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BSE circular prohibiting transfer of shares and dividend belonging to notified parties to Investors Education and Protection Fund

BACKGROUND

1. The Special Court (Trials of Offences Relating to Transactions in Securities), Bombay is established to deal with specific types of cases. During the investigations by the Reserve Bank of India it observed that large scale of irregularities and malpractices were in action in both the Government and other Securities indulged by some brokers in collusion with the employees of various banks and which led to the diversion of funds from banks and financial institutions to the individual accounts of certain brokers.

2. To restore the confidence and maintain the basic integrity, credibility of the banks and financial institutions, the Government of India promulgated an Ordinance **(Trial of Offences Relating to Transactions in Securities), 1992** on **6th June 1992**, to deal with the situation and to ensure the speedy recovery of the huge amount involved and to punish the offenders[1]

3. Section 3(1) of Special Court (Trials of Offences Relating to Transactions in Securities) Act, 1992 ['TORTS Act'] empowers central government to appoint two or more Custodians as it may deem fit. Further as per Section 3(2) of TORTS Act, The Custodian to notify list of persons who were involved in offences relating to transaction in securities. Further Section 3(3) of TORTS Act has an overriding effect on all other laws in force. As per section 3(3) of TORTS Act any property, movable, or immovable, or both, belonging to any person notified under sub-section (2) of TORTS Act shall stand attached simultaneously with the issue of the notification. It means if a person's name is notified by the Custodian, then any property belonging to that person shall stand attached[2].

4. Office of the Custodian has released a list of notified parties[3]. So, all property belonging to these notified parties stand attached from the date of notification. All property would include movable property viz. shares, stocks, bonds etc. Accordingly shares, stocks, bonds, debentures etc. belonging to these notified parties shall stand attached on the date of notification. Once these properties are attached, they would be dealt with in accordance with orders of the Hon'ble Special Court of Mumbai. It means once these shares, stocks, bonds, debentures etc. are attached they cannot be transferred to any other authority unless orders of the Hon'ble Special Court of Mumbai permit them.

Introduction

1. Bombay Stock Exchange ('BSE') has received a letter from the Office of the Custodian under TORTS Act in this regard. The Office of the Custodian has stated listed companies are transferring shares and dividends belonging to notified parties to Investor Education and Protection Fund ('IEPF'). The Office of the Custodian has highlighted that vide their letter dt: June 7, 2023, and consequent BSE Circular dt: July 8, 2003, listed companies were asked to not to transfer dividend to IEPF. But it is being seen that listed companies are still transferring dividends to IEPF. This non-compliance raises concerns, as it leads to unaccounted assets that rightfully belong to notified parties under the Custodian's jurisdiction. Rather, such shares and dividends should rightfully be deposited with the

[1] https://specialcourt-torts.gov.in/html/history.html
[2] https://specialcourt-torts.gov.in/index.html
[3] https://specialcourt-torts.gov.in/html/notparties.html

Custodian so that the total assets of the notified parties remain accounted. Further the Office of the Custodian has mentioned that if shares and dividends belonging to notified parties are transferred to an IEPF account then claiming it back from IEPF account is tedious and time consuming.

2. Office of the Custodian has now vided their letter dt: September 15, 2023, has again requested BSE to ask listed companies to not to transfer shares or dividends belonging to notified parties to IEPF. BSE has in this regard issued a circular dt: September 26, 2023, reiterating that listed companies refrain from transferring the shares and dividends to IEPF **belonging to the notified parties** attached by the custodian.

Anomalies in implementation of BSE Circular

1. **Will TORTS Act override provisions of transfer of shares and dividends to IEPF under Companies Act, 2013 ['the Act'] and SEBI Circular dt: March 16, 2023?** Section 13 of TORTS Act states as follows, *"Act to have overriding effect.---The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority"* Section 13 of TORTS Act has a non-obstante clause. A clause beginning with 'notwithstanding anything contained in this act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the *non obstante* clause[4]. It means provisions of TORTS Act will have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in an instrument having effect by virtue of any law, other than this act, or in any decree or order of any court, tribunal, or other authority.

   Section 124(5) or (6) read with Rule 6(3)(b) of Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules 2016 of the Act mandates companies to transfer of dividend and shares remaining unclaimed for a period of seven consecutive years to IEPF only if there is no specific order of court of tribunal or statutory authority restraining any transfer of such shares and payment of dividend. So, the provisions of the Act are consistent with the TORTS Act.

   SEBI vided its Circular dt: March 16, 2023 has mandated listed companies to freeze folios of physical security holders for non-updation of KYC and if the folios continue to remain freeze till December 31, 2025 it shall be referred to administering authority under Benami Transactions (Prohibitions) Act, 1988 and / or Prevention of Money Laundering Act, 2002. This provision does not speak about transferring of shares or dividends to any authority but only mandates referring the same to administering authority under Benami Transactions (Prohibitions) Act, 1988 and / or Prevention of Money Laundering Act, 2002. Unpaid dividend or unclaimed shares belonging to parities notified by Office of the Custodian under the TORTS Act should not be referred to administering authority as provision of SEBI Circular dt: March 16, 2023, are inconsistent with section 3(3) of TORTS Act.

2. **Whether provisions of BSE Circular dt: September 26, 2023, would apply to physical security holders or security holders holding shares in demat mode?** It would apply to both shares held in physical form or demat mode. But it needs to be highlighted here that as per Rule 9.3.3 of National Securities Depository Limited Depository, at the request of a Participant or on the basis of the request received from

[4] Union of India vs G. M. Kokil 1984 (Supp) SCC 196: AIR 1984 SC 1022

the Client or pursuant to the orders received from the Central or State Government, the Securities and Exchange Board of India or any order passed by a court, tribunal or any other statutory authority, shall freeze the account and/or the ISIN and/or specific number of securities of the Client[5]. Further as per 13.2.1 of Central Depository Services (India) Ltd Freeze can be initiated in the manner specified in the orders or directions of any Court, Tribunal, any Government agency, SEBI, or any other authority made or given under any Law for the time being in force[6]. Hence shares held in demat mode would not be allowed to be transferred to IEPF by CDSL or NSDL. So, compliance with BSE circular dt: September 26, 2023, and letter of Office of Custodian dt: September 15, 2023, needs to be carefully looked up for shares held in physical form by notified parties.

3. **Whether provisions of BSE Circular dt: September 26, 2023, would apply to shares only or to debt securities also?** BSE Circular September 26, 2023, expressly raises concerns on transfer of 'shares' and dividends' to IEPF by listed companies. But as per Section 3(3) of the TORTS Act any property belonging to notified parties shall stand attached. Hence it can be inferred that provisions restriction of transfer to IEPF might apply to debt securities also. Listed companies must consult the Office of the Custodian before dealing with any security belonging to notified parties.

4. **What is the procedure for transferring shares and dividends belonging to notified parties to the Office of the Custodian under TORTS Act?** As per Section 3(4) of the TORTS Act property attached under TORTS Act shall be dealt with by the Custodian in such manner as the Special Court may direct. So, there is no standard procedure for transfer of property attached by Office of the Custodian. Property attached would be dealt as per the orders of the Special Court.

Actionable for listed companies

1. **Whether any shareholder is notified by Office of the Custodian:** Listed companies will have to check with the Registrar and Share Transfer Agent whether any of their shareholder (either in holding shares in physical form or demat form) is a person who is in the list of notified parties as is released by the Office of the Custodian. If the name appears, then it needs to be ensured that dividends or shares belonging to those shareholders are not being transferred to IEPF and form IEPF-3 in this regard is filed. Compliance with this circular is crucial as many companies, after holding annual general meetings, would now be in the process of transferring unclaimed dividends and shares to IEPF.

2. **Whether IEPF-3 needs to be filed?** If listed companies have any shareholder who is also appearing in the list of notified parties, then form IEPF-3 needs to be filed in this regard.

