

MEMORANDUM

To Prof. Robert Eccles Harvard Business School

From Mr. Rahul Matthan Trilegal

Our ref 150322 Trilegal Responses to Questions on Significant audience and materiality

Your ref E-mail dated 21 January 2015

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Subject Indian law outline on statement of significant audiences and materiality

I. SETTING THE LEGAL LANDSCAPE

1.1 **Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether it's primary duty is or is not to shareholders over all other stakeholders.**

(a) *Companies Act*

The Companies Act, 2013 (**Companies Act**) imposes certain obligations on companies to protect the interest of stakeholders, community, employees, and the environment. Stakeholder protection has been introduced recently under the Companies Act. The Companies Act does not define the term stakeholders; however various provisions of the act suggest that stakeholders refer to the security holders¹ of the company. A brief outline of the company's obligations towards the stakeholders and the community is as follows:

- (i) *Corporate Social Responsibility (CSR)*: Section 135 of the Companies Act makes it mandatory for certain classes of companies² to constitute a CSR committee. This committee must formulate a CSR policy which must indicate the activities to be undertaken by such company. The Companies Act also provides a list of CSR activities that can be incorporated into a CSR policy³. The CSR Committee

¹ The term "Security Holder" has not been defined in the Companies Act. However from various provisions of the Companies Act, security holders include shareholders, debenture holders, deposit holders stakeholders etc.

² Companies having a net worth of 5 Billion Rupees or a turnover of 10 Billion Rupees or a net worth of 50 Million Rupees.

³ Activities relating to:— (i) eradicating extreme hunger and poverty; (ii) promotion of education; (iii) promoting gender equality and empowering women; (iv) reducing child mortality and improving maternal health; (v) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (vi) ensuring environmental sustainability; (vii) employment enhancing vocational skills; (viii) social business projects; (ix) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the

must recommend the amount of expenditure to be incurred on these activities and must monitor the CSR activities of the company. The board of directors of the company has been entrusted with the task of publishing the CSR policy on the company's website, ensuring that the CSR policy is implemented and that the company spends 2% of the average net profits of the company made during the three (3) preceding financial years in pursuance of the CSR policy.

- (ii) *Duties of directors:* The Companies Act expressly provides for duties of directors. Directors must act in good faith and must promote the interest of the company. They must have regard to the interest of the community, environment, and employees while discharging their functions towards the company⁴. A detailed analysis of these duties of the director has been provided in Clause IV of this document.
- (iii) *Reporting Requirements:* The Companies Act provides for stakeholder impacts, risks, and interests to be reflected in the annual and quarterly reports prepared by the company. These reports have to be prepared by the directors of the company. A detailed analysis of this duty of the company has been provided in Clause V of this document.

(b) ***Listing Agreement***

In addition to the obligations provided in the Companies Act, public listed companies have additional reporting obligations towards stakeholders, environment, employees, and the community. These additional obligations are provided in the Listing Agreement with stock exchanges (**Listing Agreement**). As per Clause 49 of the Listing Agreement, it is mandatory for public listed companies to ensure the following:

- (i) the rights of stakeholders that are established by law or through mutual agreements are to be respected.
- (ii) stakeholders should have the opportunity to redress their grievances.
- (iii) company should encourage mechanisms for employee participation.
- (iv) stakeholders should have access to relevant, sufficient and reliable information on a timely and regular basis.
- (v) the company should devise an effective whistle blower mechanism enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.

The Listing Agreement does not define the term "stakeholders". However, reliance can be placed on the interpretation of the term under the Companies Act. The relevant provisions of the Listing Agreement are discussed in clause V of the document.

(c) ***Central Public Sector Enterprises***

State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and (x) such other matters as may be prescribed.

⁴ Section 166, Companies Act

Department of Public Enterprise (**DPE**) has recently released the Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises (**CSR Guidelines**). The CSR Guidelines apply to all Central Public Sector Enterprises (**CPSE**) and it is mandatory for CPSEs to implement these guidelines. All CPSEs must devise mechanisms for regular dialogue and consultation with key stakeholders, especially to ascertain their views and priorities regarding the selection and implementation of CSR and sustainability activities. They are required to adhere to global standards and keep in mind the UN Global Compact and the UN Millennium Development Goals. Although CPSEs may select their CSR and Sustainability projects from a vast range of available options, priority should be accorded to activities pertaining to: (i) inclusive growth of society, with special attention to the development of weaker sections of society and the backward districts of the country, and (ii) environment sustainability. The CSR Guidelines supplement CSR under the Companies Act.⁵

II. REGULATORY FRAMEWORK

2.1 To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

Common law.

