ILAW

IMPERIAL LAW OFFICES

Legal Updates

November-December 2021

INDEX

1. BANKING & FINANCE

PROMPT CORRECTIVE ACTION (PCA) FRAMEWORK FOR NON-BANKING FINANCIAL COMPANIES (NBFCS)

The Reserve Bank of India ("**RBI**") on December 14, 2021, issued Prompt Corrective Action ("**PCA**") framework for Non-Banking Finance Companies ("**NBFCs**") by introducing three risk threshold categories[1]. The PCA framework for NBFCs will come into force on October 1, 2022, based on the financial position of NBFCs on or after March 31, 2022.

The objective of the framework is to enable supervisory intervention at the appropriate time and require the supervised entity to initiate and implement remedial measures in a timely manner, so as to restore its financial health. The PCA framework is also intended to act as a tool for effective market discipline. It does not preclude the RBI from taking any other action as it deems fit at any time in addition to the corrective actions prescribed in the framework.

PCA refers to restrictions imposed by the banking regulator on a lender's operations if the key financial parameters of these entities fall below a certain limit. Till now, the RBI used to impose PCA only on banks. The central bank had issued the revised Prompt Corrective Action (PCA) Framework for Scheduled Commercial Banks (SCBs) on November 2, 2021. But, with the NBFCs growing in size and complexity, the banking regulator felt it is necessary to introduce a similar framework for NBFCs as well.

This framework will apply to all deposit-taking NBFCs, excluding government companies, all non-deposit taking NBFCs in middle, upper and top layers (excluding - (i) NBFCs not accepting/not intending to accept public funds; (ii) government companies, (iii) primary dealers and (iv) housing finance companies).

❖ Tracking indicators

The central bank will track three indicators — capital to risk-weighted assets ratio (CRAR), Tier I ratio and net non-performing assets (NNPAs), including non-performing investments (NPIs).

In the case of core investment companies (CICs), the RBI will track adjusted net worth/aggregate risk-weighted assets, leverage ratio and NNPAs, including NPIs.

A breach in any of the three risk thresholds under the above-mentioned indicators could result in the invocation of PCA.

❖ PCA risk thresholds for NBFCs

According to the RBI framework, the apex bank will impose PCA on NBFCs if there is any breach of the three risk threshold. For instance, if the Capital to Risk (Weighted) Assets Ratio (CRAR) falls up to 300 bps below the regulatory minimum CRAR, Tier-1 capital ratio falls up to 200 bps below the regulatory minimum and Net NPA (non-performing assets) ratio goes beyond 6 per cent, the NBFC will fall under risk threshold -1.

The RBI will then impose restrictions on various business operations and will conduct special inspections and targeted scrutiny of the company. For an NBFC under threshold 1, the RBI will impose restrictions on dividend distribution/remittance of profits; also there will be restrictions on the issue of guarantees or taking on other contingent liabilities on behalf of group companies.

Similarly, if the CRAR falls more than 300 bps but up to 600 bps below the regulatory minimum and the tier-1 capital ratio falls more than 200 bps but up to 400 bps below the regulatory minimum and net NPA

[1] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/139PCANBFCSC3389782516C440DAF56D30473BF005B.PDF

shoots up beyond 9 per cent, the NBFC will fall into risk threshold-2. For such companies, in addition to the restrictions mentioned above, the RBI will impose restrictions on branch expansion.

If the CRAR falls 600 bps below the regulatory minimum, the tier-1 capital ratio falls more than 400 bps below the regulatory minimum and the net NPA is greater than 12%, the NBFC will fall in the risk threshold-3 category. In such cases, in addition to the mandatory actions of thresholds 1 and 2, the RBI will take appropriate restrictions on capital expenditure and will impose restrictions on variable operating costs.

Once an NBFC is placed under PCA, taking the NBFC out of PCA framework or withdrawal of restrictions imposed under the PCA framework will be considered if no breaches in risk thresholds in any of the parameters are observed as per four continuous quarterly financial statements, one of which should be an annual audited financial statement, the RBI said. Also, this will be based on the supervisory comfort of the RBI, including an assessment of the sustainability of profitability of the NBFC.

❖ **Corrective actions**

Based on the risk threshold, the RBI may prescribe mandatory corrective actions such as restriction on dividend distribution/remittance of profits, requiring promoters/shareholders to infuse equity and reduce leverage, and restriction on issue of guarantees or taking on other contingent liabilities on behalf of group companies (only for CICs).