SOURCE:
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20230926-39
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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023405/bse-circular-prohibiting-transfer-of-shares-and-dividends-belonging-to-notified-parties-to-iepf-experts-opinion

Mr. Vallabh Joshi - Senior Manager - vallabhjoshi@mmjc.in

[5] https://nsdl.co.in/downloadables/pdf/Bye-Laws_(Amended_upto_June_2023).pdf
[6] https://www.cdslindia.com/downloads/DP/currentDPs/DP-Operating-Instructions-Chapters-as-on-Sept-30-2023.pdf

Revision in the Eligibility Criteria for Migration of SME Companies to BSE Main Board

Introduction: -

The Bombay Stock Exchange (BSE) has recently introduced revised eligibility criteria for the migration of Small and Medium Enterprises (SMEs) from the BSE SME platform to the BSE Main Board. The new guidelines, effective from January 1, 2024, aim to provide a balanced approach for identifying companies suitable for transition. This article discusses the key changes and their implications.

Additional criteria by BSE for identifying companies to be shifted to the main board are quite balanced. This move by BSE to not to keep market capitalization as one of the criteria for shifting to the main board is a considerate move. It is seen that companies in the SME segment have at times more market capitalization than their main board peers. Once a company shifts to the main board from the SME segment, the bid lot becomes one share thereby increasing retail shareholder participation. This move will eventually lead to smaller companies remaining in the SME segment and reasonably large companies shifting to the Main Board, which has been the intention of the regulator prima facie.

The revisional criteria includes: -

1. The Bombay Stock Exchange ('BSE') on November 24, 2023, has issued fresh guidelines for small and medium enterprises ('SME') wanting to migrate from the BSE's SME platform to the BSE main board[1].

2. According to the new guidelines, post issue paid up capital of the applicant should be more than Rs 10 crore.

3. The applicant company should have a net worth of at least Rs. 15 crores for 2 preceding full financial years.

4. Listing on the mainboard exchange requires a minimum market capitalization of at least Rs 25 crores. In this case, the market capitalization will be calculated on the basis of the weighted average price of the preceding three months from the date of application for transfer to the Main Board.

5. The applicant company should also have positive operating profit (earnings before interest, depreciation, and tax) from operations for at least any 2 out of 3 financial years and has positive Profit after tax (PAT) in the immediately preceding Financial Year of making the migration application to Exchange.

6. Further as per new norms, Promoter(s) shall be holding at least 20% of equity share capital of the company at the time of making application.

7. Further the applicant shall have a minimum of 250 public shareholders as per latest shareholding pattern .

[1] https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20231124-55

8. In the Annual General Meeting (AGM), at least two-thirds (2/3) of the shareholders, excluding the promoters of the company, must pass a special resolution for migration.

9. Further minimum listing period on BSE SME should be for at least three years as against earlier listing requirement of two years.

10. Other requirements under regulatory action includes:

    - No material regulatory action in the past 3 years like suspension of trading against the applicant company, promoters/promoter group by any stock Exchange having nationwide trading terminals.
    - No Debarment of company, promoters/promoter group, subsidiary company by SEBI.
    - No Disqualification/Debarment of directors of the company by any regulatory authority.
    - The applicant company has not received any winding up petition admitted by a NCLT.

11. Other parameters mentioned in the circular are as follows:

    - No proceedings have been admitted under the Insolvency and Bankruptcy Code against the applicant company and Promoting companies.
    - No pending Defaults in respect of payment of interest and/or principal to the debenture/bond/fixed deposit holders by the applicant, promoters/promoter group /promoting company(ies), Subsidiary Companies.
    - The applicant company shall obtain a certificate from a credit rating agency registered with SEBI with respect to utilization of funds as per the stated objective pursuant to IPO and/or further funds raised by the company, if any post listing on SME platform.
    - The applicant company has no pending investor complaints.

12. The new guidelines will become effective from January 1, 2024

Conclusion: -

BSE's move to revise the eligibility criteria for SMEs transitioning to the Main Board reflects a balanced approach, considering factors beyond market capitalization. The changes aim to enhance retail shareholder participation and facilitate the migration of reasonably large companies to the Main Board. As these criteria come into effect in 2024, companies planning to transition should carefully assess their compliance and prepare for the revised requirements.

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Ms. Ruchira Pawase - Research Associate – ruchirapawase@mmjc.in

Eligibility Criteria for Listing on BSE - SME Platform

Introduction:

The Bombay Stock Exchange (BSE) has recently introduced revised eligibility criteria for the migration of Small and Medium Enterprises (SMEs) from the BSE SME platform to the BSE Main Board. The new guidelines, effective from January 1, 2024, aim to provide a balanced approach for identifying companies suitable for transition. This article discusses the key changes and their implications.

The Bombay Stock Exchange ('BSE') vide notice number 20231124-54 dated November 24, 2023, has issued notification related to revision in the eligibility criteria for listing on SME platform of BSE[1].

1. This Circular is in continuation with earlier BSE Circulars having vide numbers: -

   - 20180711-23 dtd July 11,2018('Circular 1');
   - 20190109-10 dtd January 9, 2019 ('Circular 2'),
   - 20200522-21 dtd May 22, 2020 ('Circular 3') and
   - 20200115-29 dtd January 15, 2020 ('circular 4')

2. BSE has now framed the revised eligibility criteria which is as under:

   I. Criterions based on financial parameters: -

   a) Post Issue Paid Up Capital

      Post issue paid up capital of the company shall not be more than Rs.25 crores which remains unchanged in comparison to the circular 1.

   b) Net Worth

      The Net Worth criteria initially mentioned in Circular 1 stated that it should be positive. Taking a step further the stock exchange has made it more specific which is at least Rs. 1 crore for 2 preceding full financial years.

   c) Net Tangible Asset

      Further the Net tangible asset criteria was Rs 1.5 crore. The same is now revised to Rs 3 crores.

   d) Track Record

      The track record of applicant company seeking listing should be at least 3 years. Where the applicant company has taken over a proprietorship concern/ registered partnership firm/ LLP, then the track record together with such proprietorship concern/ registered firm/ LLP should be at least 3 years.

[1] https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20231124-54

The above-mentioned condition in point 4 was already in existence. Now BSE has stated the following: -

Provided, the applicant company seeking listing should have a track record of operations for at least one full financial year and audited financial results for one full financial year.

Or

Where the applicant company does not have a track record of 3 years, then the Project for which IPO is being proposed should be appraised and funded by NABARD, SIDBI, Banks (other than co-operative banks), Financial Institutions.

Provided, the applicant company seeking listing should have a track record of operations for at least one full financial year and audited financial results for one full financial year.
In this case also, BSE has stated that the applicant company seeking listing should have track record of operations for at least one full financial year and audited financial results for one full financial year.

Initially, the criteria mentioned stated the following: -

In case it has not completed its operation for three years then the company/partnership/proprietorship/LLP should have been funded by Banks or financial institutions or Central or state government or the group company should be listed for at least two years either on the main board or SME board of the Exchange.

However, now in furtherance to the above *NABARD, SIDBI, Banks (other than co-operative banks) has been added for more clarity.* The funding and appraisal for project for which IPO is being proposed by central or state government has now been removed.

II. Further vide circular dated November 24, 2023, BSE has included additional financial parameters such as:

a) Earnings before Interest, Depreciation and Tax

The company/ proprietorship concern/ registered firm/ LLP should have operating profit (earnings before interest, depreciation, and tax) from operations for 2 out of 3 latest financial years preceding the application date.

Provided the company should have operating profit (earnings before interest, depreciation, and tax) from operations for one full financial year preceding the application date.

For companies seeking listing where the project has been appraised and funded by NABARD, SIDBI, Banks (other than co-operative banks), Financial Institutions, it shall have positive operating profit (earnings before interest, depreciation, and tax) from operations in one full preceding financial year.

b) Leverage Ratio

The criteria mentioned about Leverage Ratio is that it should not be more than 3:1.

