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INDEX

Additional affirmations by Practicing Company Secretaries (PCS) in Annual Secretarial Compliance Report ('ASCR')

A. Introduction: Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') ['Stock Exchanges'] have vide, their circulars dated March 16, 2023, revised the format of Annual Secretarial Compliance Report ('ASCR') to be taken from Practising Company Secretary ('PCS') by certain categories of listed company for submission to stock exchanges.

B. Background:

1. As per Regulation 24A(2) of SEBI (LODR) Regulation, 2015, in addition to annexing Secretarial Audit Report to annual report, an ASCR from PCS is to be submitted by the listed entities (to whom Regulation 15 to 27 of SEBI LODR Regulations 2015 is applicable), to the stock exchange(s) within sixty days from end of the financial year. ASCR postulates for an independent verification by a PCS to check the compliance status of the company with provisions of all applicable SEBI laws, Regulations and circulars/guidelines issued thereunder.
2. SEBI vide circular no. CIR/CFD/CMD1/27/2019 dated February 08, 2019 issued the format of ASCR which was effective from March 31, 2019 onwards.

C. Amendment: Following additional certifications have now been added to ASCR (the wordings in italics are the wordings from the BSE & NSE Circulars):

a. *Secretarial Standard: The compliances of listed entities are in accordance with the Auditing Standards issued by ICSI, namely CSAS-1 to CSAS-3:*

The heading of this point is Secretarial Standard, but the point speaks about Auditing Standards. Further the Auditing Standards needs to be complied with by secretarial auditor. But here, as per the language, obligation is shifted to listed entity to comply with this provision, which is not prescribed in the Auditing standards.

Hence wordings of this point needs to be reviewed by Stock Exchanges again.

b. *Adoption and timely updation of the Policies: All applicable policies under SEBI Regulations are adopted with the approval of board of*

c. *directors of the listed entities. All the policies are in conformity with SEBI Regulations and has been reviewed & timely updated as per the regulations/circulars/guidelines issued by SEBI.*

This will now require companies to identify policies that are statutorily required to be kept under various applicable SEBI regulations and also it needs to be checked whether they have been adopted with the approval of board of directors and whether timely updated or not?

A question arises that whether PCS is required to affirm only about the existing duly adopted and duly updated policies OR even verify the contents of the policies as per the objectives of the requisite Regulations and compliance thereof?

d. *Maintenance and disclosures on Website: The Listed entity is maintaining a functional website. Timely dissemination of the documents/ information under a separate section on the website. Web-links provided in annual corporate governance reports under Regulation 27(2) are accurate and specific which redirects to the relevant document(s)/ section of the website.*

Compliance with this provision would not be cumbersome for companies as recently Stock Exchanges have vide separate circulars ensured compliance with these provisions.

The format of corporate governance report prescribed under Regulation 27(2) of SEBI LODR Regulations, 2015 to be submitted on quarterly, half yearly and annual basis was prescribed by SEBI vide its circular no. SEBI/HO/CFD/CMD-2/P/CIR/ 2021/567 dated May 31, 2021. Annex II of this circular prescribes the additional format to be submitted by listed entity at the end of the financial year (for the whole of financial year), and one of the affirmations in this format is with regard to disclosures on website under Regulation 46 of SEBI LODR Regulations, 2015.

On referring to this format, it can be seen that it speaks about providing link to the **website**, whereas the affirmation to be given now in ASCR is about whether **specific web-links** were mentioned in this disclosure which redirects to the relevant document(s)/ section of the website.

A question arises in this regard that, although stock exchanges had carried out an exercise during FY 22-23 for maintenance of website disclosures in a separate section, in the ASCR to be given by PCS now, whether he needs to confirm w.r.t the annual disclosure given in April 2022 OR April 2023?

e. *Disqualification of Director: None of the Director of the Company are disqualified under Section 164 of Companies Act, 2013.*

It must be noted that listed entities to whom ASCR is applicable are already required to disclose, in their Annual Reports, as per Schedule V of SEBI LODR Regulations 2015, a certificate from a PCS that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as directors of companies by SEBI/Ministry of Corporate Affairs or any such statutory authority.

So a question arises that whether this additional confirmation to be given in the ASCR can be a duplication? Further the objective of this ASCR is compliance of all applicable SEBI Regulations and circulars/ guidelines issued thereunder. So whether it is appropriate to comment about Companies Act, 2013 in this ASCR?

f. *To examine details related to Subsidiaries of listed entities: Identification of material subsidiary companies. Requirements with respect to disclosure of material as well as other subsidiaries.*

Identification of material subsidiaries especially at the end of financial year would now become mandatory as it would be subject to secretarial audit and attachment in annual report.

