separate window of the stock exchange. The Block Trades Circular further clarifies that the limit of 0.5% in a bulk deal can be reached through one or more transactions executed during the day in the normal market segment.

5.3. On 26 October 2017, SEBI issued Circular No. CIR/MRD/DP/118/2017 to review the block deal mechanism (**Revised Block Trades Circular**). Pursuant to this circular, certain revisions were

introduced in the block deal window timings and the quantum of the minimum deal size, captured in paragraph 6.2 below.

6. Conditions for executing Bulk Deals and Block Trades

6.1. Bulk deals are understood to be executed on the screens of the stock exchanges in the price and order matching mechanism of the stock exchanges similar to other normal trades. Unlike block trades, there are no specific pricing guidelines with respect to bulk deals. However, bulk deals are subject to the circuit filters that usually apply to shares in the normal market segment in the stock exchanges. Therefore, any premium or discount is required to be within the applicable circuit filters with respect to the equity shares.

6.2. Pursuant to the Block Trades Circular and the Revised Block Trades Circular, block trades are subject to the following conditions:

- (a) the block trade must take place during the specific trading windows, which are kept open from 8:45 AM to 9:00 AM in the morning and from 2:05 PM to 2:20 PM in the afternoon;
- (b) orders may be placed during these windows at a price that cannot be at a premium or discount of more than 1% of the ruling market price or the previous day closing price, as may be applicable;
- (c) an order may be placed for a minimum value of INR 10,00,00,000 in each transaction; and
- (d) every trade executed during these windows must result in delivery and cannot be squared off or reversed.

6.3. We understand that bulk deals continue to occur in the normal market segment by a simultaneous match of the price and the quantity to be sold at a premium or discount greater than 1% of the ruling market price or the previous day closing price. However, while this method of conducting bulk deals is still prevalent, there may be a “leakage” as orders with the same price and quantity are matched on a time priority basis, which means that orders that come into the system earlier will be matched first. We understand that in the special block trade windows, the possibility of a leak is minimised, although the trade is subject to the 1% pricing limitation discussed above.

7. Disclosure Requirements for Bulk Deals and Block Trades

7.1. For bulk deals, under the Bulk Deals Circular:

- (a) disclosure is required to be made with respect to all transactions in a scrip where the total quantity of shares bought or sold is more than 0.5% of the number of equity shares of the company listed on the stock exchange;
- (b) brokers shall disclose the name of the scrip, name of the client, quantity of shares bought or sold and the traded price to the stock exchanges;
- (c) disclosure shall be made by the brokers immediately upon execution of the trade and by the stock exchanges to the general public on the same day after market hours; and
- (d) the stock exchanges shall disseminate the aforesaid information on the same day after the market hours to the general public.

7.2. The BSE and the NSE have issued circulars dated 16 February 2004, which provide that disclosure should be made with respect to bulk deals that consist of single trades (the execution of an order where the traded quantity bought or sold on account of any trade i.e., a client or a proprietor, is more than 0.5% of the number of equity shares of the company listed on the exchange) as well as bulk deals that consist of cumulative trades (where the quantity traded on a day under a proprietary or any single client code is more than 0.5% of the number of equity shares of the company listed on the stock exchange).

7.3. For block trades, under the Block Trades Circular, the stock exchanges are required to disseminate certain information on block trades such as the name of the scrip, name of the client, quantity of shares bought/sold and traded price to the general public on the same day, after market hours. The Block Trades Circular also states that the disclosure of trade details with respect to "bulk deals" would continue as specified in the Bulk Deals Circular.

8. Participation in a Bulk Deal and a Block Trade

8.1. A bulk deal or a block trade takes place on the floor of the stock exchange, either in the normal market segment or at the special window established for block trades, as the case may be. Any person who is ordinarily permitted to trade on the floor of the stock exchanges may participate.

8.2. With respect to foreign investors, we note that pursuant to the Reserve Bank of India's portfolio investment scheme and other applicable foreign exchange guidelines, only registered foreign portfolio investors (**FPIs**) may purchase shares on the floor of a stock exchange. As

described in "Foreign Exchange Restrictions" below, any person not resident in India may sell shares in an Indian company held by it on a recognised stock exchange in India through a registered broker. Therefore, the overseas investor may sell shares pursuant to a bulk deal or a block trade, and if the overseas investor is not a FPI or a SEBI-approved sub-account of a FPI, there will be restrictions on the overseas investor purchasing shares pursuant to such trades.