III. Further non-financial parameters for companies seeking listing included:

a) Disciplinary action

i. No regulatory action of suspension of trading against the promoter(s) or companies promoted by the promoters by any stock Exchange having nationwide trading terminals.

ii. The Promoter(s) or directors shall not be promoter(s) or directors (other than independent directors) of compulsory delisted companies by the Exchange and the applicability of consequences of compulsory delisting is attracted or companies that are suspended from trading on account of non-compliance.

b) No Disqualification / Debarment

i. Director should not be disqualified/ debarred by any of the Regulatory Authority.

c) Default

i. No pending defaults in respect of payment of interest and/or principal to the debenture/bond/fixed deposit holders by the applicant company, promoters/ promoting company(ies), Subsidiary Companies.

d) Name change

i. In case of name change within the last one year, at least 50% of the revenue calculated on a restated and consolidated basis for the preceding 1 full financial year has been earned by it from the activity indicated by its new name.

ii. The activity suggesting name should have contributed to at least 50% of the revenue, calculated on a restated and consolidated basis, for the preceding one full financial year.

All other rest listing criteria remain unchanged.

Note: Cooling off period: Gap of at least 6 months from date of withdrawal/ rejection of issue from SEBI/Exchanges.

Conclusion:

BSE's move to revise the eligibility criteria for SMEs transitioning to the Main Board reflects a balanced approach, considering factors beyond market capitalization. The changes aim to enhance retail shareholder participation and facilitate the migration of reasonably large companies to the Main Board. As these criteria come into effect in 2024, companies planning to transition should carefully assess their compliance and prepare for the revised requirements.

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Ms. Ruchira Pawase - Research Associate – ruchirapawase@mmjc.in

E-commerce, Tech and Social media Companies – Can they be an effective watchdog under the Digital Personal Data Protection Act, 2023 ("Act")

Introduction -

One thing that stands out in the recently enacted Digital Personal Data Protection Act, 2023 ("**Act**") is the notification of Significant Data Fiduciary ("**SDF**") by the Central Government.

This SDF will be a key intermediary in the effective implementation of the Act and protection of the personal data of an individual.

This Article delves into the requirement of Significant Data Fiduciary, its roles and how is it important in protecting the personal data of any individual.

I. **What is a Significant Data Fiduciary** -

Before we study who would be SDF, it is important to know who a Data Fiduciary would be.

A Data Fiduciary under the Act means a person, who either on his own or along with other persons, *is entrusted with the task of ascertaining the purpose and charts out the measures required to process personal data* i.e., any data about an individual who could be identified from such personal data.

An important point to note is that the Act prescribes a person as an individual, or a HUF or a company or association of persons or body of individuals. So, a Data Fiduciary can be either an individual or an entity.

The SDF will be a Data Fiduciary or a class of Data Fiduciaries that the Government of India will notify, basis the factors as prescribed u/s 10 of the Act. So, these Data Fiduciaries can be anybody, public or private, that collects personal data and processes it.

II. **Consent Mechanism –**

The SDF will have to carry out its functions based on the consent received from the user of the data for the specified purpose and for lawful purpose. The Act defines the term "lawful purpose" as any purpose which is not expressly forbidden by law.

Further, SDF is obliged to ensure that the consent by the user is free, specific, informed, unconditional and unambiguous and signify an agreement to the processing for the specified purpose.

Similarly, the SDF will have to cease to process the data i.e., erase the data upon such request made by the user.

III. **Parameters determining SDF** –

On deep study of Section 10 of the Act that determines criteria, *inter alia*, for notification of Data Fiduciary are the following –

i. the volume and sensitivity of the personal data processed
ii. risks to the rights of Data Principal
iii. potential impact on the sovereignty and integrity of India
iv. security of the State; and
v. public order

From the above one can infer that the Government of India ("GOI") is considering data centric sectors in the Indian Economy to be the first ones who will be impacted by this legislation.

factors for determination of SDFs.

To name a few, such data centric sectors will be e-commerce platforms like Amazon, Flipkart, Snapdeal, OTT platforms like Amazon Prime, Netflix and social media platforms like WhatsApp, Facebook, LinkedIn, Snapchat and even search engine platforms like Google and Yahoo. These tech and social media platforms can be notified as SDFs due to its *inherent business model of collecting user's personal data and processing the same*. These organisations can be first ones to start having a data protection officer, data protection security setup and data system governance amongst other sectors in the economy.

IV. **Role of SDF** –

First and foremost, the SDF will have to appoint a Data Protection Officer for each organisation to which the Act applies.

1. Appointment of Data Protection Officer -

This Data Protection Officer ("**DPO**") will –

i. be based in India,
ii. represent the SDF under this Act
iii. will be responsible to the board of directors of SDF
iv. act as point of contact for the grievance redressal mechanism under the Act

2. Data Audit -

The SDF will also have to appoint an independent auditor who will carry out independent data audit evaluating the compliance of the Significant Data Fiduciary under the Act.

3. Data Protection Impact Assessment -

As regards audit of the personal data, the SDF will undertake periodic Data Protection Impact Assessment which shall be a process comprising a description of the rights of Data Principals and the purpose of processing of their personal data, assessment and management of the risk to the rights of the Data Principals.

V. **Obligations of a Significant Data Fiduciary** –

The Obligations of SDF are as under –

i. Responsible for complying with the rules of the Act and the rules made thereunder
ii. Appointment of a Data Processor
iii. Ensure completeness, accuracy and consistency of personal data
iv. Implement appropriate technical and organisational measures to ensure effective observance of the Act and rules thereunder
v. Protection of personal data in its possession or under its control
vi. In case of data breach, the SDF shall give the Board and each affected Data Principal i.e., the person to whom the personal data relates, intimation of such breach in such form and manner as may be prescribed
vii. Erasure of personal data upon withdrawal of consent by the Data Principal
viii. Causing the Data Processor to erase any personal data that was made available by the Data Fiduciary for processing to such Data Processor.
ix. Obtain "verifiable" consent of parent or lawful guardians of a child or person with disability

VI. **Penalties**

The Act also imposes penalty on the SDF as under –

Type of breach	Penalty amount in Rs.
Failure in protection of personal data in its possession or under its control	up to Rs.250.00 crore
Failure to give notice of personal data breach to the Board or affected Data Principal	Up to Rs.200.00 crore
Breach in relation to additional obligations in relation to children u/s 9	Up to Rs.200.00 crore
Breach in observance of additional obligations of SDF u/s 10	Up to Rs.150.00 crore

Conclusion –

The Act charts all the roles, duties, obligations and even additional obligations of the SDF. The DPO that every organisation may appoint will have to be very clear about its role vis-à-vis the personal data and the SDF.

Once the Act comes into force, all the e-commerce companies, social media companies, search engine organisations and tech platforms, as they are in possession and control of tons of personal data of its users, may be recognised as SDF under the Act immediately and thus will have to start taking immediate steps to with regard to the following –

i. Determining the specified purpose for which the Data user has voluntarily provided her data
ii. Appointment of Data Protection Officer
iii. Establishment of Consent Mechanism under the Act
iv. Appointment of Independent Data Auditor
v. Carrying out Data Protection Impact Assessment
vi. Periodic audit

Any violation on the part of these MNC, social media or tech platforms will attract heavy penalty under the Act.

Reference:

The Digital Personal Data Protection Act, 2023.

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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023354/e-commerce-tech-and-social-media-companies-%E2%80%93-can-they-be-an-effective-watchdog-under-the-digital-personal-data-protection-act-2023-act-experts-opinion

This article is written by: -
Mr. Nilesh Javkar - Senior Manager – nileshjavkar@mmjc.in
Mr. Pradnesh Kamat - Partner - pradneshkamat@mmjc.in

DECIPHERING THE MEDIATION ACT, 2023: ANALYSIS AND INSIGHT

Introducing a milestone moment in the legal landscape, the Mediation Act of 2023 received the esteemed Presidential assent on the 15th of September, 2023. Notably, the former Chief Justice of India, N.V. Ramana, lauded this significant development, emphasizing its far-reaching implications. He remarked, "This Bill would be useful for the judiciary, and litigants and there will be demand for efficient mediators either from the legal profession or domain experts in various fields." This recognition underscores the Act's potential to shape and redefine the future of dispute resolution in the country, reflecting the evolving dynamics of the legal landscape. This article embarks on a comprehensive exploration of the Act's provisions, delving into a detailed analysis to unearth its nuances and implications.

