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Informal Guidance in the context of Related Party Transactions under SEBI LODR, Regulations 2015.

Background of Issue 1

- National Thermal Power Company ['NTPC'/Company'] is a government company u/s 2(45) of Companies Act, 2013 ('the Act') incorporated on 07th November 1975 in accordance with provisions of Companies Act, 1956. NTPC raised specific queries related to the interpretation and applicability of related party transactions, seeking guidance to ensure compliance and clarity.
- NTPC is having a 50:50 Joint Venture Company with a Private Company (JVC). NTPC is assigning jobs on contract basis, for sundry works in plants/stations/offices to JVC under a **multiyear contract as** Power Station and Office Maintenance Agreement (PSOMA) through a JVC between NTPC and the other JV partner. The PSOMA with JVC is in place since 1999.
- NTPC is currently paying margin of 7% over and above the cost incurred by JVC as per the agreement. As per disclosure made in Annual Report of the Company through AOC-2, transactions made with JVC are not on arms' length basis since margin was not fixed on competitive basis.
- After enactment of Companies Act, 2013, as per provisions of Section 188 read with Rule 15 of the Companies (Meetings of the Board and its Powers) Rules 2014 (applicable at that time) — approval of shareholders was required if the value of transactions to be entered during a financial year exceeded 10% of the turnover of the company of preceding financial year or Rs. 50 Crore, whichever was lower.
- Accordingly, shareholder approval was sought in the AGM dated 18th September 2015 (*before the effective date of SEBI LODR Regulations*) for entering into multilayer PSOMA with JVC subject to ceiling of 2% of the annual turnover of the Company as per audited financial statements of preceding financial year or Rs. 1000 crores, whichever is more. After the same, Audit Committee and Board of Directors of NTPC accorded their approvals for entering into PSOMA w.e.f 15th April 2015 to 14th October 2020 with JVC. After contracts were awarded, they were placed for ratification/post facto approval of Audit Committee to keep a check on the ceiling approved by shareholders.
- Thereafter SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR") became effective from 1st December 2015.
- The provision of Rule 15 of the Companies (Meetings of the Board and its Powers) Rules 2014 was amended in vide Companies (Meeting of Board and its Power) Amendment Rules, 2019 dated 18th November 2019 and limit for approval of shareholders were enhanced to ten per cent of turnover. The Board of Directors approved the extension of PSOMA by 1 more year, from 15th October 2020 to 14th October 2021 on existing terms and conditions and thereafter further extended from 1st April 2021 to 31st March 2026.
- Regulation 23 of SEBI LODR and specially the limits of materiality in case of related party transactions was amended w.e.f 1st April 2022. Transactions entered with JVC were not meeting the revised thresholds of material RPT as an 01st April 2021 as per definition applicable (under Companies Act OR SEBI LODR) at that time.
- SEBI issued a clarification on 30th March 2022 that an RPT that has been approved by the audit committee prior to 1st April 2022, which continues beyond such date and

becomes material as per the revised materiality threshold shall be placed before the shareholders in the first general meeting held after 1st April 2022.

- Thereafter on 8th April 2022, SEBI issued a circular which said that, shareholders' approval for omnibus RPTs approved in an AGM shall be valid upto the next AGM. Further in case of omnibus approvals for material RPTs, obtained from shareholders in general meetings other than AGMs, the validity of such omnibus approvals shall not exceed one year.
- At the beginning of financial year 2022-23, as per the multiyear contract with JVC, the estimated transaction value at that time was not expected to cross the ceiling prescribed for Material Related Party Transaction (under Companies Act OR SEBI LODR). Accordingly, approval of shareholders was not taken for this PSOMA at the AGM held on 30th August 2022.
- However, it was observed and assessed subsequently that the multiyear contract with JVC is likely to exceed the ceiling of Rs. 1000 Crore in the FY 2022-23.

Background of Issue 2

- NTPC has been doing transactions with PTC India Ltd where NTPC has invested 4.05% and same percentage of investment is held by other 3 promoters. Total shareholding of promoters in PTC India Ltd is 16.22% and remaining shares are held by public.
- NTPC hasslso been doing transactions with one Energy Efficiency Services Ltd (EESL) where NTPC is a JV partner with other 3 public sector undertakings. Government
- nominee directors are appointed by Government of India on the board of directors of PTC India Ltd and EESL.

Background of Issue 3

- Regulation 2(1)(zc) of SEBI LODR lists out certain transactions which shall not be considered as RPT.
- The Institute of Company Secretaries of India (ICSI) has issued a Guidance Note on Related Party Transactions (RPT) wherein a draft format of RPT policy is given which says that for certain RPTs, separate approval under RPT policy shall not be required. Certain RPTs other than those mentioned in Regulation 2(i)(zc) of SEBI LODR are also given in this list.

Guidance sought by the Company:

a) **Issue 1 - Validity of Shareholders approval**

   i. Whether the approval of multiyear agreement with JVC taken from the shareholders in the 39th AGM held on 18th September 2015 is still valid?

b) **Issue 2 — RPTs with companies where government nominee directors are on the board of directors of related party:**

   i. Whether the approval of audit committee of NTPC is required for transactions between NTPC and PTC India Limited & EESL, where nominee directors are appointed by Government of India?

c) **Issue 3 — Applicability of ICSI guidance note on exemptions of certain transactions with related party:**
   i. Whether the above guidance given by ICSI can be applied and included in the RPT policy of the Company?"

