NEWSLETTER

Legal, Compliance and ESG

August 1st, 2019

Dear Readers,

We bring to your reading and attention following topics for this month:

A) Legal and Regulatory Updates:
- I. Amendment to Aadhaar and Other Laws (Amendment) Act, 2019
- II. Cabinet approves Amendments to Insolvency and Bankruptcy Code, 2016 (IBC);
- III. SEBI circular dated July 16, 2019: New format for compliance report on Corporate Governance for listed entities.
- IV. Bounty hunting in corporate India-understanding SEBI's latest discussion paper on the insider trading regulations
- V. Consolidation of Master Circular issued by NHB for Financial Year 2018-19

B) Highlights of Companies (Amendment) Bill, 2019; and

C) Article on UN Sustainable Development Goals (SDGs)

A) LEGAL AND REGULATORY UPDATES:

I. Amendment to Aadhaar and Other Laws (Amendment) Act, 2019:

The Aadhaar and Other Laws (Amendment) Act, 2019 ("Amendment Act") came into effect from 25th July 2019. It is amendment replaces an ordinance promulgated on March 2, 2019.

Offline verification of Aadhaar number holder: Under the Aadhaar Act, 2016 (the "Act"), an individual's identity may be verified by Aadhaar 'authentication'. Authentication involves submitting the Aadhaar number, and their biometric or demographic information to the Central Identities Data Repository for verification. The Amendment Act additionally allows 'offline verification' of an individual's identity, without authentication, through modes specified by the Unique Identification Authority of India (UIDAI) by regulations.

During offline verification, the agency must (i) obtain the consent of the individual, (ii) inform them of alternatives to sharing information, and (iii) not collect, use or store Aadhaar number or biometric information.

Voluntary use: The Act provides for the use of Aadhaar number as proof of identity of a person, subject to authentication. The Amendment Act replaces this provision to state that an individual may voluntarily use his Aadhaar number to establish his identity, by authentication or offline verification. The Amendment Act states that authentication of an individual's identity via Aadhaar, for the provision of any service, may be made mandatory only by a law of Parliament.

The Amendment Act amends the Telegraph Act, 1885 and the Prevention of Money Laundering Act, 2002 to state that persons with a license to maintain a telegraph, banking companies and financial institutions may verify the identity of their clients by: (i) authentication or offline verification of Aadhaar, (ii) passport, or (iii) any other documents notified by the central government. The client has the choice to use either mode to verify his identity and no person shall be denied any service for not having an Aadhaar number.

Entities using Aadhaar: Under the Act, usage of Aadhaar number for establishing the identity of an individual, by the State or a body corporate under any law, is permitted. The Amendment Act removes this provision. An entity may be allowed to perform authentication through Aadhaar, if the UIDAI is satisfied that it is: (i) compliant with certain standards of privacy and security, or (ii) permitted by law, or (iii) seeking authentication for a purpose specified by the central government in the interest of the State.

The Amendment Act defines the Aadhaar ecosystem to include enrolling agencies, requesting agencies, and offline verification-seeking entities. It allows the UIDAI to issue directions to them, if necessary, for the discharge of its functions under the Amendment Act.

Penalties: Under the Amendment Act, the UIDAI may initiate a complaint against an entity in the Aadhaar ecosystem for failure to (i) comply with the Act or the UIDAI's directions, and (ii) furnish information required by the UIDAI. Adjudicating Officers appointed by the UIDAI shall decide such matters and may impose penalties up to Rupees One Crore on such non-complying entities.

The Telecom Disputes Settlement and Appellate Tribunal shall be the appellate authority against decisions of the Adjudicating Officer.

II. Cabinet approves amendments to Insolvency and Bankruptcy Code, 2016 (IBC):

The Union cabinet has approved of a proposal to carry out reformatory changes to the Insolvency and Bankruptcy Code, 2016. A press release dated July 17, 2019 has been issued by Ministry of Corporate Affairs (MCA) in this regard. The

amendments aim to fill critical gaps in the corporate insolvency resolution framework as enshrined in the Code, while simultaneously maximizing value from the Corporate Insolvency Resolution Process (CIRP). The Key proposed amendments to the Insolvency and Bankruptcy Code are discussed hereunder:

- Extension of deadline for completing Insolvency resolution process**:**
  One of the major proposed amendments to IBC is extension of the deadline for completion of Corporate Insolvency and Resolution Process (CIRP). The amendment proposes to extend the period of CIRP to 330 days with litigation and other judicial process against the current maximum permissible period of 270., i.e., 180 days plus extension of 90 days for completing CIRP. However, while calculating the time 330 days, litigation and other judicial process would be included

- Corporate Structuring scheme to be part of resolution plan:
  The proposed amendment seeks to enhance the flexibility on resolution plan. Resolution plan would include Corporate Restructuring Scheme such as mergers, amalgamation, demerger, takeover, Compromise and arrangement and so on.

