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Corporate & Commercial

Monthly newsletter | April 2021

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Relaxations made to the definition of listed companies under Companies (Amendment) Act, 2021

The Central Government has introduced multiple measures aimed at improving the ease of doing business in India. In line with this intention, a significant set of amendments were made to the Companies Act, 2013 (**Companies Act**) through the Companies (Amendment) Act, 2021 (**Amendment Act 2020**).

One such amendments aim to tweak the definition of a listed company. As result, a proviso has now been added under Section 2 (52) of the Companies Act which deals with definition of listed companies. As per the proviso, the Central Government may, in consultation with the Securities and Exchange Board of India (**SEBI**), exclude from the definition of listed companies, certain classes of companies which have listed or intend to list a prescribed class of securities on any recognized stock exchange. This amendment was also suggested by the Company Law Committee in November 2019.

Amendment Act 2020 and its Implications

Earlier, as per Section 2(52) of the Companies Act, the definition of a listed company referred to any company which has its securities listed on a recognized stock exchange. The definition for securities is provided under the Securities Contract Regulation Act, 1956 (**SCRA 1956**). As per Section 2(h) of SCRA 1956, a security includes shares, scrips, stocks, bonds, debentures, debenture stock or any other marketable security.

As a result of the inclusive definition under the SCRA 1956 and Companies Act, private limited companies which had their debt securities listed on a stock exchange were compelled to follow the compliances applicable to the listed companies (viz., adhere to norms such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees, etc.), which are subject to more stringent requirements as compared to unlisted companies.

However, with effect from 1 April 2021, as per Section 2(52) the Companies Act read with the newly inserted Rule 2A of the Companies (Specification and Definition Details) Rules, 2014, following classes of companies will now be excluded from the definition of listed companies:

- Public companies which have not listed their equity shares on a recognized stock exchange but have listed non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008, and/or non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013
- Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a foreign jurisdiction as specified in sub-section (3) of section 23 of the Companies Act

As a result of the Amendment Act 2020 and w.e.f. April 1, 2021 the above mentioned companies will now benefit from a major compliance relief such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees etc. amongst other stringent requirements.

Another critical implication of the Amendment Act 2020 is amendment under Section 23(3) of Companies Act. The amendment now empowers the Central Government to allow certain class of public companies to list classes of securities on a permissible foreign jurisdiction without any simultaneous listing in India. While the amendment is not yet effective, it will provide relief to listed foreign companies from compliance requirements applicable to listed companies under the Companies Act 2013.

The move to include relaxations in the definition of listed companies will, to a large extent, make it easier for smaller companies to approach debt markets, in turn boosting the listing of debt securities. The move also lays out the road for domestic companies to tap foreign equity markets in a comparatively hassle free manner. The impetus to growth is very welcome at this stage of the economy where an attempt at recovery is being made in the post-covid era.

Consultation paper on proposed IFSCA (Issuance and Listing of Securities) Regulations, 2021

International Financial Services Centres Authority (**IFSCA**) has been established to develop a comprehensive and consistent regulatory framework based on global best practices with a special focus on ease of doing business, proposed to enact an all-encompassing framework to facilitate issuers' access to the global markets.

IFSCA on March 10, 2021 has released a draft public consultation paper on IFSCA (Issuance and listing of securities) Regulations, 2021 and introduced a range of listing options in IFSC through IPO, FPO, Start-up/SME listing, SPAC, DRs, bonds and so on.

Towards this objective, IFSCA proposes an integrated regulatory framework specifying the requirements for (i) issuance and listing of various types of securities and (ii) preliminary and continuous disclosures as a unified regulator to develop and regulate financial products, financial services, and financial institutions in the International Financial Service Centres (**IFSCs**) in India.

Background

Cross-border listing helps a company meet its corporate financial needs by identifying foreign stock exchange. The market practices and the regulatory framework keeps changing which is wh,y there was a need to review the existing regulatory framework for listing of securities with IFSC, so that they can be aligned with the latest market developments and therefore, the best practices can be adopted.