Applicability: In the context of Indian legal jurisdiction, the Mediation Act, 2023 is applicable to the following:

a) any habitual residence of either party in India.
b) Incorporation within India's borders.
c) The presence of a business establishment in India.
d) Explicit agreement provisions stating governance by the relevant Indian law."

Pre-litigation mediation: Engaging in mediation prior to litigation is a voluntary and proactive choice.

Governing Authority: The Central Government will establish a distinguished Mediation Council vested with the authority to officially recognize and accredit Mediation Service Providers and Mediation Institutes. These esteemed entities shall serve as the primary conduits, offering experienced mediators to parties seeking mediation as part of their dispute resolution process. In this pivotal role, they shall act as the essential bridge, connecting applicants with skilled mediators, ensuring a streamlined and effective mediation experience for all involved parties.

Disputes not covered: The core objective behind the establishment of this Act is to serve as a catalyst for expeditious and efficient resolution of commercial disputes. While its primary focus is on promoting mediation as a preferred avenue for dispute resolution, it also delineates categories of matters that may not be suitable for mediation, as detailed in Schedule 1.

The dynamic nature of commercial transactions and evolving legal landscape necessitates flexibility. To address this need, the Act empowers the Central Government with the authority to periodically amend its provisions, ensuring its continued relevance and effectiveness in responding to the evolving needs of the commercial arena. This adaptive framework reflects a commitment to maintaining a robust and responsive mechanism for dispute resolution within the commercial sphere. This list is briefly summarised as follows:-

a) ***Disputes Ineligible by Law***
b) ***Fraud and Serious Allegations***
c) ***Special exclusions***: Excludes disputes related to minors, deities, individuals with disabilities (including high support needs), mental illness, persons of unsound mind, suits against the government, and declarations with a right in rem effect.
d) ***Criminal Prosecution***
e) ***Conflict with Public Policy:*** public policy not defined or explained

f) ***Regulated Professions:*** Excludes complaints about registration, discipline, or misconduct of professionals, such as lawyers, doctors, architects, and accountants.
g) ***Third-Party Rights:*** Disputes affecting third parties not involved in mediation proceedings are ineligible.
h) ***Environmental Jurisdiction:*** Mediation not applicable to cases within the jurisdiction of the National Green Tribunals Act, 2010.
i) ***Tax-Related Disputes:*** Excludes disputes concerning direct or indirect taxes, including levy, collection, penalties, offenses, or refunds under state or national legislation.
j) ***Competition Law:*** Mediation is not available for disputes falling under the Competition Act 2002, including proceedings before the Telecom Regulatory Authority of India.
k) ***Electricity Act:*** Excludes disputes under the Electricity Act 2003, including proceedings before appropriate Commissions and the Appellate Tribunal for Electricity.
l) ***Petroleum and Gas Regulation:*** Disputes before the Petroleum and Natural Gas Regulatory Board and appeals to the Appellate Tribunal are not subject to mediation under the Petroleum and Natural Gas Regulatory Board Act 2006.
m) ***Securities and Exchange:*** Disputes under the Securities and Exchange Board of India Act 1992, including proceedings before the Securities and Exchange Board of India and the Securities Appellate Tribunal, are ineligible for mediation.
n) ***Land Acquisition:*** Mediation cannot be used for disputes to land acquisition or any laws providing for land acquisition.
o) ***Central Government Notification:*** Any other dispute subject to exclusion can be notified by the Central Government.

Synonymous with Conciliation: Under the provisions of this Act, a significant alignment is established between the terms 'conciliation' and 'mediation.' In a pivotal move towards clarity and synergy in dispute resolution processes, 'conciliation' is made synonymous with 'mediation.' This strategic harmonization streamlines the understanding and implementation of alternative dispute resolution mechanisms.

When Government is a party to dispute:

a) The involvement of the government in disputes is restricted to commercial matters, marking a distinctive parameter under this Act. This deliberate limitation ensures that the government's engagement is reserved exclusively for circumstances that pertain to commercial disputes, aligning the Act's focus with the economic landscape.
b) In instances outside the realm of commercial disputes, the government's participation is contingent upon notification by the appropriate government. This prudent approach adds an extra layer of discretion, allowing the government to engage as a party in non-commercial matters only when it deems it necessary, thus maintaining flexibility and ensuring that government involvement aligns with the specific context and gravity of the dispute at hand.

Duration:

a) In a noteworthy shift from the previous provisions, where the stipulated timeframe for dispute resolution spanned 180 days, with the possibility of an additional 180-day extension, recent amendments have brought about a more time-efficient paradigm. The amended framework now sets the initial duration at 120 days, with the potential for a further extension of 60 days when deemed necessary.
b) The Act introduces a balanced approach to party autonomy within the mediation process. Parties are afforded the option to withdraw from mediation after the initial two sessions, providing them with a measure of control over the proceedings. However, it's crucial to note

that unexcused non-attendance during mediation sessions may carry cost implications in subsequent litigation. This provision encourages parties to engage meaningfully in the mediation process, emphasizing the significance of good faith participation and adherence to the established mediation protocol to facilitate constructive outcomes and uphold the integrity of the dispute resolution mechanism.

Online Mediation: The full scope and impact of this initiative will come into sharp focus as it moves from theory to practical implementation. As the gears of the implementation process begin to turn, stakeholders will gain a clearer understanding of how this initiative will unfold and the multifaceted ways in which it will affect various facets of the domain it seeks to reform.

Mediation Settlement Agreements

Upon the mutual agreement and acceptance of settlement terms by both parties involved, the document should not only bear the signatures of the parties but also undergo authentication by the mediator. This authentication process serves as a crucial bridge between an informal agreement and a legally binding accord, aligning it with the provisions outlined in the venerable Code of Civil Procedure, 1908.

Confidentiality

The Act underscores a paramount principle in the realm of mediation, emphasizing the sanctity of confidentiality. It lays down a steadfast directive that all mediation documents shall be treated with the utmost discretion and held in strict confidence.

This provision, which forms the bedrock of the mediation process, serves a multifaceted purpose. Firstly, it encourages open and candid communication among the parties, fostering an environment where they can freely share their concerns, interests, and proposed resolutions without the fear of public scrutiny. Secondly, it fortifies the trust that participants place in the mediation process, assuring them that their sensitive information will not be exposed to the public domain.

Moreover, this commitment to confidentiality enhances the effectiveness of the mediation process itself, as parties are more likely to engage fully when they have confidence that their discussions will remain confidential. It also aligns with international best practices in dispute resolution, promoting the privacy and dignity of parties involved.

Challenging a mediated Settlement Agreement: The Act allows for challenges on specific grounds, such as fraud, corruption, and impersonation, particularly when mediated matters fall beyond the Act's scope, as detailed in Section 7. This provision serves as a vital safeguard to uphold the integrity of the mediation process and maintain ethical standards.

Community Settlement: Unlike the settlements relating to commercial disputes, community settlements are not enforceable as court judgements or decrees. However, enhancing enforceability could bolster its role in conflict resolution.

Exceptional circumstances: An ambiguity that warrants scrutiny lies in Section 8 of the Act. While this section grants parties the ability to file a suit or seek interim relief during mediation proceedings, it introduces the term "exceptional circumstances" without offering a precise definition. This vagueness raises questions about the criteria and thresholds for determining when such circumstances truly exist, leaving room for potential interpretation challenges and uncertainty in the application of this provision. Clarifying and providing clearer guidance on what constitutes "exceptional circumstances" could enhance the Act's effectiveness and minimize potential disputes arising from its interpretation.

Penal Provisions: A notable shortcoming in the enactment is the absence of penalties for breach, which has the effect of diluting its overall impact. This omission raises valid concerns about the Act's ability to deter non-compliance and uphold its provisions effectively. A critical examination of this aspect reveals that without a robust penalty framework, there may be limited incentives for parties to adhere to the Act's mandates, potentially undermining the very objectives it seeks to achieve. Consequently, addressing this gap by introducing suitable penalties for breaches could strengthen the Act's enforceability and bolster its credibility as a potent legal instrument in the realm of dispute resolution.

