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Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : articles@vidhimaan.com along with your student registration number. The shortlisted articles shall be published in the Journal.

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MESSAGE FROM THE PRESIDENT

Dear Students,

Teaching is a Profession that teaches all the other Professions. At the beginning, my best wishes on the occasion of Teachers' Day, 2018.

Being a torch bearer of the Institute, a National Premier Body for imparting Professional Education throughout the nation, month of September is close to my heart as on one end, it gives us the opportunity to express our gratitude and respect for our teachers and on another end, it strengthens our utmost dedication in polishing the skills of our students as globally renowned governance professionals.

Friends, Sant Kabir beautifully quoted गुरु बिन ज्ञान न उपजै, गुरु बिन मिलै न मोष। गुरु बिन लखै न सत्य को गुरु बिन मिटे न दोष।, which aptly signifies the role of teachers in one's life. Indeed, with the guidance a teacher provides to his/her students in their journey from illiteracy to knowledge, from flaws to calibre, from ignorance to truthfulness, one leads an enlightened and bright life. Certainly, we all are indebted to our teachers, who have contributed in our lives in one way or the other.

As a mentoring body for our students, the Institute has taken various initiatives for igniting the minds of budding professionals to be able to flourish and succeed and to guide them with knowledge, expertise and proficiency with reassuring them on their path to becoming Governance Professionals.

Further, I convey my heartiest congratulations to all the students who have cleared the Company Secretaryship examinations and moving forward in succeeding the next step in their journey as budding Company Secretaries and my best wishes to others, who have not made it this time, but would surely keep up their spirits high in making their journey to success in the coming attempts.

Friends, to succeed in life, one needs to set goals. Motivation and dedication are the compelling strengths which endeavours towards achieving the goals. Hence, on this Teachers' Day, I advise all the students to be determined to achieve their goals and keep utilizing all their energies effectively and efficiently.

In the end I would like to quote Aristotle: "Those who educate children well are more to be honoured than parents, for these only gave life to the art of living as well".

Keep Succeeding, Keep Flourishing, Wishing you luck in all your endeavours!!

Best Wishes,

CS Makarand Lele

President, ICSI



Private Limited Companies' Stand at Ease of Doing Business – A Company Law Perspective

In this article, the author deliberates upon the impact of relaxations given to Private Limited Companies under the Companies Act, 2013.

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Where does the India Stand in terms of Ease of Doing Business?

As per World Bank's Doing Business Report 2018, India stands at 100th rank all the over the world in terms of Ease of Doing Business. This rank is measured on 11 areas of business environment in 190 countries which inter-alia includes registration of business, obtaining regulatory permits such as constructions/ electricity permits etc., access to credit facilities, taxation policies, cross-border trade policies, resolution of insolvency. India was previously ranked 142nd in year 2014. This clearly indicates that the Government is determined to create the business friendly environment by reducing the level of statutory interference to the business in India to achieve the higher economic growth.

Relaxed Norms for Private Companies

Ministry of Corporate Affairs (MCA), in exercise of powers conferred upon it under 462 of the Companies Act, 2013, has issued the mega **Exemption Notification** on 5th June, 2015 to the effect that certain provisions of the Companies Act, 2013 shall not apply or shall apply with certain modifications to the private limited companies in India.

Exemptions : A Rational

The Companies Act, 2013 contains several provisions made applicable to the private companies at par with the public companies resulting in significant increase in procedural and compliance requirements even for closely held small businesses. Recognising the need for '**Ease of Doing Business**' and to encourage the corporatisation of traditional business models in India Ministry of Corporate Affairs ('MCA') has favourably granted numerous exemptions to the private companies considering that not much of the public interest is involved in the private companies. These exemptions has significantly benefitted 11,81,877 active private limited companies (Including one person companies) ('OPC') in India registered as on **30th June, 2018**¹.

What are the Relaxations provided to Private Companies?

Let us analyse the impact of the relaxations provided to the private limited companies from the compliance point of view in the following tabular format showing impact on exemptions/modifications:

1. www.mca.gov.in

Sr. No.	Exemptions / Modifications	Impact
1.	Non-applicability of section 2(76)(viii) with respect to section 188	Holding/ associate/ subsidiary/ fellow subsidiary company shall not be treated as related parties & consequently transactions with them will not require approval of board and/or members under section 188.
2.	Sections 43 and 47 shall not apply where memorandum or articles of association so provides.	<p><i>Section 43</i> - Company can make provisions to have share capital other than that prescribed in section 43; for example, preference shares with voting rights, non-voting equity shares, share capital having features of both equity and preference capital.</p> <p><i>Section 47</i> - Company can make its own provisions relating to voting rights of shareholders ; for example, Company can issue non-voting equity shares which facilitates fund raising without change in control of management.</p>
3.	Insertion of proviso to sub clause (1) of clause (a) of sub- section (1) and Sub-section (2) of section 62	<p>If 90% members have given their consent in writing or in electronic mode ;</p> <p>(i) the offer of securities to existing shareholders can be made by a notice for a period lesser than 15 days.</p> <p>(ii) notice to existing shareholders may be dispatched less than 3 days before opening of issue.</p> <p>Fund raising through rights offer can be implemented in a speedier manner.</p>
4.	Substitution of word 'ordinary resolution' for special resolution' in section 62(1)(b)	Requirement of passing special resolution is done away with, ordinary resolution is sufficient to issue shares to its employees under the scheme of 'employees stock option scheme' (ESOP).
5.	Non applicability of section 67 provided the company satisfies certain prescribed conditions	Giving of loans by company for purchase of its own shares is now permitted.
6.	Non- applicability of clauses (a) to (e) of sub-section (2) of section 73	Companies which accepts deposits from its members not exceeding 100% of its paid up share capital and free reserves are granted exemption from procedural requirements such as issuance of circular to members and filing with ROC, creation of deposit repayment reserve, certification that the company has not defaulted in repayment of deposits or payment of interest thereon.
7.	Articles of association may have specific provisions regarding applicability of sections 101 to 107 and section 109	<p>Enabling provisions may be made to lay down company's own procedure to conduct its general meetings with respect to Notice of meeting, explanatory statement, quorum, chairman, proxies, restrictions on voting rights, demand for poll, etc.</p> <p>Greater flexibility to conduct general meetings.</p>

