MMJC

MMJCINSIGHTS

15 MAY 2023

Index

Sr. No	Particulars
MCA Corner	
1.	Introduction of C-Pace
Restructuring	
2.	Withdrawal of the scheme of merger and ultimate exercising authority
SEBI Corner	
3.	High Value Debt Listed Entities: Anomalies for Disclosures in Annual Report
4.	Introduction of Legal Entity Identifier (LEI) for issuers who have listed and/ or propose to list non-convertible securities, securitised debt instruments and security receipts
5.	Revised Format of Annual Secretarial Compliance Report approved by ICSI Council
CSR Corner	
6.	Unspent CSR obligations met, but is the company still non-compliant?
7.	Beyond Corporate Philanthropy: How CSR makes a Meaningful Impact
IBC Corner	
8.	Can Interest Component be considered as the time value of money if there is no delay in payments? In the matter of Step Stone Infras Private Limited - Applicant Vs. Yes and Yes Infracon Private Limited - Respondent at National Company Law Tribunal (NCLT) Chennai dated 24 April, 2023
FEMA Corner	
9.	Unraveling the Web: Understanding Foreign Liabilities and Assets (FLA) Returns.
Prevention of Money Laundering Act, 2002 (PMLA)	
10.	Central Government enhances reach of Prevention of Money Laundering Act, 2002 - Increases scope of 'Reporting Entities'

Introduction Of C -PACE

BACKGROUND

Hon. Finance Minister of India, Nirmala Sitharaman proposed the establishment of a Centre for Processing Accelerated Corporate Exit (C-PACE) in the Union Budget 2022-23. The C-PACE is established to facilitate and speed up the process of voluntary winding up and removal of the name of the Company from the Register of Companies.

In connection to the same the Ministry of Corporate Affairs (MCA) vide its notification dated April 17, 2023, has notified new rules named Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2023 ('Amendment Rules') which came into force with effect from May 01, 2023, whereby all the applications for striking off, the name of the company will be now made to Centre for processing Accelerated Corporate Exit in Form No. STK-2.

INTRODUCTION

The above amendment is a significant progressive step towards making it swift for companies to close down their businesses. The shifting of jurisdiction to C-PACE will facilitate and speed up the timeline for the voluntary winding-up of companies.

This is a positive step towards simplifying the process of closing down defunct or inactive companies in India. The changes will significantly reduce the time taken by the regulator to take the appropriate action. The amendment will also help to promote ease of doing business in India and encourage entrepreneurship and innovation.

The simplified procedures and the additional information required to be furnished by the applicant will help the C-PACE to assess each application with more details and transparency regarding the applicant.

Please find below the notified amendments for your reference.

AMENDMENT IN COMPANIES (REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES) RULES, 2016 ('PRINCIPAL RULES')

1. As per the Amendment Rules, Rule 4 will read as follows,

   An application for removal of the name of the company under section 248(2) shall be made to Registrar, ***Centre for Processing Accelerated Corporate Exit*** in Form No. STK-2 along with a fee of Rupees 10,000.

   Erstwhile all the applications for a Striking off of a Company were directed to the Registrar of Companies of the respective jurisdiction under which the Company is registered. Henceforth, all the applications for Strike off will be ***directed for examination to the C- PACE and not to the respective ROC.***

2. As per the Amendment Rules, sub-rule (3) of the Principal Rules, clause (iv) now stands omitted which reads as mentioned below

   (iv). a copy of the special resolution duly certified by each of the directors of the company or consent of seventy-five percent of the members of the company in terms of paid-up share capital as on the date of application;

According to the Amendment Rules now attaching the copy of the special resolution which is duly certified by each of the directors of the company or consent of seventy-five percent of the members of the company in terms of paid-up share capital as on the date of application in Form STK-2 ***is not mandatory.*** **Professionals would still be required to ensure compliance with this provision as confirmation to this extent is to be given by way of a declaration in form STK-2.**

3. As per the Amendment Rules fter sub-rule (3) of the Strike off Rules, the following clause is introduced

   (3A). The Registrar, Center for Processing Accelerated Corporate Exit established under sub-section (1) of 396, shall be the Registrar of Companies for the purpose of exercising functional jurisdiction of processing and disposal of applications made in Form no. STK-2 and all matters related thereto under section 248 having territorial jurisdiction all over India.

   Also, as per the Amendment Rules, a new sub-rule 3A has been inserted whereby it is stated the establishment of Registrar of C- PACE it is which has replaced Registrar of companies for processing and disposing of applications for Strike.

   In addition to the above-amended rules, they have also amended Form STK-2 whereby the following changes are made in the form.

- **Notice from Registrar**

  The new form STK-1 will now ask if the company has received a notice from the Registrar under Section 248(1) of the Companies Act. Companies can respond with a simple YES or NO.

- **Reasons for Closure**

  The new form includes a drop-down menu for companies to select the reason for their closure. This simplifies the process of selecting a reason and avoids the need for companies to provide a brief description of the main business they carried out.

  The options available to the company are as stated below:

  - Failed to commence business within one year of incorporation.
  - Not carrying on any business or operation for a period of two immediately preceding the financial year and has not made any application within such period for obtaining the status of dormant company u/s 455.
  - The subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation and a declaration to this effect has not been filed within one hundred and eighty days of incorporation under sub-section (1) of section 10A.
  - The company is not carrying on any business or operations as revealed after the physical verification carried out under sub-section (9) of section 12.

- **Omission of Brief Description**

  Previously, the application form required a brief description of the company's main business. This requirement has now been removed from the form.

- **Removal of Attachments**

  The new form **no longer requires** companies to attach a copy of the board resolution authorizing the filing of the strike-off application, a copy of the special resolution passed, or consent obtained under sub-section (2) of section 248.

- **Services Request Number Tagging.**

  Erstwhile Form STK-2 only required the applicant to enter the date on which the shareholders passed a special resolution to Strike off the Company. Post the Amendment Rules the Companies are now mandatorily required to mention the Service Request Number of the afore-mentioned Form MGT-14

- **Uploading STK-8 in Excel format**

  Form STK-8 Statement of Account furnished by Practicing Chartered Accountant will now be attached to Form STK-2 in Excel format.

Further format prescribed in Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 i.e. Form No. STK-6 (Public Notice) and STK-7 (Notice of Striking off and Dissolution) **are also revised.**

The Ministry of Corporate Affairs on May 10, 2023, issued the Companies (Removal of Names of Companies from the Register of Companies) Second Amendment Rules, 2023 which has amended the proviso to rule 4 stating that if a Company has received a notice from the Registrar under sub-section 1 of Section 248 of the Companies Act, 2013, the Company will have to file all the overdue financials under Section 137 and all the annual return under section 92, even if the Company has ceased to carry on the business operations during those Financial Years in question before filing the Form STK-2 under sub-section (1) of Section 248 of the Companies Act, 2013. Further if a company makes an application for strike off voluntarily then it would be required to file all the overdue financials under Section 137 and all the annual return under section 92 till the end of financial year in which the company ceased to carry its business operations.