Further, the central bank may also restrict branch expansion, impose curbs on capital expenditure other than for technological up-gradation within board-approved limits and restrict/ directly reduce variable operating costs.

Under discretionary corrective actions, the RBI may undertake the resolution of NBFC by amalgamation, reconstruction, splitting; file insolvency application under the Insolvency and Bankruptcy Code and issue show-cause notice for cancellation of certificate of registration and winding up of the NBFC.

RBI may also recommend to promoters/shareholders to bring in new management/board; remove managerial persons under the RBI Act, as applicable; seek removal of director and/or appointment of another person as director in his place; supersede the board under the RBI Act and appoint an administrator, among others. The central bank said the PCA framework for NBFCs will be reviewed after three years.

INTRODUCTION OF LEGAL ENTITY IDENTIFIER FOR CROSS-BORDER TRANSACTIONS

The Reserve Bank of India ("**RBI**") as per notification dated December 10, 2021[2], has made Legal Entity Identifier ("**LEI**") mandatory for cross-border transactions for capital or current account transactions of Rs 50 crore and above, from October 01, 2022. The LEI is a 20-digit number used to uniquely identify parties to financial transactions worldwide to improve the quality and accuracy of financial data systems.

The identifier norm has been introduced in a phased manner for participants in the over the counter (OTC) derivative, non-derivative markets, large corporate borrowers, and large value transactions in centralised payment systems.

The move seeks to further harness the benefits of LEI and hence RBI has decided that AD Category I banks, with effect from October 1, 2022, shall obtain the LEI number from the resident entities (non-individuals) undertaking capital or current account transactions of ₹50 crores and above (per transaction) under Foreign Exchange Management Act, 1999.

Further, once an entity has obtained an LEI number, it must be reported in all transactions of that entity, irrespective of transaction size. AD Category-I banks shall have the required systems in place to capture the LEI information and ensure that any LEI captured is validated against the global LEI database available

[2] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOT1375CB7650223C74E4EA18E95F06C242143.PDF

on the website of the Global Legal Entity Identifier Foundation (GLEIF).

- **GENERAL PERMISSION GRANTED TO SCHEDULE COMMERCIAL BANKS FOR INFUSION OF CAPITAL IN OVERSEAS BRANCHES AND SUBSIDIARIES AND RETENTION, REPATRIATION OR TRANSFER OF PROFITS IN/FROM SUCH CENTERS**

The Reserve Bank of India ("RBI") issued a notification dated December 08, 2021,[3] regarding the caption. Presently, banks incorporated in India are required to obtain prior approval of the RBI for the following instances:

(a) infusion of capital in their overseas branches and subsidiaries; or
(b) retaining profits in these centres and repatriate/ transfer the profits.

However, with the aforesaid notification, prior approval of RBI will not be required for the aforesaid activities, provided such banks satisfy the regulatory capital requirements. Instead, such banks should obtain prior approval of their board in this regard.

Furthermore, it has been clarified that, while considering such proposals, banks shall also analyze all relevant aspects including inter alia the business plans, home & host country regulatory requirements and performance parameters of their overseas centres. Banks shall also ensure compliance with all applicable home and host country laws and regulations.

Applicability: The aforesaid general permission is applicable to all Scheduled Commercial Banks other than foreign banks, Small Finance Banks, Payment Banks and Regional Rural Banks. It may be noted that eligible banks unable to satisfy regulatory capital requirements shall continue to obtain prior approval RBI for aforesaid instances.

Reporting: All instances of infusion of capital and/ or retention /transfer/ repatriation of profits in overseas branches and subsidiaries shall be reported to the (a) Chief General Manager-in-Charge, Department of Regulation, Central Office, Mumbai; and (b) with a copy to Chief General Manager-in-Charge, Department of Supervision, Central Office, Mumbai within 30 days of such instances.

Our Comment: The purpose behind this move is to provide operational flexibility to banks. It will definitely bring progress in overseas capital infusion or transactions by the banks. Also, it will remove all the delays used to take place for getting prior approval of RBI for such transactions, as now, banks can seek approval of their boards for the same.

[3] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CAPITALRETENTION224030BE0B1D422AA97C6043C8986190.PDF

2. INSOLVENCY & BANKRUPTCY

Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2021

The Insolvency and Bankruptcy Board of India ("**IBBI**") has recently on December 01, 2021, released the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2021[4] ("**Guidelines**"). These Guidelines shall be effective from January 1, 2022, and shall supersede the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2021 issued on June 1, 2021.