8.	Non-applicability of section 117(3)(g)	<p>No requirement to file Board resolutions passed under section 179(3) which inter-alia includes approval of financial statements, Board's report, resolutions for borrowings, investments, issue of securities. However, all the transactions which are prescribed in section 179 and relevant rules thereunder have to be carried out at the duly convened meeting unless otherwise allowed to delegate the same.</p> <p>It has substantially reduced the obligation of filing of board resolutions with RoC.</p>
9.	Non-applicability of Section 141(3)(g)	<p>Small companies, dormant companies and private companies having paid-up share capital of less than Rs. 100 crore shall not be counted in the limit of 20 companies under section 141(1)(g).</p> <p>This is a relaxation provided to the auditors rather than to the private companies.</p>
10.	Non-applicability of section 160	<p>14 days notice of candidature and deposit of Rs. 1 lakh for appointment of director other than retiring director at AGM is not required.</p> <p>Procedural ease for appointment of directors at the AGM.</p>
11.	Non-applicability of section 162	<p>Two or more persons can be appointed as directors by passing a single resolution even if no such proposal to move such a motion is agreed at the general meeting.</p> <p>Straightforwardly enables appointment of two or more persons as a director at the general meeting.</p>
12.	Non-applicability of section 180	<p>Approval of shareholder by way of special resolution for exercise of powers specified in section 180 shall not be required.</p> <p>Enables faster execution of transactions such as sale/ lease of undertakings of companies, Investments in trust securities, borrowings, remittance or giving of time to directors for repayment of debt due to company as the shareholders interference is eliminated.</p>
13.	Exception to sub-section (2) of section 184	Interested director may participate in the meeting after disclosure of his interest.
14.	Non-applicability of section 185 to the private companies provided the company satisfies the prescribed conditions	Companies are free to provide loans or give guarantee or to provide security in connection with the loan taken by directors and/or other persons in which directors are interested.
15.	Non-applicability of second proviso to sub- section (1) of section 188	If the company proposes to enter into any contracts or arrangements with related party which requires prior approval of members of the company then even related parties with whom such contracts or arrangements are proposed to be entered into are allowed to vote on such resolution if they are members of the company.

16.	Non-applicability of sub-sections (4) and (5) of section 196	<p>Appointment of managing director, whole-time director or manager and approval of remuneration payable to them need not necessarily be made at the Board meeting. Further the same is not subsequently required to be approved at the next general meeting of the company. Also such approval of Central Government is not required even if such appointment is in variance with the conditions of Schedule V.</p> <p>Notice convening board/general meeting for such appointment need not include terms and conditions including remuneration of managerial person.</p> <p>Remuneration of managerial personnel shall not be subject to limits provided under section 197.</p> <p>Return of appointment in form MR-1 need not be filed with RoC.</p>
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Implications of Relaxations provided to Private Companies

MCA, vide a further notification dated 13th June, 2017, has amended the exemption notification dated 5th June, 2015 to provide further exemptions/modifications in the provisions of Companies Act, 2013 applicable to private companies. Let us discuss the implications of those added relaxations provided to the private companies.

Sr. No.	Exemptions / Modifications	Impact
1.	Substitution of proviso to clause (40) of section 2 for certain class of companies including start up private companies.	Financial statements of OPC, dormant company, private companies if such company is recognized as a 'start-up company' by Ministry of Commerce and Industry shall not include cash flow statement.
2.	Substitution of non-applicability of clauses (a) to (e) of sub section (2) of section 73.	Private companies which are start-up company for a period of five (5) years from the date of incorporation among other prescribed class of companies are exempted from procedural requirements such as issuance of circular to members and its filing with RoC, creation of deposit repayment reserve, certification that the company has not defaulted in repayment of deposits or payment of interest thereon.
3.	Clause (g) of sub section (1) of section 92	Small companies (which are de-facto private companies) may disclose aggregate amount of remuneration drawn by directors instead of remuneration paid to each directors/ KMPs.
4.	Substitution of proviso to sub section (1) of section 92	Annual return of the OPC, small company and private company, if such private company is start-up company need not be signed by the practicing company secretary.

