Issue 27

NEWSLETTER

Legal, Compliance and ESG

07 July 2021

Dear Readers,

We bring to your reading and attention following topics:

A. LEGAL AND REGULATORY UPDATES:

~ Anand Asawa and Saurav Agarwal

I. The Companies (Incorporation) Fourth Amendment Rules, 2021[1]

Ministry of Corporate Affairs (MCA) has issued the Companies (Incorporation) Fourth Amendment Rules, 2021. The amendment provides that the application for incorporation of a company shall be accompanied by e-form AGILE – PRO-S (INC-35) containing an application for registration of the following numbers, namely:

i. GSTIN with effect from March 31, 2019
ii. EPFO with effect from April 8, 2019
iii. Profession Tax Registration with effect from the February 23, 2020;
iv. Opening Bank Account with effect from the February 23, 2020;
v. Shops and Establishment Registration

II. Companies (Meetings of Board and its Powers) Amendment Rules, 2021[2]

MCA has issued Companies (Meetings of Board and its Powers) Amendment Rules, 2021 to amend the Companies (Meetings of Board and its Powers) Rules, 2014.

Pursuant to which, Rule 4 of the aforesaid Rules was omitted. Now, the following matters in a Meeting can be dealt with Video Conferencing (VC) or Other Audio Video Means (OAVM):

i. the approval of the annual financial statements;
ii. the approval of the Board's report;
iii. the approval of the prospectus;
iv. consideration of financial statement including consolidated financial statement if any, in the Audit Committee Meetings; and
v. the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

III. Clarification on passing ordinary and special resolutions by Companies[3]

MCA vide its General Circular dated June 23, 2021 in continuation to its General Circulars 14/ 202 dated April 08, 2020, no. 17/ 2020 dated April 13, 2020, no. 22/ 2020 dated June 15, 2020, no. 33/ 2020 dated September 28, 2020 and no. 39/ 2020 dated December 31, 2020 allowed Companies to conduct their EGM's through VC or OAVM or transact items through postal ballot in accordance with the framework provided in the aforementioned circulars upto December 31, 2021 in this regard.

IV. Relaxation on levy of additional fees in filing of certain forms under the Companies Act, 2013 and LLP Act 2008[4]

MCA vide its General Circular dated June 30, 2021 in continuation to its General Circular no. 06/ 2021, has granted additional time upto August 31, 2021to companies/LLP to file forms under the Companies Act, 2013 and LLP Act 2008 (<u>other than a CHG-1 form, CHG-4 Form and CHG-9 Form</u>) which were/are due for filing during April 01,2021 to July 31, 2021 without any additional fees.

V. Relaxation of time for filing forms related to creation or modification of charges under the companies Act, 2013[5]

MCA vide its General Circular dated June 30, 2021 in continuation to its general circular no. 07/ 2021, has granted additional time upto July 31, 2021 for the purpose of filling of form

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[1] https://www.mca.gov.in/bin/dms/getdocument?mds=sbRk0d1avtQVQZrw%2BKS2GA%3D%3D&type=open

[2] https://www.mca.gov.in/bin/dms/getdocument?mds=zwpAcIfQhKOgB8vwf/ztbA%3D%3D&type=open

[3] https://www.mca.gov.in/bin/dms/getdocument?mds=fYGpVQRhK8ssM3lRSs7fsg%3D%3D&type=open

[4] https://www.mca.gov.in/bin/dms/getdocument?mds=oNl%2BU4n7x/ntbDPEaxYULQ%3D%3D&type=open

[5] https://www.mca.gov.in/bin/dms/getdocument?mds=vqTLu4GNC8MKujYEiUpIEg%3D%3D&type=open

CHG 1 and CHG 9 by a Company or a charge holder where the date of creation or modification of charge falls between April 01, 2021 and July 31, 2021 without any additional fee.

VI. Relaxation from the requirement of minimum vesting period in case of death of employee(s) under SEBI (Share Based Employee Benefit) Regulations, 2014[6]

SEBI vide its circular dated June 15, 2021, has provided relaxation from the requirement of minimum vesting period in case of death of employee(s) under SEBI (Share Based Employee Benefit) Regulations, 2014.

