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*Analysing developments impacting business*

### EXTRATERRITORIAL COMPLIANCE OF CORPORATE GOVERNANCE NORMS

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The Securities and Exchange Board of India (SEBI) by its informal guidance in January 2020 has settled the question of extraterritorial compliance of corporate governance required under Regulation 24(1) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations). The informal guidance was sought by KCP Limited (Company), which has a material subsidiary, KCP Vietnam Industries Limited (KPC Vietnam), a limited liability company incorporated under the laws of Republic of Vietnam. The fundamental question was in respect of requirement of appointment of an independent director of the Company to be a director on the board of KPC Vietnam, in accordance with Regulation 24(1) of the Listing Regulations (Reg 24(1)).

The Company in its application had stated that a limited liability company in Vietnam does not require a board of directors and the same is managed by the members council. It also referred to Article 55 of the Law on Enterprises of Vietnam, in terms of which a limited liability company is not required to have a supervisory board unless it has more than 11 members. However, a limited liability company with less than 11 members may have a supervisory board to meet its management requirements. KPC Vietnam has eight members, and accordingly is not mandatorily required to form a supervisory board.

SEBI in its informal guidance directed the Company to comply with Reg 24(1). As per SEBI, since there is no explicit restriction under the Law on Enterprises of Vietnam on entities with less than 11 members from forming a supervisory board, KPC Vietnam, should form a supervisory board and appoint an independent director of the Company as a director on the supervisory board of KPC Vietnam.

#### **Comments**

The Law on Enterprises of Vietnam does not define 'board of directors'. However, there is no specific restriction on limited liability companies in Vietnam to constitute a board of directors. The roles of a 'supervisory board' and 'board of directors' are different under the laws of Vietnam. A 'board of directors' is the body managing the company and has full competence to make decisions in the name of the company. On the other hand, a 'supervisory board' generally performs supervisory functions to check the legality, accuracy and honesty in the management and administration of the company's business activities.

Considering the present informal guidance, it is ambiguous that whether in absence of a board of directors of the material foreign subsidiary, Reg 24(1), would necessitate formation of a board of director of the material foreign subsidiary for appointment of

an independent director of the listed company. Interestingly, SEBI did not direct that a board of directors of KPC Vietnam should be constituted, nor did SEBI direct for appointment of the independent director under Reg 24(1) in the members council of KPC Veitnam. SEBI's direction to form a supervisory board of KPC Limited seems to indicate SEBI's intention that the director so appointed under Reg 24(1) should perform supervisory role. SEBI's view serves as a guidance for other companies with material foreign subsidiary not having a board of directors, to at least create a position which is supervisory in nature in the material foreign subsidiary for appointment of an independent director under Reg 24(1).

Further, it may also be interesting to note that, in the past, SEBI has been lenient in relation to applicability of requirements under Indian laws on entities incorporated under foreign laws. For instance, SEBI had not objected to unaudited financial statements of a foreign subsidiary for the purposes of inclusion of restated consolidated financial statements of an issuer company in its offering document of a proposed initial public offering, even though the SEBI regulations required inclusion of only audited and restated financial statements in the offering documents. SEBI's stance on such issue was based on the fact that the laws of the jurisdiction where such foreign company was incorporated does not require mandatory audit of financial statements. However, it is evident that SEBI has a different approach when it comes to compliance of corporate governance norms.

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