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KMP – Full time Function or Full Time for Company?

Section 203 mandates certain classes of Companies to have certain categories of whole time Key Managerial Personnel's (KMPs). This provision is applicable to listed companies and public companies having paid up capital of Rs. 10 crores or more, i.e., companies which can be assumed to be comparatively larger in size. Hence, the intent of this provision appears to be to ensure that the affairs of these companies are conducted in fair manner i.e. which is beneficial to the interest of all stakeholders.

Section 203 read with Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 states that, every listed company and every other public Company having a paid-up capital of ₹ 10 Crore or more must have all the three following **Whole-time KMPs:**

1. MD or CEO or Manager
   If none of the above is there, then WTD;
2. Company Secretary; and
3. Chief Financial Officer.

Further Sub-Section (1) of Section 203 states that an Individual cannot hold two positions of the Chairman and the Managing Director or Chief Executive officer of the Company at the same time unless, -

(a) The articles of the Company provide otherwise; or
(b) The Company does not carry multiple business

But above restriction does not apply to such public companies / listed companies which have paid up capital of Rs. 100 crores and annual turnover of Rs. 1000 crore or more which are engaged in multiple businesses and which have appointed one or more Chief Executive Officers for each such business.

According to sub-Section (3) of Section 203, a Whole Time KMP shall not hold office in more than one Company except in its subsidiary Company at the same time. But a KMP can hold non-executive directorship with the permission of board as per proviso to sub-section (3).

If we check the Dictionary meaning of Whole Time it states 'whole time means full time.' Oxford dictionary defines 'full time' as 'total normal working hours'.

The phrase "whole – time" was considered by the Bombay High Court in the context of whole – time director and it has been held that the **expression "whole – time director" must refer to a director who spends his whole – time in the management of the company**
.
If we read Sub-section (1) and Sub-Section (3) of Section 203, the intention of legislature is clear that subject to exceptions provided in Section 203, a whole time KMP means a person who devotes the whole of his working time for the Company of which he/she is a KMP and cannot work for any other Company or do any other business with permission of employer also.

A KMP must hold office in one Company only except its subsidiary but managing director can hold the position of managing director in one more company but cannot hold any other position subject to compliance of sub-section (3) of Section 203.

Whether one person can hold more than one office of KMP in a particular company at a time or Whether for each three categories specified in section 203(1), there must be three independent individuals holding any one of three officers?

If we consider the nature of functions expected to be performed by each of the three KMPs, it mainly relates to overall business administration, finance and compliance functions. Each of these functions are crucial in nature and require proper and whole-time attention of such person to whom the respective role is assigned. So,the intention of the section appears to have three different persons holding three different offices and one person cannot hold more than one office of the KMP in one company.

Hence, it can be said that whole-time position signifies whole time involvement of that person for a particular position. In order to give justice to a particular function, an individual should not be rendering the responsibilities of two whole time positions at the same time, even in the same company.

Ramaben A Thana walav Jyoti Ltd . (1957) 27 Comp Cas 105 (Bom)

Once application for insolvency resolution is admitted on behalf of one creditor, then all creditors of same class would have their respective rights at par with each other

Interpretation of Section 29A(h) of IBC – Bank of Baroda &Anr. Vs. MBL Infrastructures Ltd. &Ors. – Supreme Court