A question arises that, since ASCR is to be given within 60 days of end of financial year, whether PCS needs to confirm compliance w.r.t the Annual report for FY 21-22 OR FY 22-23?

g. *Preservation of Documents: The listed entity is preserving and maintaining records as prescribed under SEBI Regulations and disposal of records asper Policy of Preservation of Documents and Archival policy prescribed under SEBI LODR Regulations, 2015.*

Preservation of various documents is mandated to be done as per various Regulations. Further Archival Policy framed as per Reg 9 of SEBI LODR Regulations, 2015 is about laying down framework

for archival of various documents after the end of preservation period and thereafter destruction thereof. Hence, it can be seen that 'preservation period' follows by 'archival period' and thereafter destruction.

Hence a question arises that if archival policy does not prescribe any specific archival period and destruction process for any particular document, then whether destruction of such document will require approval of board of directors as prescribed under the Secretarial Standards-1 prescribed under section 118 of Companies Act, 2013?

h. *Performance Evaluation: The listed entity has conducted performance evaluation of the Board, Independent Directors and the Committees at the start of every financial year as prescribed in SEBI Regulations.*

Performance Evaluation is done for the entire financial year after the particular year ends. In the above referred provision it is mentioned that performance evaluation is to be done at the beginning of financial year. So it seems this provisions needs to be reviewed by Stock Exchanges again.

i. *Related Party Transactions:*
   (a) The listed entity has obtained prior approval of Audit Committee for all Related party transactions
   (b) *In case no prior approval obtained, the listed entity shall provide detailed reasons along with confirmation whether the transactions were subsequently approved/ratified/rejected by the Audit committee.*

In this point, a question arises that if prior approval of audit committee is not sought for any related party transaction, then where should the listed entity provide detailed reasons as there is no such required under SEBI LODR Regulations or under Companies Act, 2013? Whether such reasons are to be attached as Annexure to this ASCR?

j. *Disclosure of events or information: The listed entity has provided all the required disclosure(s)under Regulation 30 alongwith Schedule III of SEBI LODR Regulations, 2015 within the time limits prescribed thereunder.*

Companies generally make disclosures to stock exchanges on a continuous basis. It would be challenging for PCS to certify this compliance. This would require an exhaustive checking of disclosures given by company and also the time limit within this disclosures were given.

k. Prohibition of Insider Trading: The listed entity is in compliance with Regulation 3(5) & 3(6) SEBI (Prohibition of Insider Trading) Regulations, 2015 ('SEBI PIT Regulations, 2015').

It may be noted that already stock exchanges are asking for quarterly certificates from Compliance Officer / PCS with regard to maintenance of Structured Digital Database (SDD) under SEBI PIT Regulations, 2015. So a question arises that whether this additional confirmation to be given in the ASCR can be a duplication OR whether post this change in ASCR, whether stock exchanges shall discontinue with the requirement of submitting quarterly SDD certificate?

l. Actions taken by SEBI or Stock Exchange(s), if any: No Actions taken against the listed entity/ its promoters/directors/ subsidiaries either by SEBI or by Stock Exchanges (including under the Standard Operating Procedures issued by SEBI through various circulars) under SEBI Regulations and circulars/ guidelines issued thereunder.

A question arises that what shall be meant by 'action taken'? Whether it will mean any Order issued by SEBI or stock exchanges OR whether it will mean even show cause notices issued by SEBI or stock exchanges?

m. Additional Non-compliances, if any: No any additional non-compliance observed for all SEBI regulation/circular/guidance note etc.

Provisions relating to point (k) and Point (l) state that ASCR shall certify whether action has been taken against listed entity/ its promoters/directors/ subsidiaries either by SEBI or Stock Exchanges including penalty under SOP circular and any other non-compliance under any other regulations. This would be difficult to certify as there is no centralised place or database where this data would be made available. So, it would be better if Stock Exchanges or ICSI would help the members provide this data a particular place.

Stock Exchanges have further clarified that Observations/Remarks by PCS are mandatory if the Compliance status is provided as 'No' or 'NA'

D. Change in formats of existing tables in the ASCR:

In addition to the above additional confirmations from PCS, the table (a) and (c) of ASCR as specified under SEBI Circular February 8, 2019 have been clubbed. In case PCS finds any deviation in compliance with the provisions of the SEBI Regulations and circulars/ guidelines issued thereunder, earlier details of violation, action taken and remarks of PCS was required to be disclosed. Similarly, the actions taken on observations

in previous ASCR were also required to be disclosed. Now below additional details are required to be given in both these tables:-

- *Type of Action taken - Advisory/Clarification/Fine/Show Cause Notice/Warning, etc.*
- *Fine Amount*
- *Management Response*

A question arises that unless some Order is released by SEBI or stock exchanges and if they are still evaluating whether there has been any non-compliance on the part of the alleged violator, then how can the procedures which are in the nature of Advisory / Clarification /Show Cause notice be considered as Action taken?

Further it may be noted that the words used here is "fine amount". However, there have been so many Supreme Court Orders which clarify that 'fine' and 'penalty' and not one and the same. As per legal dictionary, *"**Fine** is defined in law to be a pecuniary punishment imposed **by a** lawful **tribunal** upon a person convicted of a **crime** or misdemeanour."* Further *"A **penalty** is always recoverable in **civil** action."*

Hence, it is recommended that stock exchanges may consider review of the wordings of this table as SEBI and stock exchanges levy only penalty whereas fine is levied by courts or tribunals.