This leads to a situation where if Registrar of Companies initiates process of striking off then all the backlog under Section 137 and Section 92 needs to be cleared even if companies was not carrying on business for two years prior to initiation of striking off and if company voluntarily goes for strike off then it will have to clear backlog of financials only till the financial year in which it was carrying on business? This would require further clarity from regulatory authorities.
n case the Registrar Strikes off the company's name from the register of companies and publish the notice in the official gazette regarding the same, the permitted to file the application under Rule 4 (1) of the Strike off Rules.

Jasmeet Joshi - Deputy Manager - jasmeetjoshi@mmjc.in

Withdrawal of the scheme of merger and ultimate exercising authority

I. **Background:** One of the common clauses which is seen across most of the schemes of mergers and demerger is with regards to **"withdrawal of the scheme"** which sometimes is drafted very ambiguously without proper procedure or decision-making authority.

Rule 44(2) of National Company Law Tribunal (NCLT) Rules 2016 allows withdrawal as under
"*Where at any stage prior to the hearing of the petition or application, the applicant desires to withdraw his petition or application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary, such other party arrayed as opposite parties in the petition or the application or otherwise, may permit such withdrawal upon imposing such costs as it may deem fit and proper for the Tribunal in the interests of the justice*."

The criticalities of withdrawal of scheme starts with the process to be followed for withdrawal.

II. **Challenges may arise:**
-Where an application for the scheme of merger and amalgamation is not heard before NCLT and direction from NCLT to hold shareholders meeting is awaited whether withdrawal at this stage should be referred to board of directors of companies involved in the scheme?
-Further, in another scenario where a petition for merger and amalgamation is not heard before NCLT, however the meeting of shareholders and creditors as directed by NCLT has already taken place, whether decision for withdrawal of the scheme in such a scenario requires be referred back to Shareholders and Creditors of companies involved in the scheme as they were the ones who approved the scheme of merger and amalgamation?

III. **Some Practical Scenarios:**
Let's have a look at some of the practical examples

A. **Application withdrawn before shareholder approval / where consent of shareholder has been obtained**
The issue was examined in respect of recent announcement by Reliance Industries Limited on its ***withdrawal of the scheme of amalgamation of Reliance New Energy Limited (RNEL) with Reliance Industries Limited (RIL) & their respective shareholders-***

- The board of the company had approved the scheme of amalgamation of RNEL with the RIL and their respective shareholders (Scheme) on 6 May 2022 u/s 230 to 232 and other applicable provisions of the Companies Act, 2013 with an objective to undertake new energy / renewable energy business directly by the Company.
- **RNEL being a wholly owned subsidiary (WOS) of RIL** Approval of the board to the scheme was considered as deemed consent of the Company. The scheme was pending only with the NCLT, Mumbai Bench for approval.
- The above scheme referred to an number of judgments wherein it was held that -*When transferor companies are WOS of the transferee company and financial position of the transferee company is highly positive and merger is not affecting the rights of the applicant shareholders and creditors allowing transferee company to obtain approval of the scheme without taking shareholders' approval is permissible under law and held that transferee company need not hold any meeting either with its creditors or members- so meeting of equity shareholders was dispensed.*

- Based on a review of the new energy / renewable energy business and investment structure, the board, at its meeting held on 21 April, 2023, decided to withdraw the scheme and decided that the new energy / renewable energy business should be undertaken through RNEL.

In the above case as the ultimate authority sanctioning the scheme was the board, it was through board approval that the company exercised its power of withdrawal of the scheme.

B. Application withdrawn after shareholder approval:

Another withdrawal issue was also examined in Fortis regarding withdrawal of its scheme wherein the board of directors of **Fortis Healthcare Limited (FHL)** sought shareholders' approval for a composite scheme of arrangement and amalgamation between the Company, Fortis Malar Hospitals Limited (FMHL), SRL Limited (SRL), from shareholders of the Company, through Tribunal Convened Meeting on 27th April 2017.

- In nut shell, under the scheme the existing structure was to be demolished and new structure was to emerge. The scheme was approved by the shareholders and was pending with NCLT for its approval.
- However, as per corporate announcement dated 13 June, 2018, the board decided to withdraw the scheme. The NCLT Chandigarh Bench, on 15 June, 2018 permitted withdrawal of application of the Company.

- Withdrawal Clause 62.1 as reproduced below of the scheme provided the required power to the board of directors to withdraw the scheme

  "62. Modifications to the Scheme
  62.1. Each Company (acting through its board of directors), may, in their full and absolute discretion, jointly and as mutually agreed in writing:
  (c) jointly modify, vary or withdraw this Scheme prior to the Effective Date in any manner at any time;"

Therefore, in the above case going strictly by shareholders' approval, the board does have the power for withdrawal, but lacks any specific procedure or interval for withdrawal.

IV. Conclusion:

Withdrawal of scheme by board is a risk as it would amount that shareholders would be at whims and fancy of boards of directors. Board's approval for withdrawal was considered valid in both of the above two cases. It is important to note, whenever a scheme is approved by the board of directors it is important to check whether the resolution passed \ delegated the power for withdrawal of schemes and if it does, whether it specifically cover the occasions or intervals and proper process for withdrawal of the scheme. Similarly, in case of shareholders' approval the same shall be addressed adequately.

Where the board resolution and the shareholders resolution are silent on delegation of withdrawal powers, or the process to be adopted for withdrawal, NCLT may raise a concern on the validity of the authority to deciding the withdrawal.

It also becomes the moral duty of Company to explain to shareholders about withdrawal of the scheme and reasons for it.

Omkar Dindorkar - Partner - omkardindorkar@mmjc.in
Esha Tandon - Associate - eshatandon@mmjc.in

High Value Debt Listed Entities: Anomalies for disclosures in Annual Report

Introduction:

SEBI vide notification dated September 7, 2021, notified SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2021 ('Amendment Regulations') effective from September 7, 2021 which were approved by SEBI in its Board meeting held on August 6, 2021, with a view to improve transparency, rationalization and removing of redundant provisions so as to provide further robustness to the corporate bond market.

The amendments extended the provisions related to Corporate Governance ('CG') under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('Listing Regulations') to an entity which has listed its non-convertible debt securities ('NCDs') and has the value of principal outstanding of listed NCDs of Rs. 500 crore and above, which are referred as High Value Debt Listed Entity (HVDLE).

The Amendment Regulations were made applicable from the date of publication in Official Gazette i.e. September 7, 2021. Thus, the listed entities which were determined as HVDLE will be required to comply with the CG provisions immediately to confirm compliance in the quarterly compliance report under Reg 27(1)(a) of the Listing Regulations.

