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MMJCINSIGHTS

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Affixation of Digital Signature Certificate – Exchange clarifies on applicability

Introduction:
Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') ['Stock Exchanges'] have vide circular dated September 07, 2022 ['September 2022 Circular'], provided guidance on applicability and other aspects relating to affixation of Digital Signature Certificates ('DSC') in furtherance to their earlier circular, "Circular on use of Digital Signature Certificate (DSC) for announcements submitted by listed companies" dated August 01, 2022, & August 02, 2022 ("August, 2022 Circulars")

Earlier August 2022 circulars:
Stock Exchangesvide their August,2022 circulars stated that for ease of doing business it was decided to further extend the use of DSC while submitting disclosures to stock exchanges. MMJC in its earlier insights dt: September 10, 2022 provided a detailed write up on August 2022 Circulars. Vide MMJC Insights we had raised a few questions with respect to applicability of August 2022 Circulars, applicability of August 2022 Circulars for submission of disclosures under various SEBI and Stock Exchanges Circulars etc. Now Stock Exchanges have vide September 2022 Circular provided clarification on one of the aspects with respect to applicability of August 2022 Circular and September 7, 2022 Circular.

Key Points from September 2022 Circular:
The following are the key points from the September 2022 Circular:

1. **Applicability:**It is applicable to all listed entities, which means entities other than Companies i.e., REITs, INVITs, etc shall also comply with the circular and affix DSC on all the announcements to be filed with stock exchanges. In short, any entity making corporate announcements under any SEBI Regulation shall affix detectable DSC to authenticate such document/ disclosure. August 2022 Circular mentioned applicability to listed companies. But Stock Exchanges have clarified that August 2022 Circular is applicable to all listed entities.
2. **Detectable DSC :**Scanned document/ disclosure (full set of documents) shall be in machine-readable and searchable form. Secondly, such document/ disclosure shall be authenticated using a detectable DSC..
3. **Non-submission of disclosure with DSC:**Disclosure(s) submitted in contravention to the requirements of the Stock Exchange circulars shall be treated as non-compliance and the listed entity shall re-submit the said announcement adhering to the aforementioned requirements on immediate basis.Appropriate action may follow if the non-compliance is not rectified immediately.

Conclusion:
SEBI and Stock exchanges have been taking plenty of steps to promote ease of doing business and this is one step closer to that. If this is not adhered to by corporates, then there shall be consequences from stock exchanges in this regard.

Food for thought:DSC is time stamped, will Regulatorsuse it as a toolfor enforcement as they would easily identify delayed disclosures in terms of stock exchanges fillings!!!

Enclosure:

1. NSE Circular: Guidance Note on use of digital signature certificate for announcements submitted by listed companies dated September 07, 2022

   Link: https://static.nseindia.com//s3fs-public/inline-files/Guidance%20note%20on%20Digital%20Signature%20Certificate_Final_1.pdf

2. BSE Circular: Guidance Note on use of digital signature certificate for announcements submitted by listed companies dated September 07, 2022.

   Link: https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20220907-17

3. NSE Circular: Circular on use of digital signature certificate for announcements submitted by listed companies dated August 02, 2022

   Link: https://static.nseindia.com//s3fs-public/inline-files/Circular%20on%20use%20of%20digital%20signature%20certificate.pdf

4. BSE Circular : Circular on use of digital signature certificate for announcements submitted by listed companies dated August 01, 2022

   Link: https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20220801-24

Order of Adjudicating Officer of Securities and Exchange Board of India

Name of Case: In the matter of Dish TV India Ltd(hereinafter referred to as "**DTL**" or "**the Company**")

Facts of the case:

1. The present proceedings emanate from an interim order cum show cause notice dated **March 7, 2022** (hereinafter referred to as "**SCN**"), passed by the Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") *inter alia* against Mr.Bhagwan Das Narang, Independent Director,
   Mrs Rashmi Agarwal, Independent Director, and Mr Shankar Aggarwal, Independent Director **['Noticees']** wherein it was *prima facie* found that the Noticees were in violation of the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act, 1992**") and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as "**LODR Regulations**")

