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Amendment to Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (LODR) Regulations, 2015

Securities and Exchange Board of India [SEBI] has amended the SEBI (Listing Obligations and Disclosure Requirements) [LODR] Regulations, 2015 by its notification dated: 24 January, 2022. This amendment is effective from 24 January 24, 2022.

a. **Appointment or re-appointment of Managing Director or Whole Time Director or Manager after rejection by shareholders:**SEBI had floated a Consultation Paper on 13 January, 2021 seeking public comments on "Introduction of provisions relating to appointment / re-appointment of persons who fail to get elected as Whole-time directors / Managing Directors at the general meeting of a listed entity".

   In this Consultation Paper, SEBI had mentioned that it had noticed that as a practice, companies appoint persons as Managing Directors / Whole-Time directors, by way of seeking approval from shareholders through two different resolutions – one for appointment of such persons as a director under section 152 of the Companies Act (the Act) and the second for appointment of such directors as Managing Director (MD) or Whole-time Director (WTD) along with terms and conditions for their appointment under sections 196, 197 and 198 of the Act. SEBI further stated that in case of two different resolutions, there is a possibility of the ordinary resolution for appointment as director being approved by the shareholders and the second resolution, which could be a special resolution, for designating such appointed directors as WTD / MD along with terms & conditions, including remuneration, being rejected by the shareholders. Further, Section 161(1) of the Act prohibits appointment of person as additional director who fails to get appointed as director in general meeting.

   On the lines of the above provisions, SEBI noted that the provisions of Companies Act 2013 does not explicitly prohibit the Board of Directors from re-appointing a person as a MD or WTD, whose appointment to such posts was rejected by the shareholders at the general meeting. Further, SEBI also noted that the Board of Directors of a listed entity can continue to appoint such persons as WTD / MD even after subsequent rejections by the shareholders. SEBI had expressed a view that such appointments are against will of shareholders. Hence,SEBI was of a view that there is a need to do policy intervention in this. Therefore,SEBI had proposed certain amendments to SEBI LODR by way of Consultation paper.

On the basis of comments received on the above referredConsultation Paper, SEBI at its board meeting held on 28 December, 2021 and some of the proposals were approved. **SEBI has notified the amendment in SEBI LODR w.e.f 24 January, 2022.**

(i) Regulation 17(1C) of LODR provides *"The listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier."*SEBI amended this provision to include the words 'manager'. Accordingly, **the approval of shareholders shall be needed for appointment of manager also and it should be sought at the next general meeting or within three months from the date of appointment, whichever is earlier.**

(ii) SEBI has added two provisos in Regulation 17(1C) pursuant to whichappointment or re-appointment of a personincluding as amanaging director or a whole-time director or a manager, which was earlier rejected shareholders at a general meeting, shall be done again as MD/ WTD/ Manager only with the prior approval of the shareholders.

The provisos added also state that the Board of Directors may again propose to the shareholders, the candidature of person for the post including as a MD / WTD / manager, whose candidature is already rejected by shareholders. While the appointment or re-appointment is proposed again, in the explanatory statement, a detailed explanation and justification by the Nomination and Remuneration Committee and the Board of directors for recommending to re-consider such person for appointment or re-appointmentbe given.

From this amendment, a question arises within what time can Board of Directors again propose to the shareholders, the candidature of same personfor appointment or re-appointment including asMD/ WTD/ manager, i.e., whether the listed entity needs to follow some cooling period OR will there be any time period, post which this proviso shall not apply? Since there is no such period mentioned, it appears that immediately after the rejection by shareholders, the Board is free to re-propose the same to the members. This shall also mean that once a proposal for appointment / re-appointment including as MD/WTD/ Manager is rejected by members, then even if Board wants to re-propose the appointment /re-appointment of such person after a very long time period, say 5-10 years, even then this proviso shall be applicable.

b. **Statement of Deviations or variations:** As per Regulation 32(7) of SEBI LODR where the listed entity has appointed a monitoring agency to monitor the utilisation of proceeds of a public or rights issue, the monitoring report of such agency was to be placed before the audit committee on annual basis. ***So listed entities that have done fund raising through public issue or rights issue and are getting utilisation monitored by a monitoring agency, need to place them at upcoming audit committee meeting and henceforth at every upcoming audit committee meeting on a quarterly basis***.