❖ ***Need for these Guidelines as cited by the IBBI:***

Currently, under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the NCLT appoints Insolvency Professionals ("**IP**") to act as the Interim Resolution Professional ("**IRP**"), Resolution Professional ("**RP**"), or the Liquidator for corporate debtors under the corporate insolvency resolution process ("**CIRP**""), and to act as the RP or Bankruptcy Trustee ("**BT**") for individuals under individual insolvency resolution process.

In many cases under the CIRP, the party moving an application for the appointment of an IP proposes a name. However, in those cases where no such proposal is there, the NCLT makes a reference to the IBBI to recommend an IP for the appointment. The process of reference, recommendation and appointment entail some delay. Hence, to plug this gap, the IBBI has recommended the said Guidelines. Regarding individual insolvencies, these Guidelines are made pursuant to the Rules relating to individual insolvency resolution that empowers the IBBI to share a panel of IPs to be appointed as RPs and BTs.

❖ ***Guidelines are as follows-***

Panel of IPs

1. Under the Guidelines, the IBBI would appoint a common panel of IPs for appointment as IRP, Liquidator, RP and BT and share it with the NCLTs and the Debt Recovery Tribunals from which they may make the appointments.
2. This panel may be used for appointments under the pre-pack insolvency resolution process for MSMEs as well.
3. The panel will have a Zone-wise list of IPs based on their address as per their IBBI's registration records.
4. The IBBI has listed 15 Zones that cover all the states and the union territories of India.
5. A new panel will replace the earlier panel every six months.

Inclusion of the IPs to the Panel

An IP can be in the panel if-

1. No disciplinary proceeding is pending against him from the IBBI or the Insolvency Professional Agency of which he is a part;
2. No conviction lies against him in the last three years from a competent court; and
3. He holds an authorisation for the assignment which is valid till the validity of the panel.

Order of IPs in the Panel

1. The eligible IPs will be added to the panel in order of the volume of their ongoing assignments, such that the IP having the lowest number of assignments will be put on the top.

[4] Please find the guidelines at https://www.ibbi.gov.in/uploads/legalframwork/f812a9b138081ae0760bc224a478fdc4.pdf

2. In determining the order of the IPs on the panel, different assignments will be given different weightage. The order of assignments as per decreasing weightage is:
RP (corporate debtor)
RP (fast-track process)
IRP (corporate debtor), Liquidation, Voluntary Liquidation
IRP (fast-track process)
RP (individual insolvency), BT

Obligations of the IPs in the Panel

During the validity of the Panel, the empanelled IPs shall not-

1. Withdraw their interest to act as the IRP, Liquidator, RP or BT.
2. Decline to act as the IRP, Liquidator, RP, or BT after the appointment. An IP who declines to take up the assignment after appointment shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the IBBI.
3. Surrender their registrations to the IBBI or membership or authorisation for assignment to their respective agencies.

Disclaimers

1. The NCLT may require the IBBI to recommend an IP from or outside the Panel, in which case, the IBBI would accordingly make the recommendation.
2. An IP in the Panel can be appointed by the NCLT at its sole discretion.

A CORPORATE DEBTOR IS IMMUNE FROM ANY OFFENCE COMMITTED BEFORE COMMENCEMENT OF CIRP UNDER IBC: DELHI HIGH COURT

The Hon'ble Delhi High Court ("**High Court**") vide its recent judgment in the case of *Nitin Jain PSL Limited v. Enforcement Directorate*[5], has asserted that Section 32A of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") protects the resolution applicant from being liable for any offence that may have been committed by the Corporate Debtor before the initiation of the Corporate Insolvency Resolution Process ("**CIRP**"). Similarly, it extends the protection in respect of the properties of the Corporate Debtor once a CIRP initiates.

The High Court has also opined that the power to attach the Corporate Debtor's properties as conferred by Section 5 of Prevention of Money Laundering Act, 2002 ("**PMLA**") would cease to be exercisable once any one of the measures specified in Regulation 32 of the Liquidation Regulations, 2016 comes to be adopted and approved by the Adjudicating Authority (NCLT).

The instant case was a Civil Miscellaneous Appeal preferred in Delhi High Court pursuant to the interim order issued on 17 March 2021, via writ petition by Nitin Jain PSL Limited ("**Petitioner**") who was the liquidator of M/s PSL Limited ("**Corporate Debtor**"), seeking restraint against the Enforcement Directorate ("**Respondent**") from interfering in the liquidation process which had been set in motion, on the ground that authorities under Section 5 of the PMLA lack the authority to proceed against the liquidator and properties of a Corporate Debtor once a liquidation process is initiated following the provisions made in the IBC.