Stock Exchanges have further released Revised Format of ASCR. New format of ASCR is effective from the financial year ended March 31, 2023 onwards.

Copy of NSE Circular:
https://static.nseindia.com//s3fs-public/inline-files NSE_Circular_16032023.pdf

Copy of BSE Circular:
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20230316-14

Vallabh Joshi, Senior Manager – vallabhjoshi@mmjc.in
Ruchira Pawse, Associate-ruchirapawse@mmjc.in

Manner of filing financial results as required under regulation 33 of SEBI (LODR) Regulations, 2015

A. Introduction

Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') ['Stock Exchanges'] have vide their **circulars dt: March 15, 2023** has provided guidance to listed entities with respect to submission of .pdf files while submitting financial results.

B. Background

As per Reg. 33(1)(d)(e) read with Part A of Schedule IV further read with Schedule III, Part A, Para A, Point 4(h) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations"), listed entities are required to submit certain disclosures alongwith financial results.

Stock Exchanges have stated in their above-referred circulars that it has been observed that few companies include shareholders letter, investors presentation in the **outcome of board meeting** held to consider and approve financial results, in which financial results, auditor's report, etc., as required under the aforementioned regulation, were included much after the said letter, presentation.

C. Provisions / new requirement

Stock Exchanges have now stated in their circulars dated March 15, 2023 that listed entities are requested to note that the PDF of outcome of board meeting held to consider and approve financial results must only include financial results, Auditor's report and other statements as prescribed under Regulation 33, Part A of Schedule IV of the regulation and related circulars.

Stock exchanges have further stated that if the company wishes to disclose any other information such as shareholders letter, investors presentation, it must be done as a separate announcement.

D. Ambiguity - Applicability to other than equity listed entities:

From the language of this circular, it appears that this circular is applicable for submission of financial results by equity listed entities only as Stock Exchanges have issued this circular quoting Regulation 33 of SEBI LODR.

But taking a cue from this, it is recommended that all the other listed entities viz. whose only Non- Convertible Securities are listed or units are listed shall also comply with the provisions of this circular. For entities

whose Non – Convertible Securities are listed SEBI LODR provides for certain documents to be submitted alongwith financial results as per as per Reg. 52(2)(a), 52(2A), 52(3)(a) and for entities whose only units are listed, disclosure alongwith financial results is provided under SEBI Circular November 29, 2016.

These stock exchanges circulars dated March 15, 2023 are applicable with immediate effect.

These circulars can be accessed at below mentioned links:
BSE:
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20230315-41
NSE:
https://static.nseindia.com//s3fs-public/inline-files/NSE_Circular_15032023_3.pdf

Vallabh Joshi, Senior Manager – vallabhjoshi@mmjc.in
Ruchira Pawse, Associate-ruchirapawse@mmjc.in

Common and simplified norms for processing investor's service requests by RTA's and norms for furnishing PAN, KYC details and Nomination

I. Background:

SEBI had vide its circular dt: November 3, 2021 and December 14, 2021 had prescribed the common and simplified norms for processing investor's service requests by RTA's and norms for furnishing PAN, KYC details and Nomination.

II. Amendment:

SEBI has issued revised circular in this regard. **This revised circular dt: March 16, 2023 ['SEBI Circular 2023'] shall supersede SEBI Circular November 3, 2021 and December 14, 2021 issued by SEBI earlier. This circular shall come into effect from April 1, 2023.**

III. Key features of amendment:

Few important provisions of this SEBI Circular 2023 are as follows:

1. SEBI has reiterated that folios in which PANs are not linked with Aadhar numbers as on March 31, 2023 or any other date as may be specified by CBDT shall also be frozen w.e.f April 1,2023. *Now CBDT vide circular dated as on March 28,2023 has extended the deadline of linking PAN with Aadhar number till June 30, 2023, hence freezing of folios deadline would now be extended till June 30,2023.* In this regard SEBI has also referred to its press release dt: March 8, 2023 which was on linking of PAN with Aadhar number. We, MMJC had in our MMJC Insights magazine - issue dt: March 15, 2023 had highlighted this point. https://www.mmjc.in/wp-content/uploads/2023/03/Insights-15th-Mar-23_Full-Version.pdf.
   SEBI has now stated that the requirement of existing investors to link their PAN with their Aadhaar number is not applicable for Non-Resident Indians (NRI), Overseas Citizens of India (OCI) unless the same is specifically mandated by Central Board of Direct Taxes (CBDT), Ministry of Finance / any other Competent Government authority.

2. Date for freezing of folios in case the mandatory KYC documents [i.e. PAN, nomination, contact details, bank account and specimen signature] are not furnished is October 1, 2023. Security holders whose folios are frozen would be eligible to lodge grievance or avail any service requests from RTA only after submitting requisite documents. Also security holders whose folios are frozen would be eligible for payment of dividend, interest or redemption amount in respect of frozen folios with effect from April 1, 2024.