2. It all started when certain entities belonging to the Essel Group (hereinafter referred to as "**Borrowers**") availed loans of INR 5,270 Crores between 2015 and 2018 from Yes Bank Limited (hereinafter referred to as "**YBL**"). A total of 47,19,13,990 shares of DTL (amounting to 25.63% of total shareholding of DTL) were pledged in favour of YBL by two promoter entities of DTL, namely, World Crest Advisors LLP (hereinafter referred to as "**WCA LLP**") and Direct Media Distribution Ventures Private Limited (hereinafter referred to as "**DMDVPL**")(hereinafter collectively referred to as "**Pledgors**"), as security for the said loans. In this regard, Deeds of Pledge were executed between the Security Trustees of YBL (Catalyst Trusteeship Services Limited and IDBI Trusteeship Services Limited) and the Borrowers. Between May and July 2020, the borrowers defaulted on the loans, and the Security Trustees invoked the pledge. Subsequently, the Security Trustees took steps to get the pledged shares transferred in their own names or in the name of YBL. Aggrieved by the above, WCA LLP filed a Commercial Suit No. 29569 of 2021 (hereinafter referred to as "**Suit**") before the Hon'ble Bombay High Court alleging that YBL's shareholding in the *Company* is bad in law. WCA LLP *inter-alia* prayed for an *ad-interim* injunction restraining YBL from voting at the AGM of the Company (which was scheduled on December 30, 2021). WCA LLP also prayed for postponement of the AGM and/or stay the effect and implementation of decisions taken in the said AGM.

3. The Hon'ble Bombay High Court, vide an order dated December 23, 2021, rejected the interim reliefs sought by WCA LLP and directed that the *"result/outcome of the AGM to be held on 30th December, 2021, will abide by the decision in the above Interim Application."* **Pursuant to this Dish TV India Ltd ('DTL' / 'the Company')** held the AGM but **did not submit the voting results of Annual General Meeting of DTL held on December 30, 2021**to the stock exchanges**.**DTL made a disclosure to stock exchanges, that it had requested the Scrutinizer to place all the information relating to e-voting in the AGM along with his Report in a sealed cover and hand the same over to the Company Secretary and Compliance Officer of the Company. It was stated that the same shall be

placed before the Hon'ble Bombay High Court for further directions. The Company informed that it had also moved an application to place the voting results in a sealed cover before the Hon'ble Bombay High Court.

4. Thereafter SEBIreceived a complaint dated December 31, 2021 from YBL *inter-alia* requesting SEBI to ensure that the *Company*, being a listed entity, forthwith discloses the results of the AGM in terms of the requirement under Regulation 44(3) of the LODR Regulations. After examining the issue, SEBI issued an Advisory letter dated January 17, 2022to DTL **("First Advisory")**advising it to disclose the voting results/outcome of the AGM held on December 30, 2021, clearly mentioning the directions of the High Court, immediately. SEBI also asked the Company to disclose the First Advisory to stock exchanges. It was noted that the Company did not disclose the First Advisory to stock exchange. DTL replied to the First Advisory, vide its letter dated January 18, 2022, stating that the issue of declaration of results of the AGM was *sub-judice* before the Hon'ble Bombay High Court by virtue of IA No. 121 of 2022 filed by the *Company* and IA No. 376 of 2022 filed by YBL, and requested SEBI to suspend the Advisory pending a decision in the aforesaid Interim Applications.

5. SEBI examined the reply of the Company and the Order passed by the Hon'ble Bombay High Court vide its order dated December 23, 2021. It was observed that there was no specific restraint imposed by the Hon'ble Bombay High Court on declaring the results of voting of the above noted AGM. The Hon'ble Bombay High Court had only directed that the result/outcome of the AGM to be held on December 30, 2021, *will abide by the decision in the above Interim Application, and rejected any ad-interim relief*. The Hon'ble Bombay High Court had not issued any directions to prohibit the Company from disclosing the outcome of the AGM.Hence, SEBI issued another letter dated February 9, 2022 (hereinafter referred to as "**Final Advisory**"), drawing the attention of the Company to its statutory obligation towards shareholders and other stakeholders and its failure to act in compliance with the provisions of Regulation 44(3) of the LODR Regulations. The Company was once again advised to immediately disclose the voting results of the AGM held on December 30, 2021. Further, the Company was also informed that continuing non-compliance shall result in initiation of appropriate enforcement action against the Company. The Company was also advised to disclose the Final Advisory to the Exchanges for dissemination of the same to investors. The said letter was sent to the Company by way of an email dated February 09, 2022 at 06:57:00 PM in the evening. Thereafter, DTL submitted a letter dated February 10, 2022 to SEBI, in reply to the Final Advisory reiterating that the issue of declaration of AGM results was pending with the Hon'ble Bombay High Court. DTL requested SEBI, to await the outcome of the proceedings pending before the Bombay High Court. The Company, however, disclosed the Final Advisory to the Stock Exchanges on February 10, 2022 at 9:58:36 PM.