c. **Issuance of Duplicate Share Certificate in demat form:**As per Regulation 39 (2) listed entitieswere permitted to issue physical certificates or receipts or advices, as applicable, pursuant to subdivision, split, consolidation, renewal, exchanges, endorsements, issuance of duplicates thereof or issuance of new

certificates or receipts or advices, as applicable, in cases of loss or old decrepit or worn out certificates or receipts or advices, as applicable in physical form. But pursuant to this amendment, if service request is received for subdivision, split, consolidation, renewal, exchanges, endorsements, for issue of duplicate share certificate, loss of share certificate, or issue of new share certificate against old decrepit or worn out share certificate then all the requests shall be processed in dematerialised form within the prescribed time. So,***listed entities are strictly not allowed to issue securities in physical form henceforth***.

d. **Transfer, Transmission and Transposition of Securities:**SEBI had with effect from 8 June, 2018 banned transfer of securities in physical form. But SEBI had allowed transmission or transposition of securities in physical form. Now SEBI has stated that **transmission or transposition requests**even if they are received in physical form,**they shall be processed in demat form only**. Further, SEBI has clarified that all transmission requests shall be processed within seven days only.

e. **Manner of dealing with unclaimed shares:**As per Schedule VI, Clause D, Sub-clause (1)provides for issue of securities which are lying unclaimed suspense account. Sub-clause (1) states that when the allottee approaches the listed entity, it shall, after proper verification of the identity of the allottee either credit the shares in demat form or issue physical certificates. Now, SEBI v2 has stated that if case of any claim by any allottee for shares lying in unclaimed suspense account or demat suspense account,such shares shall be transferred to allottee in demat form only.

So this makes it clear that with effect from 24 January, 2022 transmission, transposition, consolidation, issuance of duplicate share certificate, claim from unclaimed suspense account, renewal / exchange of securities certificate, endorsement, and sub-division / splitting of securities certificate shall be done in demat form only. So **if any of these service requests is received it shall be processed and shares shall be issued in demat form only.**

SEBI LODR amendment can be accessed at this link:

https://www.sebi.gov.in/legal/regulations/jan-2022/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-amendment-regulations-2022_55526.html

SEBI Circular on issuance of Securities in Demat form while processing investor service requests.

In furtherance to the above-mentioned amendment to LODR Regulations pursuant to which listed entities can issue securities in demat form only in the above-mentioned cases, SEBI has issued circular vide dt: 25January, 2022 that provided for standardised procedure for 'issuance of securities in demat form'. This procedure shall be used by RTAs or companies for issue of securities in demat form whenever any service request is made. The circular is effective immediately.

Procedures for issuance of securities in demat form whenever any service request as stated above is made:

1. Security holder / claimant shall submit his service request in form ISR-4, where the service request is for transmission, transposition, consolidation, renewal / exchange of securities certificate, endorsement, and sub-division / splitting of securities certificate then original certificate shall be sought from security holder / claimant.

2. After verifying and processing the request, the RTA / Issuer Companies shall intimate the securities holder/claimant by way of issuing Letter of Confirmation ("letter"). Format of the letter is prescribed by SEBI in the circular. The letter shall inter-alia contain details of folio and demat account number(if any) of the securities holder / claimant.

3. The letter shall be sent by the RTA / Issuer Companies through Registered / Speed Post to the securities holder/claimant. Additionally, the RTA/Issuer Companies may send such letter through e-mail with e-sign and / or digital signature.

4. Within 120 days of issue of the letter, the securities holder/claimant shall submit the demat request, along with the original letter or a copy of the email with e-sign and / or digital signature, as the case may be, to the Depository Participant (DP).

5. In case of non-receipt of demat request from the securities holder/claimant within 120 days of the date of Letter of Confirmation, the shares will be credited to Suspense Escrow Demat Account of the Company

It is recommended to take note about this change in process at the Stakeholder and Relationship Committee meeting and Board of Directors meeting that going forward, on receipt of above mentioned service requests, securities shall be issued in demat form.

Further it is also recommended to inform physical security holders of listed entities that if the above-mentioned service requests are made then on processing securities shall be issued in demat form.

