

Newsletter

# Sharp View

September 2021



# September 21

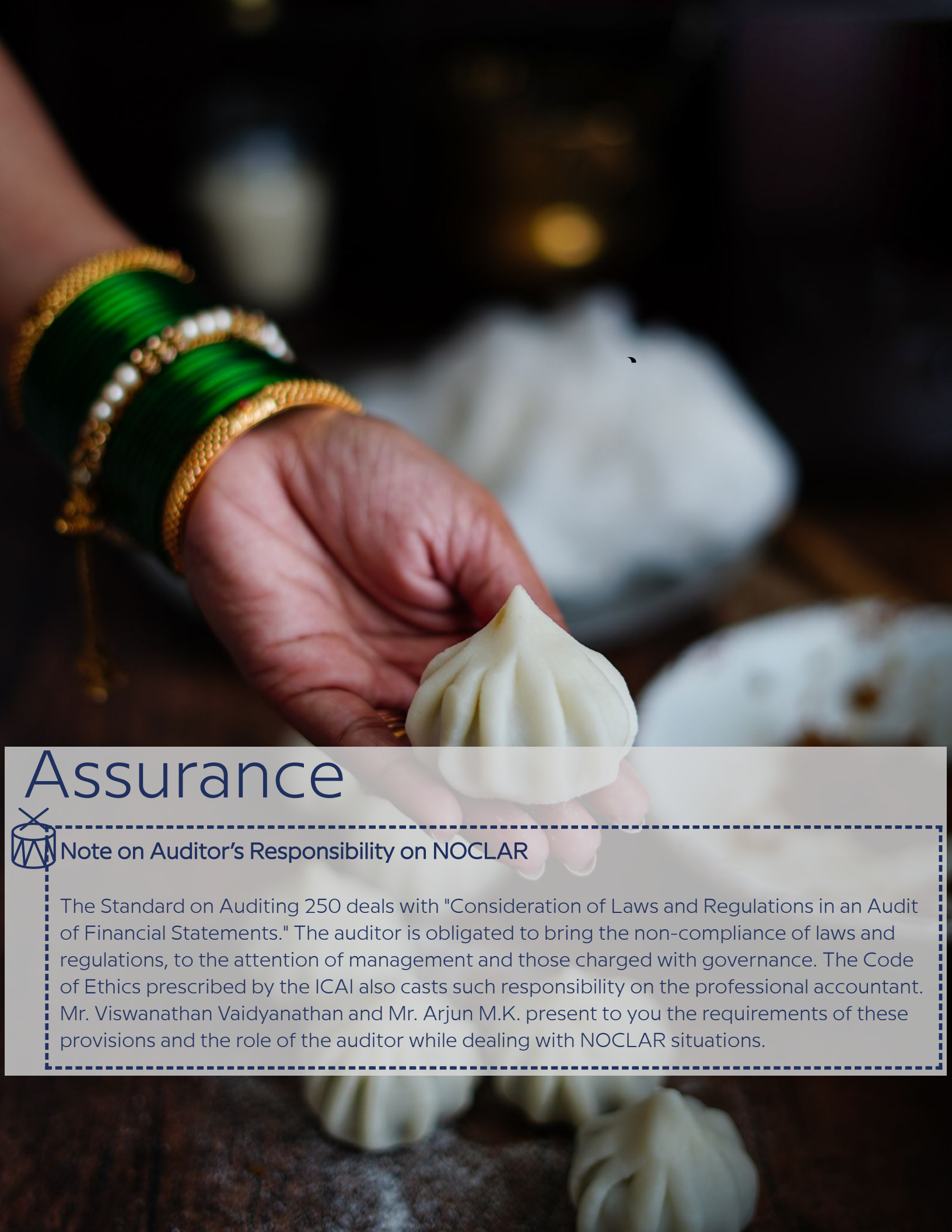
The month of September marks onset of the festive season in India, starting with Ganesh festival, followed by Navaratri, Dussehra, Diwali and conclude with Christmas celebrations at the close of the year. The festive environment in India marks a rise in the consumer spendings across the country along with increased investments in real estate, gold, and automobiles.