So a question that arises that with effect from October 1, 2023 even if folios are frozen, when payment of dividend / interest / redemption amount to security holders would be frozen from April 1, 2024 OR whether they will be eligible to claim the same only after April 1, 2024? The answer to this will some more clarification from SEBI or stock exchanges in this regard.

3. Indemnity is now required for processing of transmission and request for issue of duplicate security certificate.
4. Listed companies shall also directly intimate its security holders about folios which are incomplete with regard to details as specified in this circular [i.e. updated PAN, nomination, contact details, bank account and specimen signature] on an annual basis within 6 months from the end of the financial year. However, for the Financial Year 2022-23, intimation shall be sent by the listed companies on or before May 31, 2023.
5. **RTAs shall provide to SEBI, a certificate of compliance from a practicing Company Secretary (in the format prescribed in this circular), within 30 days from the date of this circular** coming into effect, certifying the changes carried out, systems put in place / new operating procedures implemented etc. to comply with the provisions of this circular.
   A question arises that whether a single certificate is to be submitted for all companies handled by an RTA OR whether separate certificates are required to be submitted with regard to each company? As per the language of the format prescribed, it appears that a single certificate is to be submitted for all companies handled by an RTA, but then if any company's compliance is pending due to some pending items from company's side, then whether the practising company secretary needs to qualify in this regard in his certificate is a matter caution for all RTAs and practising company secretaries.
6. Listed Companies/RTAs shall submit a report to SEBI by May 31, 2023, on the steps taken by them towards sensitizing their security holders regarding mandatory furnishing of PAN, KYC and nomination details as detailed in para 4 of this circular.

Our detailed newsletter covering changes in detail including changes in procedural norms will be shared in due course.

SEBI Circular 2023 can be accessed at below mentioned link:
https://www.sebi.gov.in/legal/circulars/mar-2023/common-and-simplified-norms-for-processing-investor-s-service-requests-by-rtas-and-norms-for-furnishing-pan-kyc-details-and-nomination_69105.html

Vallabh Joshi, Senior Manager – vallabhjoshi@mmjc.in

SEBI brings in uniformity in identification of 'Key Managerial Personnel' and 'Senior Management' for the purpose of public issue and continuous listing

A. Background

Disclosures pertaining to 'KMP' in offer documents are governed by the provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ['ICDR Regulations']. SEBI (Listing Obligations and Disclosure Requirements), Regulations 2015 ['LODR Regulations'] also specify disclosure requirements pertaining to KMP as ongoing obligations of listed entities.

The definitions of KMP under these two Regulations were not aligned. While the definition of 'KMP' under LODR Regulations is aligned with that under the Companies Act, 2013, the definition of KMP under ICDR Regulations was wider than that given under the LODR Regulations, in view of information necessary for investors to assess offer documents.

The definition of 'KMP' under ICDR Regulations includes Senior Management, viz., members of the management one level below the executive directors, as well as functional heads. However, the definition of Senior Management under LODR Regulations earlier did not explicitly include functional heads.

B. Need for aligning the definitions of KMP and Senior Management under ICDR Regulations and LODR Regulations

As may be seen from the above table, the definition of 'KMP' under ICDR Regulations waswider than that in LODR Regulations. Further, Senior Management under LODR Regulations did not explicitly include 'functional heads' while functional heads were part of KMP under ICDR Regulations. It may also be noted that 'Senior Management' was not defined under ICDR Regulations, though ICDR Regulations contain provisions on disclosures pertaining to 'Senior Management'. As a result of the above, the identification of KMP and Senior Management pre and post listing was not uniform as illustrated below:

Officers	Pre listing (as per ICDR Regulations)	Post listing (as per LODR Regulations)
Officers such as Chief Operating Officer (COO), Chief Technology Officer (CTO), Chief People Officer (CPO), etc.	Covered under the definition of KMP (as part of core management team)	Not covered under the definition of KMP but covered under the definition of Senior Management.
Functional heads such as the Head of Supply, Head of Customer Experience, etc.	Covered under the definition of KMP	Earlier not covered under the definition of either KMP or Senior Management.

From the above table it can be seen that there was a disparity in identification of officers as KMP or Senior Management pre and post listing of shares of the Issuer. For example, an investor while reviewing the disclosures in the offer documents would find the name of a Chief People Officer as KMP. However, post listing, the listed entity may identify / designate the same officer as Senior Management and not show him/her as KMP as per LODR Regulations. Therefore, the investor may be under a misapprehension regarding the true identification of such officer as KMP and may make investments in the public offer without complete information.

In one of the instances observed by SEBI, , a co-founder and Head of Supply of an Issuer, was identified as KMP in the offer documents (under ICDR Regulations). However, his resignation post listing of shares of the Issuer was not disclosed to the stock exchanges under the pretext that he is not a KMP in terms of LODR Regulations. The investors, and other stakeholders, were left aggrieved to find the news about his resignation on social media and not disclosed by the listed entity on the website of the stock exchange.