SEBI Circular dt: 25 January, 2022 can be accessed at this link:
https://www.sebi.gov.in/legal/circulars/jan-2022/issuance-of-securities-in-dematerialized-form-in-case-of-investor-service-requests_55542.html

Applicability of formats for filing of Corporate Governance reports by High Value Debt Listed Entities

Background:

SEBI has amended SEBI LODR vide its amendment dated 7 September, 2021 whereby Regulations 15 to 27 of SEBI LODR'Corporate Governance provisions' are applicable to High Value DebtListedEntities (HVDLEs)[1]on 'comply or explain basis' till 31 March,2023. As Corporate Governance provisions have become applicable, HVDLEs will have to do filings of all applicable reports/returns as are mandatory for equity listed entities to whom corporate governance provisions are applicable. The question which arose was that as to in which format these filings will have to be done by HVDLEs?
In this regard, Bombay Stock Exchange ['BSE'] vide its circular dt: 1 October, 2021 specified the formats in which HVDLEs will have to do the filings. These formats are as follows:

- Secretarial Audit Report and Annual Secretarial Compliance Report as provided under Regulation 24A– as per format given in SEBI circular dated 8 February, 2019
- Quarterly compliance reports as provided under Regulation 27(2) – as per Annexure 1 of SEBI circular dated 31 May, 2021.
- Other Corporate Governance Reports forming part of Annual Report as provided under Regulation 27 - Part C (disclosures in corporate governance report as part of the annual report), D (Declaration by CEO on compliance of the management and directors with the code of conduct), and E (Compliance certificate by auditors or practicing Company Secretary of corporate governance compliance) of schedule V of LODR Regulations.

Ambiguity:

In this circular, a statement was mentioned thatthese formats for filing will be applicable for HVDLEs for the quarter ended 30 September, 2021. Due to this an ambiguity was created that which formats will have to be used for quarters after September 2021 and that whether stock exchanges were planning to prescribe any other format for the upcoming quarters?

Clarification issued by BSE:

Hence, to bring in clarity,BSE vide its circular 7 January, 2022, has omitted the line, *"The Listed Companies are required to submit the same in pdf form through BSE listing centre for the quarter ended 30 September, 2021".* This makes it clear that formats specified in BSE Circular 1 October, 2021 have to be followed by HVDLEs for submitting disclosures in upcoming quarters too.

BSE circular dt: 7 January, 2022
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20220107-16 –

BSE Circular dt: 1 October, 2021
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20211001-3 –

[1] *High value debt listed entities are those entities which have listed non-convertible debt securities (NCDs) and have an outstanding value of listed NCDs of Rupees 500 cr or more.*

Minimum items required to be placed by HVDLEs while approving Related Party Transactions

Background:
SEBI LODRamendment dt 7 Sept, 2021 made Regulation 23 of SEBI LODRgoverning Regulation for Related Party Transactions (RPTs) to HVDLEs on comply or explain basis till 31 March, 2023.
Subsequently SEBI vide its amendment dated 9 November, 2021 amended Regulation 23.So it was assumed that the amended provisions of Regulation 23 will be applicable to HVDLEs also. FurtherSEBI vide circular dated 22 November, 2021, specified minimum items that are required to be placed before Audit Committee while approving related party transactions and minimum items to be disclosed in explanatory statements while seeking approval of shareholders for material related party transactions. This SEBI Circular dated 22 November, 2021also specified format for reporting of RPTs to Stock Exchanges under Regulation 23(9) of SEBI LODR.

Ambiguity:
It may be noted that SEBI had addressed its circular dt: 22 November, 2021 to listed entities who have listed their specified securities.As per Regulation 2(1)(zl) of SEBI LODR, 'specified securities' means equity shares and convertible securities. So there was anambiguity as to whether the SEBI Circular dt: 22 November, 2021 would be applicable to HVDLEs also as Corporate Governance provisions are applicable to them also on Comply or Explain basis?

Clarification: Now vide anotherCircular dt: 7 January, 2022, SEBI has stated that since provisions of Regulation 23 of SEBI LODR are applicable to HVDLEs,the provisions of SEBI Circular dt: November 22, 2021 would also be applicable **to HVDLEs with immediate effect**. There are two points which are highlighted in SEBI Circular dt: 7 January, 2022.
Firstly SEBI circular dt: 7 January, 2022 is now addressed to HVDLEs. So there is no room for ambiguity now.
Secondly it is mentioned in the circular that it is applicable with immediate effect as against SEBI Circular dt: November 22, 2021 which is applicable from 1 April, 2022 onwards. So a question arises that does SEBI intends to say that for HVDLEs, minimum items for approval of related party transactions (as is specified by SEBI Circular dt: 22 November, 2021) have to be placed at upcoming audit committee meetings and for other equity listed entities it has to be placed post at audit committee meetings held post April 1, 2022?
SEBI Circular dt: 7 January, 2022 is made applicable with immediate effect. So it appears that minimum items have to be placed by HVDLEs at theirrelevant audit committee meetings and relevant explanatory statements for seeking shareholders'approval, to be held post7 January, 2022, where approval of related party transactions or material related party transactions respectively, is placed for approval.
As CorporateGovernanceprovisions are made applicable on to HVDLEs on 'Comply or Explain basis', accordingly the provisions of this SEBI Circular dt: 7 January, 2022 would also be applicable on 'Comply or explain basis' till 31 March, 2023.So in disclosures made to stock exchanges, if any of the minimum items are not placed before the relevant audit committee meeting / relevant explanatory statements, then HVDLEs might have to explain the reason for non-adherence to the provisions of this Circular.
https://www.sebi.gov.in/legal/circulars/jan-2022/disclosure-obligations-of-high-value-debt-listed-entities-in-relation-to-related-party-transactions_55225.html