IFSCA has proposed regulations for issuance and listing of various entities in IFSC in India. Section 23(3) of the Companies Act, 2013 enables listing of equity shares of public Indian companies in permissible foreign jurisdictions which also includes IFSC. IFSCA is a unified regulatory authority for development and regulation of financial products, financial services, and financial institutions in the IFSC in India. Presently, listing of equity in IFSC by Indian companies incorporated and in foreign jurisdiction is governed by

[1] https://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

a combination of regulations under SEBI (IFSC) Guidelines, 2015, SEBI (Issue of Capital and Disclosure requirements) Regulations, 2018, Companies Act, 2013 and Foreign Currency Depository Receipt Scheme and circulars issued thereunder. IFSCA had also prescribed regulatory framework for listing of Depository Receipts (**DR**) in IFSC Exchange.

The Finance Minister in the Union Budget for the financial year 2021-22, has announced setting up of a 'world-class' fintech hub at GIFT City in a bid to bolster innovation in the fintech industry.

Listing of securities in IFSC

IFSCA is proposing to enable the listing of start-ups in IFSC to provide an ecosystem for fintech companies. Recently, there have been new methods for raising capital, such as raising it through Special Purpose Acquisition Companies (**SPAC**). To keep pace with the evolving market environment, IFSCA is proposing suitable framework for capital raising and listing of SPACs on the recognized stock exchanges, to facilitate sponsors, raise capital to undertake an acquisition of a company or assets.

IFSCA proposes to issue regulatory framework for IPO of specified securities by an unlisted issuer, a follow-on public offer of specified securities by a listed issuer, listing of specified securities by a start-up or SME, secondary listing, an IPO of specified securities by a SPAC, listing of depository receipts and lastly listing of debt securities. The regulation gives eligibility criteria and salient features for the different listings. There are underlying principles for an issuer to list its securities in IFSC, such as:

- Material information being disclosed must be true and correct so that the investor can make an informed decision
- There should be full, accurate and timely disclosure of financial results, risk and other non-financial information which might be important
- The standard of quality operations, management experience and expertise should be maintained
- The directors of issuers must make sure to act in the interests of the shareholders as well as stakeholders

The objective of this consultation paper is to seek comments/views from public on the proposed regulations for issuance and listing of various securities in IFSC in India. The proposed framework shall facilitate issuers from across jurisdictions to raise capital for variety of needs and list their securities at the international stock exchanges in IFSCs.

Framework for processing of e-mandates for recurring online transactions

In August 2019, the Reserve Bank of India (**RBI**) issued a framework for processing e-mandates on recurring online transactions. The framework, which was initially limited to cards and wallets, was expanded in January 2020 to include Unified Payments Interface (**UPI**) transactions. The RBI had advised stakeholders in December 2020 to migrate to the system by March 31, 2021, based on a proposal from the Indian Banks' Association (**IBA**) for an extension of time to allow banks to complete the migration.

The RBI extended the deadline to comply with the framework until September 30, 2021, giving banks and payment aggregators a six-month reprieve.

Many banks have not upgraded their capacities to comply with RBI's criteria for allowing registration, monitoring, alteration, and withdrawal of e-mandates, and the millions of e-mandates set up by customers could have failed as of April 1, 2021. While the RBI extended the deadline for processing recurring online transactions, it also stated that non-compliance would be penalized.

The primary objective of the framework was to protect customers from fraudulent transactions and enhance customer convenience. The framework mandates the use of Additional Factor of Authentication (**AFA**) during registration and the first transaction (with relaxation for subsequent transactions up to a cap of INR 2,000, which has since been increased to INR 5,000), as well as pre-transaction notification, the ability to revoke the mandate, and other features in the interest of consumer convenience and protection in the use of recurring online payments. Despite the extension, the Banks still failed to implement the framework, which, as per the RBI, has 'given rise to a situation of possible large-scale customer inconvenience and default.'

Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021

The Central Government has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (**Ordinance**) to allow pre-packaged insolvency resolution process for corporate debtors classified as micro, small or medium enterprises (**MSME**) under the Micro, Small and Medium Enterprises Development Act, 2006.

The Ordinance alters the Insolvency and Bankruptcy Code, 2016 (**Code**) to enable the Central Government to notify a pre-packaged procedure for defaults of up to INR 1 crore. In the aftermath of the Covid-19 pandemic, the Centre briefly stopped the start of new insolvency proceedings on March 24, 2020. This suspension, which had been extended on many occasions, came to an end on March 24, 2021. A separate chapter, Chapter 3A, has been inserted in the Code to deal with the pre-packaged insolvency resolution process.

A pre-packaged settlement entails a corporation working out a restructuring agreement with its creditors before applying for bankruptcy protection. This helps to reduce the overall time and expense of the process. An application for initiating a pre-packaged insolvency resolution process may be made in respect of a corporate debtor, subject to the following conditions:

- It has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date
- It is not undergoing a corporate insolvency resolution process
- No order requiring it to be liquidated is passed under section 33
- It is eligible to submit a resolution plan under section 29A
- The financial creditors of the corporate debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as the resolution professional for conducting the pre-packaged insolvency resolution process of the corporate debtor, and the financial creditors of the corporate debtor, not being its related parties, representing not less than 66%

- The majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in a form that may be specified, as to the limitation period along with a declaration of no intent to commit fraud
- The members of the corporate debtor have passed a special resolution, or at least 3/4th of the total number of partners, as the case may be, of the corporate debtor has passed a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process

The corporate debtor must obtain approval from its financial creditors, who are not connected to it, for the filing of an application to initiate a pre-packaged insolvency resolution procedure, in such form as may be stated, representing not less than 66% in value of the financial debt due to such creditors The pre-packaged insolvency resolution phase must be completed within 120 days of the pre-packaged insolvency start date. The moratorium will be in place from the pre-packaged start date until the process is completed, whether by resolution plan approval or otherwise. During the pre-pack period, the corporate debtor will remain under the current promoters' and management's control and custody. On the grounds set out in Section 61(3) of the Code, the Ordinance appeals against an order authorizing the pre-packaged resolution plan. By introducing a new chapter in the law, the Government appears to be attempting to provide an alternative and efficient resolution mechanism. This is a positive development, but it was hoped that a similar platform would apply to non-MSME businesses. Prepacks will assist corporate debtors in reaching an agreement with lenders and handling the company's entire liability. The Government needs to further enhance the NCLT's infrastructure for pre-packs to be introduced on a timely basis.

Pooled investment vehicles and amendments to the Securities Contracts (Regulation) Act, 1956

Pursuant to the Finance Act, 2021, the Securities Contracts (Regulation) Act, 1956 (**SCRA**) underwent certain amendments recently. These pertain to changes brought about by the inclusion of 'pooled investment vehicles' within the ambit of the SCRA's governance. The key changes are provided herein below:

Revised Definitions

New Section 2(da) has been inserted in the SCRA, which defines a 'pooled investment vehicle' as a fund established in India in the form of a trust or otherwise (for example, mutual fund, alternative investment fund, collective investment scheme or a business trust as understood under Section 2(13A) of the Income Tax Act, 1961 and registered with the SEBI) or such other fund, which raises or collects monies from investors and invests the same in accordance with SEBI regulations in this regard.

Consequent thereto, the definition of 'securities' has been amended, whereby:

- In Section 2(h)(i) of the inclusive definition, 'pooled investment vehicle' has been inserted. It may be noted that Section 2(h)(i) of the SCRA pertains to forms of marketable securities.
- New Section 2(h)(ida) has been inserted to include units or any other instrument issued by any pooled investment vehicle.