In view of the above, there was a need to ensure uniformity in the identification of KMP and Senior Management both during pre and post listing of shares of the Issuer.

C. Amendment in LODR Regulations

It may be noted that SEBI had, vide a notification dated January 17, 2023 amended the definition of 'senior management' in LODR Regulations to include functional heads also, if they are members of core management team of the listed entity, to make it in line with the definition of 'senior management' in the Companies Act, 2013.

The definition of 'KMP' under LODR Regulations was already in line with Companies Act, 2013 and hence there was no need to amend the definition of 'KMP' in LODR Regulations.

D. Amendment in ICDR Regulations

Accordingly, SEBI has now amended provisions of ICDR Regulations appropriately in by incorporating definition of 'Key Managerial Personnel' and 'Senior Management', which are the same as provided under LODR Regulations.

Going forward whoever is a termed as 'senior management' or 'key managerial personnel' as per SEBI (ICDR) will be same as per SEBI (LODR). Above referred amendment is effective from January 31, 2023

Copy of the amendment can be accessed at below given link:
https://www.sebi.gov.in/legal/regulations/feb-2023/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-regulations-2018-last-amended-on-january-13-2023-_68231.html

Vallabh Joshi, Senior Manager – vallabhjoshi@mmjc.in

Requirement of accounting software having audit trail w.e.f. 1 April 2023

I. Introduction.

The Companies Act, 2013 (the Act) permits companies to maintain their books of accounts in electronic mode also, instead of keeping in physical form. Further, Rule 3 of the Companies (Accounts) Rules, 2014 (the Rules) prescribes the detailed manner in which books of accounts can be kept in electronic mode.

II. Requirement.

A new requirement was inserted that "every Company which uses accounting software for maintaining its books of accounts shall use only such **accounting software which has a feature of recording audit trail** of each and every transaction, **creating an edit log of each change** made in books of accounts along with the date when such changes were made and **ensuring that the audit trail cannot be disabled**" as per proviso to Rule 3 of the Companies (Accounts) Rules, 2014.

III. Earlier Extensions.

The aforesaid requirement was first inserted via the Companies (Accounts) Amendment Rules, 2021 [MCA Notification dated: 24th March, 2021] and was set to take effect from 01st April, 2021.

Considering the practical difficulty of stakeholders to implement such requirement relating to accounting software, MCA via another Notification dated: 01st April, 2021 extended such compliance requirement w.e.f 01st April, 2022.

There were further set of developments which stakeholders were facing in relation to cost impact for maintaining such software which made MCA to give further levy of one year. MCA vide another notification dated 31st March, 2022 namely the Companies (Accounts) Second Amendment Rules, 2022 notified that such proviso to Rule 3 (1) shall take effect from 01st April, 2023.

IV. Conclusion.

As of now there are no new notifications which are notified by the Ministry w.r.t further extensions for companies using accounting software. Hence it can be concluded that **all such companies who**

are maintaining books of accounts in electronic mode must **use such accounting software** which comply with the requirement set out by the proviso to sub rule (1) of Rule 3 of Companies (Accounts) Rules, 2014, i.e., **has the following three features with effect from 1st April, 2023**:-

- Recording audit trail of each and every transaction
- Creating an edit log of each change made in books of accounts, along with date when such changes were made, and
- Ensuring that the audit trail cannot be disabled.

Shravan Pai, Intern – shravanpai@mmjc.in

C-PACE - another initiative of Ease of Doing Business by MCA

Ensuring ease of doing business requires cordial and time efficient regulatory framework for any sector. "Ministry of Corporate Affairs" [MCA] has in the recent years played a pivotal role to ensure that along with exhibiting its strict regulatory ambit, it also makes sure that ease of doing business is ensured for the corporate sector by reducing the time consumed for certain routine processing of compliances with the use of technology.

The "Ease of doing Business" initiatives undertaken by MCA not only includes faster incorporation of companies i.e. entry in a legal form in the corporate ecosystem but it also includes faster voluntary exits from the corporate ecosystem.

As witnessed the process of Incorporating companies has been revolutionised by MCA by reducing the time taken for such processes to a record two days. It has only been possible due to the establishment of "Central Registration Centre" [CRC] by the MCA w.e.f 26th January, 2016.

Further the SPICe + forms applicable for new company incorporations w.e.f 7th June, 2021 offered services from three central government ministries namely MCA, Ministry of labour & Ministry of finance, thereby saving as many procedures, time and cost for starting a business in India.

Forwarding its Ease of doing Business Initiatives, the MCA has invoked its powers under sub section (1) of section 396 of the Companies Act, 2013 to establish a "Centre for processing Accelerated Corporate Exit" to be known as "C-PACE".