5.	Non-applicability of clause (i) of sub-section (3) of section 143 to prescribed class of private companies.	Auditor's report need not state whether the company has adequate internal financial control if such company is OPC or small company or it has turnover of less than Rs. 50 crore or borrowings from body corporate or banks or financial institutions during the financial year is less than Rs. 25 crore.
6.	Substitution of sub-section (5) of section 173	Small company, dormant company and private company if such private company is start-up company shall be deemed to have complied with the provisions of section 173 if at least one meeting of the Board of directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.
7.	Exception to sub-section of section 174	Interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.

Stay Compliant : Concludary Note

The exceptions, modifications and adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar. Thus, a private company which has made a default with respect to filing of annual returns under section 92 or filing of financial statements and other documents under section 137 shall not be privy to such exemptions/

modifications. In addition to the above exemptions, the Companies (Amendment) Act, 2015 has done away with the requirement of minimum paid-up share capital for the private companies also.

It is pertinent to note that the aforementioned relaxations shall be applicable only to the 'private companies' and not to a private company which is a subsidiary of public company pursuant to proviso to clause (71) of section 2.



KNOWLEDGE UPDATE

COMPANY LAW

Companies (Incorporation) (Third Amendment) Rules, 2018

Vide Notification No. G.S.R. 708(E) dated 27th July, 2018, Central Government has amended Companies (Incorporation) Rules, 2014 by : substituting the term 'resident in India' defined in Explanation to sub-rule (1) of rule 3 and rule 15 dealing with submission of declaration.

Companies (Accounts) (Amendment) Rules, 2018

Vide G.S.R. 725(E) dated 31st July, 2018, Central

Government has amended the Companies (Accounts) Rules, 2014 by inserting clause (ix) and (x) in sub-rule (5) of rule 8, sub-rule (6) of rule 8, which states that this rule shall not apply to one person company or small company and rule 8A which states that matters to be included in Board's Report for one person company and small company.

Section 36 of the Companies (Amendment) Act, 2017 Comes into Force with effect from 31st July, 2018

Vide Notification No. S.O. 3838(E) dated 31st July, 2018, the provisions of section 36 of Companies (Amendment) Act, 2017 shall come into force with effect from 31st July, 2018.



Corporate Governance Framework vis-a-vis Enhanced Compliance Mechanism for Listed Entities : An Overview

SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 provided for a stringent Corporate Governance framework and enhanced compliance mechanism for listed entities. This article aims to explain the amended provisions in a tabular format.

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AMENDMENTS IN SEBI LODR		
Regulation	Subject Matter	Brief Amendment
2 (1)(zb)	Definition of 'Related Party'	Amendment made to definition of related party to include any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more of shareholding in the listed entity shall be deemed to be a related party.
16(1)(b)	Definition of 'Independent Director'(ID)	Following persons are not eligible to become the ID of listed entity : - who is a member of promoter group of listed entity or - who is not a non- in ID of any company on the Board of which any non-independent director of the listed company is an independent director
16(1)(c)	Definition of 'Material Subsidiary'	Amendment made to definition of material subsidiary by reducing the threshold of income or net worth from 20% to 10%
16(1)(d)	Definition of 'Executive Directors'	Executive directors, including all functional heads" shall be substituted with the following : CEO/MD/WTG/manager (including chief executive officer/ manager, in case they are not part of the board) and shall specifically include company secretary and chief financial officer.
17(1)(a)	Requirement to appoint One Woman Independent Director by top 500 listed entity	<ul style="list-style-type: none"> • Those falling in the list of top 500 listed entities based on market capitalization as on March 31, 2019 (being end of immediate previous financial year) will be required to appoint woman ID w.e.f. April 1, 2019. • Those falling in the list of top 1000 listed entities based on market capitalization as on March 31, 2020 will be required to appoint woman ID w.e.f. April 1, 2020.
New Clause 17(1)(c)	New clause to be added on Minimum Requirement of Directors	Requirement to have minimum 6 directors by top 1000 listed entities w.e.f. April 1, 2019 and by top 2000 listed entities w.e.f. April 1, 2020.

New clause 17(1A)	Upper age limit of Non-Executive Director	No listed entity shall appoint a person or continue the directorship of any person as a non-executive director who has attained the age of seventy five years unless a special resolution is passed to that effect, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person."
New clause 17(1B)	Criteria for Chairman	From April 1, 2020, the top 500 listed entities shall ensure that the Chairperson of the board of such listed entity shall - (a) be a non-executive director; (b) not be related to the managing director or the chief executive officer as per the definition of the term "relative" defined under the Companies Act, 2013:
New clause 17(2A)	Quorum	The quorum for every meeting of the board of directors of the top 1000 listed entities from April 1, 2019 and of the top 2000 listed entities with effect from April 1, 2020 shall be 1/3rd of its total strength or 3 directors, whichever is higher, including at least one independent director.
New clause 17(6)(ca)	Remuneration to Single Non-Executive Director	Requirement to obtain approval of shareholders by special resolution every year, in which the annual remuneration payable to a single non-executive director exceeds fifty per cent of the total annual remuneration payable to all non-executive directors, giving details of the remuneration thereof.
New clause 17(6)(e)	Payment of Compensation to Executive Director who is the promoter or member of promoter group	Requirement to obtain approval of shareholders by special resolution for the fees or compensation payable to executive directors who are promoters or members of promoter group in case in excess of thresholds.
17(10)	Amendment in the evaluation of Independent Director	The evaluation of IDs shall be done by the entire board of directors which shall include - (a) performance of the directors (b) fulfillment of the independence criteria as specified in these regulations and their independence from the management. Provided that in the above evaluation, the directors who are subject to evaluation shall not participate."
New clause 17(11)	Notice of General Meeting	The statement to be annexed to the notice as referred to in sub-section (1) of section 102 of the Companies Act, 2013 for each item of special business to be transacted at a general meeting shall also set forth clearly the recommendation of the board to the shareholders on each of the specific items."
New clause 17(A)	Maximum Number of Directorship	(1) A person shall not be a director in more than 8 listed entities w.e.f. April 1, 2019 and in not more than 7 listed entities w.e.f. April 1, 2020: Provided that a person shall not serve as an independent director in more than 7 listed entities. (2) Notwithstanding the above, any person who is serving as a whole time director / managing director in any listed entity shall serve as an independent director in not more than 3 listed entities.