6. SEBI has now,in the SCN dated March 7, 2022, alleged that the Company had delayed the disclosure, knowing fully well that there was no such stay/ direction in operation, which would prohibit the *Company* from disclosing the outcome of the above AGM held on December 30, 2021. The SCN also noted that subsequently, the Hon'ble Bombay High Court clarified its position in its order

dated February 17, 2022 in IA No. 376 of 2022, making the following observations:

"*Mr. Khambata finds that the reason for delay in declaring of the results is said to be pendency of Interim Application (L) no. 29574 of 2021 and defendant no. 3 has claimed that the matter is sub-judice. It is clarified that pendency of the above two Interim Applications have no bearing on the requirement reiterated by SEBI…*"

SEBI further alleged that the Company did not disclose the voting results inspite of advisories being issued by SEBI and above clarification from Hon'ble Bombay High Court. SEBI also noted that as on the date of issue of SCN, there is a delay of 68 days in submission of voting results. SEBI directed the Compliance Officer of DTL to disclose the voting results within 24 hours of receipt SCN. SEBI further ordered freezing of demataccounts of Directors and Compliance Officer of DTL till the time voting results of the AGM held on December 30, 2021are announced to stock exchange or till further orders, whichever is earlier.

7. SCN further called upon the Noticees to show cause as to why further appropriate directions under the provisions of Sections 11(1), 11(4) and 11B (1) of SEBI Act, 1992 should not be issued against them and also why appropriate penalty should not be imposed in terms of Section 11B(2) read with 11(4A) of SEBI Act, 1992 read with Sections 15A(b) and 15HB of SEBI Act, 1992 for the aforementioned alleged violations of law committed by them.

8. The Company, the compliance officer and non-independent directors have filed settlement applications with SEBI and those are pending with SEBI, and hence the SCN is address to the independent directors of the Company only.

Charges levied: 1. Board of Directors of the Company was *prima-facie* in violation of the provisions of Regulations 4(2)(f)(ii)(6), 4(2)(f)(ii)(8), 4(2)(f)(iii)(2), 4(2)(f)(iii)(3), 4(2)(f)(iii)(6) read with 17(3) of LODR Regulations. The Board of Directors of the Company was also *prima-facie* in violation of the Clauses 4.1, 4.4, 5.1, 5.2 and 5.11 of the Code of Conduct for Directors and Senior Management (hereinafter referred to as "Code of Conduct"), as available on the website of the Company, framed pursuant to Regulation 17(5) of the LODR Regulations, read with Regulation 26(3) of the LODR Regulations. The Independent Directors on the Board of the Company were also *prima-facie* in violation of the provisions of Clauses 1 and 2 of Schedule A of the Code of Conduct read with Regulation 26(3) of the LODR Regulations, wherein additional duties of independent directors were prescribed under Schedule IV of Companies Act, 2013.

Arguments made by Noticees (Independent directors):
Noticees of the Company cannot be held liable for any alleged misconduct of the Company unless it is through a Board Process:
The Noticees claimed that, they being non-executive directors, cannot be held liable for any alleged misconduct of the Company unless it is through a Board Process with the active consent of the Directors under Section 149(12) of the Companies Act, 2013. Noticees further submitted that:

a. A Board Meeting was fixed for February 24, 2022 for consideration and approval of the Un-Audited Financial Results of the Company for the quarter ended on December 31, 2021 and just before commencement of the said

Board Meeting, they were informed about the Advisories from SEBI..

b. It was the first time they were informed of the SEBI Advisories. They were also informed that the Management has already replied to SEBI vide their letters dated January 18, 2022 and February 10, 2022 and was awaiting a final response. The Management also elaborated that this was done in line with the legal advice received.
c. The Independent Directors advised the Management that any further communication from SEBI be immediately brought to the attention of the Independent Directors and no further reply be sent without their consent.
d. The Board felt that in view of the reply already sent by the Management of the Company in response to the Advisories of SEBI, it would be prudent to await the final decision of SEBI.
e. Further, the Independent Directors, after application of mind, and in discharge of their fiduciary duties, and in view of the explanation given by the Management, felt that since replies to SEBI have already been issued, it would be prudent to await the final response of SEBI.
f. The Independent Directors however asked the Management to examine the Advisories legally and act accordingly. The order of the Hon'ble Bombay High Court dated December 23, 2021 and February 17, 2022 (as corrected on February 21, 2022) were never discussed in the Board. The Independent Directors were never aware of the loan/borrowing taken by the promoter/promoter group and/or the borrowing entities as referred to in the SCN.
g. It is a well-established principle that the liability of Independent Directors is extremely limited. The Noticees relied on judgments like *V. Selvaraj v. Reserve Bank of India*, 2019 SCC OnLine Mad 38930, *S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla and Ors.*, [2005] 8 SCC 89, *Seema Khandelwal, In re, 2020 SCC OnLine SEBI 55, Sayanti Sen v. Securities and Exchange Board of India*, 2019 SCC OnLine SAT 132. and Circular dated March 2, 2020 issued by the Ministry of Corporate Affairs of the Government of India in support of their submissions in this regard.