Guidance by SEBI

For Issue 1
SEBI stated that shareholders resolution passed by NTPC on September 18, 2015 did not have time limit mentioned for which approval from members was taken. SEBI LODR was made effective from December 2015. Resolution passed by NTPC was in September 2015. So, resolution approving material related party transaction was not in terms of provisions of LODR.

Further SEBI stated that as per April 08, 2022 SEBI Circular, omnibus approval of shareholders for material RPTs taken in an AGM shall be valid upto the date of the next AGM for a period not exceeding fifteen months. In case of omnibus approvals for material RPTs, obtained from shareholders in general meetings other than AGMs, the validity of such omnibus approvals shall not exceed one year." So, validity of omnibus approval taken by NTPC in September 2015 would be valid for one year only. Hence validity of resolution approving material related party transaction would be one year and that same resolution needs to be brought before the members of NTPC in the upcoming AGM if it crosses materiality threshold.

For Issue 2
Regulation 23(5) of the LODR states audit committee approval and members approval would not be required if transactions entered into between two government companies. NTPC stated that they have government nominees appointed on Energy Efficiency Services Limited ("EESL"). and PTC India Limited ("PTC"). NTPC has transactions with PTC India Limited for dividend, sitting fees of Nominee Directors and consent of NTPC is required for MD appointment. NTPC hence sought guidance whether these entities would be considered as 'government companies' and can exemption be claimed under Regulation 23(5) of LODR?

SEBI stated that, neither EESL nor PTC are government companies as defined under sub-section (45) of section 2 of the Companies Act, 2013. Hence, exemption under Regulation 23(5) is not applicable and prior approval of audit committee as per the provisions of Regulation 23 would be required for RPTs with PTC or EESL, as the case may be.

For Issue 3:
NTPC highlighted that ICSI in its Guidance Note on Related Party Transactions has specified additional transactions that are exempted from the purview of related party transactions. Whether those additional exemptions would be valid? SEBI stated that LODR clearly specify the types of transactions with related parties which are not to be considered as a related party transaction. Therefore, any transactions specified by Institute of Company Secretaries

of India or any other authority in their suggested RPT policy, in so far as they are at variance with the express provision under Regulation 2 (1) (zc) of the LODR Regulations, are not relevant for the purpose of granting an exemption from the purview of Related Party Transactions.

Informal guidance can be accessed at the below link:
https://www.sebi.gov.in/enforcement/informal-guidance/may-2023/informal-guidance-request-received-from-ntpc-limited-with-respect-to-related-party-transactions-rpts-under-regulation-23-of-the-securities-and-exchange-board-of-india-listing-obligations-and-disclo-s_72115.html

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Informal Guidance by Securities and Exchange Board of India on continuous applicability of provisions of Corporate Governance in the context of applicability of Business Responsibility and Sustainability Reporting

Background

- Nectar Lifesciences Limited ('Company/Nectar') is listed on Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE'). Nectar was falling under top 1000 listed entities based on market capitalization as on March 31, 2021. But for FY 2022 and FY 2023 it was not covered under top 1000 listed entities based on market capitalisation.
- Regulation 34 of SEBI (Listing and Disclosure Obligation) Regulations 2015 ('LODR') read with SEBI circular dated May 10, 2021 ('BRSR Circular') made filing of Business Responsibility and Sustainability Reporting ('BRSR') in new format mandatory for top 1000 listed entities based on market capitalization with effect from FY 2023.
- As per Regulation 3(2) of LODR, provisions of LODR which become applicable to listed entities on basis of market capitalization criteria shall continue to apply to such entities even if they fall below such thresholds. This amendment was inserted in LODR with effect from May 5, 2021.
- As Nectar was falling under top 1000 listed entities as on March 31, 2021 it filed Business Responsibility Report for FY 2021 in old format.

Clarification sought by Company:

- Now the question that arises is that whether Nectar will have to file BRSR report for FY 2022 and FY 2023 also in new format as it was falling under top 1000 listed entities as on FY 2021 but not thereafter? i.e. Whether BRSR is applicable to the company for the financial year 2022-2023 and perpetually (as envisaged by Regulation 3(2) of LODR)?

Clarification by SEBI:

- SEBI considered the submissions and cited relevant text of Regulation 34(2)(f) of SEBI LODR which states that: *"(f) for the top one thousand entities based on market capitalization of a BRR describing initiatives taken by the listed entities from an environmental, social and governance perspective, in format as specified by board from time to time:"*
  Provided that *the requirement of submitting a BRR shall be discontinued after the financial year 2021–22 and thereafter, with effect from the financial year 2022–23, the top one thousand listed entities based on market capitalization shall submit a BRSR in the format as specified by the Board from time to time.*
  Provided further that *even during the financial year 2021–22, the top one thousand listed entities may voluntarily submit a BRSR in place of the mandatory BRR…"*
- Further SEBI cited Regulation 3(2) of LODR regulations which states that:
  "The provisions of these regulations which become applicable to listed entities on the basis of market capitalization criteria shall continue to apply to such entities even if they fall below such thresholds." This sub regulation was made effective from May 5, 2021, i.e., it was not in existence as on March 31, 2021 (when Nectar was covered in top 1000 listed entities).