New clause 19(2A)	Quorum of the Nomination and Remuneration Committee (NRC)	The quorum for a meeting of the NRC shall be either two members or one third of the members of the committee, whichever is greater, including at least one independent director in attendance.
New clause 19(3A)	Meeting of NRC	The nomination and remuneration committee shall meet at least once in a year.
20 (1)	Stakeholders Relationship Committee (SRC)	In sub-regulation (1), for the words “the mechanism of redressal of grievances” the words “various aspects of interest” shall be substituted.
20 (2A)	Membership of Stakeholders Relationship Committee	At least three directors, with at least one being an independent director, shall be members of the Committee.
20(3)	Amendment in the Regulation	The Chairperson of the Stakeholders Relationship Committee shall be present at the annual general meetings to answer queries of the security holders.
New Clause 3A	Meeting of SRC	At least once in a year
New clause 21(3A)	Meeting of Risk Management Committee (RMC)	The risk management committee shall meet at least once in a year.
21(4)	Terms of reference of RMC	Role and responsibility of RMC to cover cyber security function.
21(5)	Applicability of RMC	RMC to be formed by top 500 listed entities.
New 23(1A)	Related Party Transactions (RPT) Material Threshold	Material RPT threshold in case of a transaction involving payments made to a related party with respect to brand usage or royalty revised. Transaction to be entered into individually or taken together with previous transactions during a financial year, exceeding 2% of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity shall be considered material.
23(4)	Special Resolution for RPT	In case of voting for Material RPTs, related parties need not abstain from voting and can cast vote against/ not in favor of the transaction.
New clause 23(9)	Intimation of Consolidated RPT to Stock Exchange	Disclosures of related party transactions on a consolidated basis to be submitted on half-yearly basis within 30 days from the date of publication of its standalone and consolidated financial results for the half year. Publish the same on the website too
24(1)	Subsidiary Related	At least one independent director on the board of directors of the listed entity shall be a director on the board of directors of an unlisted material subsidiary, whether incorporated in India or not.

New Clause 24(A)	Secretarial Audit of Material Subsidiary	Every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex with its annual report, a secretarial audit report, given by a PCS, in specified form w.e.f year ended March 31, 2019.
25(1)	Alternate Director	An alternate director cannot be appointed for an independent director w.e.f. October 1, 2018
New Clause 25(8) and (9)		Declaration by ID at the 1st meeting as director/ 1st meeting of FY and whenever there is a change that he meets criteria of independence and taking on record of the same by Board after undertaking due assessment of the veracity.
New Clause 25(10)	Directors and Officers Insurance Policy	Obtaining Directors and Officers insurance for all their independent directors of such quantum and for such risks as may be determined by its board of directors. Effective from October 1, 2018 by top 500 listed entities.
29(1)(f)	Prior Intimation to Stock Exchange for Issue of Bonus shares	Exemption from giving of prior intimation to the stock exchange(s) in case of the declaration of bonus by the listed entity not being on the agenda of the meeting of board of directors stands withdrawn
New Clause 32(7)(A)	Utilization of Fund raised through Preferential Allotment/ QIP	Disclosure of utilization of funds in the Annual Report till the funds raised through preferential allotment or QIPs have been utilized.
33 (3)(b)	Consolidated Financial Statement	Mandatory requirement to submit consolidated financial results. The listed entity shall also submit the audited or limited reviewed financial results in respect of the last quarter along-with the results for the entire financial year
New Clause 33(3)(g)	Consolidated Cash Flow	Mandatory requirement to submit cash flow statement as part of its standalone and consolidated financial results for the half year.
New Clause 33(8)	Audit of Consolidated	The statutory auditor of a listed entity shall undertake a limited review of the audit of all the entities/ companies whose accounts are to be consolidated with the listed entity as per AS 21 in accordance with guidelines issued by the Board on this matter."
34(1)	Annual Report to Stock Exchange	<p>The listed entity shall submit to the stock exchange and publish on its website-</p> <p>(a) a copy of the annual report sent to the shareholders along with the notice of the AGM not later than the day of commencement of dispatch to its shareholders;</p> <p>(b) in the event of any changes to the annual report, the revised copy along with the details and explanation for the changes shall be sent not later than 48 hours after the annual general meeting.</p>