Conclusion

While this Act is fundamentally designed to alleviate the burden on the courts and expedite the resolution of commercial disputes, certain aspects have raised noteworthy concerns. Specifically, the absence of penalties for breaches and the non-mandatory nature of pre-litigation mediation applications, though reflecting a degree of flexibility, do introduce a level of dilution in the effectiveness of the enactment.

The Act's strength in promoting alternative dispute resolution methods and streamlining the judicial process is evident. However, the absence of punitive measures for non-compliance might potentially weaken its deterrent effect, leading to instances of non-adherence. Additionally, making pre-litigation mediation non-mandatory, while preserving party autonomy, could inadvertently diminish the Act's potential to substantially reduce court caseloads and expedite dispute resolution.

Balancing these considerations and potentially addressing these limitations may be crucial for maximizing the Act's effectiveness in achieving its overarching goals of reducing court congestion and expediting commercial dispute settlements.

Reference:

Mediation Act, 2023

This article is published in Taxmann. The link to the same is as follows: -

https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023351/deciphering-the-mediation-act-2023-analysis-and-insight-experts-opinion

Ms. Veerti Shah – Manager – veertishah@mmjc.in

The Expanding Horizon of Corporate Social Responsibility: Empowering India through Innovation and Research

Introduction:

Corporate Social Responsibility (CSR) has evolved significantly since its incorporation into the Companies Act, 2013. This mandate requires eligible corporates to allocate 2% of their net profits to specific activities or recognized funds outlined in Schedule VII of the Companies Act, 2013. Traditionally, these CSR initiatives have focused on sectors like rural development, healthcare, education, and livelihood, catering to the immediate needs of society. However, it is time to broaden our perspective and explore the transformative potential of CSR in fostering innovation and research.

Certain areas like technological development and manufacturing processes need constant efforts which although won't yield immediate results but in the long term can have transformational impact which has the potential to uplift the economy of the entire nation.

India entering its "Azaadi ka Amrit Kaal" i.e the journey from its 75th year of Independence to the 100th Year of Independence by the year 2047, is on track to become a developed nation as it has already leapfrogged nations like France and Britain to become the fifth largest economy in the world.

The growth seen so far has been an unconventional one as India thus far has not seen a manufacturing or a technological boom, more reliance so far has been placed on the services sector.

Considering the consumption demands of a populous country like India its time that more emphasis is placed on improving the manufacturing prowess. The efforts are already there to be seen with campaigns from the government such as the "Make in India" and "Vocal for local"

In order to sprint up this journey its important that the corporates in India align their goals and vision with that of the government. CSR acts as a perfect medium whereby corporates can contribute towards the improvement of manufacturing and technological processes in a more sustainable and expert oriented manner.

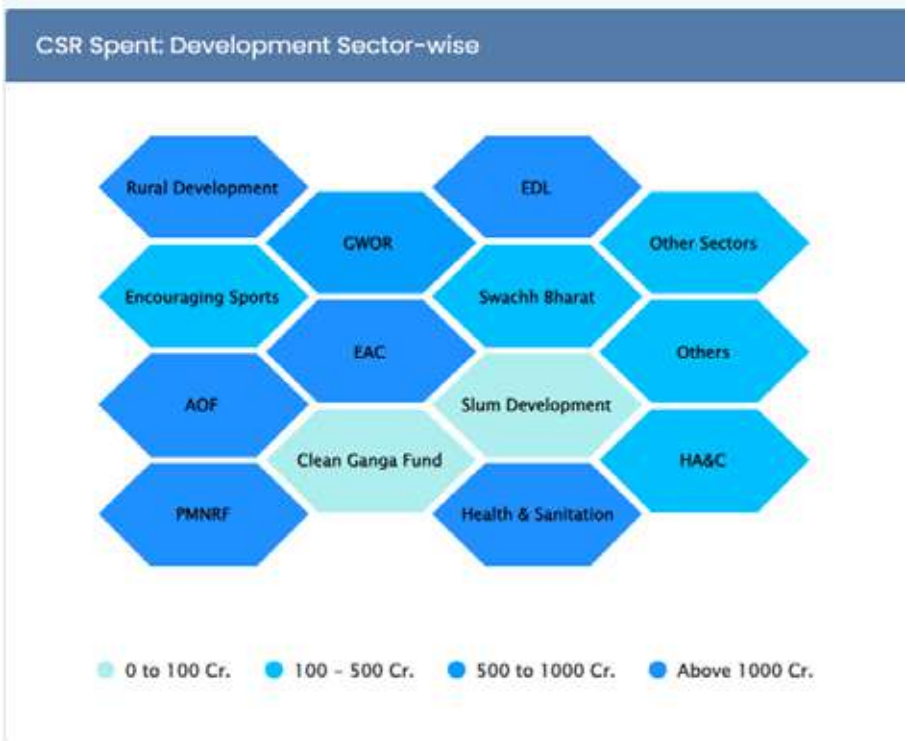
Analysis of the CSR spending trends of corporates shall be required to understand the present scenario prevailing in the corporate sector of India.

A One-Dimensional Approach:

The Ministry's CSR portal data[i] reveals a striking trend - a substantial portion of CSR spending remains concentrated within a limited spectrum of sectors as seen from the

below attached flowchart. While these domains undoubtedly contribute to societal empowerment, it is essential to understand that, in a developing nation like India, addressing sectoral needs is an ongoing endeavour.

Historically, corporates have predominantly followed a supply-based CSR model. This approach delivers quick results by addressing immediate, short-term societal needs. Nevertheless, the changing aspirations of India necessitate a more balanced and forward-looking strategy.



GWOR- Gender Equality, Women Empowerment, old Age Home, reducing Inequalities
EAC- Environment, Animal Welfare, Conservation of resources.
AOF- Any other fund
PMNRF- PM National relief fund
HA&C- Heritage, Art & Culture.
Other sectors- Technology Incubators and Benefits to armed forces

The Role of Research and Development:

The Schedule VII of the Companies Act, 2013, strategically outlines specific areas that align with India's goal of becoming a developed nation by 2047. R&D initiatives hold the potential to revolutionize the manufacturing landscape and ensure the sustainability of products. However, this naturally leads to a critical question: Is enhancing

manufacturing and technological prowess more important than addressing immediate issues like poverty, health, and livelihood?

The answer is not an 'either-or' proposition. Corporates must strike a balance between addressing immediate and long-term societal needs. The clauses ix (a) and (b) of Schedule VII reinforce this approach, emphasizing contributions to incubators, research, and development projects. These projects must be funded by government bodies.

Let us delve into the wording of clause ix (a) and (b) of Schedule VII of Companies Act, 2013 to gain a deeper understanding of their significance.

(ix) (a) Contribution to incubators or research and development projects in the field of science, technology, engineering, and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and

(b) Contributions to public-funded Universities; Indian Institute of Technology (IITs); National Laboratories and autonomous bodies established under the Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defence Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering, and medicine aimed at promoting Sustainable Development Goals (SDGs).

The choice of words within clause ix is notable. It uses the term "contribution," which, in the ordinary dictionary meaning, can signify a contribution in terms of money or in kind. However, in the context of Schedule VII, the usage of "contribution" indicates that some monetary amount is required to be transferred to the Schedule VII fund.

Also the point number 3.12 of the FAQs issued by MCA dated 25th August, 2021 includes a question as under:

"Whether contribution in Kind can be monetized to be shown as CSR expenditure?

-The requirement comes from section 135 (5) that states that "The Board of every company shall ensure that it spends.." Therefore CSR contribution cannot be in Kind and monetized.

Additionally, it's worth noting that clause ix (a) and (b) mandates corporate entities to collaborate with the government in supporting R&D initiatives and thus Independently corporates won't be able to carry out such research initiatives. The areas of Science, Technology, Engineering, and Medicine are vital to the nation's progress, and corporates are encouraged to contribute monetarily to these initiatives.