New Section 30B

Section 30B has been inserted into the SCRA in relation to debt fund raising by pooled investment vehicles. It states that a pooled investment vehicle (whether constituted as a trust or otherwise) that is registered with SEBI would be allowed to borrow and issue debt securities in line with regulations that SEBI may prescribe. Interestingly, this allowance is stated to override not just the Indian Trust Act, 1882 (the foundation legislation for private trust law in the country) and any other law being in force at the time, but also any judgment, decree or order by any court, tribunal or authority.

In addition, the pooled investment vehicle would also be allowed to create security interest in favour of a lender, whereby such lender could enforce such security interest against the trust property in case of a default by the pooled investment vehicle.

Observations

With these changes coming in, there are a few aspects to further consider:

- The most obvious consequence in relation to the amendments to Section 2(h) of the SCRA is that units or instruments issued by pooled investment vehicles would now fall within the purview of 'Security' under stamp laws, whereby making their transfers exigible to stamp duty payment. In particular, for Section 2(h)(i) of the SCRA, which pertains to marketable securities in an incorporated company, body corporate or pooled investment vehicle, it should be considered whether with private placement memoranda for alternate investment funds that typically contain conditions and restrictions around transfer, they could at all fall within the purview of 'marketable security'. While the SCRA itself may not have a definition for this, the Indian Stamp Act, 1899, does. This definition, inserted last year in the legislation, states that a marketable security is one that can be traded on any stock exchange in India.
- For Section 30B, the overriding of existing judgment, decree or order is an interesting position, as does the overriding of any other legislations in force at the time. Whether this has an effect on an entity that is in an insolvency process may have to be explored further. Whether further SEBI regulations and prescriptions would address this remains to be seen.

Conclusion

Both the changes were expected – bringing the units by pooled investment vehicles within the ambit of stamp duty regime, as well as clear recognition of debt fund raising by vehicles (including INVITs and REITs) in the manner explained. Clarity on the potential inconsistencies shall, of course, be welcome.

CCI investigation into Whatspp's privacy policy

The Competition Commission of India (**CCI**) has launched an investigation into WhatsApp's privacy policy update for 2021, citing that the decision to exchange user data with Facebook companies appeared to be an abuse of dominance at first glance.

According to the antitrust body, Facebook-owned WhatsApp's latest policy violates the Competition Act, 2002, 'through its exploitative and exclusionary conduct...in the guise of the policy update.' The inquiry into the instant messaging platform's policies follows a series of regulatory steps taken by Indian authorities against Big Tech firms, as well as increased criticism of the messaging platform's revised terms. WhatsApp's revised

policy terms were first revealed to users on January 4, 2021, in an in-app notification, asking them to adhere to the new terms by February 8, 2021, or risk losing access to their accounts. WhatsApp explained that the changes were essential to support companies through WhatsApp Business, as both users and privacy activists raised concerns. The deadline was later pushed back to May 15, 2021.

On January 19, 2021, the CCI decided to take Suo Moto notice of the policy's possible effect on WhatsApp users and the market. WhatsApp India, which has 53 million users, said it was always committed to 'protecting people's personal communications with end-to-end encryption.'

Noting that users would be forced to accept the new terms, which include terms about the sharing of their data in all information categories with other Facebook firms, in order to use WhatsApp, the CCI noted that the policy's 'take it or leave it' nature requires an investigation into WhatsApp's market power. As per the CCI order, WhatsApp submitted that the policy update did not expand its ability to share data with Facebook and that the said update intended to 'provide users with further transparency about how WhatsApp collects uses and shares data.' The CCI stated that the legitimacy of such claims would also be examined during the probe.

The CCI has pinpointed several other concerns with the new privacy policy, including the 'opacity, vagueness, open-endedness and incomplete disclosures' hiding the actual data cost that a user incurs availing WhatsApp services.

The CCI has directed the Director-General to initiate an antitrust inquiry under Section 26 (1) of the Competition Act, 2002, and send a report within 60 days.