Observations by SEBI Whole Time Member on the arguments put forth by Noticees:

Noticees of the Company cannot be held liable for any alleged misconduct of the Company unless it is through a Board Process:

a. SEBI stated that Regulation 6 read with Regulation 17(8) of LODR Regulations provide that the matters related to disclosure are to be overseen, mainly by the Company Secretary and by Whole Time Directors. Further as per Regulation 24(2) of LODR Regulations which requires the listed entity to submit, quarterly compliance report on cooperate governance, states that the same shall be signed by either compliance officer or CEO. SEBI thus noted that LODR Regulations, for practical purposes, impose the burden of compliance of matters relating to filing and disclosure mainly on the compliance officer/ CEO - who are KMPs and/or whole-time directors of the company and involved in the day to day management of the company. In this SEBI accepted the submissions of Noticees that they were informed of the SEBI Advisories (dated January 17, 2022 and February 9, 2022) on February 14, 2022, just prior to the commencement of the Board Meeting.
b. However, SEBI further stated that it is not correct to say that knowledge of independent directors must be the one acquired through the board processes. The knowledge of the independent directors could be acquired through any

reliable and credible sources including public disclosures available on the website of the stock exchanges where shares of the company are listed as disclosed by the company.

c. SEBI noted that SEBI's First Advisory was not disclosed by DTL to the Exchanges. As a result, the fact that SEBI had issued such an advisory was not in the public domain. The material available on record, does not suggest that the Noticees were otherwise aware of the First Advisory issued by SEBI. The Final Advisory was disclosed by DTL to the exchanges, and thereafter, the same was widely reported by various news outlets between February 11-12, 2022, i.e. couple of days before the Board Meeting held on February 14, 2022.

d. The SCN and facts and circumstances of the case do not show whether the replies of the Company dated January 18, 2022 and February 10, 2022 to SEBI and disclosure to the stock exchanges on February 10, 2022 was done after deliberation with independent directors and the facts do not indicate any complicity of the Independent Directors with respect to the disclosures under Regulation 44(3) of the LODR Regulations and the Advisories issued by SEBI. Thus, no omission to exercise due diligence can be attributed to the independent directors in the facts and circumstances of the case.

e. Regarding order dated February 17, 2022 of the Hon'ble Bombay High Court, the SEBI Whole Time Member noted that the Independent Directors have stated that they were not aware of the aforesaid order. Unlike the information pertaining to the filing of the Suit by WCA LLP and order dated December 23, 2021 passed therein, the order dated February 17, 2022 was not disclosed by the Company to the Exchanges. The SEBI Whole Time Member found that the material available on record does not indicate that the Noticees herein were otherwise aware of this order and having regard to discussions recorded in above paras, failure to inform the said order to the stock exchanges, is not attributable to these Noticees, in the facts and circumstances of the case.

f. SEBI concluded that Independent Directors of the Company cannot be held liable for any alleged misconduct of the Company unless it is through a Board Process with the active consent of the Directors. The phrase "attributable through Board processes" appearing in this section warrants special attention and must not be considered merely ornamental. In this regard, in the present case the decision to not disclose the AGM results, was not taken with the knowledge of the Independent Directors attributable through Board processes, or with their consent or connivance and therefore, no liability can be affixed on the Independent Directors.

Held by SEBI: Matter disposed off without penalty

Cases quoted by Noticees:V. Selvaraj v. Reserve Bank of India, 2019 SCC OnLine Mad 38930, S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla and Ors., [2005] 8 SCC 89, Seema Khandelwal, In re, 2020 SCC OnLine SEBI 55, Sayanti Sen v. Securities and Exchange Board of India, 2019 SCC OnLine SAT 132.

Interplay between Section 167 and 184 of the Companies Act, 2013

Introduction:

Section 167 and 184 of the Companies Act, 2013("the Act") relate to Directors and are amongst the various critical sections of the Act. If read individually, both the Sections are totally separate and are adequately clear in themselves. But if read conjointly, they have common connecting link, which not only connects both the Sections, but also creates some amount of anomalies. An attempt has been made vide this article to understand the interplay between Section 184(1) & (2) and Section 167(1) in relation to vacation of office of director if he acts in contravention of or fails to make disclosure u/s 184 relating to entering into contract and arrangements in which the said director is directly or indirectly interested.