BSE vide its Notice No. 20211001-3 dated October 01, 2021 and NSE vide its Circular No. NSE/CML/2021/10 dated September 30, 2021 provided that the Part C (disclosures in corporate governance report as part of annual report), Part D (Declaration by CEO on compliance of the management and directors with the code of conduct) and Part E (Compliance certificate by auditors or Practicing Company Secretary on corporate governance compliance) of schedule V of the Listing Regulations are also to be complied by HVDLEs as part of their Annual Report w.e.f Financial Year 21-2022. On perusal of provisions relating to disclosures as required to be given in the Annual report, it was seen that there were certain challenges faced by HVDLEs in making disclosures. On perusal of few annual reports of HVDLEs following are the observations or Anomalies Identified:

Anomalies pertaining to disclosure to be made in Annual Report:

1. **Manner of Disclosure**

   After going through the Annual Reports of Financial Year 2021-22 of some purely HVDLEs, it was observed that the CG Report as per Part C of Schedule V is merely included as clause in the Directors' Report, unlike Annual Reports of Equity listed entities or Equity and HVDL Entity wherein the CG Report is included as an Annexure to the Directors' Report. The requirement of Part C of Schedule V of Listing Regulations states that the disclosures shall be made in the section on the CG of the Annual Report. Hence, a practice is recommended to be adopted that the CG Report should be included as an Annexure to the Directors' Report.

2. **Listed entity's philosophy on code of governance**

   Various purely HVDLEs tend to skip/ ignore this as the same is considered not relevant from the disclosure point of view. However, the same shall be mentioned in the CG Report as the philosophy lays down the principles and practices for governing the Entity in order to promote sustainable and good corporate practices. Even many governance experts had tried to break it down into four simple words: People, Purpose, Process and Performance.

3. **Disclosures w.r.t Stakeholders' relationship committee**
   The Role of Stakeholders' relationship committee as per Para B of Part D of Schedule II of the Listing Regulations often revolve around the Shareholders of the Company, whereas, for purely HVDLE, the role of the Committee shall also include the grievances relating to the debenture holders as well. As is evident from Clause 5 (c) and (d) of Part C of Schedule V, wherein details related to number of shareholders' complaints received during the financial year and number of complaints not solved to the satisfaction of shareholders are to be given. Hence, if the entity is purely HVDLE, then the details relating to debenture holders shall also be included and if the entity is equity listed as well as HVDL then the details relating to shareholders and debenture holders must be given. Further, in case of private company which is a HVDLE and have less than one thousand security holders at any time during a financial year, then such company will be obligated to constitute Stakeholders' relationship committee due to Regulation 21 of the Listing Regulations and not as per Section 178(5) of the Companies Act, 2013, in such cases, whether the disclosure shall be made pertaining to the debenture holders only is an anomaly, and HVDLEs are suggested to take a holistic view and disclose accordingly.

4. **Disclosures w.r.t General body meetings- Postal Ballot Exercise**
   The disclosures relating to Postal Ballot activity as per Clause 7 (c), (d), (e) and (f) of Part C of Schedule V with respect to the purely HVDLE which is a Private Company may not be relevant. Therefore, it is recommended that these clauses be mentioned in the annual report and remark be mentioned as 'Not Applicable' against the relevant clauses, rather than not including the entire clause at all.

5. **Disclosures w.r.t market price data- high, low**
   The disclosures relating to market price data- high, low as per Clause 9 (f) of Part C of Schedule V is often interpreted as high, low of market price data is to be given for equity shares being listed, as the high, low of market price data of debt or other securities is not available. However, if the HVDLE has issued and listed its debt securities which are market linked or which are publicly placed, the high, low of market price data of the same will be available. Further, if the debt securities of the HVDLE are privately placed, then this data will not be available.
   Hence, the purely HVDLEs which have issued and listed its debt securities which are market linked or which are publicly placed, shall mention the high, low of market price data, whereas the equity listed as well as HVDL the high, low of market price data of equity shares as well as its debt securities which are market linked or which are publicly placed shall be given.
   In other case, it is recommended that these clauses be mentioned in the annual report and remark be mentioned as 'Not Applicable' against the relevant clauses, rather than not including the entire clause at all.

6. **Disclosures w.r.t performance in comparison to broad-based indices such as BSE Sensex, CRISIL Index etc**
   The disclosures relating to performance in comparison to broad-based indices as per Clause 9 (g) of Part C of Schedule V with respect to purely HVDLEs, might not be applicable as there is no broad-based index of Stock Exchanges being prescribed for the debt market in India. Hence, it is recommended that these clauses be mentioned in the annual report and remark be mentioned as 'Not Applicable' against the relevant clauses, rather than not including the entire clause at all.

7. **Disclosures w.r.t dematerialization of shares and liquidity**

The disclosures relating to performance in comparison to broad-based indices as per Clause 9 (l) of Part C of Schedule V with respect to purely HVDLE is not applicable. Hence, the same shall be mentioned as 'Not Applicable' against the relevant clauses then not including the same.

8. **Disclosures w.r.t Commodity price risk or foreign exchange risk and hedging activities**
   If the HVDLE is involved in the dealing or trading of the commodities like petrol, crude oil, grains etc, then adequate disclosures in accordance with SEBI/HO/CFD/CMD1/CIR/P/2018/ 0000000141 dated November15, 2018 must be given in the CG Report as per Clause 9 (n) of Part C of Schedule V or else it is recommended that these clauses be mentioned in the annual report and remark be mentioned as 'Not Applicable' against the relevant clauses, rather than not including the entire clause at all.

9. **Disclosures w.r.t Details of utilization of funds raised**
   Clause 10 (h) of Part C of Schedule V provides that details of utilization of funds raised through preferential allotment or qualified institutions placement as specified under Regulation 32 (7A) shall also be disclosed in the CG Report. In case of Equity listed as well as HVDLE, there seems no challenge in disclosing the same. However, in case of a purely HVDLE, Regulation 32 (7A) is not applicable, then whether disclosure in respect of utilization of funds raised as given to Stock Exchange as per Regulation 52 (7) to be given is an anomaly. Hence it is recommended that HVDLEs mention in their Annual Reports that disclosures as per Regulation 32(7A) as well as 52(7) are not applicable to them and hence no disclosure has been made in this regard.

10. **Details as per Clause 11 of Part C of Schedule V w.r.t non-compliance of any requirement of corporate governance report, with reasons thereof to be disclosed**
    Now the question arises that, as the CG Provisions are applicable to the HVDLE on comply or explain basis, then non-compliance with the same shall be disclosed under this clause or not?
    The HVDLEs are currently enjoying the shelter of Comply or Explain basis, therefore, in accordance with the explanation (3) to Regulation 15(1A), the reason for any non-compliance with the CG provisions and the steps initiated to achieve full compliance be given under this clause.

Conclusion:

Accordingly, the Board of the HVDLEs shall discuss the gaps in the existing practices/ compliances by the company and the steps to be taken/ action plan to comply with the CG norms in totality.