The reference of the term C-PACE was first coined in the Budget speech of Hon'ble Finance Minister of India ; Smt Nirmala Sitharaman for the year 2022-23 referred as under:

Several IT-based systems have been established for accelerated registration of new companies. Now the ***Centre for Processing Accelerated Corporate Exit (C-PACE)*** *with process re-engineering, will be established to facilitate and speed up the voluntary winding-up of*

these companies from the currently required 2 years to less than 6 months.

The reference made to voluntary winding up aforesaid is about the voluntary strike off applications made by companies in E form STK-2 under section 248 (2) of the Companies Act, 2013.

Despite meeting all the requirements of such striking off process and extinguishing or meeting all its liabilities, the time period taken for processing such strike off applications was substantial which meant the applicant companies had to wait for periods as long as Two years.

MCA has now taken cognizance of the fact that ease of doing business in India not only requires Easy and fast entry through Incorporation but also faster and hassle free exit from such ecosystem.

In an official notification dated 17th March, 2023, C-PACE has been established by the Central Government/MCA to be located in the Indian Institute of Corporate Affairs [IICA], Manesar ; Haryana. It shall be effective from 1st April 2023.

As claimed by the Hon'ble Finance Minister during the Budget speech of 2022-23, C-PACE proposes to bring down such Strike off process completion from the current period of upto 2 years to record period of 6 months.

Shravan Pai, Intern – shravanpai@mmjc.in
Vrushali Bhave Athavale, Senior Manager –vrushalibhave@mmjc.in

Transaction with WOS u/s 186 - Exemption from shareholders' approval only for specific transaction with WOS OR from calculation of limits for further LIGS to other parties too?

Background:

Section 186 of Companies Act, 2013 (the Act) deals with making investment in other companies or bodies corporate or granting loan to any person or body corporate or providing guarantee or security in connection with loan to any other body corporate or person.

Under sub-section (2) of Section 186, if the amount of any proposed transaction of Loan/Investment/Guarantee/Security (LIGS) is covered under sub-section (2) and not otherwise exempted, and is not in excess of 60% of the company's paid up capital and Free reserves and Securities premium Account or 100% of its free reserves and securities premium account, whichever is more, only board's approval in terms of sub-section (5) is sufficient for the proposed transaction. But if exceeds these limits, it cannot be done unless previously authorised by a special resolution passed in general meeting under sub-section (3) of Section 186.

Further, 1st proviso to sub-section (3) states that the requirement of this sub-section shall not apply to an investment made by a company in the securities of a wholly-owned subsidiary company (WOS); or a LGS given to a wholly owned subsidiary company or joint venture company.

Exemption only for specific transaction with WOS or whether transactions with WOS are totally excluded from calculation of limits too?

Whether this exemption seeks to altogether exclude the total amount of the transaction of LIGS made to company's WOS while calculating aggregate limit available under section 186, while making any LIGS to any other party, i.e., other than WOS? OR whether this exemption seeks to provide that while making LIGS to WOS, no need to check the limits, but such LIGS made to WOS will get included while calculating aggregate available limit under section 186 while making LIGS to any other party (other than WOS), is the question to be dealt with.

For eg: if aggregate paid up capital + free reserves + securities premium is Rs. 10 crore, amount of free reserves is Rs. 6 crores, then the limit for LIGS provided under Section 186(2) is Rs. 6 crores.

If company has already made investment of Rs. 2 crore in a WOS, and it wants to make a further investment in any other body corporate, then whether the limit available under Section 186(2) is Rs. 4 crores (Rs. 6 crores less Rs. 2 crores) or entire Rs. 6 crores?

Let's understand the interplay between sub-section (2) and sub-section (3) of Section 186.

Sub-section (3) as proviso to sub-section (2)?

Sub-section (2) is negative provision which starts with "No Company…" and it states that company cannot make transaction exceeding said prescribed limits as stipulated in that sub-section.

Further, sub-section (3) provides that in case limits under sub-section (2) are exceeded, prior approval of shareholders by way of special resolution is required. Therefore, it appears that sub-section (3) is an exception with additional condition to sub-section (2) of Section 186, although it is incorporated as separate sub-section, it is a function of proviso i.e., except something out of the main enacting part with or without additional condition, as per Principles of Interpretation of statutes. Sub-section (3) exactly playing the same role i.e. providing exception to sub-section (2) as it authorises company to enter into LIGS transaction exceeding limit subject to compliance of additional condition of taking shareholders' approval by special resolution.

Interpretation of Sub-section (3) of Section 186 as a separate sub-section?

If we read first proviso to sub-section (3), the requirement of this sub-section shall not apply to an investment made by a company in the securities of a WOS or a LGS given to a WOS or JV. So, it appears that intention of law maker is to exempt transaction with WOS/JV as the case may be from obtaining prior approval of shareholders approval by way of special resolution only.

