SAGUS SPEAKS

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This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.

REGULATORY & POLICY UPDATES

SEBI amended the Master Circular for Foreign Portfolio Investors, Designated Depository Participants and Eligible Foreign Investors.

The Securities and Exchange Board of India ("SEBI") through its circular dated 01.08.2024[1] ("FPI Amendment Circular") has amended the Master Circular for Foreign Portfolio Investors ("FPI"), Designated Depository Participants and Eligible Foreign Investors dated 30.05.2024 ("FPI Master Circular"). Key highlights of the FPI Amendment Circular are as follows:

i. University funds and university related endowments registered or eligible to be registered as Category 1 FPI, are no longer required to make additional disclosures as specified in Para 1(xiii) of Part C of the FPI Master Circular which mandated additional disclosures required to be made by FPI's that fulfilled certain objective criteria, subject to compliance with additional conditions as follows: (a) Indian equity assets under management ("AUM") being less than 25% of global; (b) Global AUM being more than INR 10,000 crore equivalent; and (c) Appropriate return/filing to the respective tax authorities in their home jurisdiction to evidence the nature of a non-profit organisation exempt from tax.

1 SEBI circular to amend the Master Circular for Foreign Portfolio Investors, Designated Depository Participants and Eligible Foreign Investors.

ii. The eligible jurisdictions with respect to the exemption granted to university funds and university related endowments will be specified by SEBI from time to time in consultation with the pilot custodians and designated depository participants standards setting forum through the standard operating procedure framed in terms of the FPI Master Circular. The FPI Amendment Circular came into force with immediate effect i.e., from 01.08.2024.

SEBI amended the Master Circular for Infrastructure Investments Trusts and Master Circular for Real Estate Investments Trusts, with respect to waiver on the restriction to the right to nominate a unitholder nominee director.

SEBI issued two separate circulars dated 06.08.2024 ("Amendment Circulars") to provide for waiver of the restriction on the board nomination rights of unitholders of Infrastructure Investments Trusts ("InvITs") and Real Estate Investments Trusts ("REITs") under the Master Circular for Infrastructure Investments Trusts dated 15.05.2024 ("Master Circular InvITs")[2] and the Master Circular for Real Estate Investments Trusts dated 15.05.2024 ("Master Circular REITs")[3], respectively.

As per para 22.3.1.(b) of chapter 22 of the Master Circular InvITs and para 18.2.2.(b) of chapter 18 Master Circular REITs, respectively, eligible unitholder(s) have the right to nominate only one unitholder nominee director. As per the proviso to the above paragraphs, if an entity has the right to nominate one or more directors on the board of directors of the investment manager in its capacity as shareholder of the investment manager or lender to the investment manager or the InvIT/ REIT (or its holding companies or special purpose vehicles), then such entity will not be entitled to nominate or participate in the nomination of a unitholder nominee director.

SEBI through the Amendment Circulars has inserted another proviso to clarify that aforesaid restriction on the right to nominate a unitholder nominee director will not be applicable if the right to appoint a nominee director is available to it in its capacity as a debenture trustee in terms of clause (e) of sub-regulation (1) of regulation 15 of the SEBI (Debenture Trustees) Regulations, 1993. The Amendment Circulars came into force with immediate effect i.e., from 06.08.2024.

SEBI notified SEBI (Alternative Investment Funds) (Fourth Amendment) Regulations 2024.

SEBI notified SEBI (Alternative Investment Funds) (Fourth Amendment) Regulations 2024 ("AIF Amendment Regulations")[4] amending the SEBI (Alternative Investment Funds) Regulations, 2012 ("Principal AIF Regulations"). The AIF Amendment Regulations were published in the official gazette and came into effect on 07.08.2024. The key amendments under the AIF Amendment Regulations are as follows:

i. The proviso to Regulation 13(5) of the Principal AIF Regulations which permitted extension of tenure to large value Alternative Investment Funds ("AIFs") for up to two years has been amended to provide that large value funds may now be permitted to extend their tenure for up to 5 (five) years, subject to the approval of two-thirds of the unit holders by value of their investment in the relevant AIF.
ii. Sub-regulation 1(c) of Regulations 16 and 17 of the Principal AIF Regulations, has now been amended to restrict Category I and Category II AIFs, respectively, from borrowing funds directly or indirectly, except for meeting temporary day to day operational needs, allowing funds to be borrowed for up to thirty days and on no more than four occasions annually. Additionally, SEBI has now permitted these Category I and Category II AIFs to create encumbrance on the equity of the investee company subject to compliance with certain conditions.