2.2 Are corporate/securities laws regulated federally/nationally, provincially or both?

Corporate/securities laws are regulated both federally and provincially. Most legislation is drafted centrally, but the executed provincially. For example, The Ministry of Corporate Affairs (**MCA**) is the nodal government department for company law matters and drafted the Companies Act. For the proper execution of the Companies Act, a Registrar of Companies (**RoC**) has been established in each state. Most corporate filings are made with the RoC.

2.3 Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

- (a) **RoC**: The RoC is responsible for registering companies and Limited Liability Partnerships (**LLP**) in India and ensuring that such companies and LLPs comply with the provisions of the Companies Act.
- (b) **Securities and Exchange Board of India (SEBI)**: SEBI is responsible for the protection of the interests of investors in the securities market and is the regulator of the securities market. SEBI is a quasi-legislative, quasi-judicial, and quasi-executive body. It drafts regulations in its legislative capacity, conducts investigations in its executive capacity, and adjudicates in its judicial capacity.
- (c) **Insurance Regulatory and Development Authority (IRDA)**: Regulator of the insurance sector in India.

⁵ Office Memorandum, DPE, 2014.

- (d) **Serious Fraud Investigation Office (SIFO):** This body is responsible for detecting, prosecuting, and recommending for prosecution serious white collar crime. The SIFO has been established under the Companies Act.

2.4 **Does the jurisdiction have a stock exchange?**

Yes, India has (9) nine stock exchanges. The Bombay Stock Exchange Limited (**BSE**) and the National Stock Exchange of India Limited (**NSE**) are the most popular stock exchanges in India.

III. INCORPORATION AND LISTING

3.1 **Do the concepts of "limited liability" and "separate legal personality" exist?**

Yes, they exist and they form important features of Indian corporate law. In exceptional circumstances, such as fraud, the court may pierce the corporate veil and impose liability on the officers or anyone controlling the company.

3.2 **Did the incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company's social and environmental impacts, or to respect its stakeholders?**

There are no obligations on a company to take into account its impacts on the society and the environment at the time of incorporation. However such obligations may arise after the incorporation of the company. Similarly, there are no mandatory requirements for the company to disclose social and environmental impacts during listing. However, there are mandatory reporting requirements public listed companies must adhere to. For example, the top 100 listed companies on the basis of market capitalisation are required to publish a Business Responsibility Report (**BRR**) which highlights the Social, Environmental, and Government (**ESG**) impacts as part of their annual report.⁶ A detailed analysis of these reporting requirements is discussed in Clause V of this document.

3.3 **Do any stock exchanges have a responsible investment index and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, and the Johannesburg Stock Exchange's Socially Responsible Investment Index).**

BSE has launched a series of responsible investment indices. S&P BSE Carbonex is an index for the top 100 companies listed on BSE. Each stock is measured in accordance with the company's relative carbon performance which is measured by the level of their greenhouse gas emissions and carbon policies. This is similar to the FTSE CDP Carbon Strategy All-Share Index, the FTSE CDP Carbon Strategy 350 Index, and NASDAQ OMX Carbon Excess Return Index.

Similarly, the BSE has launched the S&P BSE Greenex index which includes the top 25 listed companies which are good in terms of carbon emissions, free float market

⁶ Clause 55, Listing Agreement. - http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf

capitalization, and turnover⁷. The BSE Greenex will assess the energy efficiency of firms based on energy and financial data. This is similar to NASDAQ OMX Green Economy Global Benchmark Index.

BSE has also signed a memorandum of understanding with the MCA for launching a Corporate Social Responsibility Index which will further companies' obligations of CSR under the Companies Act.

The NSE follows the S&P ESG Index in which environmental, social, and governmental factors are quantified and translated into scores. It applies to the top 500 companies listed (Determined on the basis of market capitalisation) on the NSE.

IV. DIRECTOR'S DUTIES

4.1 To whom are directors' duties generally owed?

Until the enactment of the Companies Act there was no codified law on director duties. The law in this regard had evolved through judicial pronouncements and was largely based on common law principles. The duties of directors have now been codified under Section 166 of the Companies Act.

