



NEWSLETTER

Legal, Compliance and ESG

06 September 2021

Dear Readers,

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A. LEGAL AND REGULATORY UPDATES:

~ Anand Asawa and Saurav Agarwal

1. MCA amends schedule III of Companies Act on disclosure norms in financial statements¹

In order to bring in greater transparency in reporting of financial statements, the Ministry of Corporate Affairs (MCA) vide notification dated 24.03.2021 has amended the Schedule III to the Companies Act, 2013 effective from 01st April, 2021 to mandate various disclosures by companies in their financial statements.

MCA vide its press release dated August 10, 2021 stated that the new disclosures with respect to the virtual currency/crypto currency transactions and CSR spending undertaken by companies during a financial year are:

1. Details of Crypto Currency or Virtual Currency

Where the Company has traded or invested in Crypto currency or Virtual Currency during the financial year, the following shall be disclosed:-

- a. profit or loss on transactions involving Crypto currency or Virtual Currency
- b. amount of currency held as at the reporting date,
- c. deposits or advances from any person for the purpose of trading or investing in Crypto Currency/virtual currency.

2. Details of Corporate Social Responsibility (CSR)

Where the company covered under section 135 of the companies act, the following shall be disclosed with regard to CSR activities:-

- a. amount required to be spent by the company during the year,
- b. amount of expenditure incurred,
- c. shortfall at the end of the year,
- d. total of previous years shortfall,
- e. reason for shortfall,

¹<https://pib.gov.in/PressReleaseFramePage.aspx?PRID=1744542>

- f. nature of CSR activities,
- g. details of related party transactions, e., contribution to a trust controlled by the company in relation to CSR expenditure as per relevant Accounting Standard,
- h. where a provision is made with respect to a liability incurred by entering into a contractual obligation, the movements in the provision during the year should be shown separately.

2. Resolution framework for COVID-19-related stress – financial parameters – revised timelines for compliance²

RBI vide its circular dated August 06, 2021 in continuance to its circular dated September 7, 2020 has been decided to defer the target date for meeting the specified thresholds. RBI via the 2020 Circular had advised the key ratios and their sector specific thresholds to be considered by lending institutions while finalising the resolution plans in respect of eligible borrowers under Part B of the Annex to the Resolution Framework for Covid-19 related stress issued on August 6, 2020.

The key ratios consisted of four operational ratios, namely, Total Debt/ EBITDA, Current Ratio, Debt Service Coverage Ratio (DSCR) and Average Debt Service Coverage Ratio (ADSCR), along with the ratio Total Outside Liabilities/Adjusted Tangible Net Worth (TOL/ATNW) representing the debt-equity mix of the borrower post implementation of the resolution plan.

Revised Timelines:

Keeping in view of the resurgence of the Covid-19 pandemic and recognising the difficulties it may pose, RBI has decided to defer the target date for meeting the specified thresholds in respect of the four operational parameters i.e. Total Debt / EBITDA, Current Ratio, DSCR and ADSCR, to October 1, 2022. However, the target date

²https://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=12140

for achieving the ratio TOL/ATNW remain unchanged as March 31, 2022.

3. Notification as 'Financial Institution' under section 2(1)(m)(iv) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)³

RBI vide its notification dated August 25, 2021 in continuance with its Gazette Notification No. S.O. 2405(E) dated June 17, 2021 has withdrawn the criteria for notifications of HFCs as 'Financial Institution' defined in under Section 2(1)(m)(iv) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) given under Para 105 of the Master Direction–Non-Banking Financial Company–Housing Finance Company (Reserve Bank) Directions.

Government of India vide its abovementioned Gazette Notification had notified that the HFCs registered under Section 29A(5) of the National Housing Bank Act, 1987 and having assets worth ₹100 crores & above, as 'Financial Institution' under Section 2(1)(m)(iv) of SARFAESI Act, 2002.

In view of the revision of the criteria, the Master Direction – Non-Banking Financial Company – Housing Finance Company (Reserve Bank) Directions, 2021 is being modified accordingly.