- Further as per Para 7 of BRSR, *"In terms of the aforesaid amendment, with effect from the financial year 2022-2023, filing of BRSR shall be mandatorily for the top 1000 listed entities (by market capitalization) and shall replace existing BRR…"* Therefore, SEBI clarified from above regulations and circular that until 2021 -2022 the top 1000 listed entities based on market capitalization had to submit BRR in their annual report, thereafter from financial year 2022-2023, such listed entities were required to submit BRSR.
- Further by virtue of Regulation 3(2) of LODR, any listed entity which is amongst 1000 listed entities in the financial year ending on March 31, 2022 or any financial year thereafter, would be required to BRSR report for all upcoming financial years.
- SEBI stated that as the **Company was in the top 1000 listed entities only for the financial year ending March 31, 2021 so its** obligation under aforesaid provision was limited to the submission of BRR for that financial year i.e. 2020-21. As Nectar **was not in the list of top 1000 listed entities based on market capitalisation as on March 31, 2022 and March 31, 2023**, therefore the requirement under regulation 34(2)(f) and the proviso thereof does not become applicable to Nectar. Further, since Regulation 3(2) was inserted with effect from May 5, 2021, in context of regulation 34(2)(f), **it shall apply only to the entities who were in top 1000 listed entities as computed on March 31, 2022**.
- Therefore, SEBI stated that as the Company was in top 1000 listed entities only in the financial year ending on March 31, 2021 and not thereafter, the company was not required to continue the submission of BRR. Further Company was not required to submit the BRSR under regulation 34(2)(f) of the LODR regulations.

Informal Guidance can be accessed at below link:

https://www.sebi.gov.in/enforcement/informal-guidance/may-2023/request-for-informal-guidance-by-way-of-an-interpretative-letter-under-securities-and-exchange-board-of-india-informal-guidance-scheme-2003-regarding-the-applicability-of-business-responsibility-_72064.html

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Whether penal action relating to freezing of shares would amount to Encumbrance?

Encumbrance is defined under Regulation 28(3) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('SEBI SAST') . The definition reads as follows:

[(3) For the purposes of this Chapter, the term "encumbrance" shall include, -

(a) any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly;

(b) pledge, lien, negative lien, non-disposal undertaking; or

(c) any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly.]

The term 'Encumbrance' in defined in an inclusive manner. Hon'able Rajasthan High Court in the matter of Aditya Cement Staff Club vs Union of India and Ors, RLW 2004 (1) Raj 396, 2003 (4) WLC 663 has stated that, "The scope of an inclusive definition cannot be restricted to those categories only which occur in the definition, but an inclusive definition will extend to so many other things ordinary falling within the parent expression, which are not talked of in the section". It means inclusive definition cannot be restricted to events or categories mentioned in the definition.

Definition of Encumbrance provides for certain events but it also provides for certain characteristics that may amount to Encumbrance viz. any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly.

This definition of Encumbrance is referred under Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) , Regulations 2015 ['SEBI LODR'] for the purpose of disclosure of Encumbrance under shareholding pattern as per Regulation 31 of SEBI LODR in the format prescribed thereunder. . .

Now if we further dwell deep into this subject, we would get some precedents wherein regulatory authorities and judiciary have thrown light on this subject. SEBI in its Adjudication Order dt: March 31, 2020 had stated as follows, " Under Regulation 28(3) of SAST Regulations which is any way an inclusive provision to take into its ambit all kinds of restrictions on transferability of shares, the words, "by whatever name called" assume much significance when seen in light of inclusivity of the provision. These words are intended to include all encumbrances and restrictions and not to limit the applicability of the obligations only with regard to pledge, lien or other similar transactions. If the intent of regulation was to limit the scope of 'encumbrance' to pledge, lien and similar transactions only, then the words "by whatever name called" would not be necessary in regulation 28(3). ". This again reiterates the principle of encumbrance as stated above. So, it means that any restriction on free transferability and marketable title of shares would be considered as Encumbrance as per SEBI SAST

To further get some insight on this question let us read Reg. 31(4) of SEBI SAST

Regulation 31(4) of SEBI SAST, "The promoter of every target company shall declare on a yearly basis that he, along with persons acting in concert, has not made any encumbrance, directly or indirectly, other than those already disclosed during the financial year" (Emphasis supplied)

Reg 31(4) states that promoter on behalf of PAC shall declare that they have not made any encumbrance which is not disclosed too public.

On perusing these wordings, it can be inferred that encumbrance created/initiated by the Promoter or Promoter Group or Persons Acting in Concert voluntary would be covered under the term Encumbrance.

If we read the above two inferences jointly it can be seen that any restriction on free transferability and marketable title of shares and which is created voluntarily by the shareholder would be considered as Encumbrance. We would get another aspect of Encumbrance of Shares if we refer the disclosure obligations and formats pertaining to that notified under SEBI SAST. Formats for disclosure of Encumbrance was notified by SEBI vide its circular dt: August 5, 2015. SEBI further vide its circular dt: August 7, 2019 had stated certain additional formats if encumbered holding of promoter exceeds certain specified limits. On conjoint reading of formats provided by SEBI Circular dt: August 5, 2015 with August 7, 2019 it can be seen that encumbrance is generally done for raising funds.

Now if we again read conjointly above three conclusions it can be inferred as follows;

1. Encumbrance is voluntary in nature
2. It is restriction on free and marketable title.
3. It is done for raising funds for business or personal use.

Question now arises is that whether freezing of shares pursuant to non-compliance with provision of SEBI LODR whereby penal action of freezing of shares is done pursuant to SEBI circular dt: January 22, 2020 on Non-compliance with certain provisions of SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 and Standard Operating Procedure for suspension and revocation of trading of specified securities ['SEBI SOP Circular']can be considered as encumbrance?