As per Section 166 of the Companies Act (which is in line with various judicial pronouncements under the Companies Act, 1956 (**Old Companies Act**)), a director owes a fiduciary duty towards the company. Directors are also trustees for the shareholders of the company to the extent it is provided in the constitutional documents of the company⁸.

Historically, while companies were obliged to cater to shareholder interests, other stakeholders did receive some amount of recognition under corporate law. For the most part this was due to the origins of Indian corporate law in the socialistic philosophies prevalent at the time of the enactment of the Old Companies Act. The Companies Act incorporates this principle under Section 166(2) which provides that a director shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interest of the company, its employees, the shareholders, community, and for the protection of the environment.

4.2 What are the duties owed by directors - please state briefly. Please indicate if there are any express or implied duties to avoid damage to the company's reputation.

In India, director duties exist in both codified and uncodified forms. The codified director duties are as follows:

- (a) duty to comply with the articles of association of the company;

⁷ The BSE Greenex Index algorithm is based on Cap Weighted Free-Float Market Capitalization weighted Index. The stock selection criteria maybe viewed here: http://www.bseindia.com/indices/DispIndex.aspx?iname=GREENX&index_Code=75&page=19D7C1A5-BE2B-43EC-AD77-CE539070D72F

⁸ *Dale & Carrington Invnt. P. Ltd. and Anr. v. P.K. Prathapan* - (2005) 1 SCC 212; *Bajaj Auto Ltd. v. N.K. Firodia and Anr.* - AIR 1971 SC 321; *Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Ors.* - (2005) 11 SCC 314; *Reliance Natural Resources Limited v. Reliance Industries Limited*, (2010) 7 SCC 1.

- (b) duty to act in good faith in order to promote the objects of the company for the benefit of its members⁹ as a whole, and in the best interests of the company, its employees, the shareholders, the community and the protection of the environment.
- (c) duty to exercise due care, skill, diligence and independent judgment.
- (d) duty to not have direct or indirect interest with the company which may possibly conflict with the interest of the company.
- (e) duty to not achieve any undue gain;
- (f) duty to not assign his office.

While there is no express duty on directors to protect the reputation of the company, since a director is under an obligation to refrain from taking any decision which will conflict with the interest of the company, it may be inferred from this that directors have a duty to protect the reputation of the company.

4.3 More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and business partners, whether occurring inside or outside the jurisdiction?

- (a) **Director Duties:** Under the Old Companies Act, there was no duty expressly cast on the director to protect the interests of non-shareholders. However, directors have been held liable for the criminal acts of the company. In such cases, courts lift the corporate veil of the company and pin liability on the directors, agents, and persons connected with the company. Indian corporation law, in addition to imposing a duty on directors to protect stakeholders' interest under Section 166 of the Companies Act, recognizes the principle of "officer in default". This would suggest that in case a company is involved in an unlawful activity, such as fraud or fails to obtain an environmental clearance, the officer in charge, which includes a director, will also be held liable. Therefore, it is in the director's personal interest to ensure that the actions of the company take into account the interests of non-shareholders.
- (b) **Stakeholders Relationship Committee:** Section 178(5) of the Companies Act imposes an obligation on directors to constitute a Stakeholders Relationship Committee (**SRC**). It is mandatory for companies having more than 1,000 shareholders, debenture-holders, deposit-holders, or any other security holder to constitute this committee. The SRC is empowered to consider and resolve the grievances of security holders of the company. As the SRC is engaged in resolving the grievances of security holders, for the purposes of the Companies Act, stakeholders' means security holders of the company.

⁹ The term "Member" in relation to a company is defined under Section 2(55) of the Companies Act to mean (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members; (ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company; (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository.

- (c) **CSR:** Directors are also required to actively participate in the CSR projects of the company. Section 135 of the Companies Act imposes an obligation on directors to disclose the composition of the CSR committee, approve, and publish on the company's website the CSR policy prepared by the CSR Committee. The board of directors is also required to ensure that the activities in the CSR policy are undertaken by the company. In relation to the CSR activities, the board's report must include a report on CSR which is tabled at the annual shareholders meeting. Directors of CPSEs are also required to formulate and implement the CSR policy¹⁰.
- (d) **Listing Agreement:** Directors and the top management of listed companies have an additional obligation to conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture of good decision-making¹¹. Further, the board of directors should apply high ethical standards and should take into account the interests of stakeholders¹².