Ganesh festival is celebrated across the country, where people worship Lord Ganesh at their homes. The public manifestation of the festival takes the form of social gatherings, participation in various events and competitions organized by schools, workplaces and residential colonies to demonstrate individual talent.

This festival also has historical importance. India's foremost freedom fighter, Lokamanya Balgangadhar Tilak transformed the festival from household worshipping to a grand public event that was intended to be used as a platform to spread awareness and wage actions against the British rule.

All of us are aware; Lord Ganesh is prayed for wisdom, intelligence and strength. Today, our profession is consulted for our prudence, business acumen and professionalism. Our clients and clients' stakeholders look upon us for our integrity, authority and astuteness. Drawing strength from Lord Ganesh, we pray to Him to bless each of us with the judgment of identifying the good from bad, the truth from falsity and awareness from ignorance.

We wish all the colleagues of our group, good luck in all the future endeavours.



# Assurance



## Note on Auditor's Responsibility on NOCLAR

The Standard on Auditing 250 deals with "Consideration of Laws and Regulations in an Audit of Financial Statements." The auditor is obligated to bring the non-compliance of laws and regulations, to the attention of management and those charged with governance. The Code of Ethics prescribed by the ICAI also casts such responsibility on the professional accountant. Mr. Viswanathan Vaidyanathan and Mr. Arjun M.K. present to you the requirements of these provisions and the role of the auditor while dealing with NOCLAR situations.

## Assurance | Note on Auditor's Responsibility on NOCLAR (1/4)

Non-Compliance with Laws and Regulations (NOCLAR) refers to an additional responsibility laid on auditors and assurance practitioners in dealing with NOCLAR or suspected NOCLAR with respect to disclosures to appropriate authority.

The Standard on Auditing (SA) 250 deals with "Consideration of Laws and Regulations in an Audit of Financial Statements" wherein the auditor's responsibilities are divided into two categories.

SA 250 Para	Summary	Auditor's Responsibility
6(a)	Those laws and regulations generally recognised to have a direct effect on the determination of material amounts and disclosures in the financial statements.	To obtain sufficient appropriate audit evidence about compliance with the provisions of those laws and regulations.
6(b)	Other laws and regulations that do not have a direct effect on the determination of material amounts and disclosures in the financial statements, but compliance with which may be fundamental to the operating aspects of the business, to an entity's ability to continue its business, or to avoid material penalties which may therefore have a material effect on the financial statements.	Is limited to undertaking specified audit procedures to help identify non-compliance with those laws and regulations that may have a material effect on the financial statements.

The above two responsibilities need to be performed by the auditors in order to respond appropriately to NOCLAR or suspected NOCLAR identified during the audit.

The auditor is obligated to bring the non-compliance of laws and regulations, other than when the matters are clearly inconsequential with respect to nature and impact, to the attention of those charged with governance (TCWG).

The auditor may consider modifying his audit opinion in accordance with SA 705 to express a qualified or adverse opinion / disclaim an opinion / evaluate the effect of such non-compliance on the opinion if the non-compliance has a material effect on the financial statements, and has not been adequately reflected in the financial statements.

Further, the auditor shall determine whether there is a responsibility to report the identified or suspected non-compliance to appropriate authority.

The new Code of Ethics 2019 ('the Code') (section 360) expects the auditor to take such further action as appropriate in the public interest when NOCLAR or suspected NOCLAR is encountered during the course of audit of listed entities with effect from 1 April 2022.

The Code places the onus of responsibility on the management and TCWG for ensuring that the entity's business activities are conducted in accordance with laws and regulations. The auditor's responsibility is in line with the requirements of SA 250 discussed above and the Code elaborates further on circumstances where professional judgement is to be exercised for disclosure to appropriate authority/regulator. This is important especially in assessing the integrity of the management and TCWG upon finding cases of NOCLAR or suspected NOCLAR, communication with appropriate authority, impact on audit opinion or continuation of

engagement (subject to applicable law or regulation). These decisions call for professional judgement and detailed analysis for which the auditor may consider consulting internal experts (including network firms) and/or opinion from an external expert and/or even from the ICAI.