Let us understand this with an example. ABC Ltd fails to have composition of board of directors as per SEBI LODR for one quarter. As it was a continuous non-compliance, stock exchanges initiated penal action against ABC Ltd. Company failed to pay the penalty and rectify the non-compliance within the time specified. Stock exchanges pursuant to exercise of powers under SEBI SOP Circular freezed promoters demat account including shareholding of company held by them. Whether this kind of freezing would be termed as encumbrance?

Let us apply the conclusions drawn above to this situation.

Whether encumbrance is voluntary: no

Whether it is for raising funds: no

Whether it is restriction on free and transferable title: yes.

So, if we see above freezing of shares does not fulfil all conditions of encumbrance. It only fulfils one condition that is it is restriction on free and marketable title. So, as we had seen above to be termed as Encumbrance under SEBI SAST, it is necessary that all conditions shall be fulfilled. But as checked above freezing of shares is not complying with all conditions. So, it can be inferred that freezing of shares is not encumbrance.

So now question arises is that whether this would require disclosure under Reg. 31(1) states as follows: .

The promoter of every target company shall disclose details of shares in such target company encumbered by him or by persons acting in concert with him in such form as may be specified:

Provided that the aforesaid disclosure requirement shall not be applicable where such encumbrance is undertaken in a depository.

Securities Appellate Tribunal vide its various orders have been mentioning about importance of disclosures under various SEBI Regulations.

Hon'ble SAT in the matter of Coimbatore Flavors & Fragrances Ltd. vs SEBI (Appeal No. 209 of 2014 order dated August 11, 2014), has also held that "*Undoubtedly, the purpose of these disclosures is to bring about more transparency in the affairs of the companies. True and timely disclosures by a company or its promoters are very essential from two angles. Firstly; investors can take a more informed decision to invest or not to invest in a particular scrip secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same*." Further in the matter of Appeal No. 66 of 2003 -Milan Mahendra Securities Pvt. Ltd. vs. SEBI–the Hon'ble SAT, vide its order dated April 15, 2005 held that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market*." Disclosure plays a very important role in securities market. Timely disclosures of all relevant information are essential for creating a level playing field in securities market.

In this regard let us try and understand the background for introduction of 1st proviso to reg 31(1) SEBI Board Meeting dt: August 6, 2021 stated that, "*Sub-regulations (1) and (2) of Regulation 31, inter-alia, requires promoter/promoter group to disclose details of encumbrance, release and invocation of shares in the target company. 4.4. Since, disclosures of creation, invocation and release of encumbrance registered in depositories are also now system driven, thus obligation of promoter/promoter group for these disclosures is also proposed to be done away with.*" The reason for doing away disclosures pertaining to encumbrance was that the disclosures have become system driven. As per 1st proviso to Reg. 31(1) of SEBI SAST, all encumbrances that are marked in demat need not be disclosed to stock exchange as they already get displayed on stock exchange through system driven disclosure. So, it can be inferred that disclosure either manual or automated form is necessary.

But as discussed 'freezing of shares' is not encumbrance. So, 1st proviso to Reg 31(1) of SEBI SAST wouldn't be of any help to us. It will not be voluntarily marked in demat account by Promoters of the company.

But if we see the background with which this proviso is inserted it can be seen that pursuant to system driven disclosure encumbrances once marked in demat account becomes available to public at large on stock exchange platform. Accordingly, it needs to be seen whether information relating to freezing of shares is made available on website of stock exchanges? Details of SEBI SOP Circular non-compliance are also made on the website of stock exchanges. So, it can be inferred that they need not be disclosed under Reg. 31(1) of SEBI SAST.

Further if we see the other leg of disclosure under Regulation 31(4) of SEBI SAST it states as follows, "The promoter of every target company shall declare on a yearly basis that he, along with persons acting in concert, has not made any encumbrance, directly or indirectly, other than those already disclosed during the financial year"

This disclosure is much wider in scope that disclosure of encumbrance under Reg. 31(1). Regulation 31(4) of SEBI SAST asks the promoter to declare that no encumbrance is created other than those disclosed to stock exchange. So, it is confirmation from promoter on behalf of promoter group and Persons acting in Concert that there is no encumbrance created other than those disclosed to stock exchange. As we have seen that freezing of shares is not encumbrance.

Taking this understanding if promoter declares under Reg. 31(4) of SEBI SAST that there is no encumbrance would this declaration be correct? Even if the provision does not expressly mention about such kind of disclosures and also it does not mention about what can be done in such scenarios it is recommended that on freezing of shares a note may be inserted in declaration given under Reg. 31(4) of SEBI SAST giving details of freezing of shares of Promoter.

So, on freezing of shares of promoter even if no express disclosure is required under Reg. 31(1) but a mention about the same under Reg. 31(4) of SEBI SAST is recommended. Further any clarity in this regard from regulator would be welcome.

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This article is published in Taxguru. The below is the link for reference: -

https://taxguru.in/sebi/penal-action-relating-freezing-shares-amount-encumbrance.html

CSR-2 to continue as a separate web form for FY 2022-23 also!!

I. Introduction:

There have been many changes in Corporate Social Responsibility (CSR) related provisions and the Ministry of Corporate Affairs (MCA) has been continuously working on tightening of CSR related disclosures. One such disclosure is the reporting of CSR activities of a company in previous year in form CSR-2, which is to be filed post the filing of financial statements with MCA.