Brief Facts

- MBL Infrastructures Limited – Corporate Debtor and Respondent No.1 was set up by, Mr. Anjanee Kumar Lakhotiya (Respondent No. 3) in the early 1990s. Loans/ credit facilities were obtained by the Respondent No.1 from the consortium of banks (State Bank of Mysore now State Bank of India as lead bank).
- On the failure of the Corporate Debtor to act as per the terms of repayment, some of the respondents were forced to invoke the personal guarantees extended by the Respondent No.3 for the credit facilities availed by the Corporate Debtor.
- RBL Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), after duly invoking the personal guarantee of the Respondent No.3. This was followed by a similar action at the hands of Allahabad Bank and State Bank of Bikaner and Jaipur. At a later point in time, State Bank of Bikaner and Jaipur got merged with the State Bank of India. The aforesaid two proceedings invoking Section 13(2) of the SARFAESI Act were initiated in the month of February and March 2013, respectively.
- Thereafter, RBL Bank filed an application u/s 7 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) before the National Company Law Tribunal (NCLT), Kolkata Bench to initiate the Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor. The Section 7 application was admitted *vide* an order dated 30 March 2017, appointing an Interim Resolution Professional, leading to imposition of moratorium in terms of Section 14 of the IBC. After the expiry of the initial period of CIRP, an application was filed by the Resolution Professional (RP) for extending the duration of CIRP by an additional 90 days, which was duly granted.
- Out of two Resolution plan received, one Resolution Plan was received by the RP from Respondent No.3prior to the introduction of Section 29A of the IBC.
- A series of meetings took place with the active participation of the Committee of Creditors (CoC) on the resolution plan submitted by the Respondent No.3 between October 2017 and November 2017. A decision was made in the 9th meeting of the CoC held on 18 November 2017 seeking an appropriate resolution plan at the hands of Respondent No.3. In tune with the aforesaid directive, the Respondent No.3 submitted a modified resolution plan on 22 November 2017.
- Thereafter, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A was introduced to the IBC. The CoC held its meeting on 1 December 2017 to deliberate upon the impact of the amendment *qua* the eligibility of the Respondent No.3 in submitting a resolution plan in the CIRP proceedings. In view of the lingering doubt expressed, the Respondent No.3 filed an application before the NCLT praying for a declaration that he was not disqualified from submitting a resolution plan under sub-section (c) and (h) of Section 29A of the IBC.

- The NCLT *vide* its order dated 18 December 2017 held that the Respondent No.3 was eligible to submit a resolution plan, notwithstanding the fact that he did extend his personal guarantees on behalf of the Corporate Debtor which were invoked by some of the creditors. This issue was never placed and raised before the NCLT.
- The order of the NCLT dated 18 December 2017 was assailed by the Punjab National Bank (Respondent No. 10) before the National Company Law Appellate Tribunal (NCLAT). The NCLAT passed an order dated 21 December 2017 that the NCLT would not accept or reject any resolution plan without prior approval of the NCLAT.
- After a series of litigation, on 23 March 2018, the NCLAT passed an order vacating the order passed on 18 December 2017 as the Punjab National Bank sought permission to withdraw its appeal without any liberty. However, a request made by the present appellant before the NCLAT seeking to be impleaded as a party to continue the *lis* was not considered favourably without any assigning of reasons.
- Eventually, the NCLT approved the resolution plan submitted by Respondent No. 3 by an order dated 18 April 2018. A direction was also given that the resolution plan shall come into force with immediate effect. The appellant challenged the order passed by the NCLT before the NCLAT. The NCLAT confirmed the order passed by the NCLT and refused to interfere with the same. Aggrieved by the decision of the NCLAT, the appellant challenged the same before the Hon'ble Supreme Court.

Arguments of the Appellant:

- The appellant argued that Section 29A had to be given a holistic interpretation as its objective is to weed out undesirable persons with the intention of promoting primacy of debt by disqualifying guarantors who have not fulfilled their co-extensive liability with the insolvent Corporate Debtor.
- It was submitted that Respondent No.3 (who is a promoter of the Corporate Debtor) was ineligible to submit a resolution plan under Section 29A(h) of the IBC, as several personal guarantees executed by Respondent No. 3 in favour of various creditors of Corporate Debtor stood invoked prior to the commencement of CIRP. Therefore, the premise on which the NCLT held the Respondent No. 3 eligible to submit a resolution plan is *ex facie* false.
- The appellant also stated that the law which was prevailing on the date of the application had to be taken into account. Therefore, the disqualification in the present case got attracted on the date of filing of the application and on the same analogy not only Section 29(A)(h) but also Section 30(4) has to be interpreted. As fraud vitiated all solemn acts, the appeal deserved to be allowed.
- The appellant also pointed out that the approval of the resolution plan was made after the mandatory period of 270 days, i.e., after expiry of CIRP period. Since there is a clear infraction of Section 12, all orders passed were liable to be interfered with.

Arguments of the Respondent:

- The respondents submitted that a decision made by the CoC in its commercial wisdom on being satisfied with the report of the expert on the viability and feasibility of the resolution plan, is not required to be interfered with by the Hon'ble Supreme Court.
- The revised plan as accepted by NCLAT was an improvement to the earlier one

submitted by Respondent No. 3 and, therefore, there could not be any grievance on that count.