If the professional accountant determines that disclosure of the non-compliance or suspected non-compliance to an appropriate authority, if required, is an appropriate course of action in the circumstances, that disclosure is permitted pursuant to (paragraph R114.1(d)) of the Code. When making such disclosure, the accountant/auditor shall act in good faith and exercise caution when making the statements and assertions. The accountant/auditor shall also consider whether it is appropriate to inform the client of his intentions before disclosing the matter.

The documentation to be maintained by the auditor should demonstrate the procedures performed as required by the Code and the SA in good faith and exercise adequate caution before arriving at a conclusion.

### Complexities requiring professional judgement

#### 1. Assessment of the integrity of the management and/or of TCWG

Auditor needs to understand the root cause for the NOCLAR to determine whether the non-compliance was intentional or in case of continuing non-compliance from earlier periods, whether the control environment was designed to mislead/misrepresent. The assessment of management's integrity and/or TCWG will require exercise of judgement, professional skepticism, integrity and professional behaviour of the auditor.

#### 2. Suspected NOCLAR / imminent breach

It will not be uncommon to come across suspected NOCLAR or imminent breach of laws and regulations during the course of audit. The former will require considerable professional judgement and detailed analysis on the part of the auditor, including the use of external experts. The latter i.e. imminent breach would require the auditor to act promptly in communicating the observations to the appropriate level of management in the entity to prevent or mitigate the consequences of such imminent breach.

#### 3. Override of client confidentiality in order to inform appropriate authority on NOCLAR / suspected NOCLAR

Communication of NOCLAR/suspected NOCLAR either in the audit report or to the appropriate authority have to be governed by the intent of the Code even though it may result in negative impact on the client. This also involves an override of client confidentiality considering the larger image/responsibility of the auditors to the public/other stakeholders. This would require consideration of all factors such as whistle-blower protection available to the auditor in such a scenario, legal position to defend the professional judgement exercised, due procedures followed in concluding, etc.

**4. Self-interest or intimidation threat**

The identification and escalation of NOCLAR/suspected NOCLAR observations may lead to a self-interest/intimidation threat which has to be considered by the engagement team while planning the audit and during risk assessment. The Engagement Quality Control mechanism should be appropriately designed to deal with such circumstances and provide necessary guidance & support to the engagement team.

**5. Suspected NOCLAR involving legal interpretation which might have to be decided in a court of law**

Certain suspected NOCLARs may involve interpretations of law and are likely to be contested by the management. Whether an act constitutes non-compliance is ultimately a matter to be determined by a court or other appropriate adjudicative body. In such circumstances, the engagement team should involve an independent external expert in the subject matter to assist in evaluation of the suspected non-compliance before taking a decision on the audit findings.



# NOCLAR

## SERIOUS CASES OF NOCLAR

Acting in professional capacity and in good faith to all stakeholders, including general public, report the lapses to the regulators

## MANAGEMENT

Escalate imminent non-compliance or NOCLAR / suspected NOCLAR and the management takes appropriate action

## MATERIALITY & IMPACT

Lapses are appropriately identified and dealt with in the financial statements based on sufficient and appropriate audit evidence and professional judgement

## TCWG

Lapses escalated to TCWG are appropriately addressed in the financial statements and auditor finds the action taken by TCWG satisfactory

## GROUP REPORTING

Component auditor to report assessment and lapses to Group engagement partner

Understanding the entity by assessing the laws & regulations having direct and indirect impact on entity's financial statements. Adequate documentation to demonstrate due attention & care has been exercised in good faith in arriving at conclusion.



# GRC



## Understanding the *Force Majeure* Clause in Contracts in COVID Period

COVID 19 pandemic outbreak has rendered many contracts as 'void' due to the physical restrictions then imposed by the Government. The term *force majeure* (FM) has gained tremendous significance in the last couple of years. Ms. Aarti Joshi and Mr. Sajan Gour have explained in detail, the *force majeure* events, the status of agreements made before the pandemic and their fulfillment, the way forward while drafting such FM clauses in the agreement and some recent citations of the courts.