II. Amendment:

As per Rule 12(1B) of the Companies (Accounts) Rules, 2014, this form CSR-2 is to be filed as an addendum to Form AOC-4 which is the form prescribed for filing of financial statements by companies. Form CSR-2 has been introduced from FY 2020-21. For the first two financial years (i.e., FY 2020-2021 and FY 2021-2022), instead of filing as addendum to Form AOC-4, MCA had prescribed the Form CSR-2 as a separate web-form post filing of Form AOC-4.

In a recent development, the MCA has issued a notification dated 31st May 2023 regarding the filing of Form CSR-2 for the financial year 2022-2023. **The notification highlights submission of Form CSR-2 separately** for this financial year also (like previous two financial years), **on or before March 31, 2024, after filing the specified forms AOC-4 or AOC-4-NBFC (Ind AS) or AOC-4 XBRL.** These amendments come into force on the date of their publication in the Official Gazette.

There are no filing fees for the said form.

The link to notification can be accessed here: -

https://www.mca.gov.in/bin/dms/getdocument?mds=hkjC9jSSH4nRkzYxvO2a5w%253D%253D&type=open

III. Companies who have calendar year as financial year:

The Companies Act, 2013 permits companies which are holding companies, subsidiaries or associate companies of entities incorporated outside India and need to prepare consolidated financial statements, to follow different financial years other than from April to March. There are many such companies in India who follow calendar year (January to December) as financial year. Such companies are required to convene their Annual General Meetings for the financial year ended on 31st December 2022 latest by 30th June 2023 and thereafter file Form AOC-4 for filing their financial statements for FY 2022.

The text of the notification says *"for the financial year 2022-2023, Form CSR-2 shall be filed separately on or before 31st March 2024."* So an ambiguity arises that in case of above-mentioned companies, what will be the due date for filing Form CSR-2 for the financial year

2022 (which has ended on 31st December 2022)? Whether due date for such companies is 31st December 2023 OR 31st March 2024?

It is recommended that all such companies file the Form CSR-2 immediately after filing of Form AOC-4 without waiting for the last date, and preferably before end of financial year 2023.

IV. Conclusion:

The CSR provisions outlined in the Companies Act aim to ensure that businesses contribute to societal development and environmental sustainability. Companies are mandated to allocate a certain percentage of their profits towards CSR initiatives and report their activities through Form CSR-2. Timely compliance with CSR reporting requirements holds several benefits for companies, including transparency and stakeholder confidence, compliance with legal obligations, and make an impactful contribution.

The filing Form CSR-2 for the financial year 2022-2023 provides companies with additional time to fulfill their CSR reporting obligations. Businesses should take advantage of this extended deadline to ensure accurate and timely reporting of their CSR activities through Form CSR-2. By doing so, companies can demonstrate their commitment to social responsibility and contribute meaningfully to the betterment of society.

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Recent Changes in Form 3 LLP

Ministry of Corporate Affairs (MCA) vide its notification dt: June 2, 2023 **amended the format of filing Form 3** under the Limited Liability Partnership (LLP) Rules, 2009 vide Limited Liability Partnership (Amendment) Rules, 2023. The amended rules will come into effect from June 2, 2023.

A. Purpose of Filing Form 3 LLP:

Pursuant to Section 23(2) and (3) of The Limited Liability Partnership Act, 2008 read with Rule 21(1) of Limited Liability Partnership Rules, 2009, **following functionalities can be availed by the users through this webform Form 3**:

Purpose 1: Application for filing information with regard to LLP Initial Agreement.

Purpose 2: Application for filing information with regard to changes in LLP Agreement

B. Recent changes in Form 3 LLP w.e.f June 2, 2023:

When Form 3 LLP is being filed for purpose 1 as mentioned above, the details of each partner contributing money or property or other benefit or to perform services and their profit-sharing ratio had to be mentioned in the table given in the Form 3 LLP manually.

When Form 3 LLP is being filed for purpose 2 i.e., "Application for filing information with regard to changes in LLP Agreement", the details of each partners' obligation to contribute money or property or other benefit or to perform services and their profit-sharing ratio, after change in LLP agreement and details of designated partners and partner appointed, if any had to be mentioned in the table provided in the form.

Now post amendment some details in Form 3 LLP would be prefilled. These prefilled details would be available in excel file. Details of DP/Partner will be auto-prefilled in the excel file and users only need to mention the relevant change and the same will have to be uploaded along with Form 3 LLP. So, mentioning details of Designated partner/Partners in Form 3 LLP manually is done away with.

C. Further it needs to be highlighted that following additional columns are added in Excel file for all purposes:

a. Whether Body Corporate Partner?
b. Type of Body Corporate
c. LLPIN/CIN/FCRN/FLLPIN/Other Identification Number
d. Details of LLPIN/CIN/FCRN/FLLPIN/Other Identification Number
e. Name of Body Corporate

D. We would further understand changes done in Excel utility of Form 3 LLP with the help of below scenarios:

Scenario 1) In case of change in partner(s)

Scenario 2) In case of change in partner's contribution and % of profit sharing

Scenario 1

1. Where "Addition of Partner/DP" has been entered in "Type of Change"

Existing details of Partner and Designated partners details will be auto-prefilled in the excel file and only appointed partner/Designated partner details can be added in fresh row.

2. Where "Deletion of Partner/DP" has been entered in "Type of Change"

Existing details of Partner and Designated partners details will be auto-prefilled in the excel file and only resigned partner/Designated partner details has to be selected/tick marked from drop down option available in the column .

3. Where "No Change" has been entered in "Type of Change"

All details of Partner and Designated partners details will be auto-prefilled in the excel file and none of the field will be Editable.