In case sub-section (3) would have been introduced as first proviso to sub-section (2) and the exemption for LIGS transactions with WOS as second proviso to sub-section (2), without any need for change in wordings, in that

case such LIGS transaction with WOS would have been exempted from requirement of obtaining shareholders' approval for that specific transaction as well as limits calculation for any further LIGS transaction to any other party (other than WOS) too. But the intention of ministry does not appear so and hence was introduced as separate sub-section and exemption was provided from that sub-section only.

Practical difficulties:

From the above discussion, it appears that this exemption in case of WOS is limited to only shareholders' approval for specific LIGS transaction to WOS only and not Board approval or any other sub-section of Section 186. This exemption does not seek to exclude the total amount of LIGS transactions with WOS while calculation of these limits for entering into further LIGS transactions with other parties (other than WOS) and hence the LIGS given to WOS must be included while calculating the aggregate available limit, i.e., in case of the example taken above, the limit of Rs. 4 crores should be ideally available for any further LIGS.

It is important to note that there are practical difficulties in taking this view, specially in cases where the LIGS transactions entered into with WOS itself exceed the aggregate limit available under section 186. In such cases, for entering into a single LIGS transaction in future, with any party, shareholders approval by special resolution will be needed, but for making further LIGS transactions with WOS, no need of special resolution, however, that further LIGS to WOS will contribute to exhaust the maximum limits which may be fixed by the shareholders.

In view of the above practical difficulties in taking this view, i.e., many professionals are taking the other view and totally exclude the LIGS to WOS for calculation of available limits for further LIGS to other parties.

Conclusion:

It is important for the industry to reconsider its view, in light of the interplay of section 186(2) and (3) discussed above and even for the Regulator to reconsider the drafting done in section 186(2) and (3) in view of the practical difficulties faced by the Industry.

Rutuja Umadikar, Associate - rutujaumadikar@mmjc.in
Vrushali Bhave Athavale, Senior Manager –vrushalibhave@mmjc.in

Part payment by a homebuyer and subsequent CIRP does not entitle the homebuyer to be an allottee.

In the matter of Parveen Gakhar (Appellant) Vs. Adani Goodhomes Private limited & Anothers (Respondent) at National Company Law Appellate Tribunal (NCLAT) New Delhi dated 2 March 2023

Facts of the case:

- Parveen Gakhar (Appellant) had booked a flat in the project of the Adani Goodhomes Private Limited (Corporate Debtor/CD) and had made an advance payment of Rs. 4,95,000/- and total amount paid by the Appellant is Rs. 5,27,500/-.
- The notices were issued by the CD to the appellant to make the balance amount. Last such letter was issued on 27 September, 2018 asking the appellant to make payment of Rs. 21,84,377/- however the appellant failed to make any payment in pursuance of the notices issued.
- Subsequently, the Corporate Insolvency Resolution Process (CIRP) was initiated on 30 April, 2021 against the CD. There had been certain correspondence between the appellant and the Resolution Professional (RP) but ultimately the unit which was sought to be claimed was included in the list of unsold units and subsequently the Resolution Plan was approved on 9 January, 2023.
- The Application was filed by the appellant at National Company Law Tribunal (NCLT) seeking direction to the RP to register the agreement for sale in respect of the Flat of which application was
- rejected. Aggrieved by the order of NCLT dated 9 January ,2023, the appellant filed an appeal at NCLAT.

Arguments of the Appellant:

- It was argued that RP himself had communicated about the CIRP to the appellant and the CD had informed that appellant's allotment is not in the cancelled list hence the application ought to have been allowed.

Arguments of the Respondent:

- It was argued that the appellant failed to make the payments as per the notices issued. The last notice was issued on 27 September 2018 of which payment was not received. Therefore, appellant cannot claim on entitlement and rights and hence was not included against any allotment.

Held:

- NCLAT noted that the NCLT had relied on the letters issued to the appellant where appellant failed to make payments and ultimately after 2018 the appellant cannot claim himself to be allottee.
- It was held that no error was committed by the NCLT in rejecting appellant's application. Failure to make the payment against the allotted flat and by virtue of the letter dated 27 September 2018, was clearly indicated that if within 30 days amount was not paid it would be assumed that appellant was no longer interested in continuing with the captioned application.
- Further, the NCLAT also noticed that the Successful Resolution Applicant had offered before the NCLT that they shall refund the earnest amount paid by the appellant. And accordingly, the application was dismissed by the NCLAT with an order to refund the the earnest money within two weeks.

Esha Tandon, Assistant Manager– eshatandon@mmjc.in
Aarti Ahuja Jewani, Partner –artiahuja@mmjc.in

Intimation to MCA about pending actions under Scheme of Compromise, Arrangement & Amalgamation

I. Introduction:

Any scheme of compromise or arrangement or any scheme of merger and amalgamation between two or more companies has the vested interests of variety of stakeholders involved which, for instance, obviously involves the security holders of the company as well as the creditors of the company, but also the regulatory ambit as well as the public at large are affected.