Directors are not obliged to consider stakeholder impacts on suppliers, business partners, and subsidiaries unless the director is on the board of such companies. However, while preparing the consolidated financial statement of the company, officers in charge must ensure that the financials of subsidiaries are placed before the shareholders at the annual shareholders meeting¹³. Further director duties under Indian company law extend to companies incorporated in India.

4.4 If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance the different factors including such impacts? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

The JJ Irani Report on the Companies Act suggests that the common law principles must be applied to determine the extent of discretion and subsequent liability of a director. A director will not be liable for breach of duty if he exercises discretion on the basis of the common law principles of good faith, utmost care, and due diligence and in the interest of the company. As mentioned above, Section 178 of the Companies Act imposes an obligation on directors of certain type of companies to constitute the SRC. Failure to constitute the committee and address security holder grievances imposes a liability on the company and its directors. However, if the SRC does not take into consideration a complaint in good faith, the company and the directors shall not be held liable. Therefore, as long as the directors are able to demonstrate that they have acted on the basis of these principles, it is very unlikely that they will incur any liability.

4.5 What are the legal consequences for failing to fulfil any of the duties described above; and who may take action to initiate them? What defenses are available?

¹⁰ Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises, 2013.

¹¹ Clause 49, Listing Agreement.

¹² Clause 49, Listing Agreement.

¹³ Section 129, Companies Act

Being fiduciaries, directors are exposed to liabilities as a consequence of a breach of their duties. The first set of liabilities is statutory in nature, being specifically set forth in the Companies Act. These could either be civil liability requiring directors to make payments to victims or the state, or they could be criminal liability resulting in fines or imprisonment. A director may be punished with imprisonment and fine for contravening the duties enlisted under Section 166¹⁴, failing to set up SRC and redress stakeholder grievances¹⁵, and failing to publish and implement the CSR policy.¹⁶

As the directors owe a duty to the company, it is generally the company that is in the position to enforce them. However, stakeholders and employees may have a cause of action against the directors in case the director fails to protect their interests while protecting the interest of the company.¹⁷ While determining the extent of liability of a director, courts apply the general principles of common law.

The Companies Act provides that in any proceeding for negligence, default, breach of duty, misfeasance, or breach of trust against an officer of a company, if the court determines that he has acted honestly and reasonably, the court may relieve him, either wholly or partly, from his liability on such terms, as it may think fit.¹⁸ Further, Section 149 of the Companies Act provides that an independent director¹⁹ will not be held liable if he had no knowledge of the act and had acted with due care and diligence.

¹⁴ Section 166(7), Companies Act.

¹⁵ Section 177(8), Companies Act.

¹⁶ Section 450, Companies Act.

¹⁷ The duty on directors to take into account stakeholder interest has been introduced recently under Section 166 of the Companies Act. As the Companies Act is new, there is no case law interpreting these duties. However the legislative intent behind introducing Section 166 is to cast a duty on directors to strike an appropriate balance between the interests of the company and the interests of community, environment and employees. It seeks to impose an obligation on companies to weigh the impacts of the company's operations on important stakeholders, such as employees, community and the environment. As the directors are involved in important decision making processes of the company, the legislature sought to impose additional statutory obligations on the director. As this provision of the Companies Act has not been tested and interpreted by the judiciary, it will be difficult to practically demonstrate under what circumstances a director can be held liable and to what extent stakeholder interest must be protected.

¹⁸ Section 463, Companies Act.

¹⁹ Section 149(6) Companies Act defines Independent Directors: An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,— (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience; (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company; (ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company; (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year; (d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year; (e) who, neither himself nor any of his relatives— (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed; (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of— (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm; (iii) holds together with his relatives two per cent. or more of the total voting power of the company; or (iv) is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or (f) who possesses such other qualifications as may be prescribed.

Therefore, if it is found that the director has acted in good faith, with utmost care and due diligence, for the interest of the company and taken all steps to prevent an offence, it is unlikely that the director may incur liability.

4.6 Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to actions?

Stakeholders may exert pressure on the company in several ways. Since directors are responsible for day-to-day operations and management of the company, they will be held liable if the company is found guilty of contravention of any offence.