New Clause 36(4)		<p>The disclosures made by the listed entity with immediate effect from date of notification of these amendments-</p> <p>(a) to the stock exchanges shall be in XBRL format in accordance with the guidelines specified by the stock.</p> <p>(b) to the stock exchanges and on its website, shall be in a format that allows users to find relevant information easily through a searching tool.</p>
New Clause 36(5)	Notice of AGM for Appointment/ Re-appointment of Auditors	<p>The notice being sent to shareholders for AGM, where the statutory auditor is proposed to be appointed/ re-appointed shall include the following disclosures as a part of the explanatory statement to the notice:</p> <p>(a) Proposed fees payable to the statutory auditor along with terms of appointment and in case of a new auditor, any material change in the fee payable to such auditor from that paid to the outgoing auditor along with the rationale for such change,</p> <p>(b) Basis of recommendation for appointment including the details in relation to and credentials of the statutory auditor proposed to be appointed.</p>
New Clause 44(5) & (6)	E/AGM and Voting	The top 100 listed entities shall hold their AGM within 5 months from the date of closing of the financial year and shall provide one-way live webcast of the proceedings of the AGM
Schedule II	Corporate Governance Part C -Clause A: Audit Committee	The role of Audit Committee has been enhanced it should also review the utilization of loans and/ or advances from/investment by the holding company in the subsidiary exceeding rupees 100 crore or 10% of the asset size of the subsidiary, whichever is lower including existing loans, advances, investments existing as on the date of coming into force of this provision.
	Part D-Clause A	The role of Nomination and Remuneration Committee has been enhanced, as it is now required to recommend to the board, all remuneration, in whatever form, payable to senior management
	Part D-Clause B	The role of Stakeholders Relationship Committee has been completely substituted and a broader role has been prescribed.
Schedule III	Disclosures of Events or Information	7A :In case of resignation of the auditor, detailed reasons for resignation as given by the auditor, is now required to be disclosed by the listed entities to the stock exchanges as soon as possible but not later than 24 hours of receipt of such reasons from the auditor.
	In Regulation 30(4) after the existing sub-clause 7, the following new sub-clauses shall be inserted,	7B: In case of resignation of the Independent Director, the detailed reason for such resignation is required to be disclosed to the stock exchanges, within 7days of the resignation, including a confirmation from the Independent Director that there is no other material reasons other than those provided.

Schedule IV	Disclosures in Financial Results Part A - Clause BB	Where the impact of the audit qualification is not quantifiable, the management is mandatorily required to make an estimate which the auditor shall review and report accordingly. For this purpose, the management may be permitted to not provide estimate on matters like going concerns or sub-judice matters; in which case, the management shall provide the reasons and the auditor shall review the same and report accordingly.
Schedule V	Annual Report Part A	Disclosures of transactions of the listed entity with any person or entity belonging to the promoter/promoter group which hold(s) 10% or more shareholding in the listed entity, in the format prescribed in the relevant accounting standards for annual results is required to be made.
	Part B	The Management Discussion and Analysis (MDA) should now include the details of significant changes (i.e. change of 25% or more as compared to the immediately previous financial year) in key financial ratios, along with detailed explanations thereof, including various ratios.
	Part C	<p>The following changes has been done in the details required to be provided in the CG Report of a company:</p> <p>(a) The names of the listed entities where the person is a director and the category of w.e.f the Annual Report for the year ended 31st March 2019.</p> <p>(b) A chart or a matrix setting out the skills, expertise, competence of the board.</p> <p>(c) Confirmation from the board, that in their opinion, the independent directors fulfill the conditions specified and are independent of the management.</p> <p>(d) Detailed reasons for the resignation of an independent director who resigns before the expiry of his tenure along with a confirmation by such director that there are no other material reasons other than those provided</p> <p>(e) List of all credit ratings obtained by the entity along with any revisions during the relevant financial year, for all debt instruments whether in India or abroad, is required to be disclosed.</p> <p>(f) Details of utilization of funds raised through preferential allotment or QIP as specified.</p> <p>(g) Certificate from a PCS that none of the directors on board have been debarred or disqualified from being appointed or continuing as directors of companies by the Board/MCA or any such statutory authority.</p> <p>(h) Non-acceptance of any recommendation of any committee of the board which is mandatorily required is required to be disclosed along with the reason of non-acceptance.</p> <p>(i) Disclosure of total fees for all services paid by the listed entity and its subsidiaries, on a consolidated basis, to the statutory auditor and all entities in the network firm/network entity of which the statutory auditor is a part.</p>



SEBI's Exemptions for Insolvency Resolution of Listed Companies – A Critical Analysis

This article highlights the key amendments applicable to the listed companies under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI (Delisting of Equity Shares) Regulation 2009, Insolvency and Bankruptcy Code, 2016 and SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015.

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Public Float Limit under the Takeover Regulations – Consolidation beyond 75 per cent now Permitted

Under the Insolvency and Bankruptcy Code, 2016 ('the code') read with SEBI (Substantial Acquisition of Shares and Takeovers) Regulation 2011, ('Takeover Regulations') the buyer is allowed to acquire more than 75 per cent of the relevant listed company. This amendment clearly supports the earlier amendment under the code which came to be passed in August, 2017, which exempted acquisition pursuant to the resolution plans from the open offer obligation of the Takeover Regulation.