Interaction of Section 167 and 184:

1. Section 167 lists out the situations, which if incurred in case of any director, he shall have to mandatorily vacate his office of director.

   Section 167(1)(c) & (d) states that:

   " the office of a director shall become vacant in case—
   (c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
   (d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184"

   Thus, in relation to entering intoany contract or arrangement,if a director acts in contravention of section 184 or fails to disclose his interest as required under Section 184, then as per the operation of law, he shall vacate his office of director.

2. Section 184(1) and (2) prescribe two different types of disclosures of interest to be given by directors.

   (i) Section 184(1) speaks about general disclosure of interest and states that:

   "Every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed."

Therefore, every director, at first board meeting in which he participates as director, and thereafter at every first board meeting of the financial year or whenever there is any change in the disclosure already made, shall disclose his concern or interest in any company, body corporate, firms, AoP including the shareholding in form MBP 1 (format prescribed in the Companies (Meetings of Board and its Powers) Rules, 2014.

(ii) Section 184(2) speaks about specific disclosure of interest and states that: *"Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—*

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

Therefore, Section 184(1) requires all directors to disclose their interest in specified entities in prescribed format i.e., form MBP 1 at the first board meeting of every financial year. Whereas Section 184(2) requires disclosure of interest from those directors at the board meeting at which company is going to enter into any contract or arrangement with such party.

The point of discussion is that the clause "c"&"d" of Section 167(1) which lays down grounds for vacation for non-compliance of Section 184. It does not clarify whether director shall have to vacate his office for non-compliance of Section 184(1) or (2) or both. There is a recent judicial pronouncement in this regard which highlights and clarifies on this matter.

Vacation u/s 167(1) to be read in context of Section 184(2) and not (1) holds NCLAT

In its recent judgment dated December 14, 2021, in the matter of M/s Solar Industries vs KC Nuwal, National Company Law Tribunal (NCLAT) has provided clear guidance with regard to situation under section 184 when the office of the director gets vacated. In the facts of the present case, the vice-chairman and executive director of the Company Mr. Nuwalwas removed stating that his removal is due to vacation of office of director by effect of law due to non-compliance of Section 184. It was argued that the director had not given the disclosure about his interest in a new company acquired by him in format prescribed under section 184(1) i.e., in

form MBP 1 and also he had not disclosed this interest at the board meeting where the decision to enter in to rent agreement with this new company was made. Hence, the director was alleged of not complying with both Section 184 (1) & (2) and therefore leading to vacation of office of director as per section 167(1)(c)&(d).

However, the director was able to prove that all other board members including the Company Secretary ("CS") were aware of his interest in other entity as he had mentioned about this in a mail addressed to them and had requested the CS to guide if any further action is needed in this regard. He argued that the CS had not guided him regarding the proper format of disclosure, i.e.., in Form MBP-1in spite ofrepeated reminders. With regard to disclosure at the board meeting when rent agreement was entered into that party, the director argued that he was not present at that meeting.However, disclosure about this interest was already made by him to all directors and CSmuch before that Board meeting and they did not raise any objection. Rather he had discussed this matter with all directors even before acquiring that interest.

In this case,the Tribunal interpreted 167(1)(d) and explained that the said clause uses the words "contract and arrangement" and therefore the non-compliance of Section 184 leading to vacation of office of director relates to non-compliance of Section 184(2) only and not to Section 184(1). Since Section 184(2) does not specify any format of disclosure, the emails to other directors informing about interest in other entity is sufficient compliance of Section 184(2). The Tribunal held that disclosure can be in any format either written or verbal and has to be given at that board meeting wherein said contract or arrangement is to be discussed. Moreover, as the director was not present at the meeting, the question of giving disclosure at the meeting or abstaining from voting at the meeting does not arise. As a result, there is no non-compliance of Section 184(2) and hence no question of vacation of office of director.

Conclusion:

The NCLAT order therefore clarifies all the confusions arising out of interplay betweenSections 167 and 184. It makes it adequately clear that vacation of office of director under Section 167(1)(c) & (d) relate to non-disclosure of interest in any specific contract or arrangement in a specific board meeting. Moreover, the judgment provides additional clarification that, disclosure under Section 184(2) can be in any format including oral or written disclosure. However, talking about format of disclosure, it is always advisable to give important legal disclosures in written format, so as to avoid any future misunderstandings and disputes.

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