Corpsec Hotline

December 11, 2001

CORPORATE AND SECURITIES LAWS UPDATE

DECISION OF THE SUPREME COURT OF INDIA ON DISINVESTMENT OF SHARES

The Supreme Court of India ("**SC**") has, in its recent decision in the case of the divestment by the Central Government of its 51% equity stake in Bharat Aluminium Company ("**Balco**"), held that the said divestment by the Central Government in favor of the highest bidder (*i.e.* Sterlite Industries Limited) for a consideration of approximately Rs. 5.51 billion was transparent.

Importantly, the SC has stated in its judgment that the courts should keep away from economic policy matters. Furthermore, the SC restricted its power of judicial review in economic policies and said it would interfere only if the policy was contrary to the Constitution of India or any other law.

The aforesaid judgment has eased the legal hurdles in the path of the disinvestments and privatization of Public Sector Undertakings and will indeed give a boost to the disinvestment process.

*Source**:** The Economic Times December 11, 2001*

PROHIBITION ON THE USE OF CERTAIN NAMES BY INDIAN COMPANIES

The Department of Company Affairs has prohibited the Registrar of Companies ("**RoC**") of each Indian State from making available improper names (while registering new companies) under the Emblems and Names (Prevention of Improper Use) Act, 1950 ("**Act**"). The Department of Company Affairs is a part of the Ministry of Law, Justice and Company Affairs which is a part of the Government of India.

The Act prohibits RoCs from approving the use, in the corporate names of companies, of certain names, emblems or seals which closely resemble those of national leaders, global organizations, *etc*. Names, emblems or seals prohibited by the Act include names like Mahatma Gandhi India Private Limited, emblems resembling the emblem or the official seal of the United Nations Organization or the World Health Organization or the Indian National Flag, *etc*.

*Source**:** The Economic Times December 5, 2001*

AMENDMENTS TO THE RULES FOR POSTAL BALLOT

The Company Law Board amended the recently enacted Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 (the "**Rules**") *vide* its notification dated October 11, 2001. The notification has made amendments to the procedure to be adopted by a company while sending a notice to its shareholders as well as to the businesses that can be approved *vide* a postal ballot. The amendments are summarized hereinbelow:

- A company may issue notices either by Registered Post (acknowledgement due) or under certificate of posting. However in addition, a company is now also required to publish an advertisement stating that the ballot papers have been dispatched to the shareholders, in a leading English newspaper and in one vernacular newspaper circulating in the Indian state in which the registered office of the company located.
- Prior to this amendment a resolution could be passed by way of postal ballot for the alteration or the deletion of clauses of the Articles of Association of a company. However subsequent to the amendment a resolution by way of postal ballot can only be passed for the alteration of the company's Articles of Association and not for deletion of any of its clauses.

For your information we have listed below the businesses in which shareholder resolutions are required to be passed by a Company through postal ballot:

(a) alteration in the object clause of a company's Memorandum of Association;

(b) alteration of a company's Articles of Association in relation to the insertion of provisions defining a private company;

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(c) buy-back of shares by a company under sub-section (1) of section 77A of the Indian Companies Act, 1956 ("**Act**");

(d) issue of shares with differential voting rights as to voting or dividend or other wise under sub-clause (ii) of clause (a) of section 86 of the Act ;

(e) change in place of the registered office out side local limits of any city, town or village as specified in sub-section (2) of section 146 of the Act;

(f) sale of whole or substantially the whole of the undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 293 of the Act;

(g) giving loans or extending guarantees or providing security in excess of the limit prescribed under sub-section (1) of section 372A of the Act;

(h) election of a director under sub-section (1) of section 252 of the Act;

(i) variation in the rights attached to a class of shares or debentures or other securities as specified under section 106 of the Act.

Source: Notification No. G.S.R. 337(E) dated October 10, 2001.

AMENDMENTS TO BUY-BACK PROVISIONS

Section 77A of the Companies Act, 1956(relating to the buy back of shares) has now been amended by the Companies (Amendment) Ordinance, 2001 ("**Ordinance**"), which has been currently placed before the Indian Parliament. The Ordinance proposes the following changes to Section 77A:

- A company can now buy back its shares without obtaining the shareholders approval vide a special resolution if the buy-back is equal to or less than ten per cent of the total paid-up equity capital and free reserves of the company. However such buy back must be authorized by a resolution of the board of directors of the company. Furthermore, no offer of buy back shall be made within a period of 365 days reckoned from the date of the earlier offer of buy back.
- A company, which buys back its shares, is precluded from making a further issue of the same kind of shares within a period of six months from the date of such buy back. Please note that prior to this amendment the period stipulated was 24 months.

On a separate note the Securities and Exchange Board of India press, clarified that notwithstanding the proposed ("**SEBI**") in its recent discussions with the amendments to the listing agreementthe existing disclosure norms, for all companies to , it is mandatory as per intimate the Securities and Exchange Board of India about all significant board resolutions. Hence any material event including any decision by a company to buy back its shares, has to be conveyed to the Indian stock exchanges on which the company's shares are listed.

Source: The Companies (Amendment) Ordinance, 2001 and Business Standard

AMENDMENT TO TAKEOVER CODE

Exceptions in the case of a sale of the shares of a public sector undertaking

The SEBI has amended Regulations 22 (relating to general obligations of an acquirer), Regulation 23 (relating to general obligations of the board of directors of a target company) and Regulation 25 (relating to a competitive bid) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**Takeover Code**") *vide* its notification dated September 12, 2001 to provide for certain exceptions to the abovementioned regulations in the case of an open offer in the context of the sale of the shares of a Public Sector Undertaking ("**PSU**") by the Central Government:

- An acquirer of shares of a Public Sector Undertaking ("**PSU**") pursuant to the public announcement of an open offer for the shares of the PSU will now be allowed to appoint directors on the board of the target company during the open offer period, provided that the acquirer complies with certain stipulated conditions, some of which are discussed below

In order to avail of this exemption, the agreement for the transfer of the shares from the Central Government to the acquirer must contain a clause that in the event of non-compliance of any of the provisions of the Takeover Code by the acquirer, the transfer of shares or change of management or control of the PSU would revert to the Central Government. Also in the event of such non-compliance the acquirer would be liable to a penalty that may be imposed by the Central Government at its discretion.

Prior to the aforesaid amendment, no acquirer (or persons acting in concert with it) was permitted to appoint directors on the board of the target company during the offer period.

- The amendment bars any public announcement for a competitive bid after an acquirer has already made the initial public announcement for the shares of the PSU pursuant to entering into a Share Purchase or Shareholders' Agreement with the Central Government for

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acquisition of shares or voting rights or control of a PSU.'

Source: Notification No. S.O.875(E) dated September 12, 2001

Changes to 'creeping acquisition' route

The SEBI has amended Regulations 7 (relating to disclosure norms) and 11 (relating to creeping acquisition) of the Takeover Code *vide* notification dated October 10, 2001 to provide as follows:

- An acquirer holding 15% or more but less than 75% of the shares or voting rights can now acquire, pursuant to the creeping acquisition route, up to a further 10% of the shares or voting rights within a period of 12 months without being required to make a public offer for the shares of the company. Prior to this amendment such an acquirer was permitted to acquire only 5% of the shares/voting rights without being required to make a public offer.
- An acquirer (acquiring shares of a company through secondary market purchases) is required to disclose to the company the aggregate of his pre and post acquisition shareholding and voting rights where his acquisition aggregates to 5% and 10% of the shareholding or voting rights of the company.

Source: Notification SO1058(E) dated November 24, 2001

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