Achieving Energy Independence Through CSR initiatives:

To compete globally with economic powerhouses such as the USA, Germany, and Japan, India must harmonize the fulfilment of basic societal needs (healthcare, education, poverty eradication, etc.) with advances in manufacturing and technology. This balance is crucial to reduce the nation's reliance on imports, ensuring economic stability in the long run.

As of today a major chunk of India's Forex reserves are used for crude oil imports and other electronic and machine equipment imports. The dependence on crude oil for fuel consumption needs not only results in increased Green House Gas Emissions adding up to the Global warming challenges faced as a society but also makes India as a nation vulnerable and dependent on oil rich gulf countries.

CSR initiatives on part of corporates can help India to transition to ethanol blended fuels and achieve self-sufficiency in its fuel consumption requirements. Companies can support R&D initiatives to enhance ethanol production efficiency and promote the use of advanced technologies, making ethanol a more cost effective and environment friendly fuel alternative.

The Changing Global Scenario:

To understand the significance of broadening CSR to include innovation and research, we must consider the shifting global landscape. The world is moving towards a knowledge-based economy, where technological advancements and innovation are key drivers of success. To remain competitive on the global stage, India must embrace this paradigm shift.

One such highly important matter is India's reliance on imported military weapons and equipment. When the defence systems of any nation is even partially dependent on imports then it imposes certain conditions and criticalities which are not appropriate for a sovereign nation, especially when the country is one like India which constantly faces dual front war situations and internal security concerns caused by radicalised warmongers.

Corporates can thus collaborate and support the Defence research & Development Organisation by providing direct funding through its CSR obligations resulting in advancements of military capabilities of the defence forces of India.

Unlocking the Manufacturing and Technological Potential

India's aspirations to become a global manufacturing and technological powerhouse require a significant inflow of funding. Corporates, through their CSR initiatives, can act as a crucial source of support for research and development projects that enhance processes across industries.

Consider the example of the electronics industry. If India aims to produce cutting-edge smartphones and other electronic devices at competitive prices, research-oriented development of processes is indispensable. This requires a concerted effort to advance technologies and streamline production methods

Conclusion

The evolving landscape of CSR beckons us to look beyond the immediate and short-term needs of society. As India aspires to become a developed nation by 2047, it is imperative to focus on nurturing innovation and research, specifically in the domains of Science, Technology, Engineering, and Medicine. By collaborating with government bodies and supporting R&D initiatives, corporate entities can contribute significantly to India's progress.

The synergy between societal well-being and technological prowess creates a harmonious, prosperous nation. To compete on a global scale, India must harness the transformative potential of CSR to empower its citizens, reduce dependency on imports, and lead the way in innovation and research. This is not just a corporate responsibility; it is a collective responsibility toward a brighter future. In an interconnected world, the choices we make today will shape the India of tomorrow. It's time to embrace innovation and research as integral components of our CSR endeavours, working together for a better, more prosperous India.

[i] https://www.csr.gov.in/content/csr/global/master/home/home.html

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Mr. Shravan Pai – Management Trainee – shravanpai@mmjc.in

Mr. Vallabh Joshi – Senior Manager – vallabhjoshi@mmjc.in

The Balanced Pillars of ESG: Why Social and Governance Are Equally Vital

In today's ever-evolving corporate landscape, the concept of Environmental, Social, and Governance (ESG) has gained significant traction. ESG criteria are increasingly influencing investment decisions, corporate policies, and even public perception. However, there's a common misconception that ESG primarily focuses on the environment, neglecting the essential aspects of social and governance. In reality, these three pillars are of equal importance, addressing not just environmental concerns but also human rights, logistics support across all areas, and governance-related matters such as Corporate Social Responsibility (CSR) and employee engagement.

ESG, when properly understood and implemented, is a multifaceted framework designed to assess a company's performance in the realms of sustainability, ethics, and responsibility. The "E" component predominantly concerns environmental issues such as carbon emissions, resource usage, and ecological impact. Still, it's critical to acknowledge that the "S" and "G" pillars are equally significant.

The Neglected "S" – Why It Matters

The "S" in ESG represents the social dimension of corporate responsibility, encompassing a wide range of factors that go beyond environmental concerns. The social element consists of aspects such as safety, awareness, training, human rights, and labour practices, which are often overshadowed by environmental discussions.

For businesses, addressing social aspects means ensuring fair labour practices, supporting diversity and inclusion, and upholding human rights across their supply chains. Neglecting social responsibilities can lead to reputational damage, employee dissatisfaction, and even legal troubles. In an interconnected world, the repercussions of ignoring social issues extend far beyond individual companies, affecting the global business ecosystem.

Human rights, one of the core elements of social responsibility, are integral to ESG. Companies must assess and mitigate human rights risks in their operations and supply chains. Ensuring that workers are treated fairly and have safe working conditions is not only a moral imperative but also an essential component of responsible business practices. By placing an emphasis on the "S" aspect of ESG, companies can foster goodwill, strengthen their relationships with stakeholders, and contribute positively to society.

Employee engagement is another vital aspect of governance. Companies that actively engage their employees, foster a diverse and inclusive work environment, and invest in professional development are more likely to succeed in the long term. Engaged employees tend to be more productive, innovative, and loyal, ultimately contributing to the company's overall success.

The Neglected "G" - The Pillar of Governance

While discussions on ESG frequently highlight environmental and social aspects, the "G" for Governance is an equally crucial pillar that deserves attention. Governance refers to the framework of rules, practices, and ethical principles by which a company operates. It includes the composition and functioning of the board of directors, internal controls, transparency, and

accountability. The "G" in ESG, governance, encompasses a broader spectrum of elements, including corporate governance, business ethics, CSR, and employee engagement. Neglecting the governance dimension can lead to ethical lapses, financial misconduct, and a lack of transparency, which can result in significant reputational damage and legal consequences for corporations. Strong governance is the backbone of a sustainable business, ensuring that the right decisions are made, risks are managed, and ethical standards are upheld, ultimately fostering trust among stakeholders. In an increasingly complex business world, the "G" in ESG is the compass that guides corporations on the path to ethical and responsible practices.

Sound corporate governance ensures transparency, accountability, and fair decision-making processes within an organization. It is a key driver of sustainability and responsible business practices. Governance also extends to CSR efforts, which involve a company's commitment to support environmental and social causes beyond its core operations.

Some aspects that are food for thought when considering the "S" and "G" in "ESG". They are as follows: -

1. Human Rights – A Global Imperative

One crucial facet of the social element is upholding human rights. This involves addressing issues like forced labour, child labour, and ensuring that employees are treated fairly, with equal opportunities for employment and remuneration. Additionally, promoting diversity in the workplace, bridging gender gaps, and providing opportunities for people with disabilities are all part of the broader social challenge.

2. Breaking the Glass Ceiling

Equal opportunity is not just about gender; it extends to the LGBTQ[1]+ community as well. Corporates must break the glass ceiling, ensuring that every individual has a chance to excel, regardless of their gender or sexual orientation. This is not only a matter of social justice but also good business practice, as diverse teams often lead to more innovation and success.

3. The Influence of Corporates

The question often arises: Should corporates venture into social matters? When companies express their views on social issues, they can influence a certain generation and age group, potentially leaving a long-lasting impact. However, it's crucial to distinguish between authentic social intent and simply seeking social mileage.

4. The Role of Hiring Policies

Promoting equal opportunity starts with hiring policies that are publicly promoted and transparent. Companies must ensure that their actions align with their words and that their corporate culture truly embraces diversity and inclusivity at all levels.

5. Labor Practices in the Value Chain

Social responsibility extends beyond the corporate walls to the entire value chain. Companies should evaluate their manufacturing, warehousing, supply chain, logistics, and transportation practices. Fair labor conditions, quality standards, and consumer rights should be upheld throughout the entire value chain.

[1] Lesbian, gay, bisexual, and transgender

6. Engaging with the Community

In addition to internal practices, engaging with the community and key stakeholders is another essential aspect of the "S" in ESG. Building relationships with the communities where companies operate and listening to their concerns is vital for long-term success.

7. CSR as a Governance Aspect

Corporate Social Responsibility (CSR) is not just a standalone activity; it is an integral part of governance. It should be embedded in the decision-making process and should reflect a company's commitment to social responsibility and ethical practices.