Amendments to the Companies (Audit and Auditors) Rules, 2014: Bid for greater transparency

The Companies (Audit and Auditors) Rules, 2014 (**Rules**) saw a couple of amendments in quick succession recently. Notifications dated March 24, 2021, and April 1, 2021, issued by the Ministry of Corporate Affairs (**MCA**), came into effect from April 1, 2021. Hereunder, we take a look at the key aspects of these changes.

It must be noted that all the amendments are in Rule 11 of the Rules, which pertain to additional issues to be addressed by an auditor in its audit report. In summary, these are as follows:

- Whether the management has represented that to the best of its knowledge and belief, other than as disclosed in notes to accounts in the audit report, there have been no funds advanced or loaned or invested by the company to any person or entity (including foreign entity) with the understanding that such funds would be onward lent or invested (directly or indirectly) in another person or entity identified in any manner whatsoever by or on behalf of the company. The understanding with the intermediary entity may be written or otherwise. The position applies not just to lending or investing but also for providing guarantee, security or similar use for such identified ultimate beneficiary.
- Similarly, whether the management has represented that to the best of its knowledge and belief, other than as disclosed in notes to accounts in the audit report, no funds have been received by the company from any person or entity (including foreign entity) with the understanding that the company would (directly or indirectly) lend, invest in another person or entity identified in any manner whatsoever by the original funding party. The understanding with the funding party may be written or otherwise. Again, the position applies not just to lending or investing but also for providing guarantee, security or similar use for the identified ultimate beneficiary.
- Based on reasonable audit procedures by the auditor, there is nothing that has come to its notice whereby it would believe that the statements described above (as provided by the company) could be mis-statements.
- Additionally, the auditor would also have to state whether dividend either declared or paid during the year by the company was in compliance with Section 123 of the Companies Act, 2013.
- For financial years commencing on or after April 1, 2022, whether the company has used accounting software with audit trail features in it; and, if the same has been used throughout the year for all transactions recorded in the software without tampering with the audit trail feature.

Observations

- The changes are intended to bring about greater transparency in the operations of a company. This is particularly true in matters of audit tampering as well as money movement to persons and entities that are close but not identified as 'related parties'.
- The statements regarding money movement that the auditor needs to make beyond the notes to accounts imply that it would have to take specific representations from the company from the management of the company.
- It may also be noted that the statements are in capacity of original funding party as well as intermediary, but not in the capacity of ultimate beneficiary. The reason behind this remains to be explored, in the context of potential off the book transactions.

The changes themselves are welcome. At the same time they are likely to increase audit costs for a company. For smaller or financially weaker entities, this could pose an additional challenge to ease of doing business.

Press Note 1 of 2021: Downstream investments made by non-resident Indians

The first Press Note of 2021 was issued by the Department for Promotion of Industry and Internal Trade (**DPIIT**) on March 19, 2021 pertaining to downstream investment by a non-resident Indian (**NRI**). Therein, by way of a simple amendment to the extant Foreign Direct Investment Policy of 2020, it has been clarified that investment by an NRI on a non-repatriation basis under Schedule IV of the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019, would be deemed as domestic and treated at par with investments made by residents. Thus, an investment made by an Indian entity which is owned and controlled by one or more NRI on a non-repatriation basis would not be considered for calculating indirect foreign investment.

It is to be noted that the above decision would take place from the date of FEMA notification. At the time of this writing, the specific notification is awaited.

Regulating block deals by SEBI

Recently, the Asia Securities Industry and Financial Market Association (**ASIFMA**), a group of Foreign Portfolio Investors, had made a complaint to the Indian market regulator SEBI and made allegations about bulk buy orders being front run. They particularly pinpointed eight bulk deal transactions where the foreign portfolio investors did not receive shares in full value with regard to the amount invested by them.