- Casting of votes by majority:
  The proposed amendment explicates that votes of financial creditors would be counted as per the decision of the majority, i.e. highest voting share of financial creditors. Having said that, if more than half (i.e. more than 50%) of the creditors present in the meeting approve a plan, it will be considered that the entire class of creditors has approved it.

- Rights of financial creditors:
  The amendment brings more clarity on rights of financial as well as operational creditors who have not voted in favor of a resolution plan. The amendment proposes that they will be paid as per the order of priority specified in the IBC while distributing the proceeds from resolution or liquidation.

  It provides highest priority to those who have brought interim finance to meet the costs of resolution or liquidation, followed by dues to workers for the past two years and dues to secured creditors in equal priority. Employees other than workmen, and unsecured creditors and operational creditors are further down the line in the priority of receiving resolution or liquidation proceeds. The intention of Government is very clear with this proposed amendment that it would give priority to financial creditor over the operational creditor

- Binding in nature:
  Any resolution plan or liquidation order as decided by the competent authority would be binding on all the stakeholders including the Central Government., any

State Government or local authority to whom a debt in respect of the payment of the dues may be owned. This will prevent State authorities, Regulatory bodies including Direct & Indirect Tax Departments from questioning the resolution plan or liquidation order as well as jurisdiction of Tribunals with regard to IBC.

- Delegation of power:
  The amendment proposes more power to the committee of creditors (COC):

  The COC can take into account commercial considerations in respect of distributions under the resolution plan, making the resolution process hassle free. The proposed amendment would also empower the COC to take the decision to liquidate the corporate debtor (where it is inevitable to revive the corporate debtor), any time after constitution of the COC and before preparation of Information Memorandum. The amendments are expected to address the issue of sanctity of timelines for completion of the entire corporate insolvency resolution process.

III. SEBI circular dated July 16, 2019: New format for compliance report on Corporate Governance for listed entities.

The Key takeaways are as follows:

- Disclosure of Director's details:
  The new format requires companies to disclose director details such as date of birth, date of cessation of directorship, date of appointment, number of directorship and so on. This information is already available on public domain on the MCA21 portal.

- Composition of Directors:
  The new format also requires disclosure of information relating to composition of board, Chairperson and their appointment and cessation. ✓ Meeting of Board of directors: Now, the listed entities shall also have to disclose the presence of number of directors and independent directors and quorum of the meeting of the board of directors including committee meeting if any held during the period of reporting.

- More details to be displayed on the website by listed entities:
  Now, the listed companies would be required to disclose more details on their websites. List has been extended to include details related to maternity policy, dividend policy distribution, credit rating and so on.

- Increase in disclosure of Annual Affirmations:

Part II of the Annual report on compliance on corporate governance requires listed companies to make disclosure to stock exchange with regards to Annual affirmation in 'yes' or 'no' in respect of list of compliances of various provisions of listing regulations.

SEBI unveils format for reporting violation related to code of conduct SEBI vide circular dated July 19, 2019.

With an objective to standardize the process relating to dealing with such violations of the Code of Conduct, all listed companies, intermediaries and fiduciaries shall:

A) Report such violations by the designated persons and immediate relatives of designated persons in the standardized format to SEBI as per Annexure A as specified in the circular.

B) Maintain a database of the violation of code of conduct by the designated persons and immediate relatives of designated persons that would entails initiation of appropriates action against them.

IV. Bounty hunting in corporate India-understanding SEBI's latest discussion paper on the insider trading regulations

Prosecuting insider trading cases has always been a challenge for the Securities Exchange Board of India **("SEBI")**. Primary evidence is difficult to come by, which impacts success rates as well as investigation timelines.