As of now, some part of the disclosures are not practically possible to give and some of the disclosures are not applicable to the purely HVDLEs. Hence, we are hopeful that SEBI or Stock Exchanges may issue some clarifications regarding the same in near future, in order to bring more clarity on the disclosures required in Annual Reports by HVDLE.

Jyotika Bhojwani - Intern – jyotikabhojwani@mmjc.in

Introduction of Legal Entity Identifier (LEI) for issuers who have listed and/ or propose to list non-convertible securities, securitised debt instruments and security receipts

- SEBI vide Circular No.: SEBI/HO/DDHS/DDHS_Div1/P/CIR/2023/64 dated May 3, 2023 **introduced** LEI **code for issuers having outstanding listed Non-convertible securities, listed securitised debt instruments and security receipts or proposing to issue and list the same.**
- This circular is applicable for issuers **having outstanding listed non-convertible securities** as on **August 31, 2023**, to report/ obtain the LEI Code.
- **Also, they have to** report the LEI code in the Centralized Database of corporate bonds, on or before September 1, 2023.
- **Similarly, issuers having outstanding listed securitised debt instruments and security receipts** as on August 31, 2023, shall report/ obtain the LEI code and are required to report the LEI code to the Depository(ies), on or before September 1, 2023.
- Further, issuers proposing to **issue and list** non-convertible securities, on or after September 01, 2023, shall report their LEI code in the **Centralized Database of corporate bonds** at the time of allotment of the ISIN.
- Similarly, issuers proposing to issue and list securitised debt instruments and security receipts, on or after September 01, 2023, shall report their LEI code to the Depositories at the time of allotment of the ISIN.
- Entities can **obtain the LEI code** from any of the Local Operating Units (LOUs).
- The LEI code may be obtained from **Legal Entity Identifier India Ltd (LEIIL)**, a subsidiary of the Clearing Corporation of India Limited (CCIL), which has been recognised by the Reserve Bank of India as issuer of LEI under the Payment and Settlement Systems Act, 2007 and is accredited by the GLEIF as the LOU in India for issuance and management of LEI codes.
- The Depositories are being advised to map the LEI code to existing ISINs by September 30, 2023; and for future issuances, map the LEI code provided by the issuers with the ISIN at the time of activation of the ISIN.

  This circular of SEBI has come into force from May 03,2023.

Source:

1. https://www.sebi.gov.in/legal/circulars/may-2023/introduction-of-legal-entity-identifier-lei-for-issuers-who-have-listed-and-or-propose-to-list-non-convertible-securities-securitised-debt-instruments-and-security-receipts_70875.html.

Ruchira Pawase – Associate - ruchirapawase@mmjc.in

REVISED FORMAT OF ANNUAL SECRETARIAL COMPLIANCE REPORT APPROVED BY ICSI COUNCIL

I. Background:

As per Regulation 24A(2) of SEBI (LODR) Regulations, 2015 read with SEBI Circular dated 8th February 2019, every listed entity to which corporate governance provisions under Regulation 15 are applicable is required to submit to the stock exchanges where it is listed, an Annual Secretarial Compliance Report (ASCR) issued by a Practising Company Secretary (PCS), within 60 days from the end of financial year in its annual report. The BSE and NSE have vide circulars dated 16th March 2023 and 10th April 2023 prescribed certain additional affirmations to be given by PCS in this report, to be given for FY 2022-23.

II. Format prescribed by ICSI now:

The Council of the Institute of Company Secretaries of India (ICSI) has, on 4th May 2023, approved a format of Annual Secretarial Compliance Report, which covers not only the additional affirmations prescribed by BSE and NSE but contains few more points in order to ensure compliance with all applicable SEBI Circulars.

As per the new format released by ICSI now, compliances related to conditions and timeline to be followed regarding resignation of statutory auditors from listed entities and their material subsidiaries and other procedures as mentioned under SEBI Circular dated 18th October, 2019 have been prescribed to be specifically mentioned in the report by PCS.

This requirement (as prescribed format released by ICSI) is coming from above-mentioned SEBI Circular dated 18th October 2019 which mentions that *"The practicing company secretary shall certify compliance by a listed entity with 6(A) and 6(B) above in the annual secretarial compliance report issued in terms of SEBI Circular no. CIR/CFD/CMD1/27/2019 dated February 08, 2019."*

Hence it is relevant that the Annual Secretarial Compliance Report (ASCR) issued by PCS should specifically include the affirmation about compliance with SEBI Circular dated 18th October 2019 and its material subsidiaries

III. Material subsidiaries related compliance:

There can be situations where the secretarial auditor issuing the secretarial audit report to listed entity, the PCS issuing the Annual Secretarial Compliance Report (ASCR) to the listed entity and the secretarial auditor of material subsidiaries are different.

In such cases, it is the responsibility of the PCS issuing this certificate ensure the identification of the material subsidiaries correctly and ensure statutory auditor related compliance not only in the listed company but also in each material subsidiary.

.

SEBI has been taking action against non-compliance of SEBI's circular dated 18th October 2019 and there have been few orders in which Companies were penalised[1] for not complying with such circulars.

IV. Conclusion:

It is recommended that all Annual Secretarial Compliance Report (ASCR) which are issued by PCS after the release of this revised format from ICSI be submitted in this format only, and even listed entities may ensure the same while submitting this certificate with stock exchanges.

Ruchira Pawase - Associate – ruchirapawase@mmjc.in

[1] https://www.sebi.gov.in/enforcement/orders/may-2022/settlement-order-in-the-matter-of-upl-ltd_58801.html
https://www.sebi.gov.in/enforcement/orders/oct-2022/adjudication-order-in-the-matter-of-ifgl-refractories-ltd-_64174.html

Unspent CSR obligations met, but is the company still non-compliant?

Applicable Provisions for Spending of CSR & Responsibility casted:

Sub section (5) of section 135 of the Companies Act, 2013 [“Act”] casts a duty on the Board of Directors of every company who is required to constitute a CSR Committee in terms of section 135 (1) which states:

- That the company must spend in every financial year at least 2% of the average net profits of the company made during the three immediately preceding financial years in pursuance of its CSR policy.
- In case the company has not completed three financial years since its incorporation, average of profits of such number of financial years shall be considered.

To clear the ambiguity regarding *what shall be considered as a fund specified in schedule VII to which such unspent CSR amount shall be transferred* in pursuance of second proviso of section 135 (5) of the “Act”; MCA vide its General circular no 14/2021 dated 25th August 2021 has clarified the meaning of Fund.

Point no 3.15 & 3.16 of the aforesaid circular has specified. The same is:

3.15 Contributions to the following funds shall be admissible CSR expenditure. They are: -

i. Swachh Bharat Kosh.
ii. Clean Ganga Fund
iii. Prime Minister’s National Relief Fund [PMNRF]
iv. Prime Minister’s Citizen Assistance and Relief Emergency Situations Fund [PM Cares fund]
v. Any other fund set up by the Central Government and notified by the Ministry of Corporate Affairs, for socio economic development and the relief and welfare of the schedule castes, the Schedule Tribes, other backward classes, minorities, and women.