4. The Insolvency and Bankruptcy Code (Amendment) Act, 2021⁴

The IBBI vide notification dated August 11, 2021 has notified The Insolvency and Bankruptcy Code (Amendment) Act, 2021. Key highlights of the Amendment are as follows:

- For matters relating to pre-packaged insolvency resolution the minimum amount for default shall not be more than three crore rupees.
- Certain sections of the Code have been amended to include pre-packed insolvency resolution process along with the corporate insolvency resolution process in order to make it feasible.
- Section 11A inserted for disposal of applications filed under Section 7, 9, 10 or 54C.
- Inclusion of Chapter III-A explaining the process of a pre-packaged insolvency resolution process, time-limit for its conclusion, eligibility of corporate debtors, duties and powers of insolvency resolution professional, Committee of creditors, etc.
- Section 67A and 77A inserted for governing fraudulent management of corporate debtor and punishment for offences relating to pre-packaged insolvency resolution process respectively.

³<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12151&Mode=0>

⁴<https://ibbi.gov.in/uploads/legalframework/0150ec26cf05f06e66bd82b2ec4f6296.pdf>

B. Overview of the SARFAESI Act 2002 and Note on the process of Enforcement of Security Interest under Section 13.

~ Yogesh Babar, Assistant Manager - Legal

I. BRIEF OVERVIEW OF SARFAESI ACT, 2002 AND THE ENFORCEMENT PROCESS:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (hereinafter referred as "SARFAESI Act") was enacted with the intent to provide banks or financial institutions (FIs) to recover on NPAs without intervention by the court. The Act provides for two broad methods for recovery of NPAs. This includes either taking the possession of the secured assets of the borrower (with the right to lease, assign or sell the secured assets) or taking over the management or business of the borrowers until the NPA is recovered. The SARFAESI Act also provides for the sale of financial assets by banks and financial institutions to Asset Reconstruction Companies (ARCs). The financial assets can be sold to ARCs in accordance with the guidelines and directions issued by the RBI.

The right of the secured creditor to enforce the security interest under the SARFAESI Act does not arise unless the account of the borrower has been classified as an NPA in the books of account of the secured creditor (banks or financial institutions) in accordance with the guidelines issued by the Reserve Bank of India (RBI). The secured creditor must serve a 60-days-notice on the borrower demanding repayment of the amount due and specifying the borrower's assets over which the secured creditor proposes to enforce its security interest.

If on the expiry of the 60-day notice period, the borrower fails to discharge its liability, the secured creditor can enforce security interest over secured assets by (I) take possession of the secured assets; (II) take over the management of the secured assets along with the right to transfer by way of lease, assignment or sale of the secured assets; (III) appoint any person to manage the secured assets; and (IV) require any person who has acquired any of the secured assets from the borrower to pay amounts necessary to satisfy the debt.

II. KEY STEPS FOR THE ENFORCEMENT OF SECURITY INTEREST

1. Furnish of Demand Notice after borrower's account has been classified as Non-Performing Asset (NPA):
 - 1.1. After classifying the borrower's account as NPA, the secured creditor must furnish a written demand notice to the borrower to discharge its liabilities within sixty (60) days. The demand notice shall contain details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment. (Section 13(2) and Section 13(3)).
 - 1.2. The Borrower retains the right to make any representation or raise any objection against the notice to the Secured Creditor within the sixty (60) days' notice period. The Secured Creditor must consider this representation/objection and if such an objection is raised or representation is made, and the Secured Creditor comes to the conclusion that such representation/objection is not acceptable or tenable, the same shall be communicated to the borrower within 15 days with written reasons for non-acceptance. [Section 13(3A)].
 - 1.3. Rejection of the representation made by the borrower and the reasons communicated does not confer any right upon the borrower to file an application to the Debts Recovery Tribunal (DRT) or the Court of District Judge.
 - 1.4. After receipt of the demand notice, the borrower cannot transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. [Section 13(13)]