On June 10, 2019, SEBI released a discussion paper ("Discussion Paper") proposing amendments to the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("Insider Trading Regulations") to establish systems and processes (both within listed companies, as well as, at SEBI) that incentivise individuals to report insider trading violations, if they come to their knowledge. In terms of the Discussion Paper, the informant may be rewarded up to INR 1 crore (approx. USD 150,000) if SEBI undertakes disgorgement of at least INR 5 crores (approx. USD 0.72 million) as a result of any action taken on the basis of true, credible and original information.

The informant mechanism is proposed to be implemented through amendments to the Insider Trading Regulations. Some of its key features are as follows:

- Any individual who has knowledge or reasonable basis to believe that an insider trading violation has or is about to occur, whether through trading or communication, can voluntarily inform SEBI through the Voluntary Information Disclosure Form ("Form"). The informant must also provide the source of the information.

- The Discussion Paper also envisages submission of information anonymously, acting through a practising advocate. In such cases, the representative advocate would also have to adhere to certain obligations vis-àvis the informant, such as verifying their identity and maintaining confidentiality.
- The Office of Informant Protection ("OIP"), would be set up as an independent wing (separate from SEBI's investigation and inspection wings), to act as the liaison with the informant. The OIP would be responsible for putting in place a policy for processing the Form, including a mechanism to assess the veracity of the information received. Once the information is processed by the OIP, it would be transferred to the relevant department, which would recommend suitable enforcement action. Subsequently, the OIP would also make a decision regarding the grant of reward to the informant upon completion of the enforcement action by SEBI.
- Under the framework, the identity of the informant, as well as that of the information provided would be kept confidential by the OIP, including through any proceedings initiated by SEBI, except in cases where the informant's evidence is required to be relied on.
- Listed companies, intermediaries, etc., would be required to revise their internal codes to ensure that employees are not penalised merely on account of filing a Form or assisting SEBI.
- An amnesty scheme may also be offered to informants facing enforcement action, where they choose to cooperate with the regulatory investigation.

On the face of it, this Discussion Paper draws heavily from the US Security Exchange Commission's ("SEC") whistle-blower protection framework, institutionalised under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and its three pillars of whistle blower protection policy, viz., anonymity, bounties and job protection.

While the whistle-blower mechanism has been fairly successful in the US, replicating the model for the Indian market, though well-intentioned, may not be an automatic guarantee for success. Some of the concerns that could arise have been discussed below:

- At the outset, the Discussion Paper, as currently formulated, has potential for misuse as persons can file false and intentionally misleading complaints or simply result in tip-offs that prove to be red herrings; SEBI will need to demonstrate the tools at their disposal to prevent such misuse and remain discerning about the complaints.
- Deploying additional resources and time to establish a new division within SEBI that investigates the veracity of such complaints is not just logistically challenging, but also likely to make the main insider trading investigations even more protracted.

- The Discussion Paper cursorily states that frivolous and vexatious complaints would trigger regulatory action, but this will need more nuanced consideration. Insider trading, as SEBI itself acknowledges, is difficult to prove and conclusive evidence may not be available, even to an informant. Therefore, considerable thought needs to be given to the manner in which the bona fides of the informant should be established.
- Confidentiality of the complainant will be the fundamental measure of the success of such an initiative. The Discussion Paper states that the identity of the complainant remains anonymous unless their evidence needs to be relied on in proceedings. Such an exception may dilute the number of takers for this, especially in cases where the whistle blower is in a position to furnish primary evidence and hence is likely to be required for the enforcement process as well.
- Anonymous complaints can also be filed through lawyers who are charged with the responsibility of maintaining the confidentiality of the identity of the complainant. SEBI is, as yet, silent on the liability standards that legal advisors will be held to if such confidentiality is compromised, despite their best measures and efforts.
- In terms of the Discussion Paper, reporting to the internal compliance committee of a company is not considered for a reward. Given that the Insider Trading Regulations require listed companies to draft their whistle blower policy, SEBI may consider combining both. For example, if an employee were to report to the internal compliance committee of the company and within a prescribed time period, follow up with a SEBI complaint, then the individual should be able to avail of both protection and reward.