The process of Compromise, Arrangement and Amalgamation involves a lengthy set of procedures which are required to be fulfilled and seeking approval of National Company Law Tribunal (NCLT) which is a Quasi-Judicial Body, is the most important step in the process. There are certain procedures to be fulfilled before seeking approval of NCLT and post seeking approval of NCLT.

II. Closure of financial year before giving effect to all actions under the Scheme:

The order passed by NCLT approving such scheme of Compromise, Arrangement or Amalgamation is an obligation imposed by NCLT on the company that whatever it has mentioned in the scheme approved by the NCLT must be given effect to. However practically there may be instances where the company in relation to which order is passed by the NCLT may not be able to fully give effect or complete the actions which were mentioned in the scheme, before end of financial year in which the Scheme has become effective, or it may take 1-2 years' time for completing all actions mentioned in the Scheme. For eg: a Scheme may say that some actions will be done subject to receipt of Special Economic Zone (SEZ) approval, and it may take certain time to get such approval.

The financial statements prepared at the end of financial year are required to be filed with the Ministry of Corporate Affairs (MCA) and are public documents. If any action mentioned in the Scheme is not completed as on the end of financial year, then relevant effect may not be seen in the financial statements. This may give an incorrect impression to the public at large, as they may not be aware about some pending actionable under the Scheme.

III. Requirement of filing an intimation with MCA about pending actions under Scheme:

Understanding such practical difficulty, sub section (7) of section 232 of the Companies Act, 2013(the Act) provides a recourse to the Transferee company that in instances where any actions under the Scheme are not fully completed as at the end of any financial year, then the Transferee company shall file a statement in Form CAA-8 as an attachment in E form GNL-2 with the MCA within 210 days from the end of that relevant financial year in which the order was passed by the NCLT. For every next financial years too, in which is the Transferee company is required to complete the actions / implementation of the Scheme, such requirement of filing Form CAA-8 with MCA shall subsist.

Further if the Transferee company has not fully complied with the conditions of scheme/NCLT order by the end of a particular financial year, but has complied with the same before completion of 210 days from the end of such financial year, i.e., before last date of filing Form CAA-8, even then the Transferee company is required to file this form with ROC.

Form CAA-8 is a format in which a statement is required to be filed with the MCA / Registrar of Companies [ROC] which is duly certified by a practicing professional who can be either a Chartered Accountant, Company Secretary or a Cost Accountant.

This statement is to give details regarding completed actions under the Order and the pending actions under the Order with status.

IV. Consequence of not filing this form:

The consequence of delay in compliance of sub section (7) of section 232 was highlighted in a recent Adjudication order passed by ROC Chattisgarh in the matter of "Abis Agrotech Private Limited" wherein the Transferee company was required to file the Form CAA-8 with ROC on or before October 27, 2022, but there was a significant delay of 52 days on the part of the company which meant that it actually made the filing on December 19, 2022, attracting a general penalty u/s 450 via the ROC adjudication mechanism.

A penalty of Rs 61,000/- was imposed on the company and Rs 50,000/- each was imposed on Two Officers in Default of the company.

The above case sets a precedent for all companies about consequence of non-filing of this intimation to MCA for all companies which would have

any pending actions under and Scheme of Compromise, Arrangements and Amalgamations under section 230 to 232 of the Act and highlights the importance of filing this intimation.

Shravan Pai, Intern – shravanpai@mmjc.in
Deepti Jambigi Joshi – Partner – deeptijambigi@mmjc.in

Foreign Investment in Online Gaming Sector

Background:

We had discussed on the emerging regulatory framework proposed for gaming industry, restriction on games involving betting and gambling in the previous article dated 27th February, 2023 (https://www.mmjc.in/mmjc-insights-dated-27-feb-2023/). In furtherance to the earlier discussion, the questions was whether foreign investment is allowed in gaming sector and if yes under which sector and which route i.e. automatic or approval route?

Whether online gaming qualify as goods or services?

If we refer the business model of online gaming platform, it charges registration fee/entry fee/subscription fee and prize money/pot money which is usually kept separately to be distributed as prize money to the winners.

As goods refers to movable property other than money and securities and Service refers to service of any description which is made available to potential users. In this case, online gaming platform provide services to its potential users for which consideration is charged in the form of entry fee/platform fee. Therefore, online gaming may qualify as services.

Entry Route/ Sectoral Cap for FDI

FDI in India is regulated by Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 [NDI Rules]. Gambling and betting including casinos are included in the list of prohibited sectors for FDI under the NDI Rules. Further there is no specific sector included in NDI rules to include online gaming Industry. However, gaming services are provided through various electronic platforms.

Further as per NDI Rules, sale of services through e-commerce shall be under automatic route subject to the sector specific conditions, applicable laws/ regulations, security and other conditionalities.

Thus, FDI under gaming industry not involved in gambling and betting shall be allowed upto 100% under automatic route subject to the applicable laws/ regulations, security and other conditionalities.

Ridhi Gada, Deputy Manager – ridhigada@mmjc.in
Vrushali Bhave Athavale, Senior Manager –vrushalibhave@mmjc.in