Background

The concept of bulk deal came into existence in the Indian capital markets in 2005. A bulk deal was defined as a transaction where the total quantity of shares bought or sold is greater than 0.5% of the total number of equity shares of the company listed on the stock exchange. This predefined standard of 0.5% could be reached either in a single transaction or through multiple transactions. To enable exchanges to conduct bulk deals through a single transaction, they were allowed to operate on a separate trading window. This trading on a separate window gave birth to the concept of block deal where a minimum quantity of 5,00,000 shares or shares having a minimum value of INR 5 crore are executed in a single transaction.

Front Running

Front Running is an illegal practice of buying securities based on information not available to the public regarding an expected high value transaction which has the potential to affect the price of a security. This kind of activity is usually committed by brokers or brokerage firms who receive the order to buy a large number of shares. The traders so involved in these kinds of transactions leverage the non-public information available to them and then sell their positions for a profit, as the fund which could not get its full quantity of shares will look to buy those from the market.

Revised framework for block deals

Two separate windows of 15 minutes each will be provided for trading in morning and afternoon. Furthermore, the minimum order size has been increased to INR 10 crores. These steps will help tighten up the system and provide confidentiality for the large trades and stability in price for these transactions.

From 8:45 Am to 9:00 AM, the morning window would be operational and the previous day's closing price of the stock would be the reference for the execution of the block deal. The transaction price of a share should be within plus or minus 1% of the previous day's closing.

The afternoon window will be operational from 2:05 PM to 2:20 PM. For the trades executed in this window, the pricing would be based on volume weighted average market price (**VWAP**). "Between the period 2:00 pm and 2:05 pm, stock exchanges shall calculate and disseminate necessary information regarding the VWAP applicable for the execution of block deals in the Afternoon block deal window," the SEBI has stated in Circular no. CIR/MRD/DP/118/2017.

SEBI aims to make this process more transparent by ensuring that those trades executed in the block deal window must be delivered and would not end up being squared off or reversed. Also, information like name of the scrip, client name, traded price, quantity of the shares bought or sold among others would be made available to the general public on the same day after the market hours by the stock exchange, eliminating anonymity.

Extension of Emergency Credit Line Guarantee Scheme

The Government has extended the Emergency Credit Line Guarantee Scheme (**ECLGS**) for another three months and expanded its coverage to include up to 40% of outstanding loans as of February 29, 2020, up from 20% previously.

Due to the continuing adverse effect of the Covid-19 pandemic on some services sectors, the scheme, dubbed ECLGS 3.0, has been extended until June 30, 2021, or until INR 3 lakh crore is disbursed, as stated by the Ministry of Finance. The collateral-free loan guarantee scheme, which was announced as a part of the Atmanirbhar Bharat package, would now also cover borrowers with total credit outstanding up to INR 500 crore, with overdues for 60 days or less on February 29, 2020, as compared to 30 days overdue earlier.

The scheme was initially scheduled to expire in October 2020, but it was extended until the end of November. In November 2020, as part of the Aatmanirbhar Bharat 3.0 package, the scheme was extended again until March 31, 2021, and included the 26 stressed sectors defined by the RBI-appointed K V Kamath Committee.

Loans issued under ECLGS 3.0 would have a 6-year term, including a 2-year moratorium duration. Under the previous edition, ECLGS 2.0, loans had a 5-year term with a 12-month grace period on principal repayment. The Government has incurred an expense of INR 4,000 crore to provide a guarantee on 91.9 lakh loans amounting to INR 2.01 trillion as of March 15, 2021. The revised operational guidelines would be issued by National Credit Guarantee Trustee Company Ltd (**NCGTC**).

Through these modifications, the Government aims to make additional funding available to eligible beneficiaries while providing an incentive to Member Lending Institutions (**MLI**), which will go a long way in .

DFI bill

The Government passed The National Bank for Financing Infrastructure and Development (**NaBFID**) Bill, 2021 (**Bill**). This Bill sets up a government-owned Development Finance Institution (**DFI**) with initial paid-up capital of INR 20,000 crore to leverage around INR 3 lakh crore from the markets in a few years to provide long-term funds to infrastructure projects. Below are some of the pertinent highlights of Bill.