DERC issued DERC (Net Metering for Renewable Energy) (First Amendment) Regulations, 2024.

The Delhi Electricity Regulatory Commission ("DERC"), on 26.07.2024 issued DERC (Net Metering for Renewable Energy) (First Amendment) Regulations, 2024[5] ("Net Metering Amendment Regulations") to amend DERC (Net Metering for Renewable Energy) Regulations, 2014 ("Net Metering Principal Regulations").

Net Metering Amendment Regulations provides that technical feasibility of renewable energy system up to 10kW is exempted from technical feasibility studies on the same supply type. It is further provided that any commensurate enhancement of

[2] Circular to amend the Master Circular for Infrastructure Investment Trusts (InvITs)
[3] Circular to amend the Master Circular for Real Estate Investment Trusts (REITs)
[4] SEBI (Alternative Investment Funds) (Fourth Amendment) Regulations 2024
[5] Net Metering Amendment Regulations

sanctioned load of the consumer, as may be required, shall be carried out by distribution licensee.

Net Metering Amendment Regulations also provided that any upgradation in distribution infrastructure including distribution transformer to facilitate the installation of renewable energy system utpo 10 kW shall be carried out by distribution licensee and shall be allowed in average revenue requirement subject to prudence check by the commission.

It has been further provided that technical feasibility of renewable energy system above 10 kW shall be completed by distribution licensee within fifteen days from the date of receipt of application complete in all aspects.

IBBI issued Guidelines for Committee of Creditors.

The Insolvency and Bankruptcy Board of India ("IBBI") on 06.08.2024 issued guidelines for Committee of Creditors[6] ("COC Guidelines"), to maximize Corporate Debtors' ("CD") asset value through objective decision making. The key highlights of the COC Guidelines are:

i. Nomination of a creditor's representative with proper authorization and sufficient mandate to effectively participate in meetings.
ii. Avoidance of litigation by making endeavors to resolve *inter-se* disputes between members of the COC.
iii. Ensuring that the insolvency resolution cost or the liquidation costs are reasonable.
iv. Recommend inclusion of acceptable belated claims in the list of creditors and its treatment in the resolution plan.
v. Sharing all relevant details, such as latest financial statements, stock audit, transaction audit, forensic audit, etc. with the insolvency professional, to efficiently conduct the resolution process.
vi. Seek details of litigation filed against or by the CD and provide recommendations to the insolvency professional to safeguard the CD's interests.
vii. Consider the requirement of a monitoring committee for implementation of the resolution plan.
viii. Contribute to the preparation of marketing strategy by the insolvency professional and take measures for marketing assets of the CD.

The COC Guidelines aim to stem value erosion, by curtailing procedural delays and to enhance transparency and coordinating the approach taken by members of the COC, while making decisions.

CERC notified CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2024.

Central Electricity Regulatory Commission ("CERC") through its notification dated 05.08.2024 notified CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2024[7] ("DSM Regulation") to ensure that the grid users do not deviate from the prescribed schedule of drawal and injection of electricity in the interest of the security and stability of the grid. The key features of the DSM Regulation are as follows:

i. DSM Regulation shall apply to all grid-connected regional entities and other entities engaged in the inter-State purchase and sale of electricity.
ii. DSM Regulations provides for computation of deviation in a time block for general sellers, Wind or Solar ("WS") sellers and buyers. Pertinently, deviation in time block for WS sellers shall be computed at different formulas for the period of commencement of this DSM Regulation up till 01.04.2026 and for the period of 01.04.2026 and onwards.
iii. Various charges for deviation for the sellers and the buyers are also provided under the DSM Regulations. The charges shall be receivable or payable by the seller if the deviation is by way of over injection or by way of under injection respectively. Further, these charges are separate for each type of seller. Similarly, for a buyer, the charges are either receivable or payable depending on the type of deviation i.e., by way of under-drawal or over-drawal.
iv. The regional load despatch centres will provide the data for deviation calculated in terms of Regulation 6 of the DSM Regulations to the respective regional power committees, wherein the secretariat of the regional power committee shall prepare the statement of charges and will thereafter issue the weekly statement of deviation charges.
v. The payment of charges for deviation shall have a high priority and the regional entity shall pay the due amount within 10 days of issuance of the statement of surcharge for deviation, failing which the entity will be levied with late payment surcharge at 0.04% for each day. The entity which fails to make the payment within the time stipulated under DSM Regulation will be required to open a letter of credit equal to 110% of its average payable weekly liability. Further, the regional load despatch centre will have the power to encash the letter of credit of the concerned regional entity if the entity

6 Guidelines for Committee of Creditors

7 Central Electricity Regulatory Commission has notified the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2024

fails to pay the amounts in the deviation and ancillary service pool account.

vi. CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2022 stands repealed from the date of commencement of DSM Regulations.