Further point 3.16 clearly **does not** recognize contribution made to any other fund for carrying out activities mentioned in Schedule VII. The same is quoted as follows:

3.16 The Act does not recognize any contribution to any other fund, which is not specifically mentioned in Schedule VII, as an admissible CSR expenditure.

Second Proviso of section 135 (5) provides a way to the company that even where such amount has not been spent completely and the company has any unspent CSR obligations as on 31st march then they can still be compliant w.r.t their CSR spending obligation provided:

- Such unspent amount is transferred to a fund specified in Schedule VII within a period of six months from the expiry of the financial year.
- The Board report of the company shall specify the reason for not spending such an amount up to 31st March.

However, there may be situations where the company is not able to spend the entire obligation upto the end of the financial year i.e., upto 31st March of the relevant financial year except other than instances where the company is pursuing an ongoing project. The reasons for the same could be: -

- Budget constraints: Companies may face budget constraints due to economic downturns or other unforeseen circumstances that may impact their ability to spend the entire CSR obligation.
- Technical Errors: Certainly, companies may transfer some part of obligation to a schedule VII fund but sometimes due to tech breakdown the money may get bounced back and it may go unnoticed.
- Unconsciously the amount may fall short due to unforeseen circumstances beyond the control of the company.

Having stated the above, there have been precedents where wrong spending, incorrect transfer has occurred, and ROC calls it noncompliant, and the offence falls under the umbrella of adjudication.

Below is the gist of cases where **Adjudication orders passed by ROC.**

Serial No	Name of the Company	ROC	Source of finding violation	Penalty Levied
1.	Temenos India Private limited	ROC Chennai	Company had an unspent amount of Rs 39,83,030/- as on 31st March,2021. On 19.08.2021 the company transferred an amount of Rs 42,00,000/- to 'Center for University-Industry Collaboration Anna University, Chennai under the head **"Contribution to Public Funded Universities"** pursuant to clause ix (b) of Schedule VII. During the Audit of 2021-22 it came to the knowledge of the company that such transfer of unspent CSR amount was not in tune with the MCA circular dated 25th August,2021 which clarified the meaning of fund. On 27.09.2022 the company made the transfer of the unspent amount to PM Cares Fund amounting to Rs 39,83,030/- in terms of the meaning of fund.	ROC observed that penalizing the company for non-compliance of the provision relating to the transfer of Unspent CSR amount i.e., 2nd proviso to section 135 (5) may lead to double jeopardy as the company has already paid twice the amount required to be transferred, as the penal provisions u/s 135 (7) states that the penalty to be imposed on company shall be twice the unspent amount or Rs 1 Crore [whichever is less]. A penalty of **Rs 2 lakhs each** was imposed **on Four Officers in default** of the company which is the maximum limit set out by section 135 (7).
2.	RHI Magnesita	ROC	The subject company had an	Penalty imposed by

	India limited	Mumbai	unspent CSR amount of Rs 1,35,40,799/- as on 31st March,2021. It was able to deposit only Rs 32,00,000/- before 30th September,2021 to PM Cares Fund. The secretarial Audit report for the F.Y 2020-21 pointed out the shortfall in CSR expenditure to the tune of Rs 1,03,40,799/- The same was acknowledged in the director's report 2020-21 stating that the company was affected due to covid pandemic. The default was rectified by the company on 18.05.2022 by transferring the unspent amount to PM Cares Fund.	ROC Mumbai in terms of section 135 (7): **On Company:** Rs 1 Crore **On four officers in default:** Rs 2 lakhs each.
3.	Comviva Technologies Limited	ROC Delhi	The company had an unspent CSR obligation of Rs 5,50,122/- as on 31st March,2021. It transferred such unspent amount to PM relief fund which is a specified schedule VII fund on 22nd April,2021. Due to technical error, the said amount bounced back into the applicant company's Bank Account on the same day, and it remained unnoticed to the officers of the company. The said default was made good by the company by transferring the unspent CSR amount on 30th March,2022 to PM relief Fund.	Penalty imposed by ROC Delhi in terms of section 135 (7): **On company:** Rs 11,00,244/- **On Eight officers in default:** Rs 55,012/- each.

Due to these challenges faced by the company and lack of information they were penalized by ROCs. This therefore leads us to ponder and deliberate upon what could be viable solutions for the same.

One solution that can notably be done is systematic preparation of an annual action plan. Parallelly, there should be provisions made well in advance and noted in the annual action plan for transfer of unspent CSR amount in right quantum and right fund which shall be specifically stated.

Various companies recently had to bear the brunt of ROC and heavy penalties were levied on them for non-compliance despite meeting the spending obligation.

The second proviso of section 135 (5) of the Act, which embarks a precedent for all such companies who are required to transfer their unpent CSR amounts as clarified at the start of the article for the Financial Year 2022-23.

Conclusion

Hence, it is significant and crucial that companies which have unspent CSR obligations pending as on 31st March must transfer such unspent amounts only to specified schedule VII funds and ensure that such transaction is completed before 30th September, and it is not rendered ineffective on account of any technical discrepancies.

Further it is also advisable that companies must include a statement in their annual action plan specifically stating the schedule VII funds within the meaning of fund to rule out any default as seen from aforesaid orders. Does your CSR annual action plan have this?

Shravan Pai - Intern - shravanpai@mmjc.in

Hasti Vora - Research Associate- hastivora@mmjc.in

Beyond Corporate Philanthropy: How CSR makes a Meaningful Impact

"CSR is not a one-time program, but a culture and a way of doing business that will generate a lasting impact." - Paul Polman, former CEO of Unilever

Corporate Social Responsibility (CSR) has gained traction in recent years and has come a long way since its inception. Companies back then began donating to charitable causes demonstrating their commitment to societal issues. The purpose then was to encourage businesses to take a more proactive and responsible approach to leave a lasting impact on society and the environment. This involved initiatives such as philanthropy, environmental conservation, ethical sourcing, and employee welfare programs.

Today, CSR has evolved into a broader concept that includes sustainability, diversity and inclusion, responsible governance, and other areas that have a significant impact on society and the environment. The transition has been 360 degree and has undergone a complete overhaul. What started as a philanthropic endeavour by companies has now become an essential part of business strategy, encompassing social and environmental considerations in addition to economic goals.

While there are many different approaches to CSR, ultimately, the goal is to create a positive impact on the world. This impact can take many forms, from reducing the carbon footprint of a company's operations to improving the lives of the communities in which they operate. Ultimately, the impact of CSR is what sets it apart from traditional business practices, making it a powerful tool for creating a better world.

According to the Ministry of Corporate Affairs, the total CSR spending by companies in India was Rs 25714.65 crore in the financial year 2020-21 in comparison to last year spending, which was Rs 24954.78 crore which represents a round about 3% increase in spending. The top sectors that received CSR funding in India in 2020-21 were education, healthcare, rural development, environment, and disaster management.