### Background

A contractual obligation between the parties to a contract is governed by the terms specifically spelt out therein. In India, the Indian Contract Act, and various other laws viz., Sale of Goods Act, Transfer of Property Act and so on define the rights and obligations of the parties under the specific contracts. Most of the contracts contain a *force majeure* (FM) clause. *Force majeure* clauses are risk attribution clauses between the parties, where due to any unseen external factors or events, either party to the contract fails to perform its contractual obligations. FM events are those:

1. Which can neither be controlled by either of the parties,
2. Nor the happening of which can be prevented by the parties.

Under the Indian Contract Act following 2 sections deal with FM events:

**Section 32** deals with the enforcement of contingent contracts: Under these contracts, the parties cannot fulfill their obligations unless a specified event occurs.

**Section 56** specifies that an agreement to do an act which is void in itself (i.e. either it is impossible or unlawful) cannot be enforced.

Natural calamities like hurricanes, floods, cyclones, are some of the 'Acts of God' which fall under the definition of FM events. Events like wars, labour lock-outs, and strikes fall under the category of 'Acts of men.' Most contracts in India clearly spell out the liabilities of the parties in case FM events occur while the contracts are being performed.

### FM clauses under COVID 19 scenario

The COVID pandemic has led to worldwide business disruption. Government of India has promptly declared the lock-down event as a FM event and has come up with reliefs to various business sectors. In this scenario, many parties to the contract have been relieved from non-performance, if such non-performance was purely due to the COVID restrictions. However, the following points must be considered before deciding whether the non-performance of a particular contract was due to COVID factors or a mere failure by the party.

### Agreements made before the COVID pandemic

Till COVID 19 outbreak, the parties were unaware of the pandemic outcomes and therefore the contracts did not specify 'pandemic/epidemic' as FM events. The language of the contract included various FM events termed as 'including but not limited to any cause outside the reasonable control of the parties' which the people relied on to infer that even the pandemic was one of such acts. Various courts have relied on the following checkpoints to determine whether there was a breach of contract.

1. Whether the non-performance of the contract was related to essential goods/services on which there were no restrictions?
2. Whether the parties had some control to fulfill the contractual obligations?
3. Whether the parties had initiated the performance, but the same was stopped due to external factors beyond their control?
4. Whether the FM event has a direct impact on the performance and whether the parties have explored other alternatives to fulfill the contract?
5. Whether there was a proper communication by the promisor to his counterpart that such non-performance/delayed performance was attributable to the pandemic and that the promisor has taken reasonable steps to still perform his obligation?
6. Whether the due date of fulfillment of the contract fell before the declaration of lock-down?
7. Whether any industry regulator has issued relevant circular granting relief to such non-performance or has allowed the delayed performance?

Courts granted the reliefs in only those cases where the parties had no option but to waive the performance/delay the same beyond their control. In cases of lapse by the party itself (and where the contract would have been otherwise fulfilled), the courts have not granted the reliefs.

Some of the case laws are cited below\*.