GOVERNMENT NOTIFICATIONS

MoP amended the Guidelines for import/export (Cross Border) of Electricity, 2018[8]

Ministry of Power ("MoP") through its office memorandum dated 12.08.2024 issued amendment in the Guidelines for Import/Export (Cross Border) of Electricity, 2018 ("IECBE Guidelines") allowing export of electricity to neighbouring countries. The salient aspects of the IECBE Guidelines amendment are as follows:

a. Generating companies/distribution companies may export electricity generated from coal or renewable energy or hydropower based generating plants to entities of neighbouring countries directly or indirectly through trading licensee after taking approval of designated authority.
b. In case of coal based generating station, export of electricity is allowed only if such electricity is generated utilizing imported coal or spot e-auction coal or coal obtained from commercial mining. However, this restriction is not applicable for collective transaction through power exchanges in India.
c. In case of gas based generating station, export of electricity is allowed only if such electricity is generated utilizing imported gas or gas from any other sources specified by Government of India from time to time.
d. Generating Stations supplying electricity to neighbouring countries are allowed to build dedicated transmission line for connecting the transmission system of neighboring country keeping in view technical and strategic consideration.
e. Further, Government of India may permit connection of such generating station to India Grid (inter-State or intra-State grid) to facilitate sale of power within India in case of sustained non-scheduling of full or part capacity or default notice issued by generator for any default including delayed payment under the power purchase agreement.

JUDICIAL PRONOUNCEMENTS

Supreme Court held that directors of the company cannot be held vicariously liable under National Housing Bank Act, 1987 unless the pleadings specify that they were responsible for conduct of the company's business.

The Supreme Court through its judgment dated 01.08.2024 in the matter of *National Housing Bank* v. *Bherudan Dugar Housing Finance Ltd & Ors. Etc*[9]. held that specific averment must be made against the directors under sub-section (1) of Section 50 of the National Housing Bank Act, 1987 ("NHB Act") to hold the directors vicariously liable.

In the present case, National Housing Bank filed a complaint alleging the commission of offence under Section 29A of the NHB Act. The Magistrate took cognizance of the complaint wherein the second accused was described as the Managing Director and the others accused were described as directors of Bherudan Dugar Housing Finance.

The Supreme Court observed that sub-section (1) of Section 50 of the NHB Act is *pari materia* with Section 141 of the Negotiable Instruments Act, 1881 ("NI Act"). The Supreme Court further relied upon *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla and Anr.*[10] to held that in absence of averments as contemplated under sub-section (1) of Section 50 of the NHB Act, no cognizance could have been taken against the accused except the second accused as the other accused were the alleged directors of Bherudan Dugar Housing Finance.

Supreme Court held that Banks, NBFCs cannot classify MSMEs loan account as NPA without following the framework for Revival and Rehabilitation of MSMEs.

The Supreme Court through its judgement dated 01.08.2024 in the matter of *M/s. Pro Knits* v. *The Board of Directors of Canara Bank & ors.*[11] and batch appeals held that Non-Banking Financial Companies ("NBFCs") cannot classify loan accounts of Micro, Small and Medium Enterprises ("MSMEs") as non-performing assets ("NPA") without following the framework laid down in the Instructions for Framework for Revival and Rehabilitation of MSMEs issued through Notification dated 29.05.2015 ("MSME Revival Notification").

[8] Amendment IECBE Guidelines
[9] Criminal Appeal Nos. 3176-3177 of 2024. Judgement delivered on 01.08.2024.
[10] (2005) 8 SCC 89.
[11] Special Leave Petition (C) No. 7898 of 2024

The Supreme Court observed that MSME Revival Notification along with the instructions and directions issued by the Central Government and RBI have statutory force and are binding on all the banking companies, scheduled commercial banks.

However, the Supreme Court clarified that, if the MSMEs account is classified as NPA by the bank or the creditors, and the MSMEs does not declare to the bank or to the creditors about its MSME status, and if the MSMEs does not object to the securitisation process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), then the MSMEs cannot later use its status as an MSME to hinder the relief granted or for the actions taken under the SARFAESI Act.

APTEL held that the SERCs are not justified in directing generators to participate in negotiation exercise or to unilaterally determine tariff in proceedings under Section 63 of the Electricity Act.