Bounty-hunting in the corporate world fosters a rather unique form of vigilantism; one that can benefit regulators and create greater awareness but also, simultaneously, clutter the regulator's attention with misleading or irrelevant issues. If and when this becomes law, SEBI will have to maintain a fine balance between encouraging proxy regulators within organisations and creating a more institutionalized, reward-based framework for whistle blowers. Also, if indeed implemented, SEBI must consider extending its application to fraudulent and unfair trade practices within companies as well. Many of the recent concerns surrounding governance practices and market conduct issues in Indian companies are, in theory, equally amenable to such a framework, given the similar set of constraints faced by SEBI in the course of investigations.

V. Consolidation of Master Circular issued by NHB for the financial year 2018-19

In order to have all current instructions on the subject at one place, the National Housing Bank has updated the circulars / notifications. The instructions related to

the captioned subject contained in various circulars/notifications issued by NHB have been updated as on June 30, 2019.

Please find attached herewith following Master Circulars issued by National Housing Bank dated July 1, 2019 for your perusal and actions:

(You can view the same by clicking on the relevant circular)

1. **Master Circular the Housing Finance Companies NHB Directions 2010**
2. **Master Circular Miscellaneous Instructions to all Housing Finance Companies**
3. **Master Circular - Fair Practices Code**
4. **Master Circular HFC - Auditor's Report National Housing Bank Directions 2016**
5. **Master Circular - Approval of Acquisition or Transfer of Control National Housing Bank Directions, 2016**

B) Highlights of Companies (Amendment) Bill, 2019

The Companies (Amendment) Bill, 2019 was passed by the Rajya Sabha on the 30th day of July 2019. Earlier the Amendment Bill, 2019 was passed by Lok Sabha on the 27th day of July 2019. While introducing the Bill in the Lok Sabha, the Hon'ble Finance and Corporate Affairs Minister, Nirmala Sitharaman said, "the Bill seeks to ensure more accountability and better enforcement to strengthen the corporate governance norms and compliance management in corporate sector as enshrined in the Companies Act, 2013".

Background:

- The Companies Act, 2013 (the Act) was enacted with a view to consolidate and amend the law relating to companies.
- In order to review the existing provisions of the Act dealing with the offences and to make recommendations to promote better corporate compliance, the Government of India constituted a Committee in July 2018.
- The said Committee, after taking the views of several stakeholders, submitted its Report in August 2018.
- The Committee recommended that the existing rigour of the law should continue for serious offences, whereas the lapses that are essentially technical or procedural in nature may be shifted to in- house adjudication process
- Accordingly, it was proposed to amend certain provisions of the Companies Act, 2013.
- However, in view of the urgency, the Companies (Amendment) Ordinance, 2018 was promulgated on 2nd day of November 2018.
- To replace the aforesaid Ordinance, a bill, namely, the Companies (Amendment) Bill, 2018 was introduced in the Lok Sabha and passed in the said House on the 4th day of January 2019.
- However, the said Bill could not be taken up for consideration in the Rajya Sabha.
- In order to give continued effect to the Companies (Amendment) Ordinance, 2018, the President promulgated the Companies (Amendment) Ordinance, 2019 and the Companies (Amendment) Second Ordinance, 2019 on the 12th day of January 2019 and the 21st day of February 2019 respectively.

Amendments through the Companies (Amendment) Second Ordinance, 2019

The main reforms undertaken through the Ordinance include the following:

- **Issuance of dematerialised shares**: Under the Act, certain classes of public companies are required to issue shares in dematerialised form only. The Bill states this may be prescribed for other classes of unlisted companies as well.
- **Re-categorisation of certain Offences**: The 2013 Act contains 81 compoundable offences punishable with fine or fine or imprisonment, or both. These offences are

heard by courts. The Bill re-categorizes 16 of these offences as civil defaults, where adjudicating officers (appointed by the central government) may now levy penalties instead. These offences include: (i) issuance of shares at a discount, and (ii) failure to file annual return. Further, the Bill amends the penalties for some other offences.

- **Corporate Social Responsibility (CSR):** Under the Act, if companies which have to provide for CSR, do not fully spent the funds, they must disclose the reasons for non-spending in their annual report. Under the Bill, any unspent annual CSR funds must be transferred to one of the funds under Schedule 7 of the Act (e.g., PM Relief Fund) within six months of the financial year.