Key highlights of the circular are:

The provisions under the SEBI (Share Based Employee Benefit) Regulations, 2014 (SBEB Regulations) relating to minimum vesting period of one year shall not apply in case of death (for any reason) of an employee and in such instances all the options, Stock Appreciation Rights or any other benefit granted to such employee(s)shall vest with his/her legal heir or nominee on the date of death of the employee. Prior to this circular, the regulation provided that there shall be a minimum vesting period of one year in case of employee stock options and Stock Appreciation Rights; and this relaxation shall be available to all such employees who have deceased on or after April 01, 2020.

VII. Resolution Framework - 2.0: Resolution of Covid-19 related stress of Individuals and Small Businesses – Revision in the threshold for aggregate exposure[7]

RBI vide its Circular No. RBI/2021-22/46 dated June 04, 2021 has revised the threshold for aggregate exposure in view of Covid-19 related stress of Individuals and Small Businesses.

The aggregate exposure Individuals, Small businesses, including those engaged in retail and wholesale trade, other than those classified as MSME is enhanced from existing Rs. 25 crore to Rs. 50 crore as on March 31, 2021.

VIII. Resolution Framework - 2.0: Resolution of Covid-19 related stress of Micro, Small and Medium Enterprises (MSMEs) – Revision in the threshold for aggregate exposure[8]

RBI has revised the threshold for aggregate exposure in view of Covid-19 related stress of Micro, Small and Medium Enterprises (MSMEs). The aggregate exposure, including non-fund based facilities, of all lending institutions to the MSME borrower is enhanced from existing Rs. 25 crore to Rs. 50 crore as on March 31, 2021.

IX. Declaration of Dividends by NBFCs[9]

RBI has issued guidelines on distribution of dividend by NBFCs in order to infuse greater transparency and uniformity in practice. The guidelines shall be effective for declaration of dividend from the profits of the financial year ending March 31, 2022 and onwards. These will be applicable to NFBCs regulated by the RBI.

The Board of Directors of the NBFC, while considering the proposals for dividend, will take into account supervisory findings of the RBI (National Housing Bank (NHB) for HFCs) on divergence in classification and provisioning for Non-Performing Assets (NPAs). The board will also have to take long-term growth plans of the NBFC.

As per the minimum prudential requirements prescribed for declaration of dividend, the net NPA ratio of the NBFC concerned shall be less than 6 per cent in each of the last three years, including as at the close of the financial year

[6] https://www.sebi.gov.in/legal/circulars/jun-2021/relaxation-from-the-requirement-of-minimum-vesting-period-in-case-of-death-of-employee-s-under-sebi-share-based-employee-benefit-regulations-2014_50545.html

[7] https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12104

[8] https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/REC21MSMES67B4E963A5AA42AAB17E25A39880F062.PDF

[9] https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12118

for which the dividend is proposed to be declared.

Also, NBFCs (other than Standalone Primary Dealers) should have met the applicable regulatory capital requirement for each of the last three financial years, including the financial year for which the dividend is proposed.

The guidelines also prescribe ceilings on dividend payout ratios for NBFCs.

S. no.	Type of NBFC	Max. dividend payout ratio (in %)
1	NBFCs that do not accept public funds and do not have any customer interface	No ceiling
2	Core Investment Company	60
3	Standalone Primary Dealers	60
4	Other NBFCs	50

The dividend payout ratio is the ratio between the amount of the dividend payable in a year and the net profit as per the audited financial statements. The proposed dividend shall include both dividend on equity shares and compulsorily convertible preference shares eligible for inclusion in Tier 1 capital.

In case the net profit for the relevant period includes any exceptional and/or extraordinary profits/ income or the financial statements are qualified by the statutory auditor that indicates an overstatement of net profit, the same shall be reduced from net profits while determining the dividend payout ratio.
NBFCs shall be required to furnish report to RBI within a fortnight after declaration of dividend.

X. New Definition of Micro, Small and Medium Enterprises[10]

RBI vide its circular dated June 25, 2021, has amended its notification no. RBI/2020-2021/26.FIDD.MSME & NFS.BC.No.4/06.02.31/2020-21 dated August 21, 2020.

As per the amendment, the existing Entrepreneurs Memorandum (EM) Part II and Udyog Aadhaar Memorandum (UAMs) of the MSMEs obtained till June 30, 2020 shall remain valid till December 31, 2021. Prior to this amendment, same was valid till March 31, 2021.