Similarly, Section 32A (1) and (2) of the IBC requires two conditions to be satisfied, firstly, the offense which may entail prosecution of the Corporate Debtor or proceedings against its properties must be one

[5] Nitin Jain PSL Limited v. Enforcement Directorate, W.P. (C) 3261/2021, CM APPLs 32220/2021

that was committed prior to the commencement of the CIRP. Secondly, the termination of liability for the offence committed is to occur the moment a resolution plan is approved. Therefore, in the present case, both the pre-requisites seem to have been fulfilled by the Petitioner, whereas, Section 5 of the PMLA only gets attracted when the person possesses any property constituting a money laundering offence.

Furthermore, to explain the scheme of IBC, the High Court has discussed the recent case of *Ghanashyam Mishra and Sons Pvt. Ltd. V. Edelweiss Asset Reconstruction Company*,[6] wherein the Hon'ble Supreme Court has upheld that Section 31(1) which was incorporated in terms of amending Act 26 of 2019, now clarifies that the resolution plan as approved by Adjudicating Authority, would also bind the Central and State Governments or any local authority to whom a debt is owed.

As discussed, Section 32A immunes the Corporate Debtor against any offence if CIRP commences after the commission of such offence. However, does the same provision also save erstwhile management of Corporate Debtor including promoters? The answer was categorically stated in the case of *JSW Steel v. Mahender Kumar Khandelwal*[7], wherein it was held that the investigating agency under PMLA can confiscate personal assets of the erstwhile promoters which are acquired through crime proceeds. It further added Section 32A (1)(a) provides a proviso stating after approval of the resolution plan it must not result in a change in the management or control of the corporate debtor to a person who was a promoter of erstwhile management of corporate debtor. Therefore, promoters are not immune from criminal investigations under PLMA for any offence they have committed and the new management taking over the company cannot be made liable for past wrongs of erstwhile management because the very essence of CIRP is to ensure that unacceptable persons must take the control of Corporate Debtor.

Accordingly, the Hon'ble High Court, to support its reasoning, has thoroughly relied on *Opto Circuit India Ltd. v. Axis Bank &Ors*.[8], wherein the Hon'ble Supreme Court has attempted to strike a correct balance between two competing legislation i.e. PMLA and IBC by deeply analyzing their respective legislative intent. The legislative intent behind IBC is to provide timely resolution of corporate insolvency as well as restructuring of indebted Corporate Debtors, and securing the interests of creditors, whereas PMLA bring investigative and adjudicatory mechanism into existence to try offences related to money laundering, attachment of confiscated properties and follow a course of criminal procedure.

The Hon'ble High Court, by its decision in favour of the Petitioner, has adopted reconciliation between IBC and PMLA and has given their respective spaces to operate in distinct spheres. It has reaffirmed and re-settled the position of law as already discussed in *Manish Kumar v. Union of India*[9] that IBC warrants protection to the Corporate Debtor and its properties liable to be confiscated for any offense (even under PMLA) committed before the initiation of CIRP proceedings by virtue of Section 32A of the IBC.

[6] Ghanashyam Mishra and Sons Pvt. Ltd. V. Edelweiss Asset Reconstruction Company 172021 SCC OnLine SC 313.
[7] JSW Steel v. Mahender Kumar Khandelwal 2020 SCC Online NCLAT 104
[8] Opto Circuit India Ltd. v. Axis Bank &Ors., 2021 SCC OnLine SC 55.
[9] Manish Kumar v. Union of India, (2021) 5 SCC 1

3. ENERGY & INFRASTRUCTURE

DISTRIBUTION LICENSEE HAS NO RIGHT TO APPROACH THE ELECTRICITY OMBUDSMAN: SUPREME COURT

The Hon'ble Supreme Court *vide* its recent decision in the case of *Uttar Pradesh Power Corporation Limited & Ors v. Kisan Cold Storage and Ice Factory & Ors.*[10] has clarified and reaffirmed that the right to approach the ombudsman under Section 43(6) of the Electricity Act, 2003 ("the **Act**") ("**Ombudsman**") is the exclusive right of the **Consumers**, and Distribution Licensee cannot avail the same as a right of appeal.

The instant case was an appeal preferred against the judgment dated 03.04.2019 of a Division Bench of the Allahabad High Court, wherein the Hon'ble High Court had declared Regulation 8.1 of the Uttar Pradesh Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2007 ("**CGRF Regulation**") to be ultra vires sub-sections (5), (6) and (7) of Section 42 of the Act and Rule 7 of the Electricity Rules, 2005.