It presently has become the talk of the town and is looked upon as a significantly relevant concept in businesses even today. It is company's responsibility towards the community beyond its core business operations. In fact, some companies are going beyond the mandatory 2% spending and allocating more funds towards CSR initiatives to create a greater impact on society. One such example was Mr Jamshedji Tata. In 1892, he established the JN Tata Endowment, which provided scholarships to Indian students to study abroad. He also donated funds for the establishment of the Indian Institute of Science in Bangalore. He established the Tata Memorial Hospital in Mumbai in 1941, which is now one of India's leading cancer treatment centres. His vision for corporate social responsibility was well ahead of its time and he proved that the sole purpose is just to make an impact.

CSR is often viewed by businesses as a compliance mechanism due to regulatory pressures, which can be counterproductive to its intended purpose. When companies perceive CSR solely as a legal obligation, it shifts the focus away from creating meaningful impacts on society and the environment. This approach defeats the purpose of CSR, which is to encourage businesses to act as responsible and ethical actors beyond their profit-making goals. It is essential to recognize that voluntary and proactive CSR initiatives can bring about significant social and environmental benefits, and regulatory compliance should not be the

only driving factor. By viewing CSR as a compliance mechanism, corporations are limiting their ability to create lasting positive impacts on the community and the environment.

Investing in programs that support education, healthcare, and environmental sustainability, companies aided in improving the quality of life for residents and help build stronger, more resilient communities. Some classic examples of CSR initiatives in India that left a lasting impact:

- **Tata Group's Clean Drinking Water Project**: Tata Group, one of India's largest conglomerates, initiated a project to provide clean drinking water to underserved communities in rural India. The project has installed over 8,000 water purifiers across the country, providing access to safe drinking water for more than 6 million people.
- **Wipro:** Wipro's initiatives include the Wipro Cares program, which supports education, healthcare, and other social causes, and the Wipro Earthian program, which promotes environmental sustainability. It also launched several innovative CSR initiatives, such as the Wipro Applying Thought in Schools program, which aims to improve the quality of education in India.
- **Reliance Foundation's Rural Transformation Programme**: The Reliance Foundation, the philanthropic arm of Reliance Industries, has launched a Rural Transformation Programme aimed at providing comprehensive support to underserved communities in rural India. The programme focuses on areas such as healthcare, education, livelihoods, and infrastructure development, and has impacted over 12 million people across 15,000 villages in India.
- **Infosys Foundation's Healthcare Initiatives**: The Infosys Foundation, the philanthropic arm of Infosys Limited, has launched several initiatives aimed at improving healthcare outcomes in India. These initiatives include the construction of hospitals and clinics in underserved areas, the provision of medical equipment and supplies, and the training of healthcare workers. To date, the foundation has impacted over 2 million people across India through its healthcare initiatives.

CSR is a crucial aspect of modern business, with the aim of creating a positive impact on society and the environment. Companies that prioritize CSR are not only contributing to the betterment of society but also building strong yet resilient relationships with their stakeholders, enhancing their reputation and ultimately, creating long-term value for their business. From the examples we have seen, it is evident that CSR has the potential to create a significant impact on the communities and society at large. The impact shall reflect the changing expectations of society, as well as the challenges and opportunities presented by the global economy and environment.

Hasti Vora - Research Associate- hastivora@mmjc.in

Can Interest Component be considered as the time value of money if there is no delay in payments?

In the matter of Step Stone Infras Private Limited - Applicant Vs. Yes and Yes Infracon Private Limited - Respondent at National Company Law Tribunal (NCLT) Chennai dated 24 April, 2023

- The Step Infras Private Limited who is Financial Creditor and Applicant (FC) and Srico Projects Private Limited (SIRCO) had entered a Memorandum of Understanding (MOU) for sub-contracting the construction of dwelling units. The FC had deposited a refundable security deposit to the Principal Contractor for the said contract.
- Thereafter, the FC and the **Yes and Yes Infracon Private Limited** - Corporate Debtor (CD) had entered into MOU dated 28 September, 2019, wherein FC agreed to transfer the above said construction work to the CD and the CD agreed to pay the security deposit to FC which was deposited by the FC with the SRICO plus the retention amount and yardstick payment totalling to the amount of Rs.85,00,000/-.
- The CD issued post-dated cheques as a guarantee to the FC. Upon presenting the same on the due date with the respective bank the cheques were returned with the remarks as insufficient funds. Aggrieved by the order, the applicant sent a legal notice dated 20 January, 2020. In return, CD sent a reply dated 3 February, 2020 denying applicants claim. Hence, the application was filed by the FC at NCLT.

Arguments of the Applicant (FC):

- It was argued that as per the MoU, CD was liable to pay amount of Rs. Rs.85,00,000/- from 1 January,2020 with interest rate at 14 % per annum.
- Further, it was claimed that the transactions under the said MoU were admitted by the CD in the reply notice dated 3 February, 2020.
- Further relied on several precedents to substantiate that the above debt as financial debt u/s 5(8)(e) of Insolvency and Bankruptcy Code,2016 (IBC).

Arguments of the Respondent (CD):

- It was claimed that the claim of the applicant was not a financial debt u/s 5(8)(e) of IBC.
- Relied on the decision passed by *NCLT Hyderabad in Shree Jaya Laboratories Private Limited* wherein it was held that '*section 5(8)(e) of IBC only the factoring transactions in respect of "receivables other than non- recourse basis" are included*'.
- It was also claimed that there was no disbursal against consideration for the time value of money. No money has been paid or disbursed to the CD by the FC, in fact, it was paid only to the SRICO which was not a party to the proceedings.
- In MoU, the term security deposit does not carry any interest and hence there was no disbursal against consideration for time value for money and it could not be termed as financial debt.
- As per clause 4 of MoU dated 28 September,2020 "*After the settlement of Rs1,50,00,000/- by the party of second party to party of first part Rs 1,00,00,000/- through SRICO and Rs 50,00,000/- the party of the first part shall have no claim from the party of the second part*". The amount claimed was not payable by CD.

- Further, it was argued that as per the letter dated 30 October 2020 issued by SRICO to the FC Rs.50,00,000/- and Rs.15,00,000/- had been paid to the FC on 1 October 2019 and 2 January, 2020 respectively, towards refund of the security deposit.
- Further out of Rs. 1,00,00,000/- being claimed as security deposit after deducting the above Rs. 65,00,000/- only Rs. 35,00,000/- were payable which was to be payable by SRICO and not by the CD.
- The issue raised being complex in nature and had to be dealt in a civil court and was beyond the purview of IBC.