### The way forward

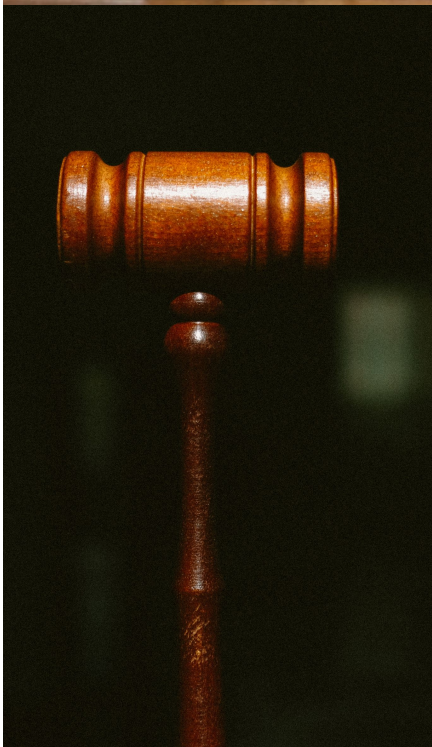
- From the financial year 2021-22 and thereafter it will be very crucial for the parties to draft the contractual rights and obligations before entering into contracts.
- The specific remedies, in case of non-performance and delayed performances need to be spelt out for contracts where men, material, machinery etc. are involved. E.g., construction contracts, production contracts, logistics and so on.
- The language of the contract should be unambiguous so as to determine the viability of the performance in such unexpected circumstances.
- Contracts involving exports, international workers, deputation of professionals outside India need to be carefully drafted (clarifying the rights/remedies available to the parties) as the same would involve the laws of two or more sovereign states.
- The financial liability arising out of such failures/delays should be specifically spelt out or they should be restricted to a certain monetary limit.

### \*Citations

Sr. No	Subject	Citation	Adjudicating Authority
1.	COVID pandemic is an Act of God	National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.	The Supreme Court
2.	Sale of pledged shares to be deferred	Rural Fairprice Wholesale Ltd. & Anr. vs IDBI Trusteeship Services Ltd. & Ors.	Bombay High Court

**GRC | Understanding the *force majeure* clause in contracts in COVID period (3/3)**

Sr. No	Subject	Citation	Adjudicating Authority
3.	No FM relief in fulfilling contracts under 'essential commodities' category	Standard Retail Pvt. Ltd vs Gs Global Corp And Ors	Bombay High Court
4.	No waiver of rent of commercial premises, only postponement in the payment schedule	Ramanand & Ors vs Dr Girish Soni & Anr	Delhi High Court





# Taxation



## Customs and Foreign Trade Policy: RODTEP Scheme for Exporters

The government of India has recently announced the Remission of Duties and Taxes on Exported Products (RODTEP) scheme for exporters while discontinuing the existing Merchandise Export from India Scheme (MEIS). Mr. Shouvik Roy gives you an insight into the newly introduced RODTEP scheme for the exporters.

The Central Government has announced the much awaited 'Remission of Duties and Taxes on Exported Products (RoDTEP) scheme,' vide notification no. 19/2015-2020 dated 17 August 2021, through the Ministry of Commerce. Appendix 4R to the said scheme prescribes the incentive rates covering almost all HSN codes.

- Basic framework of the scheme:
  - RoDTEP Scheme shall replace the Merchandise Export from India Scheme (MEIS).
  - RoDTEP scheme would refund to exporters the embedded central, state and local duties or taxes that were so far not being rebated or refunded and were, therefore, placing India's exports at a disadvantage.
  - The rebate under the scheme would not be available in respect of duties and taxes already exempted or remitted or credited.
- Rationale for RODTEP Scheme in lieu of MEIS:
  - RODTEP scheme is made effective from 1 January 2021 as a replacement for the MEIS, which was not compliant with the rules of the World Trade Organisation (WTO).
  - As per the WTO norms, a country cannot grant export subsidies like MEIS, if its per capita income is above USD 1,000. India's Per Capita Income crossed USD 1,000 in 2017. Even though India initially challenged this norm, she subsequently lost the case at WTO and had to come up with a new WTO compliant scheme to help the exporters.
- The tax incentive rates range from 0.5 % to 4.3 % across various sectors.
- Rebate would be granted to the eligible exporters at a notified rate as a percentage of FOB value.
- All exporters of goods are eligible to take benefit under this scheme. Such exporter may either be the merchant or manufacturer exporter. However, such goods should have been directly exported by such person. The scheme provides a rebate on 8,555 tariff items.
- Exclusions: The following supplies / items / categories are ineligible for the rebate.
  - Export of imported goods covered under paragraph 2.46 of Foreign Trade Policy (FTP).
  - Exports through trans-shipment, meaning, exports originating in third country but trans-shipped through India.
  - Export products which are subject to minimum export price or export duty.
  - Products restricted for export under Schedule-2 of Export Policy in ITC (HS).
  - Products prohibited for export under Schedule-2 of Export Policy in ITC (HS).
  - Deemed Exports.
  - Supplies of products manufactured by DTA units to SEZ/FTWZ units.
  - Products manufactured in EHTP and BTP.
  - Products manufactured partly or wholly in a warehouse under section 65 of the Customs Act, 1962.
  - Products manufactured or exported in discharge of export obligation against an 'Advance Authorization' or 'Duty-Free Import Authorization' or 'Special Advance Authorization' issued under a duty exemption scheme of relevant FTP.