Sub-section (5) of Section 42 of the Act (*Duties of Distribution Licensees and Open Access*) requires every Distribution Licensee to establish a forum for redressal of grievances of the Consumers in accordance with the guidelines framed by the State Commission, within six months from the appointed date or date of grant of a licence, whichever is earlier. Further, any Consumer, who is aggrieved by non-redressal of his grievances shall make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission under Sub-section (6).

In exercise of the power conferred under Section 181, empowering the State Commissions to make regulations, U.P. Electricity Regulatory Commission framed the CGRF Regulations in the year 2007. By the said CGRF Regulations, a forum was constituted for the redressal of consumer grievances. Regulation 8.1 of the CGRF Regulations provides that **any person** aggrieved by an order made by the forum may prefer a representation against such order to the Electricity Ombudsman.

The High Court opined that Section 42(6) of the Electricity Act restricts the representation against the decision of the forum constituted by a Distribution Licensee to Consumers only. Therefore, the Regulation providing an opportunity to a Distribution Licensee to prefer a representation to the Ombudsman is ultra vires Section 42(6) of the Act.

The Hon'ble Supreme Court, while upholding the High Court decision settled the position that CGRF Regulation, being a subordinate legislation cannot override the provisions entailed in Section 43(6) of the Act. Further, Section 43(6) of the Act makes it very clear that a representation before the Ombudsman against a decision of the forum can be preferred only by a Consumer and not by a Distribution Licensee. Therefore, Regulation 8.1(i) providing a right of representation to **any person** (including a Distribution Licensee) is completely contrary to Section 43(6) of the Act and is, therefore, ultra vires.

By this decision, the Hon'ble Supreme Court has reiterated and reserved the right to approach the Ombudsman as the sole right of the Consumers, who are aggrieved by the decision of the forum constituted by respective State Commissions under Section 42(5), much to the dismay of the Distribution Licensees.

[10] Civil Appeal No.7465 of 2021, decision dated December 07, 2021.

4. INCOME TAX

- **No requirement to obtain no objection/ no dues certificate from Income Tax Department during Voluntary Liquidation Process under the Insolvency and Bankruptcy Code, 2016[11].**

Insolvency and Bankruptcy Board of India ('IBBI') has recently clarified that in the case of the Voluntary Liquidation Process under I&B Code, 2016, there is no requirement to obtain no objection/ no dues certificate from Income Tax Department.

It was observed that it is a prevalent practice that the Liquidators obtain no objection/ no dues certificate from the income tax department which consumes substantial time and defeats the objective of time-bound completion of the process under the I&B Code,2016. Section 178 of the Income Tax Act, 1961 which, inter alia, obligates the liquidators to obtain no objection/ no dues certificate from the income tax department explicitly states that the provisions of I&B Code, 2016 will prevail over the said section. Further, it was noted that regulation 14 of IBBI (Voluntary Liquidation Process) Regulations, 2017 provides an opportunity for all the stakeholders to make claims in the liquidation process. Thus, it was clarified that Insolvency professional handling voluntary liquidation process is not required to seek NOC/NDC from the Income Tax Department as a part of compliance in the said process.

Our Comments: The clarification is a welcome step as it would cut down the unnecessary delay in the Voluntary Liquidation Process. It shifts the burden to Income Tax Department to file its claim under the liquidation process at par with all the other stakeholders.

- **Reassessment Conundrum[12]:**

Due to the onset of the Covid-19 pandemic followed by nationwide lockdown in March 2020, the citizens and authorities inter alia faced difficulties in complying with the statutory time limits. To provide relaxation as well as to avoid any adverse consequence to either party, the Government of India announced various relaxations by way of The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 ('Relaxation Ordinance, 2020') which was later followed by Relaxation Act, 2020. In pursuance to the power vested under Section 3 of Relaxation Act, 2020, the Central Government issued the following Notifications inter-alia extending the timelines prescribed under Section 149 for issuance of reassessment notices under Section 148 of the Income Tax Act, 1961 ('IT Act'):

Date of Notification	Original limitation for issuance of notice under Section 148 of the Act	Extended Limitation
31.03.2020	20.03.2020 to 29.06.2020	30.06.2020
24.06.2020	20.03.2020 to 31.12.2020	31.03.2021
31.03.2021	31.03.2021	30.04.2021
27.04.2021	30.04.2021	30.06.2021