XI. Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2021[11]

IBBI on June 01, 2021 released guidelines namely Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2021.
As every IP is equally qualified to be appointed as the IRP, Liquidator, RP or BT of any corporate or individual insolvency resolution, liquidation or bankruptcy process, as the case may be, if otherwise not disqualified, and in the interest of avoiding administrative delays, the Board released these guidelines.

XII. Regular hearing in NCLT Benches w. e .f. July 01, 2021 through Video Conference[12]

NCLT vide its order dated June 25, 2021 announced the start of regular hearing in NCLT Benches w.e.f. July 01, 2021 through Video Conference on all working days or as mentioned in the Circular.

[10] https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12122
[11] https://ibbi.gov.in/uploads/legalframwork/57df52b9084e184d7dd15a6f4c3e314b.pdf
[12] https://www.ibbi.gov.in/uploads/legalframwork/ac543006840abd6a5bc2a21849507cc5.pdf

B. CASE STUDY: Lalit Kumar Jain Vs Union of India & Ors.

~ Su Prabhat Pathak

The Hon'ble Supreme Court of India in the matter of Lalit Kumar Jain Vs Union of India & Ors. [Trans. Case (Civil) No. 245/2020] has upheld the notification issued by the Central Government on November 15, 2019, enabling the creditors to initiate corporate insolvency process against personal guarantors of corporate debtors under the provisions of The Insolvency and Bankruptcy Code, 2016 "(IBC").

It is usual practice where the promoters or directors of companies act as personal guarantors to credit facilities availed by the companies from the lenders including banks and financial institutions. However, in an application under the IBC against the corporate debtor, there was no available recourse against the personal guarantors.

On November 15, 2019, Central Government issued a notification ("Notification") notifying certain provisions in the IBC in so far as they related to personal guarantors, in effect enabling financial creditors to initiate proceedings under the IBC against personal guarantors to the corporate debtors. As a result, the personal guarantors began receiving demand notices under IBC and in turn, these personal guarantors approached various high courts challenging the notification so issued on November 15, 2019.

All the petitions pending before different high courts were transferred to the Hon'ble Supreme Court and were heard in a consolidated manner. On May 21, 2021, the Hon'ble Supreme Court delivered a judgment upholding the vires of the Notification and rejected the argument of personal guarantors that the Central Government acted beyond its powers under the IBC in issuing the Notification by singling out the application of provisions to Corporate individuals. It held that the liability of the personal guarantor cannot be absolved since it arises out of an independent contract with the lender even if the corporate insolvency process has been initiated against the corporate debtor.

Thus, going forward, any financial creditor will be at liberty to initiate the insolvency process against the personal guarantor under the provisions of the IBC. The Hon'ble court has also ruled that initiation of an insolvency resolution plan for a company does not absolve corporate guarantees given by individuals from paying up the dues to financial institutions.

Detailed judgement can be accessed through the link.

C. YOUR LEGAL QUERIES ANSWERED

(Answers by K. Selvaraj, Group General Counsel and Head Compliance, Corporate Office, Mumbai)

Q) A Hindu male who availed a loan from NBFC lender by mortgage of his property cleared the loan but before receipt of the title deeds passed away leaving behind his mother and wife. Now wife is claiming she is alone entitled to receive the title deeds from NBFC lender.
Whether NBFC lender can hand over the title deeds to his wife of the deceased borrower?

- *Samir Parab, Senior Operations Officer*

A) As per Hindu Succession Act, 1956, wife, mother and children of deceased Hindu male are the legal heirs. Hence in this case both wife and mother must submit a joint application to receive the title deed from NBFCs.

Q) In case of mortgage of third-party property, if the mortgagor dies after putting through equitable mortgage of transaction before the disbursement of the loan amount, whether fresh mortgage from the legal heirs of deceased mortgage is required? If not, what are the precautions for safeguarding the lender's interest.

- *Ravi Varma, State Credit Manager*

A) A mortgage is transfer of interest in specific immovable property for the purpose of securing the money advanced or to be advanced by way of loan, an existing or future debt or performance of an engagement which may give rise to pecuniary liability. In this case, mortgage has been completed securing the money to be advanced to a third party. The mortgage so completed does not get vitiated by the death of the third-party mortgagor. Therefore, fresh mortgage is not required. However, as a matter of precaution a letter may be obtained from the legal heirs of deceased confirming the mortgage already created in favour of the lender and declaring such mortgage is binding on them.