The Appellate Tribunal for Electricity ("APTEL") through its judgment dated 05.08.2024 in the matter of *Mr. Rama Shanker Awasthi* v. *Uttar Pradesh Electricity Regulatory Commission & Ors.*[12] held that State Electricity Regulatory Commissions ("SERCs") can refuse adoption of tariff under Section 63 of the Electricity Act, 2003 ("Electricity Act") if they are satisfied that the quoted tariffs were not aligned with the then prevailing market rates, subject to SERC providing reasons to the parties based on the material on record and affording them a reasonable opportunity of being heard.

In the present case, Uttar Pradesh Electricity Regulatory Commission ("UPERC") had reduced the discovered tariff for the projects of the generating companies and directed that the Power Purchase Agreements ("PPA") signed by such generating companies with the distribution company be modified as per the reduced tariff.

APTEL held that Section 63 of the Electricity Act does not empower the SERCs to force the successful bidders (generators), under the guise of protecting consumer interest, to enter into negotiations for the purposes of reduction of tariff quoted in the bid and unilaterally reduce the tariff below the quoted tariff. Further, SERCs do not have the power to force the unwilling generators to supply power at a lower tariff than what was quoted in the bid as same would amount to determination of tariff under Section 62 of the Electricity Act. APTEL also held that SERCs, cannot force an unwilling generator to enter into negotiations with the procurer or unilaterally reduce the tariff below what was quoted.

High Court of Delhi held that once a Resolution Plan is approved, it becomes binding on all stakeholders and the assets of Corporate Debtor are shielded from criminal prosecution and attachment

The High Court of Delhi through its judgment dated 07.08.2024 in the matter of *Aryan Constructions v. Punjab National Bank Ltd. and Ors.*[13] held that once the resolution plan is approved by the assets of the corporate debtor in the hand of the resolution applicant stood shielded from the criminal prosecution and attachment.

In the present case, Aryan Constructions challenged the approved Resolution Plan submitted by JSW Steel Limited, alleging that the Committee of Creditor ("CoC") failed to protect creditors' interests as it ought to have moved against the erstwhile promoter and director of the corporate debtor to ensure that money siphoned off and laundered be returned to creditors of corporate debtor. Further, it was alleged that JSW Steel was ineligible to submit the resolution plan in terms of Section 29A of IBC.

The High Court of Delhi held that CoC once constituted, acts on behalf of all the creditors and task of the CoC is to attain a balance between twin goal of CIRP process i.e., maximization of the value of the assets of corporate debtor and also a planned course of revival of corporate debtor. These decisions taken by CoC and approved by adjudicating authority are considered commercially viable and cannot be interfered by court.

NCLT, Amaravati held that proof of due service of the demand notice must first be verified by the resolution professional before presenting it before the adjudicating authority/ tribunal.

The National Company Law Tribunal ("NCLT"), Amaravati through its judgment dated 22.07.2024 in the matter of *State Bank of India* v. *Dr. Jitendra Das Maganti & Anr.*[14] held that it is the duty of the resolution professional under Section 99 of IBC that while preparing the report, recommending admission or rejection of the application, to examine whether the applicant has complied with Section 95(4) of IBC and adjudicating authority cannot be called upon to perform the function of resolution professional.

12 Appeal No. 88 of 2018 and Batch
13 Writ Petition No. 10768 of 2024
14 Company Petition (IB) No. 49/95/AMR/2022.

NCLT further held that for initiation of insolvency resolution under Section 95 of IBC is the due invocation of the personal guarantee and the burden of the proof lies on the creditor / applicant to establish that guarantee has been duly invoked, lest the debt under the guarantee payable by the guarantor will not exist and the application is liable to be rejected.

NCLT also observed that Section 99(1) of IBC imposes a legal obligation on the resolution professional to examine the application under Section 94 and 95 and submit a report to the adjudicating authority recommending for approval or rejection. The resolution professional while examining the application to ascertain whether the application satisfies the requirement of Section 94 or 95 is entitled to seek further information or explanation from creditor/applicant.

ABOUT SAGUS LEGAL

Sagus Legal is a full-service law firm that provides comprehensive legal advisory and advocacy services across multiple practice areas. We are skilled in assisting businesses spanning from start-ups to large business conglomerates including Navratna PSUs, in successfully navigating the complex legal and regulatory landscape of India. Our corporate and M&A, dispute resolution, energy, infrastructure, banking & finance, and insolvency & restructuring practices are ranked by several domestic and international publications. We also have an emerging privacy and technology law practice.

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