Scenario 2

Where there is "Change in partner's contribution and % of profit sharing"

In such scenario, the following columns will be editable in the Excel file i.e. these details will have to be manually entered

1. Form of contribution (Conversion/Cash/ Other than cash)
2. Monetary value of contribution
3. % of Profit sharing

E. What's the impact of change of this amendment?

This will be a step forward for ease of doing business. Downloading and Editing details in the excel files will be more convenient while uploading revised data. This can also help in reducing the load on V3 portal of MCA and help the V3 portal in collation of accurate data and displaying accurate data in all future LLP related forms being filed on MCA (unlike the present scenario where incorrect details are getting prefilled from V3 portal in Form 11).

This change indicates that in future, there can be many other forms on V3 portal where data will be mandated to be filled in excel sheet, so as to enable V3 portal of MCA to function better.

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ROC's Vigilance on Private Placement Provisions: Imposing Penalties on Non-compliant Companies

1. Introduction:

There are multiple ways of raising funds: One amongst those is Private Placement.
Whenever a company acquires finance from a specified group of persons against issuance of securities of the company, this corporate action is called private placement. The conditions and compliances relating to the private placement are discussed in section 42 of the Companies Act, 2013 read with rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

2. Key provisions relating to Private Placement:

Section 42 and above-referred Rules prescribe that private placement offer for each kind of security shall not be made to more than 200 persons in aggregate, in one financial year. Also, the procedures like keeping subscription money in separate bank accounts till allotment and utilisation of subscription money only after filing a return of allotment in form PAS-3 are prescribed in section 42 and its Rules.

Section 42(6) states a timeline of 60 days for making allotment after receipt of money. The subsection further states that if allotment of securities is not done within the prescribed time, the money must be returned to the applicant within 15 days from the end of 60 days and if the money is not so returned, then interest must be paid on such money. Further after completion of these 15 days, the application money received will be considered as deposits accepted by the Company,

Since section 42 deals with a very crucial corporate action, the consequences of non-compliance with this section are also serious. Subsections 9 & 10 of section 42 prescribe penalties for non-compliance with any provisions of section 42 and subsection 11 states that private placement issue not made in contravention of section 42(2), i.e., if made to more than 200 persons in aggregate, in one financial year, it shall be considered as a public issue of securities and SEBI regulations shall become applicable to such issue.

Subsection 10 of section 42 prescribes that, if the company accepts money in contravention of section 42, then the company and its directors shall be liable to a penalty that may extend a maximum of up to RS. 2 Crores and the company is required to refund all the money received against the allotment of securities.

3. Precedents

Companies doing private placement and not complying with all the applicable provisions of private placement have been facing the flak from ROC. ROCs have been adjudicating on this matter for a while now. Recently, a company having to face harsh consequences due to non-compliance with section 42 was seen in the latest adjudication order passed by ROC Mumbai on 1st May 2023. In this order, ROC imposed heavy penalty on the company and ordered a refund of allotment money along with interest.

4. **Facts of the case.**
   As per the ROC order, the facts of the case were as under.

- **M/S. NV AUTOSPARES PRIVATE LIMITED** ("the Company") had taken money amounting to Rs. 13 Crores (without making any offer / issue of shares and issuance of private placement offer letter in PAS-4) over the span of 2 financial years – FY 2017-18 and FY 2018-19, from a total of four investors to bailout itself from financial distress. At the time of soliciting the money, the Company had promised that it shall allot shares to the investors under the private placement.
- Since the Company's account was classified as a non-performing asset and it was not allowed to open a separate bank account, the investors paid part of the share application money directly to the Company's banker as a one-time settlement agreement. Thereafter, company could open a separate bank account and the remaining money was deposited by the investors in that account.
- The Company showed the said amount as share application money pending allotment in the balance sheets and made payments out of such amount to the regulators and creditors but did not allot shares to the investors against the money.
- The investors did not get any copies of financial statements or notices of general meetings etc. for 4 years. Therefore, the investors complained to ROC in this behalf.

Company's contentions.

The Company through its written reply and oral submissions argued that,

- The Company never intended to make a private placement. Therefore, neither did it identify / shortlist persons to make offer (offerees) nor did it send any offer letter to anyone.
- Also, the Company presented before the ROC a letter from investors wherein the investor had referred the said money infused as financial assistance and not as share application money.
- The Company also alleged that the investors, in consultation with the Company's auditor and company secretary, showed the money as share application money without the notice and consent of the directors of the Company.

ROC's observations.

After considering the documents submitted by both the parties, written replies and oral submissions made before the adjudicating officer, the ROC noted that,

- The Company failed to identify the persons to whom private placement was to be made, also it did not send offer letter and application in form PAS-4 to prospective investors. The Company has not placed on record, the approval of shareholders for undertaking private placement of shares.
- The balance sheet of the Company for year ended 2018-19 showed amount of share application money pending allotment as Rs. 10,35,82.407/-, whereas the balance sheet for year ended 2019-20 showed the amount under same head as Rs. 13, 92, 19,042/-, which clearly means, the Company has accepted further share application money of Rs. 3,56,36.635/- without completing the earlier offer. No documents have been placed on record by the Company indicating that earlier offer had been withdrawn or abandoned.

