

Companies Act Amendment Will Facilitate Direct Overseas Listing

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Companies that are considered 'listed' only by virtue of having issued specified debt instruments can breathe easy on the compliance front starting April 2021.

For instance, such issuances were done by some of the IL&FS group entities, unlisted companies in the non-banking financial and power sectors. As a result, they were considered 'listed' and were required to comply with norms relating to appointment of internal auditor or independent director, undergo secretarial audit, among others, under the company law.

Now, they won't be required to do so.

The change means that such companies will now be excluded from certain core compliances which are specifically meant for listed companies that have issued instruments to the public at large, Harvinder Singh, partner at DSK Legal, said.

Who's The Relief Meant For?

The definition of 'listed companies' under the Companies Act, 2013 has been amended. The move will benefit:

- Public companies with listed non-convertible debt securities, non-convertible redeemable preference shares or both on a private placement basis but whose equity shares are not listed.
- Private companies with listed non-convertible debentures on a private placement basis, and
- Specified class of public companies which may issue certain securities on permitted overseas stock exchanges.

Inclusion of the third category in the recent notification is being viewed as a welcome precursor to the overseas listing framework.

In September last year, the government amended the company law to say that it will specify the class of companies and shares that will be allowed to access foreign markets. The specific rules on this have not yet been notified.

This amendment and last week's notification read together would mean that merely a foreign listing by specified companies won't make them 'listed' under Indian company law. The ministry has now clarified that a company which directly lists its shares abroad without a primary listing in India will not be considered as a "listed company".

Last week's notification is certainly a very useful building block for the overseas listing model, Shruti Rajan, partner at Trilegal, said. "Startups and tech companies will be tracking this closely."

It also makes a much needed carve-out for debt listed companies, reducing their compliance burden drastically, she said.

What's Next?

While the three categories have been exempted from company law compliances, market regulator SEBI will need to amend its listing regulations as well. Under the Listing Obligations and Disclosure Requirement Regulations, companies listing specified debt instruments are also required to comply with the debt securities listing regulations, which prescribe norms relating to minimum subscription, obtaining mandatory credit rating, event specific disclosures, among others. Amendments will also have to be made to SEBI regulations for non-convertible redeemable preference shares.

SEBI will have to revisit both regulations and reconsider if such companies would still be required to have an independent woman director, constitute a nomination and remuneration committee or comply with the onerous requirement of having a code of conduct under the Insider Trading Regulations, among others, Sumit Agarwal, partner at law firm Regstreet Law Advisors, said.

But, Hetal Dalal, president and chief operating officer at proxy advisory firm IiAS, said in aligning its regulations with the company law, SEBI must not completely dilute the compliances for such purely debt-listed companies.

With the debt and equity markets colliding, the disclosure requirements for companies with listed debt securities should not be completely removed. SEBI could link the disclosures to the amounts raised via listed debt securities but no disclosures may not be in the best interest of the market.

Hetal Dalal, President and COO, IiAS

It would be worthwhile to remember that IL&FS' equity was unlisted, Dalal said.

For the third category—class of companies that's allowed to list abroad—regulators will also need to issue detailed guidelines on investor KYC, origin of capital, anti-money laundering norms etc. based on whether the listing is done in a FATF-compliant or non-compliant jurisdiction, experts said.

Financial Action Task Force is an inter-governmental organization which develops policy for combating money laundering and misuse of virtual assets. It classifies countries on the basis of high and low risk in terms of compliance.

For this notification to be effective, the framework for overseas listing must address all possible concerns relating to investments coming from compliant and non-FATF jurisdictions, Rajan said.