HELD:

- It was noted that the MOU - FC had deposited amount of Rs. 1,00,00,000/- to SRICO for construction of work and the transaction is operational in nature.
- Further, the MOU between the FC and CD – the above work was transferred to the CD and the same had been agreed by the FC and CD.
- Transfer of same work by subsequent MOU would not alter the nature of the original transaction.
- It was apparently noted that Applicant/FC had attempted to convert a debt of operational nature into financial debt.
- For entertaining an application u/s 7 of IBC - the debt should be qualified as a financial debt as per section 5(8) of IBC. To qualify as financial debt, the debt should be disbursed against consideration for the time value of money.
- In the instant case, there is neither disbursement of debt nor the time value of money for the debt. 14% interest component in the MoU would take effect only in the event of delay in payment, in such case it cannot be considered as the time value of money.
- It was noted that debt owned by the CD was not disbursed against the time value of money and does not qualify as financial debt. Accordingly, the application u/s 7 of IBC was dismissed and disposed off.

Aarti Ahuja Jewani – Partner – artiahuja@mmjc.in

Esha Tandon – Associate – eshatandon@mmjc.in

Unraveling the Web: Understanding Foreign Liabilities and Assets (FLA) Returns.

Introduction;

In today's times, when world has become a global village, cross-border transactions and forex trades are gaining popularity. Corporations and establishments are engaging in foreign investments. In such a situation, understanding and ensuring compliance of foreign trade related laws has gained remarkable importance. One such very basic compliance under foreign exchange laws is, Filing of Return on Foreign Liabilities and Assets. More popularly known as 'FLA return'. We would now have a walk through on some important aspects of FLA Return

Background:

FLA return is filed by entities with Reserve Bank of India ('RBI') through an online portal called 'Foreign Liabilities and Assets Information Reporting' portal ('FLAIR Portal'). Earlier, this return was filed as part B of FCGPR form. Thereafter, RBI through its 2011 circular, introduced a new form for filing FLA return.

For around eight years post 2011, FLA return was filed with RBI on dedicated mail id provided by RBI. Thereafter, with the intent to enhance data protection and data quality in submissions of FLA return, RBI replaced system of filing through email with filing through FLAIR Portal. Currently, the portal requires the applicant to register itself on the FLAIR portal and thereafter file the return using the login ID and password.

Eligibility and due date:

As per the applicable laws, all those entities including companies who receive Foreign Direct Investment ('FDI') and/or all such entities who make oversees investments, are required to file FLA return up to 15th July every year. In this return, the data as at end of preceding financial year has to be provided.

Exempted entities;

Even though, all the entities receiving or making foreign investments are required to file FLA return, there are some exemptions to this general rule.

The following entities are exempt from filing FLA return.

- Companies that have issued shares only on a non-repatriable basis to the non-residents of India.
- Investee Company in case it has downstream investments.
- Companies that have foreign portfolio investment.
  Companies who don't have any outstanding balance of FDI or ODI by the end of financial year, including such companies who have received remittance of money before 31st March but allotment of securities is made post 31st March. Provided that if any company has not received or made any foreign investment during the current financial

year, but the balance sheet reflects the foreign investment made or received in any earlier year, then such company will not be exempted and it will be required to file FLA return within time prescribed.

Contents of the FLA return:
The form for filing the FLA return is divided in to five parts:

1. The first part talks about the basic information with respect to the Reporting Company (i.e. entity required to file FLA return). Basic information includes information such as name of the company, its contact details, CIN and PAN number etc.
2. Second part requires the Reporting Entity to provide financial details such as, paid up capital, profit or loss, details of sales and purchases etc.
3. Third part of the form draws attention to Foreign Liabilities like Investment in India under the umbrella of FDIs, Portfolio Investment in India, Disinvestment etc.
4. Fourth part showcases Foreign Assets like Overseas Direct Investment, Direct Investment Abroad, Portfolio Investments abroad and
5. Fifth part calls attention to variation report. This is an auto generated report. This report is generated by the system after all necessary information is filled in the form. Ones this is generated, the applicant can neither edit or change this part nor can it alter the previous parts of the form.

Anomalies in filing the returns:
As discussed above, the data as at 31st March of every year has to be provided in FLA return and the last date for filing this return is 15th July of every year. Since the unlisted companies have time up to 30th September for presentation of financial statements to shareholders and regulators, the companies may not have complete and audited data while filing the return. In such a condition, there is a possibility that the figures provided in the FLA returns may not match with the figures in the audited financial statements. In case of such significant difference, the company will have to file a revised FLA return.

Filing of revised FLA return;
Due to the above-mentioned anomaly, RBI allows the companies to file a revised FLA return. For filing the revised returns, the applicant is required to make an application to RBI to allow filing of revised return. After the request is approved by the RBI, the applicant is allowed to revise only that part of the form which he had mentioned in the request to RBI. Thereafter, the portal accepts the changes and updates the database accordingly. Every year, the company is allowed to file a revised returns, if necessary up to 30th September.

Penalty and compounding application for non-compliance
If for any reason, the Reporting Entity is not able to file the FLA return up to 15th July, it can file the same after the due date, but it shall be in violation of FEMA regulations. Therefore, RBI may impose a penalty for such non-compliance. The late submission fee is Rs 7500/- per return for reporting delays. Such late filing can be done up to 3 years from the last date of filing returns. If the returns are not filed within 3 years from last date of filing of such returns,

then the Reporting Entity will have to make a compounding application to RBI. The fees for compounding application is Rs. 5,000. Penalty on compounding would be Rs 10,000 per FLA return. The Reporting Entity may file all the pending FLA returns and make the default good before making compounding application to RBI.

Conclusion

Filing of FLA return is the first and very basic compliance under FEMA laws. Since the last date for filing the return is approaching, the companies are required to pull up the data relating to foreign investments made and received during the year and verify its correctness before filing the actual return. Such verification will help the company avoid the further complications like revision of returns etc. arising due to use of unaudited data.

Hasti Vora - Research Associate - hastivora@mmjc.in
Darshika Thakkar - Manager - darshikathakkar@mmjc.in

Central Government enhances reach of Prevention of Money Laundering Act, 2002 – Increases scope of 'Reporting Entities'

I. Introduction:-

Central Government vide its notifications dt: May 3, 2023 and May 9, 2023 enlarged the activities covered under the definition of 'Persons carrying on Designated Business or Profession' under Section 2(1)(sa) of Prevention of Money Laundering Act, 2002 ['PMLA'].
Section 2(1)(sa) of PMLA covers certain businesses and has a residual clause which provides power to Central Government to notify any other activities/ persons as 'persons carrying out Designated Business or Profession'. Clause (vi) states as follows, "*person carrying on such other activities as the Central Government may, by notification, so designate, from time to time*"

II. Amendment dated May 3, 2023:-

By exercising this power Central Government has now, vide its notification dt: May 3, 2023, stated that, "*Financial transactions carried out by a relevant person on behalf of his client, in the course of his or her profession, in relation to the following activities-*
(i) buying and selling of any immovable property;
(ii) managing of client money, securities or other assets;
(iii) management of bank, savings or securities accounts;
(iv) organisation of contributions for the creation, operation or management of companies;
(v) creation, operation or management of companies, limited liability partnerships or trusts, and buying and selling of business entities, shall be an activity for the purposes of said sub-section.