8. Adapting to Changing Consumer Dynamics

Consumer expectations are evolving rapidly. It's not only about delivering quality products and services; it's also about ensuring data security, respecting food safety, and respecting the rights of consumers. Companies need to adapt to these changing dynamics to maintain consumer trust and loyalty.

Conclusion

In the modern business landscape, the lines between these three pillars are often blurred. A company that demonstrates strong environmental responsibility likely has effective governance practices and a commitment to social issues. These elements are interconnected and interdependent, and they collectively determine a company's overall sustainability and ethical standing.

To sum it up, ESG is not solely about the environment. It's a holistic framework that acknowledges the importance of environmental, social, and governance factors. The "S" and "G" components are equally crucial as the "E," addressing human rights, logistics support across all areas, and governance-related matters like CSR and employee engagement. When businesses embrace ESG in its entirety, they are better equipped to create a more sustainable, responsible, and prosperous future for all stakeholders, while also contributing to the greater good of society.

In the age of ESG, companies should strive for a balanced approach, recognizing that success and sustainability are inseparable from ethical practices that encompass the full spectrum of ESG considerations.

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Ms. Hasti Vora – Research Associate – hastivora@mmjc.in

Mr. Pradnesh Kamat – Partner – pradneshkamat@mmjc.in

SPEED BREAKERS IN GETTING NCLT CLEARANCES IN SCHEME OF MERGER/ DEMERGER/ CAPITAL REDUCTION

INTRODUCTION

When it comes to getting approvals for Merger/ Demerger / Capital reduction (hereinafter "Restructuring") from National Company Law tribunal (NCLT), things are now getting complex from the perspective of compliances under the Companies Act, 2013 and rules made thereunder.

During clearances from Regional Director and Official liquidator (Herein after "Regulator") in case of restructuring as applicable, Companies face many queries or concerns regarding compliances and health of the company or decoding the ultimate objective of restructuring. There have been many cases wherein Regulator have raised concerns over some of the areas of Compliances under the Companies act, 2013 repeatedly.

Let's understand some of the crucial areas of compliances under Companies act, 2013 that should ideally be taken care before proceeding for Restructuring.

A. Significant Beneficial Owner (SBO) under Section 90 of Companies Act, 2013.

SBO Concept was enacted in 2019 under the Companies act, 2013 and plays a crucial role to identify the ultimate owner / controller of Companies. Whenever any restructuring happens the ultimate beneficiary may gain the direct or indirect benefits of the restructuring and if at all if there is any ulterior motive for restructuring it will be a red flag, hence compliance of reporting of SBO has been repeatedly been raised as a concern. Therefore, it is expected that the Companies make due reporting of SBO as and when required.

B. Registered office

INC – 22 A i.e., Active form was enacted in 2019 which mandated all the companies to validate the Registered offices. Generally Regulatory notices for queries and requirements regarding restructuring are served on Registered offices of the company and if at all the same is not delivered, it creates a hurdle in process of clearances from the regulator, also it gives doubt in the mind of Regulator that whether the company has registered office in place. Considering this Companies going for restructuring shall duly ensure about the registered office.

C. Clarification on Securities Premium

Age old companies which are transferor or transferee often face a situation wherein they are asked clarification on how the Securities premium account has been built up through allotment of shares, having a detailed working on Issue and allotment of securities along with securities premium since inception may help companies to be ready with clarifications.

D. Mismatch of Paid-up Capital with master data

Many a times it is seen that the paid-up capital of the company on master data on Ministry of Corporate affairs website does not matches with the paid-up capital as appearing in financials of the company for multiple reasons being previous restructurings, erroneous filing of form MGT-7 or AOC-4 and transition of online data in 2006 etc. resolving this beforehand may save time and be helpful for clearances.

E. Index of Charges

Often it is seen that age old companies have a long list of charges open against loans, however these loans are not appearing in financials and are paid off but the process of satisfaction of these charges on MCA records is not done. This may be a hurdle wherein regulator is not satisfied whether the Banks against whom charges are open are not shown as creditors in merger applications. It is therefore required that companies take adequate steps to clear and reconcile the Index of Charges before approaching for Restructuring.

F. Public Deposits

Public Deposits related non-Compliances are serious non compliances and not addressing the same adequately in reply to regulators have resulted into rejection of scheme of mergers by NCLT as well as NCLAT[1].

The same amount of business advances appearing in financials for back-to-back years is again a concern that attracts the eyes of Regulators and has been a point of argument of becoming a public deposit.

Careful financial Due Diligence and adequate steps to compliance is utmost whenever the point related to public deposit is concerned.

G. Annual filing

Non filing / Late filing of financials /AOC-4 and Annual Return / MGT-7 before approaching for restructuring may result into Adjudication as condition preceding before final sanction from NCLT[2]. Also, Director disqualification may trigger for Non filing of financials and annual returns for continuous period of 3 financial year. Therefore, it is utmost important make sure that companies going for restructuring are complied with filling of financials and Annual Returns.

H. Non-banking financial Companies Criteria

Often the general objective of merger is to reduce compliance burden by eliminating the companies which are not operative in terms of business. However, this companies may hold some financial assets and earn dividends / interests on those financial assets, that's where it may hit the NBFC Criteria and may become a problem in regulatory clearance. The real objective of such companies may not have been to carry out the NBFC business, but criteria would trigger pursuant to unintended actions wherein the company was operating, therefore, it is very important to keep a check on the compliance triggers while approaching for restructuring.

I. Validation of Wholly owned Subsidiaries

In case of wholly owned Subsidiaries, it is often seen that entire capital i.e., 99.99% is held by the holding company and one nominee is appointed to hold 1 share i.e., 0.01 % for the purpose of compliance of law. However it is also important to see whether holding Company has disclosed the beneficial interest of that 1 share and has reported the same in MGT-5 or that nominee has reported the same in MGT-4 and the same has been filled in MGT-6, else it may happen that regulator may not consider it as Holding – Wholly owned subsidiary and it will appear that the 1 share is held in individual capacity by the nominee. This problem may result into loss of all the benefits of restructuring that ideally would be available in case of WOS merger. Considering this filing of MGT-4/5/6 become very important.

J. Shareholding Proof

In case of capital reductions wherein the actual payout happens or in case of merger / demerger wherein the shareholders get shares of transferee companies, it becomes important to check whether the shareholders appearing in register of members has rightfully acquired the shares or not. In case of age-old companies which later gets acquired/ taken over, it happens that shareholders may not have the share certificates in place, or the record of acquisition may not be in place, and this may become a problem. There have been cases wherein the composite scheme of arrangement has been withdrawn/ plead for rejection by Regulator for not having shareholding proofs.

K. Appointed Date

MCA Circular dated 21 August 2019 states that the appointed date should not be older than one year without sufficient justifications and the same shall be specifically brought out in the scheme, whenever this specific justification is missed in the scheme it may results into clarification from Regulators and therefore scheme shall be drafted carefully, and all the relevant clauses shall be taken into account.

L. Shareholders Complaints

Any age-old complaint pending against transferor company regarding oppression mismanagement or any other complaints which later have been resolved or closed but still open with Registrar of Companies may become a challenge and be reported to NCLT during the regulatory clearances. While planning for any restructuring, considering the consequences of past and present disputes and actions over it decides the success of restructuring.

M. Details of Signatory in Correspondence with Regulator

Rule 7 of the Companies (Registration offices and fees) Rules, 2014 requires any correspondence (Physical or electronically) and documents to be filled by any person shall contain Name, designation, address, membership number or director identification number as the case may be of the person signing such document and correctness thereof and in no case correspondence merely with signature and writing authorised signatory shall be acceptable.

This makes it very important that while submitting any documents or replying any queries with Regulator, company shall make sure the above provisions are complied with as it may become a precondition for self-adjudication while in process of restructuring[2].