The Explanations to the Notifications dated 31st March, 2021 and 27th April, 2021 issued under Section 3 of Relaxation Act, 2020 also stipulated that the provisions, as existed prior to amendment by Finance Act, 2021, shall apply to the reassessment proceedings initiated thereunder **('impugned notifications').**

On the other hand, the government of India vide Finance Act, 2021 amended the reassessment provisions of the IT Act namely section 147 to 151 with effect from 01.04.2021. On the basis of impugned notifications, the income tax department issued reassessment notices under erstwhile provisions of reassessment under the IT Act between the period of 01.04.2021 to 30.06.2021 **(impugned notices).**

[11] **CIRCULAR No. IBBI/LIQ/45/2021 dated 15th November, 2021**

[12] Mon Mohan Kohli Vs ACIT W.P.(C) 6176/2021

Apparently, the amended provisions of reassessment were also applicable during this period. The Assessee challenged the said impugned notices along with vires of the Explanations to the Notifications dated 31st March, 2021 and 27th April, 2021 issued under Section 3 of Relaxation Act, 2020.

Hon'ble Delhi High Court has quashed the impugned reassessment notices and the impugned notifications. The impugned notifications were held to be ultra vires of section 3 of the Relaxation Act, 2020. It was further held that Section 3(1) of the Relaxation Act empowers the Government/Executive to extend only the time limits and it does not delegate the power to legislate on provisions to be followed for initiation of reassessment proceedings. In fact, the Relaxation Act does not give power to Government to extend the erstwhile Sections 147 to 151 beyond 31st March, 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021.

Our Comments: This controversy is far from over as Chhattisgarh High Court has taken a view against the view taken by Delhi High Court whereas Allahabad High Court and Rajasthan High court has taken a view in consonance with Delhi High Court. Further, this issue is also pending for consideration in various other High Courts of the country. The issue is certainly debatable and will only be settled at Supreme Court.

5. CORPORATE (SEBI / MCA / RBI)

Non-compliance with certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("SEBI ICDR Regulations")

The Securities and Exchange Board of India ("**SEBI**") issued a circular on, November 23, 2021[13] ("**SEBI Circular 2021**") for amending circular no. SEBI/HO/CFD/DIL2/CIR/P/2019/94 dated August 19, 2019 ("**SEBI Circular 2019**") which specified the fines to be imposed by the Stock Exchanges on listed entities for non-compliance of certain provisions of SEBI (ICDR) Regulations.

Paragraph 9A has been inserted after Paragraph 9 of SEBI Circular 2019 circular, as reproduced below:

"*9A. The Stock Exchanges may deviate from the provisions of the circular, wherever the interest of the investors is not adversely affected, if found necessary, only after recording reasons in writing.*"

Our Comments: Earlier, SEBI Circular 2019, had mandated stock exchanges to impose the penalty of Rs 20,000 per day on listed companies that do not (a) complete the issue of bonus shares; (ii) complete the conversion of convertible securities and allot shares; or (iii) make the application(s) to concerned stock exchange for the listing of equity shares or obtaining trading approval within the timelines prescribed under SEBI (ICDR) Regulations, 2018.

With SEBI Circular 2021 amendment, stock exchanges now have the discretion to deviate from the provisions of SEBI Circular 2019 including the imposition of penalties, in cases where the interest of the investors is not adversely affected and if found necessary, for the reasons recorded in writing.

SEBI issues disclosure obligations of Listed Entities in relation to the Related Party Transactions

It may be noted that with Notification dated November 09, 2021 ("**RPTs Notification**"), Reg. 23 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 was revised, mandating listed companies that have listed specified securities to submit to the stock exchanges disclosure of Related Party Transactions (RPTs) in the format specified by SEBI from time to time.

Pursuant to the aforesaid revision, the circular dated November 22, 2021[14], ("**RPTs Disclosure Circular**") provides for a list of information, as listed below, to be placed before the audit committee for approval and the shareholders for consideration of RPTs.