- The object of the IBC had to be read with Section 29A(h) of IBC.The appellant was estopped from questioning the eligibility of Respondent No. 3 to submit a resolution plan under Section 29A(h) of the IBC. The provision had to be literally interpreted to the extent that a personal guarantor is barred from submitting a resolution plan only when a creditor invoking the jurisdiction of the NCLT had invoked a personal guarantee executed in favour of the said creditor.
- No personal guarantee stood invoked by RBL Bank at the time of application to the adjudicating authority u/s 7 of the IBC. The invocation of the consortium guarantee by other banks under Section 13(2) of the SARFAESI Act, 2002 was *ex facie* illegal in terms of the inter-se agreement executed between consortium members.
- That the object of the IBC is to revive a corporate debtor and liquidation in such circumstances is the last resort. It was submitted that Respondent No. 3 had infused over Rs. 63 crores since the resolution plan was made operational and further received approval of shareholders to raise another Rs. 300 crores to revive the Corporate Debtor.
- Since the approval of the resolution plan submitted by the Respondent No.3, several projects of national importance had been completed and various others are under execution. Further, all workmen have also been paid in full, and all current employees, operational creditors and statutory dues are being regularly paid.

Held:

- The Code has got its laudable object. The idea is to facilitate a process of rehabilitation and revival of the corporate debtor with the active participation of the creditors. Thus, there are two principal actors in the entire process, viz.,(i)the committee of creditors and, (ii) the corporate debtor. The others are mere facilitators. There can never be any other interest than that of the committee of creditors and the corporate debtor. And placed the reliance *Swiss Ribbons (P) Ltd. v. Union of India, (2019)*for the rationale behind the enactment.
- The Hon'ble Supreme Court observed that Section 29A was one of many facets of the IBC and therefore, the provision had to be read with the main objective enshrined thereunder.
- The objective behind Section 29A of the IBC was to avoid unwarranted and unscrupulous elements to get into the resolution process and preventing their personal interests to step in. Secondly, Section 29A consciously seeks to prevent certain categories of persons who may not be in a position to lend credence to the resolution process by virtue of their disqualification.
- The Apex Court then emphasised on the need for adopting a purposive interpretation with the primary aim to revive and restart the corporate debtor, with liquidation being the last resort as held in*Chitra Sharma &Ors. v. Union of India, (2018)*
- The Apex Court then turned to the scope of Section 29A(h). Section 29A(h) of the Code creates **one more category of persons not being eligible to be a resolution applicant. Other than the persons mentioned thereunder, there may not be any disqualification. The word "person" is of a wider import to include a promoter or a director, as the case may be definition**

of "person" as mentioned under Section 3(23) of the Code includes certain categories of persons and thus, there is no such exclusion. It is merelyillustrative/inclusive in nature and therefore, the persons mentioned in Section29A alone are ineligible to be resolution applicants.

- It was observed that once a person executed a guarantee in favour of a creditor for credit facilities availed by the corporate debtor, and in case where the application for insolvency was admitted and the guarantee was invoked, the Apex Court opined that the bar *qua* ineligibility would certainly come into play.
- The Hon'ble Supreme Court noted that the provision requires a guarantee in favour of a creditor. ***Once an application for insolvency resolution was admitted on behalf of the creditor then the process would be one of rem, and therefore, all creditors of the same class would have their respective rights at par with each other***.
- The words 'such creditor' in Section 29A(h) **has to be interpreted to mean similarly placed creditors after the application for insolvency is admitted by the NCLT.** As a result, the Apex Court observed that what is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process. This is subject to further compliance of invocation of the said personal guarantee by the other creditor.
- Ineligibility has to be seen from the point of view of the resolutionprocess. It can never be said that there can be ineligibility qua one creditor asagainst others. Rather, the ineligibility is to the participation in the resolutionprocess of the corporate debtor. Exclusion is meant to facilitate a fair andtransparent process.
- The Section 29A had a laudableobject of protecting and balancing the interest of the CoC andthe corporate debtor, while shutting the doors to canvas the interests of others.That is the reason why it consciously excludes certain categories of persons
- Respondent No. 3 had executed personal guarantees which were invoked by three of the financial creditors even prior to the date when the application filed. Thus, on the touchstone of the interpretation Hon'ble Supreme Court of Section 29A(h), it was held that the plan submitted by Respondent No. 3 ought not to have been entertained in the first place.
- The Hon'ble Supreme Court clarified that the NCLT and NCLAT were not right in rejecting the contentions of the appellants on the ground that the earlier appeals were withdrawn without liberty. The Apex Court noted that admittedly, the appellant was not a party to the decision of NCLT on the first occasion, in the appeal the appellant merely filed an application for impleadment. The NCLT did not decide the matter on merit. In fact, the question of law was left open. The Apex Court held that the principle governing *res judicata* and *issue estoppel* would never get attracted in such a scenario. Thus, the reasoning rendered by the NCLAT to that extent could not be sustained in law.
- The Hon'ble Supreme Court stated that the interest of over 23,000 shareholders and thousands of employees of the Corporate Debtor also needed to be looked into. AboutRs300 crores was raised with the approval of the shareholders by Corporate Debtor. Further, about Rs. 63 crores was infused into the Corporate Debtor to make it functional. The Apex Court noted that there were many ongoing projects of public importance undertaken in nature of construction activities at different stages.