This means the persons carrying out above activities shall be considered as carrying out the designated business of profession and are obligated with certain actionable under PMLA.

As per Explanation given in this notification, *"Relevant Persons" here would include*
(i) an individual who obtained a certificate of practice under section 6 of the Chartered Accountants Act, 1949 (38 of 1949) and practicing individually or through a firm, in whatever manner it has been constituted;
(ii) an individual who obtained a certificate of practice under section 6 of the Company Secretaries Act, 1980 (56 of 1980) and practicing individually or through a firm, in whatever manner it has been constituted;
(iii) an individual who has obtained a certificate of practice under section 6 of the Cost and Works Accountants Act, 1959 (23 of 1959) and practicing individually or through a firm, in whatever manner it has been constituted.

Amendment dated May 9, 2023

Again, the Central Government, vide its notification May 9, 2023 has included few more activities which when carried out in the course of business on behalf of or for another person, as the case may would be brought under the definition of "persons carrying out designated business of profession" under PMLA and are also obligated with certain actionable under PMLA.

Persons carrying on below mentioned activities would also be considered as 'Reporting Entities' and would have to do compliances under PMLA and its rules:

The additional activities notified vide Notification dated May 9, 2023 under the definition of 'person carrying out designated business or profession" are:-

(i) *acting as a formation agent of companies and limited liability partnerships;*

(ii) *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a firm or a similar position in relation to other companies and limited liability partnerships;*

(iii) *providing a registered office, business address or accommodation, correspondence or administrative address for a company or a limited liability partnership or a trust;*

(iv) *acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another type of trust; and (v) acting as (or arranging for another person to act as) a nominee shareholder for another person.*

As per Explanation given in this notification, certain situations are excluded from being covered under this definition. This Explanation reads as:-

Explanation –For removal of doubts, it is clarified that the following activities shall not be regarded as activity for the purposes of sub-clause (vi) of clause (sa) of sub-section (1) of section 2 of the Act, namely:-

(a) any activity that is carried out as part of any agreement of lease, sub-lease, tenancy or any other agreement or arrangement for the use of land or building or any space and the consideration is subjected to deduction of income-tax as defined under section 194-I of Income-tax Act, 1961 (43 of 1961); or

(b) any activity that is carried out by an employee on behalf of his employer in the course of or in relation to his employment; or

(c) any activity that is carried out by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of a company to the extent of filing a declaration as required under clause (b) of sub-section (1) of section 7 of Companies Act, 2013 (18 of 2013); or

(d) any activity of a person which falls within the meaning of an intermediary as defined in clause (n) of sub-section (1) of section 2 of the Prevention of Money-laundering Act, 2002 (15 of 2003).

III. Impact of the amendment:-

What is proposed to be covered for regulation under PMLA are financial transactions of the nature mentioned above. It can be understood that activities mentioned above would not cover certification or services rendered of professional nature where fee is charged by a professional. Only if a professional OR any other person (who may not be a practicing CS / CS / CMA) carries out any of the activities mentioned above (as per Notification dated May 3, 2023 OR as per Notification dated May 9, 2023) and does not fall under the Explanation given in Notification dated May 9, 2023 (in case of activities covered under Notification dated May 9, 2023), then he is required to comply with the actionable prescribed under PMLA, which is explained in below paras.

Questions arises is what are the compliances that Practicing Chartered Accountants, Practicing Company Secretaries and Practicing Cost and Management Accountants are expected to do on notification of this amendment?
As per the definition of "reporting entity" given in Section 2(1)(wa) of PMLA 2002, "Persons carrying on a designated business or profession" are covered under the definition of "Reporting Entity" also. As per Section 2(1)(wa) of PMLA, *"Reporting entity means a banking company, financial institution, intermediary or a person carrying on a designated business or profession"*.

Reporting entity has lot of obligations under PMLA. So now these compliances that are done by Reporting Entities would have to done by Practicing Chartered Accountants, Practicing Company Secretaries and Practicing Cost and Management Accountants also as they are also covered as Reporting Entities w.e.f May 3, 2023. Following are compliances in brief that a Reporting Entity is required to comply with:

Sl. No	Section no.	Compliances required to be done
1	Section 11AA	Reporting Entities are required to verify identity of clients and beneficial owner by offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 or use of passport issued under section 4 of the Passports Act, 1967 or (d) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf. This provision casts responsibility on the Reporting Entity to identify beneficial owner as per PMLA. As per Rule 9(3) of PMLA Rules limit of shareholding for identifying beneficial owner is 10%. It is important to note that "beneficial owner" as per PMLA may be separate from the "significant beneficial owner" or "beneficial owner" under section 90 and 89 of Companies Act, 2013.
2	12	Reporting entity will have to maintain records relating to transactions whether attempted or executed, the nature and value of which may be prescribed for a period of five years from the date of transaction between a client and the reporting entity. Maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients. These records shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.
3	12AA	Reporting entity shall prior to commencement of each specified transaction verify the identity of the client based on Aadhar verification. take additional steps to examine the ownership and financial position, including sources of funds of the client. take additional steps as may be prescribed to record the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties. This information shall be preserved by Reporting

		Entity for a period of five years from the date of transaction between a client and the reporting entity.
4	Rule 7 of PMLA (Maintenance of Records) Rules, 2005	Every reporting entity shall communicate to the Director the name, designation and address of the Designated Director and the Principal Officer.

IV. Conclusion:-

The above compliances have increased onus on professionals while dealing with clients money, even in cases as simple as getting ROC filing fees in advance / re-imbursement from client (one of the activities listed in Notification dated May 3, 2023) OR even in situations where an individual is agreeing to become nominee shareholder in a wholly owned subsidiary, as a nominee of the holding company (one of the activities listed in Notification dated May 9, 2023)

As mentioned above, compliances were already required to be done by other Reporting Entities till now, it is necessary that a similar compliance framework needs to be set up by professionals, depending on the complexity and the nature of activities conducted by these persons. It is not that professionals and other persons are completely banned for conducting these activities on behalf of their clients, but they are required to conduct enhanced due diligence of their clients and maintain additional records of their clients and beneficial owners and designate dedicated persons who shall be responsible for carrying out these functions.

As this is a new concept but made effective with immediate effect, it would be helpful if Institute of Company Secretaries of India (ICSI) helps to create awareness amongst practicing professional community and also prescribe certain formats for maintaining of records and guidance on techniques for conducting the due diligence of the client as well as beneficial owner, so as to safeguard the interest of all practising professionals.

Looking at the stringent enforcement of PMLA, every professional will have to start taking due diligence on all the assignments being handled by them right now and be very careful while taking any assignment from any new client.

Vallabh Joshi- Senior Manager – vallabhjoshi@mmjc.in