- Products manufactured or exported by a unit licensed as hundred per cent Export Oriented Unit (EOU) in terms of the provisions of the FTP.
  - Products manufactured or exported by any of the units situated in Free Trade Zones or Export Processing Zones or Special Economic Zones.
  - Products manufactured or exported availing the benefit of the Notification No 32/1997- Customs dated 1 April 1997.
  - Exports for which electronic documentation in ICEGATE EDI has not been generated/ exports from non-EDI ports.
  - Goods which have been taken into use after manufacture.
- Rebate would not be dependent on the realization of export proceeds at the time of issue of rebate. However, adequate safeguards would be put in place so that the rebate can be disallowed in case of non-receipt of sale proceeds within the time allowed under Foreign Exchange Management Act 1999.
  - The scrips would be transferable to any other person having a valid IEC and valid ICEGATE registration.
  - The e-scrips would be utilized for payment of the Basic Customs Duty (BCD.) It cannot be utilized towards payment of any other taxes like IGST, Compensation Cess, etc. upon the import of goods.
  - Economic Significance: The scheme will enhance India's competitiveness in global markets :
    - The reimbursement of taxes such as duty on power charges, VAT on fuel in transportation and in farm sector, etc. is expected to make Indian products competitive in global markets.
    - It is expected to significantly impact India's competitiveness, trade flows, and export numbers over the next 5-10 years.
  - Concerns from Exporters/Industry
    - Lower Rates
      - The scheme disappointed many exporters as the rebate rates are much lower than MEIS rates with lesser budget allocation.
      - In large number of cases, the rates are calculated without taking into account the taxes embedded in its raw material, e.g. steel used in the engineering products.
    - Deprive Large Sectors
      - The benefit appears currently not to be available to major export industries such as steel, pharmaceuticals, and exports made under Advance Authorisation, EOU (Export oriented unit), SEZ (Special Economic Zone), etc.
      - Aggrieved Industries can file a representation with the inter-ministerial committee named as "RODTEP Policy Committee (RPC)" chaired by DGFT (comprising members of Department of Commerce and Department of Revenue), whose decisions would be binding.



# Consulting



## Summary of SEBI (LODR) Regulations as amended on 5 May 2021

SEBI has notified the new Listing Obligations and Disclosure Requirements for listed entities. The new regulations bring in the enhanced roles and disclosures to the stakeholders and to the exchanges. Mr. Raviraj Jethwa summarizes the key disclosure requirements of the SEBI (LODR) regulations.

Securities Exchange Board of India has published the SEBI (Listing Obligations and Disclosure Requirements) (second amendments) vide notification No SEBI/LAD-NRO/GN/2021/22 dated 5 May 2021. With the introduction of critical amendments, SEBI has emphasized the need for compliance & risk management to improve the corporate governance standards of listed companies in India.

### Highlights of the amended Listing Obligations and Disclosure Requirements (LODR)

#### 1. Applicability

LODR provisions that became applicable to the listed entities based on market capitalization shall continue to apply even if it falls below the given threshold in the future.

#### 2. Submission of Compliance Certificate

Compliance certificate, duly signed by the compliance officer of the Listed Entity and the authorized representative of the share transfer agent (STA), to be submitted to the stock exchange within 30 days of the end of financial year (FY), instead of within 1 month of the end of each half of the FY.