A. Information to be placed Before Audit Committee for approval of RPTs:

(i) Type, material terms and particulars of the proposed transaction;
(ii) Name of the related party and its relationship with the listed entity or its subsidiary, including nature of its concern or interest (financial or otherwise);
(iii) Tenure of the proposed transaction (particular tenure shall be specified);
(iv) Value of the proposed transaction;
(v) The percentage of the listed entity's annual consolidated turnover, for the immediately preceding financial year, that is represented by the value of the proposed transaction (and for a RPT involving a subsidiary, such percentage calculated on the basis of the subsidiary's annual turnover on a stand-alone basis shall be additionally provided);

[13] Please find the notification at https://www.sebi.gov.in/legal/circulars/nov-2021/non-compliance-with-certain-provisions-of-sebi-issue-of-capital-and-disclosure-requirements-regulations-2018_54130.html

[14] Please find the notification at https://www.sebi.gov.in/legal/circulars/nov-2021/disclosure-obligations-of-listed-entities-in-relation-to-related-party-transactions_54113.html

(vi) If the transaction relates to any loans, inter-corporate deposits, advances or investments made or given by the listed entity or its subsidiary:

(a) details of the source of funds in connection with the proposed transaction;

(b) where any financial indebtedness is incurred to make or give loans, inter-corporate deposits, advances or investments:

- nature of indebtedness;
- cost of funds;
- and tenure;

(c) terms, including covenants, tenure, interest rate and repayment schedule, whether secured applicable or unsecured; if secured, the nature of security; and

(d) the purpose for which the funds will be utilized by the ultimate beneficiary of such funds pursuant to the RPT.

(vii) Justification as to why the RPT is in the interest of the listed entity;

(viii) Copy of the valuation or other external party report, if any such report has been relied upon;

(ix) Percentage of the counter-party's annual consolidated turnover that is represented by the value of the proposed RPT on a voluntary basis.

(x) Any other information that may be relevant.

The audit committee shall also review the status of long term (more than one year) or recurring RPTs annually.

B. <u>Information to be placed before Shareholders for consideration of RPTs:</u>

The notice being sent to the shareholders seeking approval for any proposed RPT shall, in addition to the requirements under the Companies Act, 2013, include the following information as a part of the explanatory statement:

(i) A summary of the information provided by the management of the listed entity to the audit committee as specified in point 4 above;

(ii) Justification for why the proposed transaction is in the interest of the listed entity;

(iii) Where the transaction relates to any loans, inter-corporate deposits, advances or investments made or given by the listed entity or its subsidiary:

(a) details of the source of funds in connection with the proposed transaction;

(b) where any financial indebtedness is incurred to make or give loans, inter-corporate deposits, advances or investments:

- nature of indebtedness;
- cost of funds;
- and tenure;

(c) applicable terms, including covenants, tenure, interest rate and repayment schedule, whether secured or unsecured; if secured, the nature of security; and

(d) the purpose for which the funds will be utilized by the ultimate beneficiary of such funds pursuant to the RPT.

(The requirement of disclosing the source of funds and cost of funds shall not be applicable to listed banks/NBFCs.)

(iv) A statement that the valuation or other external report, if any, relied upon by the listed entity in relation to the proposed transaction will be made available through the registered email address of the shareholders;

(v) Percentage of the counter-party's annual consolidated turnover that is represented by the value of the proposed RPT, on a voluntary basis;

(vi) Any other information that may be relevant.

The said circular of November 22, 2021, shall be effective from April 01, 2022, and thereafter the listed entities, that have listed specified securities, shall make RPT disclosures every 6 months in the prescribed format.

Our Comments: SEBI, vide RPTs Notification, has strengthened the corporate governance and disclosure norms for RPTs earlier in November 2021. To further the same, SEBI vide RPTs Disclosure Circular has prescribed the mode and manner of disclosure obligations for RPTs and enhanced the roles and

responsibilities of the audit committee with respect to approval of RPTs effective from April 01, 2022.

The aforesaid measures will safeguard the interest of stakeholders ensuring greater transparency with better corporate governance. The listed entities would require redefining their approach for RPTs and related aspects including a list of related parties, identification of RPTs and material RPTs that requires audit committee and shareholder approval etc.

ANNUAL GENERAL MEETINGS (AGMs) / EXTRAORDINARY GENERAL MEETINGS (EGMs) FURTHER ALLOWED THROUGH VIDEO CONFERENCE OR OTHER AUDIO-VISUAL MEANS UNTIL JUNE 30, 2022

The Ministry of Corporate Affairs ("**MCA**") vide its general circular dated December 08, 2021[15], with reference to General Circular No.20/2020 dated 5.05.2020 and General Circular No. 02/2021 dated 13.01.2021, has further allowed the companies to conduct the AGMs through Video Conference (VC) or other Audio-Visual Means (OAVM) as well until 30th June, 2022.