- **Structure:** The NaBFID will be formed as a company with an authorized share capital of INR 1 Lakh Crore. The following entities may hold NABFID shares: (i) the Central Government, (ii) multilateral institutions, (iii) sovereign wealth funds, (iv) pension funds, (v) insurers, (vi) financial institutions, (vii)banks, and (viii) any other entity that the Central Government deems appropriate.
- **Functions of NaBFID:** The NABFID will have both financial and developmental targets. The financial targets would be to lend, invest, or attract funds for infrastructure projects entirely or partially located in India. The Central Government will specify the infrastructure domain, which will determine the sectors that will be protected. Facilitating the growth of the market for bonds, loans, and derivatives for infrastructure financing are a few of the developmental objectives of the NABFID.

- **Source of funds:** NABFID can raise funds through loans or other means in both Indian rupees and foreign currencies or by issuing and selling various financial instruments such as bonds and debentures. NABFID can borrow money from the Central Government, the Reserve Bank of India (RBI), scheduled commercial banks, mutual funds, and multilateral institutions such as the World Bank and Asian Development Bank.
- **Management of NABFID:** A Board of Directors will oversee NABFID's operations. The Board of Directors will consist of (i) a Chairperson appointed by the Central Government in consultation with RBI, (ii) a Managing Director, (iii) up to three Deputy Managing Directors, (iv) two central government-nominated directors, (v) up to three shareholders-elected directors, and (vi) a few independent directors (as specified). A Central Government agency will recommend candidates for the positions of Managing Director and Deputy Managing Directors. On the advice of an internal committee, the Board will name independent directors.
- **Support from the Central Government:** By the end of the first fiscal year, the Central Government would have provided NABFID with grants worth INR 5,000 crore. The Government would also have a guarantee for borrowing from multilateral banks, sovereign wealth funds, and other international funds at a discounted rate of up to 0.1%. The Government can reimburse part or all of the costs of insulating against foreign exchange fluctuations (in connection with borrowing in foreign currency). The Government can guarantee NABFID's bonds, debentures, and loans if NABFID requests it.
- **Prior sanction for investigation and prosecution:** No investigation into NABFID employees will begin without the following parties' approval: (i) the Central Government in the case of the chairperson or other directors, and (ii) the Managing Director in the case of other employees. In cases involving NABFID staff, courts may also require prior authorization before taking cognizance of the offense.
- **Other DFIs:** The Bill also allows anyone to create a DFI by applying to the RBI. In consultation with the central Government, the RBI can issue a DFI license. These DFIs will also be subject to RBI regulations.

The Bill is a good step towards supporting the development of long-term non-recourse infrastructure financing in India, including the developing bonds and derivatives markets necessary for infrastructure financing.

Delay in implementation of Labor Codes

The notification on the Rules of the Labor Codes (four Codes on Wages, Industrial Relations, Social Security and Occupational Safety, Health & Working Conditions) and their implementationhas been delayed beyond the original date of April 01, 2021, onwards as it was being expected. With States yet to frame the Rules, the Government's proposal for a fast-track rollout of the four labor codes faces some turbulence, leaving the Centre in limbo about whether it can notify the Rules in areas under its jurisdiction.

The Centre's sphere includes establishments in ports, docks, mines, banking, insurance, and railways, while the majority of the manufacturing and services sector falls in the state sphere. Since 3/4th of all institutions fall under the jurisdiction of states, the absence of State Rules creates a legal vacuum, defeating the entire purpose of labor reforms.

The States have yet to issue Draft Rules for stakeholder consultations under the four Codes, which usually takes 30-45 days. Key states such as Uttar Pradesh, Bihar, Madhya Pradesh, Haryana, and Uttarakhand have only circulated the Draft Rules for two codes, while Karnataka has circulated Draft Rules for one code. So far, only Jammu and Kashmir has finalized its Rules.