SEBIcirculardt: January 7, 2022

Is share application money pending allotment is a financial debt?

In the matter of Mr. Kushan Mitra (Appellant) Vs. Mr. Amit Goel (Suspended Director/Financial Creditor/Respondent) CMYK Printech Ltd (Corporate Debtor) passed at National Company Law Tribunal (NCLAT) at New Delhi on 16December,2021Facts of the case

- Mr. Amit Goel – Financial Creditor (FC/Respondent)filed an application againstCMYK Printech Ltd., Corporate Debtor(CD) u/s 7 of the Insolvency and Bankruptcy Code, 2016 (Code/IBC) for initiation of Corporate Insolvency Resolution Process (CIRP). The application was admitted by the National Company Law Tribunal (NCLT).
- The CD allotted the Equity Shares on Preferential basis to the Director (Respondent) and filed the form PAS -3 with the Registrar of Companies (RoC) with the date of allotment dated 11 Sept, 2018. The shares were issued in lieu of the outstanding loan of Rs. 79.68 lakhs. PAS- 3 form filed with ROC provided that that there was no agreement or contract executed in writing for allotting securities for consideration other than cash.
- Notes to Financial Statement at point 2(i) for the year ending 31 March, 2019 stated that the Board of Directors vide resolution dated 10 May, 2019 declared the allotment made to the Director/FC as invalid and void ab initio and authorized jointly/severally the directors to approach the RoC for cancellation of the PAS-3..
- The CD submitted that the Petition filed by the FC/Director/Shareholder u/s 7 of the code is not maintainable as he does not come under the category of a Financial Creditor.
- The board resolution passed on 11 Sept, 2018 was still in existence and was not superseded by anyother of the board resolution.
- Mr. Kushan Mitra, Suspended Shareholder/Director of the Company preferred the Appeal u/s 61 of the Code.

Arguments on behalf of the Appellant

- NCLT has wrongly admitted the application u/s 7 despite recording its satisfaction only to the extent of Rs. 79.35 Lakhs as the claim amount due to the FC/Director. Even if the amount and an interest of 12% due is calculated from 10 November 2018, the claim amount would only be Rs. 97,55,919/- which is below the threshold of Rs. 1 Crore.
- Proceedings under the Code are not recovery proceedings and no debt is payable by the by the CD to the FC as there exists no loan received by the Company which is evident from the facts mentioned in the Complaint to the RoC on 29April,2019. The same is also reflected in the board resolution Dated 10 May,2019, Criminal Complaint dated 29August 2020 and also in the clarification given to the Economic Offences Wing (EOW) dated 4 September 2020. It is submitted that all these Complaints have been made much prior to the filing of Section 7 Petition, which was filed on 8 October 2020.
- The entire transaction to Allotment of Equity Shares was illegally done by the FC/Director. Application mentions date of default as 10 November 2018, whereas the revocation happened only on 10 May 2019.
- The FC/Director did not challenge the Resolution dated 10 May, 2019 and there was also no demand for the refund of the alleged due amount of Rs. 1.56 Crores