- (a) **Tort Claims:** Companies may incur tortious liability in case it breaches any duty of care it owes to its employees or any third party. Further, India recognizes the concept of corporate criminal liability arising from the principles of absolute liability. Stakeholders may initiate criminal action against the company, and the agents or officers of the company may be held criminally liable. In *MC Mehta v Union of India*²⁰ the Supreme Court of India held that companies engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. Failure to do so will attract criminal liability on the company and its agents.
- (b) **Companies Act:** As discussed above, directors are under an obligation to protect stakeholder interests and also set up the SRC for redressing stakeholder grievance. Any failure of these obligations may give Stakeholders a right to initiate proceedings against the directors of the company, thereby indirectly exerting pressure on the company. Further, as discussed above, certain classes of companies are under an obligation to undertake CSR activities, failure of which may give stakeholders a right to initiate proceedings against the company and the directors.
- (c) **Trade Unions:** Employees or workmen may form trade unions under the Trade Unions Act, 1926. Through such unions, employees may exert pressure on the company to fulfil their demands.

4.7 Are there any other directors' duties which are relevant to the interests of stakeholders?

Directors of companies, if involved in the day-to-day operations of the company, or nominated directors, are under an obligation to ensure that the company complies with all its obligations under various statutes. For example, the Environment Protection Act, 1986 imposes an obligation on the person in charge to ensure that all environmental clearances are obtained and the provisions of the act are adhered to.²¹ Courts have pinned liability on directors who are managing the affairs of the company for failing to obtain various

²⁰ AIR 1992 SC 248

²¹ Section 16, Environment Protection Act, 1986

environmental clearances for the company.²² A director, if involved in the day-to-day operations of the company, also has an obligation to protect the interests of its employees and ensure that labour laws are adhered to.

- 4.8 **For all of the above, if there exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures. What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?**

India follows the single or unitary board system, where the governing board of the company is comprised of a single board. However, the Companies Act empowers the board of directors to approve the appointment of a person to be in charge of the operations of the company - the managers.²³ Such persons generally act on behalf of the board and are obligated to ensure that the company complies with all its obligations under the Companies Act and other statutes. As discussed in 4.8 above, persons in charge may be held liable for failing to ensure that the company adheres to its obligations under various statutes. Generally, obligations on persons in charge are expressly provided under various statutes. However, additional obligations may be determined contractually.

V. REPORTING

- 5.1 **Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.**

Disclosure requirements in India are different for listed companies and unlisted companies. Most disclosures made by listed companies, are publicly available although the same is not true for unlisted companies. All companies have to make annual disclosures to their shareholders at the annual shareholders' meeting. These disclosure reports provide information about the performance of the company, the financial position of the company, steps taken towards energy conservation, and a detailed report on the CSR activities of the company. Shareholders and other security holders of the company get these reports free of charge and anyone else can access them from the RoC by paying a fee²⁴.

The Companies Act and the Listing Agreement impose an obligation on companies to disclose the following reports to the public:

- (a) **CSR Annual Report:** The board's report must contain the CSR annual report. The CSR annual report must contain a brief outline of the company's CSR policy, including an overview of projects or programs proposed to be undertaken and a

²² *Haryana State Board for Prevention and Control of Water Pollution v Bharat Carpets Limited (1995) 84 Com Cases 681 (P&H).*

²³ Manager means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not.

²⁴ Section 94, Companies Act

reference to the web-link to the CSR policy and projects or programs. It must also address the prescribed CSR expenditures and the details of such expenditures during the financial year. In case the company has failed to spend 2% of the average net profit of the last three financial years, it must provide the reasons in the CSR annual report²⁵.

- (b) **Annual Reports:** It is mandatory for every listed public company to prepare the annual report of the company for each financial year²⁶. The annual report must contain a fair review of the company's business and a description of the conduct of the shareholders' meeting; related party disclosures; accounting treatment of the company; remuneration, appointment and resignation of the directors, etc. This report must also contain the Corporate Governance Report (**CGR**). The CGR must provide details of the number of complaints received and resolved by the Stakeholders Relationship Committee.

The Reserve Bank of India (**RBI**) in 2007 released a circular on “Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting”. It is a voluntary initiative, where banking companies can formulate a suitable and appropriate plan of action towards helping the cause of sustainable development, with the approval of the directors. These reports can be part of the Bank's annual report or can be published on their website²⁷.

- (c) **Business Responsibility Report (BRR):** The BRR is a report that is derived from the principles articulated in the “National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business” that were released by the MCA in 2011. These guidelines list the principles that companies must adopt as part of their business practices and a structured business responsibility reporting format requiring certain specified disclosures, demonstrating the steps taken by companies to implement the said principles. The Guidelines define “stakeholders” to mean “individuals or groups concerned or interested with or impacted by the activities of the businesses and vice-versa, now or in the future”.