- The Hon'ble Supreme Court reminded itself of the ultimate object of the IBC, which is to put a corporate debtor back on its feet. It was also noted that no prejudice would be caused to the dissenting creditors as their interest would otherwise be secured by the resolution plan itself, which permits them to get back the liquidation value of their respective credit limits. Thus, on the peculiar facts of the instant case, the Hon'ble Supreme Court held that it did not wish to disturb the resolution plan leading to the on-going operation of the Corporate Debtor.

Making fundraising Investor-friendly and Transparent Amendment to Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2022 [ICDR Regulations]dt: 14 January, 2022

The ICDR Regulations were amended by SEBI vide an amendment dated 14 January, 2022. In our earlier edition of MMJC Insights, we had discussed about the amendments relating to preferential issue. Here, we shall discuss about amendments in ICDR Regulations other than those relating to preferential issue:-

A. **Conditions for objects of issue and utilization of proceeds underInitial Public Offer ('IPO'), Further Public Offer ['FPO'], Rights Issue, Small and Medium Enterprises Initial Public Offer ['SME IPO'], and Indian Depository Receipts issue ['IDR issue']**

   a. **Unidentified acquisitions and General Corporate Purpose [GCP]:**ICDR Regulationshave provisions specifying eligibility requirements for an IPOby an issuer and also have provisions for various issue related aspectssuch as objects of the issue, amount earmarked for general corporate purpose(GCP), minimum promoter contribution, offer for sale requirements, etc.The current regulatory framework for IPOs dealing with the aforementionedaspects and the issues emerging out of the recent spate of IPOs, particularlywith respect to filings by new age technology companies were deliberated at themeeting of the Primary Market Advisory Committee (PMAC) of SEBI. It was recommended by the PMAC that while disclosures in the offer documents coverspecifics related to the particular issuer and its business model, thereis a need to lay down certain additional requirements for compliance by theissuers so as to enhance the existing framework.

   SEBI had discussed at its board meeting held on 28 December, 2021 that Schedule VI of ICDR Regulations, under section 'Particulars of the Issue'provides for descriptive disclosure requirements for objects of the issuecovering various objects such as loan repayment, purchase of property etc. ICDR Regulations does not prescribe any limit on allocation of fresh issue for any specific object type. The growth of new-age technology companies (NATCs) has brought in funding of inorganic growthinitiatives as one of the motives for primary issues as they are asset-light organizationswhose growth comes from expanding into new micro-markets and adding or acquiring new customers, companies, technology, etc. Due to this, it was seen that many NATCs had earmarked substantial amount of proceeds for the purpose of inorganic growth.

   However, raising funds for unidentified acquisition leads to some amount of uncertainty/ambiguity in the IPO objects.Such uncertainties about theobjects of the issue increase further in case a major portion of the issue was being earmarked for such unidentified acquisitions, especially given that issuer companies already have flexibility to earmark upto 25% of the fresh issue size under GCP.