The entire process has been beset with problems and has faced opposition from trade unions, which have been vocal in their disapproval of the laws, claiming that they are anti-labor. Opposition labor unions did not attend the negotiations on the Draft Rules of the codes and have argued that the Codes were passed in Parliament without proper debate and that having a rule discussion was a farce.

However, the Codes have been well received by the employers. According to Grant Thornton Bharat's Industry Expectation Survey, 50% of Indian businesses are optimistic about their ability to enforce the new labor laws. Internal reviews have begun in 43% of companies. According to the survey, 13% are waiting for the final announcement on the implementation date.

With a delay in implementing the Codes, the Government should initiate a constructive dialogue with trade unions to ensure a smooth implementation of the Codes.

Waiver Of improper share allotment and irregular appointment of directors

The National Company Law Tribunal (**NCLT**) recently in the matter of *Harman Singh Arora & Ors v. Axestrack Software Solutions Pvt Ltd & Ors*[2] and in *Priya Choudhary & Ors v. Axestrack Software Solutions Pvt Ltd & Ors*[3] after taking into record the settlement agreement arrived at between the parties inter- se, allowed waiver/exemption to the Company (Axestrack Software Solutions Pvt Ltd) from the penalty(ies) qua any inadvertent violations committed in the share(s) allotments and compounding of irregular appointment of Director(s) of the Company.

This case is one of its kind, in which the NCLT while exercising authority under Section 241-242 of the Companies Act, 2013, granted a waiver/exemption from the Company's possible fines and prosecution for unlawful share allotment and unauthorized director appointments. It will be interesting to see if, in light of this decision, the NCLT adds another chapter to the emerging jurisprudence of oppression/mismanagement remedies after reiterating and reaffirming similar precedents set under the old Companies Act, 1956 regime.

In their respective complaints, the Petitioners filed cross petitions before the NCLT alleging multiple incidents of oppression and mismanagement against the Respondents. The Counsel for the Company in both the matters argued that under Sections 241-242 of the Companies Act, 2013 (erstwhile Sections 397-398 of the Companies Act, 1956), the court has been given the authority 'to make such orders as it sees fit' for the purpose of safeguarding the interests of the Company, its shareholders, and the public in general, and these powers include passing orders that could include exemption/waiver from potential liability under the Companies Act for defaults that had occurred and were made the subject of the petitions under the NCLT.

[2] Company Petition No. 11/241-242/JPR/2018

[3] Company Petition No. 279/241- 242/JPR/2019

NCLT acknowledged the Applicants' arguments and held that in order to bring a resolution to the issues between the parties and for the public good, the Application to remove the corresponding Company Petition(s) was permitted, along with any possible fines or litigation that might occur against the Company as a result of the instances of injustice and mismanagement that were made subject matter of the Petition, were pardoned.

The Tribunal cited numerous judicial orders to argue that when dealing with applications filed under Sections 241-242 of the Companies Act, 2013, the Tribunal has ample powers to protect the interests of the Company, its shareholders, and the general public. Such powers include the right to issue orders that may include the exception or waiver of certain Act parameters for larger interests.

The NCLT also granted the right to have previous filings with the Registrar of Companies (**RoC**) marked as defective in the case of erroneous share allotments and incorrect Director assignments.

The NCLT held as under:

"...(iii) No action shall be taken against Respondent No. 1 Company or its past/incumbent directors or officers or shareholders by the concerned Regional Director, Ministry of Corporate Affairs, or the Registrar of Companies, or any other authority, in respect of any transgressions with regard to the improper share allotment or irregular appointment of Directors hitherto. This exemption shall be only limited to the specific past issues of share allotment and Director's appointment.

(iv) The Petitioners are at liberty to seek marking as defective the previous filings with the Registrar of Companies in respect of the erroneous share allotments and incorrect appointment of directors, as a consequence of which the said returns/filings shall stand nullified. Appropriate modifications/ rectification may be made in relevant statutory registers and related records."

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