It is to be noted that because of the "public float" rule (25 per cent), acquisition beyond 75 per cent of a listed company are generally restricted. This is because every listed company has to mandatorily keep 25 per cent shares in public i.e., non-promoter holding. In the case of Code, the situation is different and it is a case of financial distress. The value of the listed company is depressed and any investment of new equity or conversion of debt into equity would significantly dilute the percentage holdings of existing shareholders. Now, with the amendment to the Code, further consolidation beyond 75 per cent is now permitted. In other words, in the case of corporate insolvency resolution process ('CIRP'), a company can acquire more than 75 per cent of

the total shares of a company which is undergoing Insolvency proceedings.

Impact of Amendment and Points to Ponder

In terms of amendment Code, acquisition pursuant to a resolution plan should be made available to all including the plans which were approved earlier to the amendment. It should specifically include in the resolution plan for future investment or should contemplate a debt for equity conversion.

Comments – Presently, the listed company if it is having less than 25 per cent public float, should restore it to 25 per cent public float within one year. But as per the amended Code when it comes to public float, SEBI has not provided any dispensation for the maximum time within which the public float should be restored and hence it should be interpreted that the existing rule of one year will be applicable under default clause. It is a known fact that a company which is undergoing CIRP will have stressed assets. If a company increases the threshold limit of acquisition beyond 75 per cent of the company which is undergoing the CIRP, it is not certain that a listed entity can turnaround and improve its market valuation to have a public float of 25 per cent and hence the acquirer may struggle in some cases to bring back the public float to minimum 25 per cent.

Classification of Promoter Holding

Under the amendment to the SEBI (Listing Obligations & Disclosures Requests) Regulations 2015 (LODR Regulations), which states that former promoter's shareholding, pursuant to any promoter re-classification will be considered as a part of public shareholding. Normally, such shareholding, despite re-classification, is not treated as public or can be counted for the public float. This is to prevent the promoters from diluting the public shareholding limit by reclassifying any part of the promoter or promoter group shareholding.

Exemption from Delisting

If a listed company wants to delist its securities, it will have to undergo vigorous formalities like the minimum shareholder approval and participation requirements and high exit prices and it has to be through the reverse book-building mechanism and experience shows that it is a tough task to delist a listed company in India. Very often because of these stringent conditions many promoters have abandoned the idea of delisting a listed company.

With the amendment in place, the delisting procedure under the SEBI (Delisting of Equity Shares) Regulations, 2009 (Delisting Regulations) will no longer apply to any delisting of equity shares pursuant to an resolution plan, provided the following conditions are satisfied:-

- ♦ The Plan provides a specific delisting procedure
- ♦ The Plan provides an exit option to existing public shareholders at a price not less than the liquidation value (as applied in the order of claims prescribed under the Code)

And if the promoters are also exiting, but at a higher price, the exit price for public shareholders is not less than such higher price. These auditors are alternatives. But actually, if we take consideration the financial pattern of most companies which are undergoing CIRP, the liquidation value of the equity shareholders could be miniscule or almost equal to zero. Thus, the exit opportunity is not an attractive one for the shareholders

The amendment provides that the details of the proposed delisting as well as the justification for the exit price will need to be disclosed to the Stock Exchanges, within a day of the approval of the resolution plan. It is the responsibility of the acquirer to ensure that these points are covered as action items under the resolution plan and the resolution professionals should comply with these provisions in time while implementing the acquisition.

Re-listing of Delisted Equity Shares

A company which has undergone CIRP may apply for relisting of its delisted equity shares notwithstanding the five year / ten year cooling off period under the Delisting Regulations.

Comments - While SEBI has given the amendment regarding delisting of shares of a company under the CIRP, it has not amended the Securities Contracts (Regulation) Rules, 1957 which set out the governing rules and also mention about the grounds for delisting under detailed Delisting Regulations. Under the Delisting Regulations, a company can be eligible to delist its securities only if it is listed for a minimum period of 3 years. Thus, the risk of this requirement in the case of the delisting company is very low as most companies under CIRP regime have been listed for several years. Thus the amendment should be carried out both in the Regulation and in addition to the subordinate rules.

Amendments/Changes to the LODR Regulations

Various changes made by SEBI to the LODR Regulations with respect to the Code are as under :-

- Composition and roles and responsibilities of Board of Directors - Listing companies undergoing the CIRP do not have to comply with the provisions of the LODR Regulations dealing with the composition and roles and responsibilities of the Board of Directors and Board Committees. The said roles and responsibilities would be fulfilled by the

resolution professional. This is in compliance with the Code's general scheme of entrusting the corporate debtor's management and governance function to the resolution professional and committee of creditors. The resolution professional may find it redundant under the Code regime in respect of certain matters like seeking shareholder approval through the Board's approval etc., Hence, the resolution professional needs to interpret the provisions of LODR Regulations carefully in order to comply with these provisions.