The core elements of these Guidelines are as follows:

- (i) businesses should conduct and govern themselves with ethics, transparency and accountability;
- (ii) businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle;
- (iii) businesses should promote the wellbeing of all employees;
- (iv) businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized;
- (v) businesses should respect and promote human rights;
- (vi) business should respect, protect, and make efforts to restore the environment;

²⁵ Rule 8, Companies (Corporate Social Responsibility Policy) Rules, 2014

²⁶ Section 121, Companies Act

²⁷ RBI Circular on Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting, 2007

- (vii) businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner;
- (viii) businesses should support inclusive growth and equitable development;
- (ix) businesses should engage with and provide value to their customers and consumers in a responsible manner.

The BRR should disclose the responsible business practices adopted by a public listed company in respect of its stakeholders and must be published as part of the annual report of the company. SEBI has prescribed a format for a BRR as a mandatory requirement for the top 100 listed companies. Other companies are encouraged to prepare a BRR for making disclosures to their stakeholders. The BRR must contain the following information:

- (i) general information about the company;
- (ii) the financial details about the company;
- (iii) the number of stakeholder complaints received in the past financial year and the number of complaints that have been satisfactorily resolved;
- (iv) list products or services whose design has incorporated social or environmental concerns, risks and/or opportunities. For each product details regarding energy used and conserved must be provided as well;
- (v) details on whether the company uses recycled products and waste;
- (vi) the company's strategy to address global environmental risks;
- (vii) initiatives taken by the company on clean technology, energy efficiency, renewable energy, etc.
- (viii) details on environmental violations and notices received from the Central pollution Control Board and the State Pollution Control Board;
- (ix) percentage of consumer complaints received and redressed;
- (x) details of cases filed by stakeholders for unfair trade practices; irresponsible advertising; and/or anti-competitive behavior;
- (xi) employee information;
- (xii) initiatives taken by the company to connect and identify disadvantaged, marginalized and vulnerable stakeholders. Information on the initiatives taken to engage with them must be provided as well;
- (xiii) details of the company's human rights policy.

5.2 Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

Clause 49 of the Listing Agreement makes it mandatory for listed companies to make timely disclosures to uphold transparency. Public listed companies are required to ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the company. This information should be prepared and disclosed in accordance with the prescribed standards of accounting, financial, and non-financial disclosure. The company should maintain minutes of the meeting explicitly recording dissenting opinions, if any. Lastly, the company should implement the prescribed accounting standards in letter and spirit in the preparation of

financial statements taking into consideration the interests of all stakeholders and should also ensure that the annual audit is conducted by an independent, competent, and qualified auditor.

Further, as discussed in 5.1 above, public listed companies must put in place a whistle blower mechanism to allow all stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices. The BRR report must also highlight the steps taken by the company to ensure ethical conduct and transparency in communication. The Guidelines on the basis of which the BRR is prepared provides for the following mandatory guidelines to be followed by the top 100 public listed companies:

- (a) Businesses should not engage in practices that are abusive, corrupt, or anti-competitive.
- (b) Businesses should truthfully discharge their responsibility on financial and other mandatory disclosures.
- (c) Businesses should acknowledge, assume responsibility and be transparent about the impact of their policies, decisions, product and services and associated operations on the stakeholders;
- (d) Businesses should report their environmental performance, including the assessment of potential environmental risks associated with their operations, to the stakeholders in a fair and transparent manner.

As per the Companies Act, companies must disclose in their profit and loss account contributions made to political parties²⁸, national funds approved by the central government²⁹, and charitable organizations. Such disclosure requirements are mandatory.

As discussed in 5.1 above, Banks are encouraged to be transparent to stakeholders, not only through robust, regular, and standardized disclosure, but also by being responsive to stakeholder needs for specialized information on banks' policies, procedures, and transactions³⁰.

5.3 **Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?**

There appears to be no jurisdictional restriction on the reporting requirements of listed and unlisted companies in India. Accordingly, disclosure reports can report on impacts outside the jurisdiction and can be made available to stakeholders outside India.