- However, if the CSR funds are committed to certain ongoing projects, then the unspent funds will have to be transferred to an Unspent CSR Account within 30 days of the end of the financial year and spent within three years. Any funds remaining unspent after three years will have to be transferred to one of the funds under Schedule 7 of the Act. Any violation may attract a fine between Rs 50,000 and Rs 25,00,000 and every defaulting officer may be punished with imprisonment of up to three years or fine between Rs 50,000 and Rs 25,00,000, or both.

- **Debarring auditors**: Under the Act, the National Financial Reporting Authority debar a member or firm from practising as a Chartered Accountant for a period between six months to 10 years, for proven misconduct. The Bill amends the punishment to provide for debarment from appointment as an auditor or internal auditor of a company, or performing a company's valuation, for a period between six months to 10 years.

- **Commencement of business**: The Bill states that a company may not commence business, unless it (i) files a declaration within 180 days of incorporation, confirming that every subscriber to the Memorandum of the company has paid for the shares agreed to be taken by him, and (ii) files a verification of its registered address with the RoC within 30 days of incorporation. If it fails to comply with these provisions and is found not to be carrying out business, its name of the company may be removed from the Register of Companies.

- **Registration of charges**: The Act requires companies to register charges (e.g., mortgages) on their property within 30 days of creation of charge, extendable upto 300 days with the permission of the RoC. The Bill changes the deadline to 60 days (extendable by 60 days).

- **Change in approving authority**: Under the Act, change in period of financial year for a company associated with a foreign company, has to be approved by the National Company Law Tribunal. Similarly, any alteration in the incorporation document of a public company which has the effect of converting it to a private company, has to be approved by the Tribunal. Under the Bill, these powers have been transferred to central government.

- **Compounding**: Under the Act, a regional director can compound (settle) offences with a penalty of up to five lakh rupees. The Bill increases this ceiling to Rs 25 lakh.
- **Bar on holding office**: Under the Act, the central government or certain shareholders can apply to the NCLT for relief against mismanagement of the affairs of the company. The Bill states that in such a complaint, the government may also make a case against an officer of the company on the ground that he is not fit to hold office in the company, for reasons such as fraud or negligence. If the NCLT passes an order against the officer, he will not be eligible to hold office in any company for five years.
- **Beneficial ownership**: If a person holds beneficial interest of at least 25% shares in a company or exercises significant influence or control over the company, he is required to make a declaration of his interest. The Bill requires every company to take steps to identify an individual who is a significant beneficial owner and require their compliance under the Act.

C) UN Sustainable Development Goals (SDGs)—The Leading ESG Framework for Large Companies

- The 17 SDGs and 169 targets are part of the 2030 Agenda for Sustainable Development adopted by 193 Member States at the UN General Assembly Summit in September 2015, and which came into effect on 1 January 2016. These goals are the result of an unprecedented consultative process that brought national governments and millions of citizens from across the globe together to negotiate and adopt the global path to sustainable development for the next 15 years.
- NITI Aayog, the Government of India's premier think tank, has been entrusted with the task of coordinating the SDGs. NITI Aayog has undertaken a mapping of schemes as they relate to the SDGs and their targets and has identified lead and supporting ministries for each target. They have adopted a government-wide approach to sustainable development, emphasising the interconnected nature of the SDGs across economic, social and environmental pillars. States have been advised to undertake a similar mapping of their schemes, including centrally sponsored schemes.
- In addition, the Ministry of Statistics and Programme Implementation (MoSPI) has been leading discussions for developing national indicators for the SDGs. State governments are key to India's progress on the SDG Agenda and several of them have already initiated action on implementing the SDGs.

The 17th Goals by United Nation has declared in which India is the signatory are as follow:

Goal 1. End poverty in all its forms everywhere
Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture
Goal 3. Ensure healthy lives and promote well-being for all at all ages
Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
Goal 5. Achieve gender equality and empower all women and girls
Goal 6. Ensure availability and sustainable management of water and sanitation for all
Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all
Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
Goal 10. Reduce inequality within and among countries
Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable
Goal 12. Ensure sustainable consumption and production patterns
Goal 13. Take urgent action to combat climate change and its impacts
Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development
Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development

The UN Country Team in India supports NITI Aayog in its efforts to address the interconnectedness of the goals, to ensure that no one is left behind and to advocate for adequate financing to achieve the SDGs. In close collaboration with NITI Aayog and partners, the UN has supported thematic consultations on the SDGs to bring together various state governments, central ministries, civil society organisations and academia to deliberate on specific SDGs.

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