- Shareholders approval dispensed with - Further, shareholder approval will not be applicable in the following cases : (i) approval of material related party transactions; (ii) cessation of majority shareholding, or exercise of control over, a material subsidiary; and (iii) transfer or lease of more than 20 per cent of a material subsidiary's assets on an aggregate basis for a given financial years. This is to be disclosed to the Stock Exchanges, within a day of the approval of the resolution plan.
- Pre-clearance from stock exchange - In respect of any scheme of arrangement under the resolution plan, the requirement of pre-clearance from stock exchange is not applicable. Had it been kept, then it will not be possible to complete the Code process in time.
- Reclassification of Promoters' Holding - Certain provisions of the LODR Regulations dealing with promoter reclassification will not apply if reclassification is contemplated under resolution plan and the promoter and promoter group being reclassified as public shareholders do not remain in control of the company. This may be because of the fact that any involvement of the former promoters after a resolution plan is approved, should be controlled by the provisions of Section 29A of the Code.
- Disclosures - As regards disclosures, a number of Code related and CIRP related disclosures/ information need to be made by the listed company without applying any judgment as to the materiality of the information. Some of the

disclosures would include application filings and admission, appointment and replacements of the resolution professional, notification of meetings of the Committee of Creditors and salient features of resolution plans.

Conclusion

The amendment provides for further consolidation beyond 75 per cent in a listed company. In a classic example, the Tata Steel which has received only 72 per cent in exchange for its initial investment in Bhushan Steel, can now invest additional funds and can increase the stake beyond 75 per cent as contemplated under its IBC resolution plan. This is a welcome step in order to help the acquirer to consolidate beyond the threshold limit. The additional disclosure requirements will go in a long way to enhance the transparency of the CIRP and in particular the listed company's shareholders. On the overall, SEBI's amendment will facilitate the timely resolution of financially stressed listed companies. It is to be noted that SEBI's discussion paper also talked about certain trading restrictions and an extended time line, i.e., two years for restoring the public float limit. But SEBI has not considered these issues as of now. The trading restrictions will definitely help to curb market manipulation and can also check any risk arising out of insider trading and should be considered by SEBI. Similarly, the extended time line for restoring the public float should be rightly considered by SEBI as the company which is subject to CIRP will have stressed financials and to improve market capitalisation, sufficient time should be given. We do hope that SEBI will clarify in due course to strengthen the regulatory provisions to facilitate the timely resolution of the financially stressed listed companies under the Code.





Credit Rating Process - An Overview

In India, the business of credit rating was first started in 1987 by large financial institutions and creditors through CRISIL. In the last 30 years, seven Credit Rating Agencies have been established. Four Credit Rating Agencies have now become an essential part of the Indian financial system. They are regulated by the Securities and Exchange Board of India (SEBI) through the SEBI (Credit Rating Agencies) Regulations, 1999 and circulars issued there under. In this article the author provides an overview of Credit Rating Process.

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What is Credit Rating Agency

Credit rating is an opinion of a recognized entity on the relative creditworthiness of an issuer or instrument. Indian credit rating industry mainly comprises of CRISIL, ICRA, CARE, ONICRA, FITCH and SMERA. CRISIL is the largest credit rating agency in India, with a market share of greater than 60%. These agencies issued credit ratings that are publicly available assessments on whether instruments would be able to perform in accordance with the terms of their issue. Credit ratings are relative measures of default probability, not a guarantee against default. A credit rating does not indicate that payment of interest and principal is completely certain. The rating should not be construed as an opinion on the issuer's general performance. Neither is it an opinion on the likely future price of the rated bonds, nor on the potential value of the issuer's equity shares.

Regulatory Regime

Regulatory regime can be summarized as follows :

- Credit rating agencies should be companies promoted by persons who have experience in the field of credit rating i.e., by financial institutions or by persons who have a net-worth of more than Rs.100 crore.
- They need to have a minimum net-worth of Rs. 5 crore, and adequate infrastructure, professionals and employees to carry on the activity of issuing credit ratings. Additionally, registration would only be granted if it registering the applicant is in the interest of investors and the securities market.
- CRAs need to carry out their activities in accordance with the terms of their engagement

with the issuer, and the baseline principles in the Regulations. CRAs have to comply with the Code of Conduct prescribed by SEBI, which requires that they discharge their duties with integrity, professional, competence, independence and confidentiality. In addition, CRAs are required to monitor their rating throughout the lifetime of the securities rated and carry on periodic reviews of their rating as well.

- The CRA Regulations require CRAs to maintain and disclose their ratings in a specified manner. They require that CRAs should maintain copies of their rating notes, ratings issued, terms of engagement, records of decisions of rating committees and fees charged for ratings for at least five years.
- CRAs must also maintain an arm's length relationship between credit rating activities and other activities. CRAs should have an internal audit, submit information to SEBI whenever required, and be open to inspection and investigation by SEBI.

Role of Credit Rating Agency

Following is the process for credit ratings:

- Their primary role is to reduce information asymmetry in credit markets by providing investors an opinion on the ability of an instrument to meet its obligations. Their investigation into affairs of companies is likely to reduce duplication of efforts by different persons in determining the creditworthiness of a debt instrument. Thus, investors who rely on such ratings benefit from reduced informational asymmetries and costs associated with determining the credit worthiness of issuers.