   Hence, it was approved by SEBI at its Board meeting held on 28 December, 2021 and Regulation 7(3) was inserted in ICDR Regulations to the effect that

where the issuer, in its offer documents, sets out an object for future inorganic growth but has not identified any acquisition or investment target, the amount for such objects and the amount for general corporate purpose (GCP) shall not exceed a combined limit of 35% of the total amount being raised. The amount so earmarked for such unidentified acquisitions shall not exceed 25% of amount being raised by issuer. These limits will not be applicable if the proposed acquisition or strategic investment object has been identified and suitable specific disclosures about such acquisitions or investments are made in the draft offer document and the offer document at the time of filing of offer documents. **The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022.**

b. Monitoring of General corporate purpose and change of format: Issuer Companies are permitted to specify certain portion of the fresh issue portion as general corporate purpose (GCP) which cannot exceed 25% of the fresh issue. As per Regulation 41(2) proceeds of GCP are not required to be monitored by monitoring agency. Public financial institutions and scheduled commercial banks were allowed to act as monitoring agency. Both these institutions are not within the regulatory purview of SEBI. So PMAC had recommended that an entity regulated by SEBI may only be assigned the monitoring agency's role.

Further it was also discussed that monitoring agency is required to monitor only till 95% of the proceeds of the issue are utilised. However, for larger issues, even 5% of amount can besubstantial, thus, monitoring agency should continue to monitor till 100% ofthe proceeds is utilized.

Further concerns were also raised that as the average issue size has increased over a period of time, the GCP size also becomes very substantial in terms of absolute numbers. The usage of GCPamount was not covered in the monitoring agency report. Given the large sizeof IPOs, it was recommended by PMAC that there is a need to provide adequate information aboutthe utilization and monitoring of such a large portion of issue proceeds, earmarked under GCP.

Also it was felt necessary to increase transparency in monitoring agency reports that are submitted to stock exchanges. SEBI also raised concerns stating that monitoring agency reports are reviewed on yearly basis. With the increase in issue size and NATCs it is necessary that these reports be reviewed by audit committee periodically.

Taking into consideration all of these recommendations by PMAC, SEBI has now stated amended ICDR Regulations as follows:

(a) Credit Rating Agency (CRAs) registered with SEBI, shall henceforth be permitted to act as Monitoring Agency. (Regulation 41(1))

(b) Monitoring shall continue till 100% utilisation of proceeds Regulation 41(2))

(c) Amount raised for GCP shall also be brought under monitoring and utilization of same shall be disclosed in monitoring agency report (Schedule XI)

(d) Monitoring agency report shall be placed before audit committee for consideration *"on a quarterly basis" instead of "on an annual basis"*.

(e) Format of Monitoring Agency report as specified in Schedule XI of ICDR Regulations, shall cover item by item description for all

the objects and for sub-heads (if any) stated in the offer document separately. Further, format of Monitoring Agency report shall coverdisclosure regarding source of information / certifications considered byMonitoring Agency for preparation of report.(Schedule XI)

The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022.

B. **Conditions for Offer for Sale to public in IPO:**Presently, for offer for sale (OFS) under an IPO, selling shareholders can offer equity shares which have been held by them for a period of at least one year prior to the filing of draft offer document. There is no limitation for such selling shareholders regarding as to how much of their existing pre-issue shareholding can be diluted/offered through OFS in IPO. In case of issuers which have identifiable promoter(s), Minimum Promoters Contribution ['MPC'] is applicable for promoters, and promoter(s) are required hold at least 20% of the post issue capital as MPC. In case an issuer does not have any identifiable promoter, existing shareholders can divest their entire stake or a part of their stake in OFS without any requirement of mandatory MPC. Also OFS of entire stake, other than MPC, by promoters of loss making company would also dilute the confidence of investors in these companies.

Hence the PMAC had recommended that where an issuer company does not have any identifiablepromoter, the existing shareholders who are having significant shareholding,should continue with the company post IPO for a longer period to inspireconfidence amongst the investors. SEBI floated a consultation paper and proposed this recommendation of PMAC for IPOs where there are no identifiable promoters.