#### 3. Risk Management Committee (RMC)

a. The provisions of this regulation shall apply to the top 1000 listed entities, determined based on market capitalization, as at the end of the immediate previous FY.

b. Composition: RMC should comprise a minimum of 3 directors, with a majority of them from the Board and a minimum of 1 independent director. If the Listed Entity has SR equity shares (shares with special rights), a minimum of 2/3rd of the RMC members shall be independent directors.

c. Meetings: RMC shall meet at least twice a year (the earlier requirement was once a year) within a maximum interval of 180 days.

d. The quorum for RMC meeting, shall be either 2 members or 1/3rd of the committee members, whichever is higher, including at least 1 member of the Board of Directors (BOD) in attendance.

e. Roles and responsibilities of the RMC:

- Formulate a detailed risk management policy
- Ensure that appropriate methodology, processes, and systems are in place to monitor and evaluate risks associated with the business of the company
- Monitor and oversee implementation of the risk management policy, including evaluating the adequacy of risk management systems
- Periodically review the risk management policy, at least once in 2 years, including by considering the changing industry dynamics and evolving complexity
- Keep the BOD informed about the nature and content of its discussions, recommendations and actions to be taken
- The appointment, removal, and terms of remuneration of the Chief Risk Officer (if any) shall be subject to review by the RMC

The RMC shall coordinate its activities with other committees, in instances where there is any overlap with activities of such committees, as per the framework laid down by the BOD.



### 4. Vigil mechanism

Apart from the existing vigil mechanism, a listed Entity is now required to formulate a whistleblower policy to report the genuine concerns of the directors and the employees.

### 5. Disclosures on the entity's website

a. Schedule of analysts or institutional investors meet, and presentations made by the listed entity to analysts or institutional investors. 'Meet' shall mean group meetings or group conference calls conducted physically or through digital means.

b. Audited/unaudited consolidated financial statements of its subsidiary(ies) if incorporated outside India

c. Secretarial compliance report

d. Policy for determination of the materiality of events or information required along with the contact details of key managerial personnel who are authorized for the purpose of determining the materiality of an event or information and for the purpose of making disclosures to stock exchange(s).

e. Disclosures under sub-regulation (8) of regulation 30 of these regulations

f. Statements of deviation(s) or variation(s)

g. Dividend distribution policy by listed entities based on market capitalization

h. Annual return as provided under section 92 of the Companies Act, 2013

### 6. Secretarial Audit and Secretarial Compliance Report

a. Every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex a secretarial audit report given by a company secretary in practice, in such form as specified, with the annual report of the listed entity.

b. Every listed entity shall submit a secretarial compliance report in such form as specified, to stock exchanges, within 60 days from end of each FY.

### 7. Quarterly report on Corporate Governance

The listed entity shall submit a quarterly compliance report on corporate governance in the format as specified by SEBI from time to time to the recognized stock exchange(s) within 21 days from the end of each quarter.

### 8. Business Responsibility Report

For the top 1,000 listed entities based on market capitalization, a business responsibility report describing the initiatives taken by the listed entity from an environmental, social and governance perspective, in the format as specified by SEBI from time to time.

Provided that the requirement of submitting a business responsibility report shall be discontinued after the FY 2021–22 and thereafter, with effect from the FY 2022–23, the top 1,000 listed entities based on market capitalization shall submit a business responsibility and sustainability report in the format as specified by SEBI from time to time.

9. Remuneration to Directors - Disclosure in Corporate Governance Report

- a. All pecuniary relationships or transactions of the non-executive directors vis-à-vis the listed entity;
- b. criteria of making payments to non-executive directors. Alternatively, this may be disseminated on the listed entity's website and reference is drawn thereto in the annual report;
- c. In addition to the disclosures required under the Companies Act, 2013, the following disclosures shall be made:
  - all elements of remuneration package of individual directors summarized under major groups, such as salary, benefits, bonuses, stock options, pension, etc.
  - details of the fixed component and performance-linked incentives, along with the performance criteria.
  - service contracts, notice period, severance fees.
  - stock option details, if any & whether issued at a discount as well as the period over which accrued & over which exercisable.



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