Credit Rating Process

Following is the process for credit rating :

- Companies seeking to raise debt (issuers) request a rating from the CRA. They then sign a rating agreement, which provides the terms of the CRA's engagement and gives the CRA access to the issuer's information.
- The CRA then assigns a 'rating team' to the company. This team collects information from the company, and conducts meetings with its management. Based on this, the team prepares a report of the risks associated with the company.
- This report is presented to a separate 'rating committee' which makes the rating decision. The rating committee is composed of a group of experts, who do not interact with the company directly.
- The rating decision is then communicated to the company. If the company accepts the rating decision, it is published.
- The CRA then periodically surveys the company and updates the rating decision through the period of the rating agreement.
- If the company chooses to reject the rating decision, CRAs typically provide for an appellate mechanism. If the rating is rejected after the appeal, such a rating is classified as an unaccepted rating. All ratings, regardless of whether they are accepted or unaccepted have to be disclosed by CRAs.

Kinds of Rating outlook : Positive, Stable, or Negative

A 'positive' outlook indicates that there is a material likelihood (at least one-in-three) of the rating being upgraded over the medium term. A 'stable' outlook indicates that the rating is likely to remain unchanged over the medium term. A 'negative' outlook indicates that there is material likelihood (at least one-in-three) of the rating being downgraded over the medium term.

Rating on Watch

Credit rating agencies may place an outstanding rating on rating watch if the issuer announces a merger or acquisition, or demerger of some business that may

impact the credit profile of the rated debt instrument. Ratings may also be placed on watch if the issuer's credit profile is impacted on account of an action by regulators, or when the impact of specific events on the credit profile cannot be accurately assessed at the point when they occur, and additional information may be necessary for CRAs to fully ascertain the creditworthiness of the rated instrument. CRAs may place a rating on watch, with positive, negative, or developing implications.

Rating on Watch with Positive, Negative, or Developing Implications : Impact

A rating placed on watch with positive implications indicates that the rating may be upgraded or reaffirmed. A rating placed on watch with negative implications implies that the rating may be downgraded or reaffirmed. A rating placed on watch with developing implications indicates that the rating may be upgraded, downgraded, or reaffirmed.

Uses of Credit Ratings

CRAs typically rate as follows

- Debt securities
- Short term debt instruments, like commercial papers
- Structured debt obligations
- Loans
- Fixed deposits.

Conclusion

It is well recognized that since ratings are intended to provide investors with an informed and objective opinion expressed by a professional rating agency after analyzing various factors such as business and financial prospects, management quality, corporate governance practices etc; CRAs need to be regulated intensely. The rating agencies in India would have already abilities to undertake relatively fair and systematic rating exercises for issuance of corporate bonds, both domestically and internationally. It is therefore commended that harmonization and adjustment between "local scale" and "international scale" ratings are to be further promoted.

■■■

KNOWLEDGE UPDATE

CASE LAW

Erstwhile Companies Act, 1956

Relevant material has to be provided by company to creditors or members to enable them to take informed decision about the proposed scheme of arrangement. Scheme of arrangement will not be sanctioned when material facts have not been disclosed to the shareholders.

The Court before sanctioning a scheme of arrangement has to be satisfied that the creditors or members of any class have been provided with the relevant material to enable them to make an informed decision as to whether the scheme is just and fair. Where action taken and initiated against the company by the Reserve Bank is not disclosed to the creditors, it cannot be contended that the provisions contained in the Reserve Bank of India Act (RBI Act) will not apply in cases of schemes submitted for approval under the Companies Act, when the position in law is that section 45QA of the RBI Act has non-obstante clause and the provisions of this section would prevail over the earlier enactment, namely, the Companies Act, 1956 - *Integrated Finance Co. Ltd. v. Reserve Bank of India*, in the Supreme Court of India, CA Nos.5505-5508 of 2013 dated 16th July, 2013.

Claims of the workmen, who claim to be entitled to payment pari passu, have to be considered and adjudicated by the liquidator of the debtor company and not by the Debt Recovery Tribunal.

If the debtor-company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in sub-section (9) of section 19 of the Recovery of Debts Act inasmuch as sub-section (9) does not clothe the Debts Recovery Tribunal ('DRT') with jurisdiction to determine the workmen's claim against the debtor company and it is liquidator of the debtor-company who alone has power to adjudicate workmen's dues. However, where the sale of security has been effected in execution of recovery certificate issued by the DRT, the distribution of sale proceeds has to be made by the DRT alone in accordance with section 529A and by no other forum or authority - *Bank of Maharashtra v. Pandurang Keshav Gorwardkar*, in the Supreme Court Of India, CA Nos. 7045 & 7046 of 2005 dated 7th May, 2013.

Insolvency and Bankruptcy Code, 2016

Where petition for corporate insolvency resolutions process was admitted much before introduction of section 29A, the resolution applicant shall not be debarred as old provisions of the Code will apply.

Where the petition for initiation of corporate insolvency resolution process was admitted by an order of the Tribunal passed much before the Ordinance was promulgated prescribing a new section 29A to the effect that a person shall not be eligible to submit a resolution plan if such person is a 'connected person' [which meant any person who is promoter or in the management or control of the resolution applicant], then the sole resolution applicant is not debarred or disqualified as a 'connected person' on account of applicability of the old provisions of the Code. Once a resolution plan as proposed by such resolution applicant is due for consideration, the same is required to be examined for its merits and demerits to record the 'satisfaction' prescribed under the statute - *Wig Associates (P.) Ltd., In Re.*, National Company Law Tribunal, Mumbai Bench, MA No. 435 of 2018 in CP No.1214/I&BC/NCLT/MB/MAH/2017 dated 4th June, 2018.

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