- Application mentions date of default as 10 Nov, 2018, whereas the revocation happened only on 10 May, 2019. If the amount due of Rs. 1.56 Crores was converted as Equity Shares of 26,00,566/- by Board Resolution dated 11 Nov 2018, then the question of any default having occurred prior to revocation of the allotment made by the Board does not arise.
- When the Appellant lodged the complaint against the FC/Director before RoC, he could have moved the Application under the Act or could have satisfied the RoC that the allotment of Shares was legal instead of filing an Application u/s 7 of the Code showing wrong date of default, which shows the fraudulent action.
- The cause of action for filing application under the code is the board resolution dated 10 May 2019, in which the equity shares have been cancelled. The board resolution is yet to be approved in the General Meeting of the CD. Hence,the Petition under Section 7 is premature as the first respondent continues to be the shareholder of the CD, holding 26,00566/- shares in the Balance Sheet and the Auditors Report.
- The FC did not disburse the said amount for time value of money and hence does not fall within the definition of 'Financial Debt' under Section 5(8) of the Code. For a debt to become 'Financial Debt', the basic elements are that it ought to be disbursed against 'consideration for time value of money'. The FC does not fall within the meaning of 'Financial Creditor' as the amount invested for purchasing shares does not amount to disbursement against consideration for time value of money. The share application money was neither disbursed nor invested for consideration for time value of money, but for purchasing Equity Shares
- The Section 42(6) of the Act is not attracted as the said provision deals with application money actually coming in to increase the subscribed capital, whereas the present case the alleged amount due being converted into equity, the option which is resorted to tide over the financial difficulty. Section 42(6) of the Act does not contemplate a situation of cancellation of equity shares.

Arguments by the Respondent

- As per Section 42(6) of the Act and the Companies Acceptance of Deposit Rules, 2014 provides that share money pending allotment carries statutory interest and it is 'Financial Debt' for time value of the money.
- The amount of Rs. 1,56 Crores was treated as share application money in the books of account of the CD. Also, the is above the threshold limit and is a 'Financial Debt' as the interest amount payable under Section 42(6) is 'consideration for time value of money'
- The Appellant himself was instrumental for the cancellation of the shares allotted and as the suspended director of the CD he himself complained to RoC on 29 April, 2019 that the shares of issue in favour of the first Respondent should be declared as invalid

Question for Consideration

- Whether Share Application Money in the event of non-allotment of shares, be treated as Loan/Debt and whether such an amount falls under the definition of Financial Debt as defined under Section 5(8) of the Code.
- Whether Statutory accrual of interest under Section 42(6) of the Act, be construed as consideration for time value of money, to qualify the requirement of Financial Debt as defined under the Code.

Held:

- Financial Debt' means outstanding principal due in respect of Loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only outstanding principal would qualify as 'Financial Debt'. Furthermore, sub-clause (a) (i) of sub-Section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive
- Share application money is the amount of advance received from a prospective shareholder which is later transferred to share capital account on the issue of shares or refunded in case the issue falls to take place. When the company fails to refund the application money as stipulated within the time limit of 60 days such balance shall be treated as Deposit under the Companies Deposit Rules, 2014
- Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 makes it clear that all provisions of Section 42 (Private Placement) are also applicable to issue of shares under Section 62(1)(c) (Preferential Allotment).
- The principals laid down by the Hon'ble Supreme Court of India in *"Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Limited* consideration for time value of money is an essential element for the amount to fall within the ambit of Financial Debt. The debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces for disbursal against consideration for time value of money.
- The key feature of a Financial Transaction as contemplated under Section 5(8) of the code is consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of financial debt which are usually for sum of money received today to be paid over a period of time in a single or series of payments in the future. In Black's Law Dictionary the expression Time Value has been defined *as the price associated with the length of time that an investor must wait until an investment matures or the related income is earned.*
- In the instant case, allotment of equity shares on preferential basis by Private Placement Offer was done and subsequently revoked**. Therefore, NCLAT is of the view that the money given by the FC/Director indeed falls within the definition of Share Application Money.**
- To understand the nature of transaction involving a Share Application Money, the section 42, its rules and the deposit rules envisages that if the shares are not allotted within 60 days of receiving the share application money, and if the refund does not take place within 15 days form the expiry of 60 days' time limit, then this amount will be treated as a Deposit, advanced to the Company, which has to be returned by the Company at the rate of 12 percent per annum from the expiry of the 60thday. Thus the concerned person would get compensation for the time value of money given by him to the Company which changes the nature and character of the money so given. Although the amount was initially paid towards shares, since the allotment was revoked, the equity did not materialise. Thereafter, by operation of law, Section 42(6) of the Act, the amount has statutorily been given the character of loan with interest.

- Share application money in the event of non-allotment of shares, attracts interest under Section 42(6) of the Act and therefore falls within the ambit of definition of Financial Debt as defined under Section 5(8) of the Code and dismissed the appeal.

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