9. Applicability of the SEBI (Prohibition of Insider Trading) Regulations, 2015

9.1. The SEBI (Prohibition of Insider Trading) Regulations, 2015, as amended (**Insider Trading Regulations**), provide that no insider shall communicate, counsel or procure, directly or indirectly, any unpublished price sensitive information to any person, who while in possession of such unpublished price sensitive information shall not deal in securities. An "insider" means any person who, is or was connected with the company or is deemed to have been connected with the company, and who is reasonably expected to have access or connection to unpublished price sensitive information in respect of securities of a company, or who has received or has had access to such unpublished price sensitive information. In addition to the directors, officers and employees of the Indian listed company, certain persons who are deemed to be connected include merchant bankers, investment advisors and their employees. The Insider Trading Regulations further provide that no company shall deal in the securities of another company or associate of that other company while in the possession of unpublished price sensitive information.

9.2. The Insider Trading Regulations deem certain information to be “price sensitive”, including information such as any major expansion plans or execution of new projects, amalgamations, mergers or takeovers and any significant changes in policies, plans or operations of the company. The Insider Trading Regulations state that unpublished price sensitive information in connection with a due diligence may be communicated, provided, allowed access to, if the board of a listed company decides that sharing of the unpublished price sensitive information is in the best interests of the company. Listed companies are required to provide price sensitive information on an immediate and continuous basis to stock exchanges.

9.3. There are certain defences that are available to a company in a proceeding against it with respect to dealing in the securities of another company or associate of that other company when the unpublished price sensitive information was in the possession of an officer or employee of the first company. Another defence available is to prove that the acquisition of shares of a listed company was in accordance with the Takeover Code (*as defined below*).

10. Applicability of the SEBI (Substantial Acquisitions of Shares and Takeover) Regulations, 2011

10.1. The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011s amended (**Takeover Code**), applies to bulk deals and block trades in the same manner as it applies to any other sale or purchase of equity shares. Regulation 3 of the Takeover Code provides that no acquirer shall, together with persons acting in concert with him, acquire shares or voting rights

in a company that entitle him to 25% or more of the voting rights, unless such acquirer makes a public announcement to acquire shares in accordance with the Takeover Code.

10.2. Under the Takeover Code, a “person acting in concert” comprises a person who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operates by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

10.3. Regulation 5 of the Takeover Code also provides that even if an entity, together with persons acting in concert, acquires less than 25% shares, the Takeover Code may be triggered if it is understood that such entity has acquired “control” over the Indian listed company (irrespective of whether or not there has been any acquisition of shares or voting rights in the Indian listed company).

11. Foreign Exchange Restrictions

11.1. The foreign exchange restrictions on the transfer of securities by a person not resident in India are set forth in the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (**NDI Rules**) and the Master Direction FED Master Direction No.18/2015-16 issued by the RBI dated 1 January 2016. A person not resident in India may, without the prior approval of the RBI, pursuant to an off-exchange transaction (i) sell shares in an Indian company to a person resident in India subject to compliance with certain pricing restrictions (for a listed company, this is the ruling market price) and the filing of a

form FC-TRS with the authorised dealer confirming that the remittances for the shares have been received by the transferee; or (ii) sell or gift shares in an Indian company to another person resident outside India freely without any price restrictions.

11.2. Under Regulation 9 of the NDI Rules, a person resident outside India may sell shares in an Indian company on a recognised stock exchange in India.

12. Applicability of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003 And the SEBI Act

12.1. The pricing of the equity shares and the manner in which the trade is conducted should not violate the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, as amended (**FUTP Regulations**). Regulation 3(a) of the FUTP Regulations prohibits any person from buying, selling or otherwise dealing in securities in a fraudulent manner. SEBI has examined synchronised transactions from time to time and may consider various factors in determining whether such transactions violate the FUTP Regulations. These factors include whether the synchronised transaction in question has the effect of manipulating the market price. Section 12A of the SEBI Act also prohibits the use of any manipulative or deceptive devices in connection with the purchase or sale of any securities listed on a recognised stock exchange.

13. Approaches To Regulators

13.1. If the overseas investor were to sell the equity shares held by it pursuant to on-exchange

transactions, no prior regulatory approval in India will be necessary. However, if the overseas investor proposes to sell the equity shares held by it pursuant to an off-exchange transaction consisting of an offering memorandum, it can consider approaching the SEBI for their approval.