The proposal and public comments on that were discussed by SEBI at its board meeting held on 28 December, 2021 and following amendment was approved.
The existing Regulation 7 of ICDR Regulations specifies general conditions for an issuer making IPO, whereas Regulation 8 of ICDR Regulations specifies additional conditions for Offer for Sale. Now, a new Regulation 8A is inserted which lays down additional conditions for Offer for Sale to public in an IPO where DRHP is filed by an issuer not satisfying conditions mentioned under Regulation 6(2) of ICDR Regulationsi.e. IPO made through mandatory book-building route under Regulation 6(2) of ICDR Regulations: These additional conditions are as follows:-

(i) Shares offered for sale by selling shareholders, individually or with persons acting in concert, holding more than 20% of pre-issue shareholding of the issuer, shall not exceed more than 50% of their pre-issue shareholding.
(ii) Shares offered for sale by selling shareholders, individually or with persons acting in concert, holding less than 20% of pre-issue shareholding of the issuer, shall not exceed more than 10% of pre-issue shareholding of the issuer.

Further for shareholders holding, individually or with persons acting in concert, more than 20% of pre-issue shareholding of the issuer based on fully diluted basis, the provisions of lock in as specified under Regulation 17 of SEBI ICDR

shall be applicable and no relaxation as provided under Regulation 17(c) of SEBI ICDR shall be applicable. **The provisions will be applicable for draft red herring prospectus that shall be filed on or after 14 January, 2022.**

C. **Refund and Release of subscription money:**from the earlier prescribed timeline of refund of all application monies in the event of non-receipt of minimum subscription & release of subscription money in case the issuer fails to obtain listing or trading permission from stock exchanges where the securities were proposed to be listed of 15 days & 7 days respectively, the revised timeline of 4 days is prescribed for both such instances for streamlining purpose. In order to avoid misuse of funds, a stricter timeline of 4 days isprescribed. This has been brought in taking into consideration the point that now application is made mandatory through ASBA.

This provision is applicable for IPO, FPO, Rights Issue, SME IPO, and IDR issue. The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022.

D. **Price Band:**In case of a book built issue, the issuer, in consultation with the merchant banker, needs to provide a price band for the issue Over the last few years, there is a trend wherein the price band, as provided by the issuers on the mainboard is extremely narrow, sometimes as small as Re. 1, Rs 2, or Rs.3. Narrow price band raises certain concerns w.r.t. the objective of fair and transparent price discovery mechanism in a book-built issue and also presents an opportunity to camouflage a fixed price issue as a book-built issue thus circumventing the conditions attached to the fixed price method especially related to allocation methodology.Therefore, with the existing maximum ceiling price of 120% of the floor price prescribed in Regulation 127(2), now a minimum price band of at least 105% of the floor price has been notified by way of a proviso to Regulation 127(2).

This provision is applicable for IPO and FPO. The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022.

E. **Lock in period for anchor investors:**It was observed by SEBI that anchor investors were selling their holdings in public issues at the end 30-day lock-in period prescribed in case of anchor investors only. This can be perceived as a selling pressure in the market creating artificial volumes leading to falling prices of a stock. SEBI raised concerns on these as anchor investors are perceived as trustworthy entities and this concept was introduced to inspire investors' confidence in the public issue. Other investors may take cue based on the investment decisions of anchor investors. Further SEBI stated that a longer lock-in period will provide more confidence to other investors. SEBI further stated that the PMAC was of the view that instead of increasingof lock-in period for all Anchor Investors from 30 days,it is better to give not less than 50% of the anchor book to those Anchor Investors who may beagreeable for a longer lock-in period.
So Schedule XII was modified to the extent thatthe existing lock in of 30 days from the date of allotment shall continue for 50% of shares allotted to anchor

investors and for the remaining portion of 50% of shares allotted, lock in of 90 days from the date of allotment **shall be applicable for all issues opening on or after 1 April, 2022. These provisions will be applicable to IPO, FPO, IDR issue and SME IPO.**