- From the bank account statement of the Company, it was noticed that the complainants have directly paid the part of money to the bank for clearing the debt of the Company. Thereafter separate bank account was opened, and the

  remaining money was deposited therein. That means the Company has failed to open separate account in a scheduled bank for keeping the application money.
- The statutory auditor of the Company had qualified his report for FY 2019-20 saying that company has accepted the share application money but has not made allotment against the same within 60 days from receipt of money also it has not refunded the said money. The directors of the Company had taken note of this qualification in the Board of Directors' report and had replied that the management will decide later about allotment of shares or refund of money.
- This shows that Company had accepted share application money in contravention of subsections 2, 3, 5 & 6 of section 42 and had neither made allotment of shares within 60days of receipt of money, nor refunded the money within 15days from the end of 60th day.

Penalty imposed.

Considering the serious violation of section 42 of the companies act 2013 on the part of the company, the ROC imposed the following penalty on the company as per section 42(10).
- Rs. 2 Crores for financial year 2018-19 and Rs. 2 Crores for financial year 2019-20 i.e., total Rs.4 Crores for two financial years on the Company.
- Further the Company is also ordered to refund the money to the investors within 30 days from the date of order along with interest of 12%.

Other violations and consequences thereof.

Even though, the said ROC adjudication order talks of violation of section 42 only, there is one more violation on the part of the company in this case. Clause (vii) of definition of "deposits" provided under rule 2 (c) of the Companies (Acceptance of Deposits) Rules, 2014 says that, if allotment of securities is not done within 60 days from receipt of money and the said money is not refunded within 15 days from the end of 60th day, then such money shall become deposit under section 73 and the Company will have to undertake deposit related compliances. Further, these deposits related sections provide for criminal prosecution in case of non-compliance of these provisions. In the given case, the company has not treated the money as deposits and therefore has not done deposit related compliances.

Other Similar Adjudication Orders by ROC under Section 42

Name of the Company	Name of ROC	Details of Violation	Penalty on Company	Penalty on Director
Valleymonks Private Limited	Bangalore	• Company did not open separate bank account for receiving allotment money. • Filed MGT-14 after sending offer letter. • No mention of section 42 in	5000000 + refund of allotment money	50,00,000each on 2 directors

		board and shareholder resolution		
Burger King India Limited	Mumbai	• Company did not keep the allotment money in a separate bank account	2,00,000	1,00,000 each on 3 officers in default
Biocon Biologics Limited	Bangalore	• Company filed form PAS-3 with a delay of 100 days	1,00,000	total 6,13,000 on 7 officers in default
Krazybee Services Private Limited	Bangalore	• Company utilised allotment money before filing return of allotment in form PAS-3	13,000	total 65000 on 5 officers in default
Anand Rathi Wealth Limited	Mumbai	• Separate bank account was not opened	5,00,000	
Gozing Technology Private Limited	Delhi	• Delay in filing of EForm PAS 3 (pursuant to issuance of CCPS)	Rs 1,11,000/-	Rs 1,11,000/- each on 3 directors

Conclusion.
This order highlights the importance of compliance with section 42 and brings to notice the profound consequences of non-compliances. The companies should take into consideration all these factors before undertaking private placement and make sure that all the provisions are complied with.

Considering such exorbitant penalties, it is highly significant that companies be absolutely cautious about these compliances. Companies should ensure the below mandatory (but frequently missed) compliance for undertaking private placement: -

- Separate bank account be opened for receipt of share application money
- Keeping record of persons to whom private placement is made in Form PAS-5 format
- E-Form MGT-14 for special resolution or board resolution, as the case may be, is filed with ROC before circulating private placement offer letter (PAS-4) to offerees
- PAS-3 is filed before utilizing the application money,
- Contents of explanatory statements to notice convening shareholders meeting (especially details of registered valuer) should be verified and correctly inserted

These are some basic and frequently missed compliances which should be ensured for smooth process of fund raising via private placement and no penalty from Regulators in future.

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Cessation of LIBOR

Background

London Interbank Offer Rate ("LIBOR") serves as a globally accepted key benchmark interest rate. The loan products with variable interest rates were linked to LIBOR to determine final interest rates. Due to multiple allegations and manipulations surrounding it, the Financial Conduct Authority (FCA), UK in a press statement[1] dated March 05, 2021 announced that all London Interbank Offer Rate ("LIBOR") settings will either cease to be provided by any administrator or no longer be representative of:

- Immediately after December 31, 2021, in the case of all Pound sterling, Euro, Swiss franc and Japanese yen settings, and the 1-week and 2-month US dollar settings; and
- Immediately after June 30, 2023, in the case of the remaining US dollar settings.

Pursuant to same, Reserve Bank of India (RBI) issued various advisories and notifications advising to cease entering into new financial contracts that reference London Interbank Offered Rate (LIBOR) as a benchmark and instead use any widely accepted Alternative Reference Rate (ARR), by December 31, 2021.

Implication on ECB

The benchmark rate for foreign currency external commercial borrowings and trade credit was referring to LIBOR. Pursuant to press release issued by FCA, RBI in order to facilitate smooth transitioning from LIBOR linked overseas borrowings to market related benchmarks issued notification[2] almost 2 years beforehand. The said notification reflects the following changes:

Particulars	Prior to Notification	After Notification
Benchmark rate for Foreign Currency ECB's and Trade Credits:	6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing	Any widely accepted interbank rate or alternative reference rate (ARR) of 6-month tenor, applicable to the currency of borrowing
All-in-cost ceiling	Benchmark rate plus 450 bps spread	Benchmark Rate plus 550 bps spread: For existing ECBs linked to LIBOR whose benchmarks are changed to ARR. Benchmark rate plus 500 bps spread: For new ECBs.