2. Recourse to remedies provided under Section 13(4) in case of failure to discharge debt:
 - 2.1. In case the secured debt is not discharged within the notice period (sixty days), the Secured Creditor can enforce security interest and take one or more of the actions as enumerated in the Section 13(4) of the act. These include the right to:
 - 2.1.1. Take the possession of the secured assets of the borrower. This includes the right to transfer by way of lease, assignment, or sale for realizing the secured asset.
 - 2.1.2. Take over the management of the business of the borrower. This also includes the right to transfer by way of lease, assignment, or sale for realizing the secured asset. However, in case of taking over the management of the business, the right to transfer shall be exercised only where the substantial part of the business of the borrower is held as security for the debt. Additionally, in case the management of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt.
 - 2.1.3. Appoint any person as the 'Manager' to manage the secured assets the possession of which has been taken over by the secured creditor.
 - 2.1.4. Require any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the dues to the secured creditor. Such demand must be accompanied by written notice. The payment made by such person to the secured creditor shall give a valid discharge as if he has made payment to the borrower.
 - 2.2. In case the dues of the secured creditor (including the costs, charges and expenses incurred) are tendered at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset. [Section 13(8)]
3. In case of Multiple Secured Creditors:
 - 3.1. In the case of there is more than one secured creditor or if there is joint financing of the financial asset(s) by secured creditors, only such rights shall be exercised by the secured creditor under Section 13(4) which have been agreed upon by the secured creditors representing not less sixty percent (60%) in value of the 'amount outstanding' as on a 'record date'. [Section 13(9)]
 - 3.2. 'Amount outstanding' shall include principal, interest and any other dues payable by the borrower in respect of secured asset as per the books of account of the secured creditor. 'Record date' means the date agreed upon by the secured creditors representing not less than sixty per cent (60%) in value of the amount outstanding on such date.
4. Additional Rights of the Secured Creditor:
 - 4.1. The Secured Creditor can take the assistance of the Chief Metropolitan Magistrate or District Magistrate (with competent jurisdiction) in taking possession or control over secured asset through a request in writing.
 - 4.2. The Secured Creditor has the right to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in Section 13(4) of the Act.

C. YOUR LEGAL QUERIES ANSWERED

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

Q) What are the steps involved in initiating criminal case against the drawer of the cheque for dishonor of cheque under Section 138 of Negotiable Instruments Act (N I Act)?

A) Steps Involved for initiate complaint under Section 138 of Act

- (i) Cheque must have been issued by a person on an account of any debt or other liability
- (ii) Presentation of the cheque to the bank within a period of 3 months from the date of its issue
- (iii) Returning of the cheque unpaid by the drawee bank.
- (iv) Upon receipt of dishonor memo from the bank, a notice of demand has to be issued to the drawer of the cheque within 30 days from the date of receipt of cheque memo (“Demand Notice”).
- (v) If the Borrower fails to pay with 15 days from date of receipt of Demand Notice, then the criminal complaint under Section 138 of N I Act to be filed before the court of competent court within one month from the date of expiry aforesaid notice period. Usually, the jurisdiction for initiating the proceedings for dishonour of cheque lies with courts where the branch of the bank lies where Payee (APAC) maintains the account and where the cheque was presented.

D. ESG: Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR)⁵

MCA vide its general circular dated August 25, 2021 issued the Frequently Asked Questions (FAQs) on Corporate Social Responsibility.

Ministry had received several references and representations from stakeholders seeking clarifications on the various issues related to CSR. Accordingly, in suppression of clarifications and FAQs issued vide General Circular no. 21/2014 (dated 18th June 2014), 36/2014 (dated 17th September 2014), 01/2016 (dated 12th January 2016) ,05/2016 (dated 16th May 2016), the clarification issued vide letter dated 25.01.2018 and General Circular no. 06/2018 (dated 28th May 2018), a set of FAQs along with the response of the Ministry have been provided in the annexure for better understanding and facilitating effective implementation of CSR.

Through these FAQs, MCA has clarified issues relating to the Applicability of CSR, CSR Framework, CSR Expenditure, CSR Activities, CSR Implementation, Ongoing Project, Treatment of Unspent CSR Amount, CSR Enforcement, Impact Assessment and CSR Reporting & Disclosure.

⁵ <https://www.mca.gov.in/bin/dms/getdocument?mds=uCTTViAfc1KSszKI91LQvA%3D%3D&type=open>