Conclusion:

Rounding up all the above if we observe the current trend of Regulator carefully, one can understand that petty matters / non compliances even if it may or may not have larger impact are now under scrutiny by Regulators and one should have a through due diligence of provisions of Companies Act, 2013 before going for Mergers/ Demerger/ Capital Reductions. Some of the above points may not be the showstoppers in scheme of arrangement however may become speed breakers and consume lot of time in resolving and ultimately taking sanctions from NCLT.

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1 *Order passed on 16 January 2023 by National Company law Appellate tribunal in the matter of Hotel City Plaza Private Ltd Vs Union of India*

2 *Order delivered on 14 July 2023 by National Company law tribunal in the matter of CSP No. 85 of 2021 Marathon Nextgen Townships Private Limited – Transferor Company and Marathon Nextgen Realty Limited – Transferee Company*

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Mr. Omkar Dindorkar– Partner - omkardindorkar@mmjc.in

FCRA Suspension Fallout: Delhi High Court's Ruling for Utilisation of Unspent Funds

Background

The Ministry of Home Affairs (MHA) has suspended the Foreign Contribution (Regulation) Act registration of the Centre of Policy Research (CPR), a Delhi based think tank on 27th February, 2023 in response to the allegations of misappropriation of foreign contributions for purposes outside the scope of its registered objectives.

Further Rule 14 of Foreign Contribution (Regulation) Rules, 2011(FCRR) provides that in case of suspension of certificate of registration, 25% of unspent amount can be utilised for the declared aims and objects for which the foreign contribution has been received.

Application for utilisation of funds in case of suspension:

The CPR made an application to permit it to utilize 25% of the total foreign contribution amount/funds held under section 13(2)(b) of FCRA, 2010 read with rule 14(1) of FCRR. The CPR is permitted to utilize 25% of foreign contribution amount lying in its custody which was 25% of the contribution held by the petitioner only of the current bank accounts.

Writ petition under Article 226

In response to suspension order issued by the MHA, CPR approached the Delhi High Court (Delhi HC) through a writ petition under article 226 of the Indian constitution, seeking cancellation of suspension order. Additionally, to address the immediate financial challenges pending writ petition, an application for interim relief had been filed by CPR invoking Section 13(2)(b) of FCRA r/w Rule 14(a) of FCRR.

Contention of CPR

Section 13(2) of FCRA permits utilization of foreign contribution which is in custody of the person whose certificate has been suspended. Sub-Section (2) of Section 13 states as follows:

(2) Every person whose certificate has been suspended shall—
(a) not receive any foreign contribution during the period of suspension of certificate:
***Provided** that the Central Government, on an application made by such person, if it considers appropriate, allow receipt of any foreign contribution by such person on such terms and conditions as it may specify;*
*(b) utilise, in the prescribed manner, the foreign contribution **in his custody** with the prior approval of the Central Government.*

The CPR sought definitive interpretation of term 'in his custody' as stipulated in Section 13(2)(b) of the FCRA. The Petitioner argued that this provision of the FCRA permitted the utilization of 25% of the entire unutilized amount, including funds held in different deposit accounts/schemes like fixed deposits, government bonds, etc.

Contention of Respondent:
However, the Union of India, who was respondent in such case contented that the FCRA provisions permitted the utilization of 25% of the unutilized amount in the current account of the CPR and argued that the amount kept under different deposit/investment schemes cannot be included in the definition of 'custody' under the provisions of S.13(2)(b) of the FCRA.

Court held:
The Delhi HC examined the term "in his custody" under Section 13(2)(b) of the FCRA and state that there is no occasion to restrict the term "his custody" only to the current account. There is nothing in the said Section which restricts that only the amounts lying in the current account can be permitted to be utilized, this Court is inclined to allow the Petitioner to utilize the 25% of the total FCRA funds held it in fixed deposits, government bonds etc. pending consideration of the cancellation of registration under Section 14 of the FCRR.

Further to avoid misuse or diversion of foreign contribution during suspension period, the Delhi HC imposed specific compliance and obliged to submit a complete statement of the CPR's FCRA account and the amounts deposited in fixed deposits and government bonds etc. along with expenses incurred from the date of suspension to respondent periodically.

Conclusion:
The Delhi HC has taken practical approach which will bring balance between the regulatory compliance and organisations operation requirements. It will provide greater flexibility in managing unutilised foreign contributions during the FCRA suspension and will get option in addressing financial challenges faced during such period.

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https://taxguru.in/corporate-law/fcra-suspension-fallout-delhi-high-courts-ruling-utilisation-unspent-funds.html

Ms. Vrushali Bhave – Senior Manager – vrushalibhave@mmjc.in

NEWS UPDATES/AMENDMENTS FOR THE MONTH OF NOVEMBER:

Sr. No.	News Updates/Amendments	Link & Brief Summary
	NEWS	
1	GST Changes: Amnesty scheme, guarantee tweaks to have far-reaching impact on India Inc.	https://cfo.economictimes.indiatimes.com/l.php?email=--email--&clid=433993 The Goods and Services Tax (GST) Council took several decisions that could have a far-reaching impact on India Inc, including a GST amnesty scheme and relaxing age limits for GST Appellate tribunal members that would help in expanding such tribunals.
2	MCA to soon launch Centre to process all compliances for companies	https://www.business-standard.com/india-news/ministry-of-corporate-affairs-to-launch-its-central-processing-centre-soon-123102700901_1.html MCA to set up CPC for processing of non-STP forms. This move is decluttering ROC and RD for enforcement. Industry demand is to release SOP as to how CPC will process forms.
3	Insolvency Law: Supreme Court Divided Over Government's Position as Secured Creditor	https://www.bqprime.com/law-and-policy/insolvency-law-supreme-court-divided-over-governments-position-as-secured-creditor The Supreme Court delivered a judgement earlier this year, wherein it was held that dues payable to the government are placed much below those of secured creditors and even unsecured and operational creditors.
	AMENDMENTS / CIRCULARS /CONSULTATION PAPERS	
1.	MCA amends incorporation rules.	https://www.mca.gov.in/bin/dms/getdocument?mds=uqnggXxHARXXjysr4uSRjQ%253D%253D&type=open Allows shifting of registered office of companies taken over by new management under resolution plan approved under IBC provided no appeal against the resolution plan is pending in any Court

		or Tribunal and no inquiry, inspection, investigation is pending or initiated after the approval of the said resolution plan.
2.	MCA notifies that incorporation of cos and LLPs can also be done through National Single Window System.	https://www.mca.gov.in/bin/dms/getdocument?mds=cr9F9%252F8lGDiypPxTWd6oQw%253D%253D&type=open This is an independent portal under DPIIT, Ministry of Commerce and Industry. Through this portal stakeholders would be guided about different government approvals required as per their business models. Also, these approvals can be sought through this portal.
3.	Companies (Management and Administration) Rules, 2014 –	https://www.mca.gov.in/bin/dms/getdocument?mds=lVo7Nz8E9SMEBo5r07okJw%253D%253D&type=open Designation of a person who shall be responsible for furnishing, and extending co-operation for providing, information to the Registrar or any other authorised officer with respect to beneficial interest in shares of the company.
4.	Companies (Prospectus and Allotment of Securities) Rules, 2014	https://www.mca.gov.in/bin/dms/getdocument?mds=ZvNqoKdfvPrRcqeoGzGdDg%253D%253D&type=open 1. Warrants issued by public companies' prior to the commencement of Companies Act, 2013 and have not converted them into shares must within 3 months inform ROC about the details of such share warrants in Form PAS-7. 2. Ask warrant holders to surrender the warrants for dematerialization within 6 months of coming into effect of this amendment. 3. If the same is not done, then the company should convert them into demat and transfer them to IEPF. 4. Issue of securities in dematerialised form by private companies ***(Rule 9B – newly inserted)***
5.	SEBI Circular	https://www.sebi.gov.in/legal/circulars/oct-2023/revision-in-manner-of-achieving-minimum-public-unitholding-requirement-infrastructure-investment-trusts-invits-_78561.html

		SEBI Circular on revision in manner of achieving minimum public unitholding requirement- InvITs.
6.	BSE Circular	https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20231031-42 BSE Circular about Working Groups to recommend simplification, ease of compliance and reduction in cost of compliance; suggestions invited.