Further, it has been clarified that the aforesaid shall not be construed as conferring any extension of time for holding of AGMs by the companies under Companies Act, 2013 **("the Act")** and any non-adherence to relevant timelines regarding holding of AGMs shall be liable to legal action under the applicable provisions of the Act.

Similarly, MCA vides its General Circular No.20/2021 dated 8.12.2021, with reference to earlier General Circulars issued regarding the EGMs, has further allowed to hold their EGMs through VC or OAVM or transact items through the postal ballot in accordance with the framework provided in the aforesaid circulars until 30th June, 2022.

Our Comments: MCA, in view of maintaining social distancing norms and discouraging large physical gatherings amid the apprehension of a surge in Covid cases due to new variant, MCA has further allowed hold AGMs/EMGs through virtual modes until June 30, 2022, by complying with the requirements of respective general circular(s).

EXTERNAL COMMERCIAL BORROWINGS ("ECBS") AND TRADE CREDITS ("TC") CHANGES AMID LONDON INTERBANK OFFERED RATE ("LIBOR") TRANSITION

RBI has made the following changes to the all-in-cost **("AIC")** benchmark and ceiling for foreign currency denominated (**"FCY"**) ECBs and TC due to imminent discontinuance of LIBOR vide in its circular dated December 08, 2021[16].

A. Redefining 'Benchmark Rate':

In the case of FCY ECBs and TC, the term 'Benchmark Rate' has been redefined as:

"Any widely accepted interbank rate or alternative reference rate ("ARR") of 6-month tenor, applicable to the currency of borrowing".

[15] Please find the notification at https://www.mca.gov.in/bin/dms/getdocument?mds=LzJdfoYrL7zlnxT8HWRv5Q%253D%253D&type=open

[16] Please find the notification at https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/APDIR1359BBB85EB5DBF49DDBE2E5BACC25A7358.PDF

B. Change in AIC for new ECBs and TC:

The AIC ceiling for new FCY ECBs and TCs has been increased by 50 basis points ("bps") to 500 bps and 300 bps, respectively, above the benchmark rates to account for variations in credit risk and term premia between LIBOR and the ARRs.

C. One Time Adjustment in AIC ceiling for existing ECBs and TC:

To enable a smooth transition of existing ECBs and TCs linked to LIBOR, the AIC ceiling for existing FCY ECBs and TC has been increased by 100 bps to 550 bps and 350 bps, respectively, over the benchmark rates.

Our Comments: The LIBOR is a benchmark interest rate used by major international banks in the international interbank market to lend to one another for short-term loans. However, LIBOR transition is the movement of the financial markets away from using LIBOR as the interest rate benchmark to using alternative "risk-free" benchmark rates. One essential point to be noted is that there is no change in the AIC benchmark and ceiling for INR ECBs / TC.

RBI ISSUES NEW DIRECTION IN RELATION TO THE RESTRICTION ON STORAGE OF ACTUAL CARD DATA

RBI by circular dated December 23, 2021,[17] has further allowed the non-bank payment aggregators and merchants on-boarded by them for storing of Card on File Data (**"CoF Data"**) i.e., primarily customer payment/card credentials until June 30, 2022. Earlier it was allowed only up to December 31, 2021.

Further, RBI, with respect to Card on File Tokenization (**"CoFT"**), has also advised the stakeholders, to formulate an alternate workable solution for handling any use case (i.e., recurring e-mandates, EMI option, post-transaction activity including chargeback handling, dispute resolution, reward/loyalty programme, etc.) that currently involves/requires the storage of CoF Data by entities other than card issuers and card networks.

Our Comment: The stakeholders have expressed their inability to implement the tokenization framework, as prescribed by RBI earlier, by December 31, 2021, citing several operational challenges including payment ecosystem unpreparedness, lack of adequate solutions for adopting tokenization framework etc., which are key to develop a robust infrastructure for securing customer payment/card credentials and eradication of fraudulent transactions. Therefore, RBI has extended the timeline up to June 30, 2022, for the development of aforesaid infrastructure and implementation, effectively including formulation of alternate workable solution wherein storage of CoF Data by entities (other than card issuers and card networks) is essential.

For any queries please contact:

amit.prakash@imperiallaw.in

amit.shrivastava@imperiallaw.in

v.vasudev@imperiallaw.in

[17] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT142A0F19E38D78F4F779A73977873648A85.PDF

IMPERIAL LAW OFFICES

Office No. 304, Tower A-1, Ansal Corporate Park, Sector 142, Noida (U.P.) - 201305, INDIA

Board: +91 120 4520293; www.imperiallaw.in