F. **Revised Allocation methodology for Non-Institutional Investors ['NII']: SEBI did an** analysis of oversubscribed IPOs during the period 01 January, 2018, to 30 April, 2021 as mentioned in the agenda for SEBI's Board meeting dated 28 December, 2021. It was observed that in 29 IPOs, on an average around 60% of the applicants in the NII category did not get any allotment. In a few cases, application for as large as Rs 75 lakhs was also unable to get allotment. This was concerning SEBI as it is expected that any public offering should aim to provide as dispersed and diverse offerings as possible with equitable opportunity for retail and non-institutional investors. SEBI observed that current methodology of proportionate allotment carries a certain risk where few highly leveraged NIIs with larger bid amounts crowd out other NIIs."Hence SEBI felt the need to relook the provisions. Accordingly consultation paper was floated and after receipt of comments, proposal was discussed in the above-mentioned SEBI board meeting. Majority of the comments were in agreement for sub-division of NII category. On deliberation, it was decided to amend Schedule XIV of ICDR Regulations such that Non-institutional category shall be divided into two sub-categories–
   a. Application size Rs 2 lakh to Rs 10 lakh – allocation quote 1/3rd of total NII allocation
   b. Application size above Rs.10 lakh: allocation quote 2/3rd of total NII allocation
   c. In case of oversubscription, allotment under NII category shall be done on 'lots basis' as against proportionate basis earlier. Subsequent to allotment of minimum bid lot to applicants, the remaining portion would be available for proportionate allotment.

   The provisions shall be applicable for book built issues (IPO and FPO) opening on or after 1 April, 2022.

G. **Repealing of the concept of underwriter:** For many years,only few people had registeredas underwriters under the SEBI (Underwriters) Regulations, 1993. Further SEBI in 2021 has repealed the SEBI (Underwriters) Regulation, 1993. Therefore, de-recognition of registration of underwriters under the said regulation would not have any adverse impact on the activity of underwriting public issues in the securities market. Hence, SEBI has substituted the reference of 'underwriters' and permitted merchant bankers and stock brokers to act as underwriters.**The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022. This provision is applicable for IPO, FPO, Rights Issue, SME IPO, and IDR issue.**

H. **Introduction of the concept of 'fraudulent borrower'":**Certain unscrupulous borrowers enjoying credit facilities under "multiple banking arrangements", after defrauding one of the financing banks, continue to enjoy the facilities with other financing banks and in some cases avail even higher

limits at those banks. In certain cases, the borrowers use the accounts maintained at other financing banks to siphon off funds by diverting from the bank on which the fraud is being perpetrated, these borrowers are called Fraudulent Borrower[1]. The penal provisions are the same as for wilful defaulter, therefore the reference of 'fraudulent borrowers' has been inserted in ICDR Regulations at all such places where the reference of 'wilful defaulter' appeared. So with effect from 14 January, 2022 wherever issuersare classified as 'fraudulent borrowers' or where any promoter or director is classified as 'fraudulent borrower' by any bank or financial institution (as defined under the Companies Act, 2013) or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the Reserve Bank of India, then such entities will not be able to raise funds as per ICDR Regulations. **The above provisions are applicable for issues whose draft offer documents are filed after 14 January, 2022. This is applicable for all issues made under SEBI ICDR.**

I. **Timelimit for opening of rights issue:**SEBI has reduced the minimum time period for which rights issue is to be kept open from 15 days to 7 days by an amendment in Regulation 87 of ICDR Regulations.

J. **Further Public Offer in case of change in name:** As per Regulation 103 of ICDR Regulations, one of the eligibility conditions of FPO was that in case anissuerhas changed its name within last one year, then to make a FPO, atleast 50% of the revenue should have been earned by it from the activity indicated by new name. This was creating confusion as to what shall be done if revenue from new activity is not 50% or more than that? Now SEBI has clarified by substituting Regulation 103 to the effect that if this condition is not fulfilled, then the issuer shall undertake to allot at least seventy five per cent. of the net offer, to qualified institutional buyers and to refund full subscription money if it fails to make the said minimum allotment to qualified institutional buyers.

K. **Amendments to eligibility conditions for Fast Track Rights Issue and Fast Track FPO:**

   a. One of the eligibility conditions for making a fast track rights issue, as per Regulation 99 of ICDR Regulations was that the average market capitalisation of public shareholding of the issuer shall be atleast of Rs.250 crore. But there was no clarity on the recognised stock exchange from which this market capitalisation had to be computed, if the issuer was listed on both exchanges?Now SEBI has clarified by amending Regulation 99 to the effect that the average market capitalisation of Rs. 250 crore can be computed in at least one of the recognized stock exchanges with nationwide trading terminal on which the securities are listed.

   b. **Disclosure on Show Cause Notice [SCN]**: One of the conditions for making a fast track rights issue mentioned in Regulation 99 was that no SCN,excluding proceedings for imposition of penalty,should have been issued by SEBI and pending against the issuer, promoter or whole time directors as on the reference date. This was in line with requirement mentioned under SEBI (Issuing Observations on Draft Offer Documents