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1 https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf

2 https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12204&Mode=0

The Triumphant Rise of ESG Compliances: Pioneering a Sustainable Future

Introduction

In a world plagued by unprecedented environmental challenges and social inequalities, a powerful movement has emerged, reshaping the landscape of business and finance. Enter the era of Environmental, Social, and Governance (ESG) compliances - a holistic approach that transcends mere profit-seeking and heralds a transformative paradigm shift. Capturing the hearts and minds of corporations, investors, and consumers alike, ESG compliances have swiftly become the cornerstone of responsible and sustainable business practices.

From the boardrooms of multinational corporations to the bustling trading floors of financial markets, the influence of ESG compliances has permeated every level of the global economy. This article seeks to illuminate the driving forces behind this transformative shift, shedding light on the benefits and challenges associated with ESG integration.

Attention to ESG

In recent years, Environmental, Social, and Governance (ESG) investing has gained significant traction as investors increasingly prioritize sustainability and responsible business practices. These in India have gained significant momentum. The transformative power of ESG investing and its profound impact on companies and society is to be looked at in a very comprehensive and significant manner. ESG investing is on a rising spree and goes beyond traditional financial analysis by considering a company's performance in environmental stewardship, social responsibility, and governance practices. Investors are increasingly recognizing that integrating ESG factors into investment decisions can enhance long-term value, mitigate risks, and align investments with their values and cautiously observing company's approach towards the same.

ESG-focused investing acts as a catalyst for affirmative change by encouraging companies to adopt sustainable practices. As investors increasingly prioritize ESG factors, companies face growing pressure to align their operations with sustainability goals. This includes reducing carbon footprints, promoting diversity and inclusion, ensuring responsible supply chains, and strengthening corporate governance.

The rise of ESG investing has amplified the importance of ESG compliance in companies. To attract ESG-conscious investors, companies must prioritize sustainability, transparency, and ethical practices. This shift in investor preferences is compelling companies to adopt ESG compliance measures, such as enhanced reporting and disclosure, setting measurable ESG goals, and establishing robust sustainability strategies.

Number Crunching in ESG: Investor Driven

Globally there is a round about $38 trillion invested in ESG funds, and this number is expected to reach $53 trillion in the coming years across the globe. Investors and more specifically ESG themed funds are directing their investments towards companies focusing on socially responsible investing and sustainable business growth. Investors are now moving towards sustainable investing which is also known as ethical investing or impact investing. They are building a portfolio of stocks wherein they aim to achieve financial returns in addition to promoting long-term ESG value.

Consequences of Non-Compliance

A recent high-profile example highlighting the impact of ESG compliance is one of a case where a popular name in investment banking industry took a decision to withdraw from a bond deal with an Indian conglomerate who is involved in various sectors. This move was in response to concerns regarding environmental impact. The withdrawal of ESG funds serves as a clear signal that ESG-focused investors expect companies to adhere to stringent ESG standards. It was observed that many ESG focused funds in their portfolio held companies that are facing flak on social and environmental and governance parameters. In a survey conducted by 'Economist', it was discovered that world's 20 biggest ESG funds had investments in fossil-fuel producers, oil producers, coalmining, gambling, alcohol, and tobacco. Presently, many ESG focused funds are taking steps and in process of modifying their investments. To aid the same, introduction of unified, regulated, and independent standards for ESG rating and reporting requirements is the need of the hour.

Regulator's Take

Securities market regulator has taken important steps to streamline areas of ESG Disclosures, ESG Ratings and ESG Investing. In March 2023 the Securities and Exchange Board of India (SEBI) came out with a holistic regulatory framework for ESG disclosures for India Inc, and rating agencies to facilitate a balanced approach for ESG. To enhance the reliability of ESG disclosures, the BRSR (Business Responsibility and Sustainability Report) Core has been established that contains a limited set of key performance indicators (KPIs), for which listed entities must obtain reasonable assurance. Initially top 150 listed companies in terms of market capitalization are expected to disclose and obtain a reasonable assurance on BRSR Core parameters. Eventually, the same will be extended to the top 1,000 listed entities. This along with ESG rating will help to enhance the reliability of ESG disclosures.

Expectation of investors and regulators from the company on ESG disclosures, transparency and assurance is increasing exponentially. This compliance has put an additional responsibility on the Board. The Board shall through its committees oversee overall ESG program focusing on associated risks, opportunities, and disclosures. Standardization of reporting framework will ensure correct disclosures in public domain. The Directors especially independent directors must ensure that management has in place appropriate systems, controls, policies, and processes to mitigate risks and monitor the regulatory changes.

ESG-focused investing is driving a paradigm shift in the business world, pushing companies to prioritize sustainable and responsible practices. The demand for ESG compliance from investors is reshaping corporate behaviour, promoting transparency, accountability, and positive societal impact. As more investors embrace ESG investing, companies will be incentivized to align with ESG principles, implement robust compliance measures, and work towards a sustainable future.

While recent cases demonstrate the increasing scrutiny on companies' ESG performance, it also underscores the broader trend of investors using their financial influence to drive positive change. The ESG imperative is not just a passing trend; it is transforming the way businesses operate and reshaping the future of investing, ensuring a more sustainable and responsible global economy.

Conclusion

ESG is no longer just a buzzword; it has evolved into a critical lens through which organizations are evaluated, celebrated, and held accountable. These multifaceted criteria serve as the compass guiding decision-making processes towards long-term value creation, fostering resilience, and enhancing stakeholder trust. Gone are the days when profit margins were the sole measure of success; now, a broader set of considerations encompasses the environment, social impact, and corporate governance.

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