14. Sale Consideration

14.1. Transactions on Indian stock exchanges are denominated in INR. Bulk deals or block trades entered into by the overseas investor for the sale of the equity shares on the stock exchanges will need to be denominated in INR. If a sale of the equity shares by the overseas investor pursuant to an off-exchange transaction to a person resident outside India is executed outside India, there will be no price restrictions on such a sale and the consideration may be denominated in a foreign currency. However, a sale by the overseas investor to a person resident in India will involve the transfer of foreign exchange from India. Since the Rupee is not fully convertible, an authorised dealer will convert the consideration from INR to the relevant foreign currency and transfer such amount to the non-resident seller. The consideration may be denominated in a foreign currency, provided the amount in INR that is converted into the relevant foreign currency complies with the INR denominated pricing restrictions applicable to a sale of Indian securities by a person resident outside India to a person resident in India.

14.2. No statutory or governmental approvals are necessary for the sale proceeds to be remitted to the overseas investor.

15. Announcements

15.1. The overseas investor will be required to disclose any sale that exceeds 2% of the issued share capital of the Indian listed company to the Indian listed company and the stock exchanges within two days of such sale as described below.

15.2. Under Regulation 29 of the Takeover Code, a person that holds more than 5% of shares of, or voting rights in, a listed company must disclose any change in its shareholding where such change exceeds 5% of the total shareholding or voting rights in such company, even if such change results in its shareholding falling below 5%. Upon receipt of such information, the listed company must within two days of receipt of such information, under Regulation 29(3) of the Takeover Code, disclose all such information to the stock exchanges on which securities of the listed company are listed and the registered office of the company. Accordingly, the overseas investor will be required to make a disclosure to the Indian listed company if it sells more than 2% of the equity shares held by it.

15.3. Under Regulation 29(2) of the Takeover Code, the overseas investor will be required to disclose any sale of the equity shares that exceed 5% or more of the share capital of the Indian listed company, along with its shareholding following such sale, to the Indian listed company and the stock exchanges within two days of such sale.

16. Tax Implications

(This section has been contributed by an external tax advisor. However, specialist tax advice in this regard should be obtained.)

16.1. When the equity shares are sold on a recognised stock exchange:

16.1.1. Long Term Capital Gains (LTCG)

(a) Under Section 112A of the Income Tax Act, 1961 (**IT Act**), the LTCG arising on the sale of equity shares of a company will be payable at the rate of 10% of the capital gain, provided that:

(i) the transaction is through a recognised stock exchange; and

(ii) such transaction is chargeable to STT and appropriate STT is paid (currently STT payable by the seller is 0.1% of the value of transaction, which will be collected by the stock broker at the time of sale).

(b) STT will be deducted from the sale proceeds of the equity shares by the stock broker. The net proceeds (i.e., the sale consideration less brokerage, securities transaction tax, other charges, if any and withholding tax) will be remitted to the overseas investor.

16.1.2. Short Term Capital Gains (STCG)

(a) Under Section 111A of the IT Act, tax on STCG arising from the sale of equity shares in a company shall be payable at the rate of 15% of the capital gain, provided that:

(i) the transaction is through a recognised stock exchange; and

(ii) such transaction is chargeable to STT and appropriate STT is paid (currently STT payable by the seller is 0.1% of the value of transaction, which will be collected by the stockbroker at the time of sale).

16.2. When the equity shares are not sold on a recognised stock exchange:

16.2.1. LTCG

(a) Under Section 112 of the IT Act, tax on LTCG is payable at the rate of 20% of the capital gain on the transfer of any long-term capital asset.

(b) If the overseas investor holds the equity shares for a period of more than a year, long-term capital gains tax will be deducted by the acquirer of such equity shares. In an off-exchange transaction, the overseas investor must provide the acquirer with a certificate from a chartered accountant that sets forth the capital gain, the rate of tax and the net amount payable by the acquirer to the overseas investor. The authorized dealer will not remit the net proceeds without the delivery of a "withholding tax" certificate.

16.2.2. STCG

Under the IT Act, tax on STCG is charged to tax at normal rate of tax which is determined on the basis of the total taxable income of the taxpayer.

17. Limits And Qualifications

17.1. With respect to matters of fact, this memorandum relates only to the position as at 17 August 2022 based on the information of which we were aware of at that time.

17.2. We have prepared this memorandum based on our understanding and interpretation of the relevant laws and practices of India as at the date hereof and, as such, there can be no assurance that the regulators will not take a position contrary to that expressed in this memorandum. In particular, we have not, for the purposes of preparing this memorandum, spoken to or otherwise ascertained from, the regulators what their views are likely to be in relation to the issues raised.

This material is for general information only and is not intended to provide legal advice.

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