PendingRegulatory Actions) Order, 2020. Now this requirement is done away with while issuing observations. So SEBI has now amended Regulation 155 of ICDR Regulations and this provision has been extended to fast track further public offer toostating that even if the SCN is issued by SEBI or the Adjudicating Officer, then disclosure shall be made in that regard in the draft offer document alongwith the potential adverse impact on the issuer. So now if a SCN is issued against a listed company either by Adjudicating officer or SEBI, then disclosure would have to be given in this regard alongwith the impact of such SCN and listed entity will be able to make a FPO on fast track basis.

c. **Disclosure on settlement:**One of the eligibility critieria for fast track rights issue mentioned under Regulation 99 was that no settlement any alleged violation of securities laws through the consent or settlement mechanism with SEBI should have been done by the issuer or the promoter or the promoter group or the director of the issuerduring three years immediately preceding the reference date.Now Regulation 99 has been amended to the effect that in case of any such instance, a disclosure in the letter of offer has to be given about the settlement in the past three years immediately preceding the reference date and issuers who were ineligible for fast-track issues after a settlement, would now be eligible for fast-trackrights issues. A similarprovision is also made applicable if company is making a fast track FPO.

d. **Restatement of financials:**Earlier as per Regulation 155 of ICDR Regulations, in case of fast track FPO, the impact of audit qualifications, if any and where quantifiable, on the audited accounts of the issuer in respect of those financial years for which such accounts are disclosed in the letter of offer should not exceed 5% of the net profit or loss after tax of the issuer for the respective years.
SEBI has now substituted this clause and stated that restated financial statements adjusting for the impact of the auditqualifications need to be provided in case of audit qualifications, if any in respect of any financial year for which accounts are disclosed in offer document& if impact on financials cannot be ascertained, then appropriate disclosure in that regard be given in the offer document.

L. **Securities eligible for promoters' contribution:**As per Regulation 15 of ICDR Regulations, for calculation of Minimum Promoter Contribution [MPC] of at least 20% of the post issue capital, specified securities acquired by promoters and certain category of persons during the preceding 1 year at a price lower than the price at which specified securities are being offered to the public in the IPOare ineligible. However,promoters and Alternative Investment Funds [AIFs] were allowed to pay difference in issue price and purchase price, in such cases, to make such acquired specified securities eligible for MPC. There was no similar provision for foreign venture capital investors or scheduled commercial banks or public financial institutions or insurance companies registered with Insurance Regulatory and Development Authority of India, who were covered under similar restriction with regard to calculation of MPC. SEBI has now amended Regulation

15 to cover all these parties also in the above-mentioned relaxation with regard to MPC if these entities pay the difference between the said prices.

M. Format and content of offer document, abridged prospectus and draft letter of offer: Brief of amendments made to Schedules under SEBI ICDR are as follows:

- Abridged prospectus shall contain issue and issuer details,details of selling shareholders in tabularformat alongwith their average cost of acquisition and offer for sale details, and other details as may be specified by SEBI from time to time.

- Abridged prospectus, prospectus and letter of offer shall specify about exemptions, if any, provided by SEBI.

- Top 10 Risk factors in case proforma financial statement or restated financial statement is provided by a peer reviewed Chartered Accountant other than statutory auditor. This indicates that a peer reviewed Chartered Accountantother than statutory auditor is now allowed to certify proforma financials or restated financials whenever they are given.

- Aadhar number and driving license number need not be made public in draft offer document. Undertaking needs to be given that it is submitted to stock exchange.

- Clarified that designated stock exchange as disclosed by the respective issuer at the time of the issue shall be considered for disclosing the price information.

- Fraudulent borrowers' names shall be disclosed along with wilful defaulters' names in case of QIP.

- While submitting report on monitoring of proceeds of IPO / FPO, the monitoring agency shall give information not only broad heads but also description/utilization needs to be given for sub-heads. Further source of information /certification considered while preparing report also needs to be given. Further a new sub point 'utilisation of GCP' also added.

Amendment to ICDR Regulations can be accessed at below mentioned link:
https://www.sebi.gov.in/legal/regulations/jan-2022/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-amendment-regulations-2022_55351.html

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