Companies in India have to make certain financial disclosures with regard to its subsidiaries. According to the Companies Act, all listed and unlisted companies having one or more subsidiaries must compulsorily prepare the consolidated financial statements. These statements must provide the financial details of all holding companies

²⁸ Section 182, Companies Act

²⁹ Section 183, Companies Act

³⁰ RBI Circular on Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting, 2007.

and subsidiaries and must be placed at the annual general meeting of the company³¹. Further, the Listing Agreement and the BRR make it mandatory for listed companies to provide details of their subsidiaries, suppliers, and business partners. These disclosure requirements are mostly financial disclosures and they do not relate to the activities of the subsidiaries.

5.4 Who must verify these reports; who can access reports; and what are the legal and regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints or misreporting?

(a) Companies Act

The annual returns³² prepared by the company are not subject to third-party verification; however, it has to be signed by a director of the company and its company secretary³³. The annual return of a listed company must be certified by a company secretary in practice, stating that the annual return discloses the facts correctly and adequately and that the company has complied with the provisions of the Companies Act³⁴. A company secretary who certifies an annual return that is found to be not in conformity with the Companies Act is punishable with imprisonment and fine³⁵. The annual return must be kept at the registered office of the company and is open to inspection by any member, debenture-holder, other security holder or beneficial owner³⁶.

The annual report³⁷ which includes details of the ESG activities undertaken by listed companies must be filed with the RoC within the prescribed time period. Any company that fails to file the report is liable to a fine, and every officer of that company who is in default is liable to be punished with imprisonment³⁸.

³¹ Section 129, Companies Act

³² As per Section 92 of the Companies Act every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding— (a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies; (b) its shares, debentures and other securities and shareholding pattern; (c) its indebtedness; (d) its members and debenture-holders along with changes therein since the close of the previous financial year; (e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year; (f) meetings of members or a class thereof, Board and its various committees along with attendance details; (g) remuneration of directors and key managerial personnel; (h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment; (i) matters relating to certification of compliances, disclosures as may be prescribed; (j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them; and (k) such other matters as may be prescribed.

³³ Section 92(1)(a), Companies Act.

³⁴ Section 92(2), Companies Act. Under the Companies Act, listed companies having a paid up share capital of INR 10 crore or more must appoint a company secretary. Annual returns prepared by such companies must be certified by 'the' company secretary. Private companies on the other hand are under no obligation to appoint company secretaries. The annual returns prepared by such companies can be certified by 'a' company secretary in practice.

³⁵ Section 92(6), Companies Act.

³⁶ Section 94(2), Companies Act.

³⁷ All public companies must submit along with the annual returns, the annual report of the company. Such reports highlight the ESG activities undertaken by listed companies. The particulars of this report is provided in footnote number 36. The term "Annual Report" has not been defined under the Companies Act. However as per Section 121 of the Companies Act the Annual Report must record the shareholders meeting of the company, including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Companies Act and the rules made thereunder.

³⁸ Section 121(3), Companies Act.

The Companies Act does not specify what the punishment for failing to implement CSR and/or publishing the required CSR reports and policies will be. However, such cases are covered under Section 450 of the Companies Act, which has residual provisions under which the company and every officer in default shall be punishable with fine which may extend to INR 10,000.

If the company fails to prepare the financial statement and board's report, the company shall be punishable with a fine and every officer of the company in default shall be punishable with imprisonment and a fine.

Any person who makes a statement which is false and omits material facts in any report, returns, certificates, financial statement, or any other document is punishable with imprisonment of 6 (six) months which may extend to 10 (ten) years and a fine. Further, in cases of fraud in matters of public interest, the defaulter could face a minimum of 3 (three) years in prison.

Under the Companies Act, the RoC, the central government and National Company Law Tribunal (NCLT) are authorized to inspect and inquire into the affairs of the company³⁹. In addition, the SIFO has been established under the Companies Act, and, once a matter has been assigned to it by the central government, the SIFO is solely responsible for investigating the matter.

(b) ***Listing Agreement***

As discussed above, the reports and returns submitted under the Listing Agreement are generally verified by auditors and signed by the directors of the company⁴⁰.

As per the Securities Contract Regulation Act, 1956 all persons listing their stocks on a stock exchange have to comply with the Listing Agreement⁴¹. Further, any person who fails to furnish or maintain any documents, books, returns, or any documents as per the Listing Agreement or other by-laws of the stock exchange could be liable to pay a penalty of INR 100,000 for each day during which the default continues or pay a lump sum fine of INR 100,000,000,⁴² whichever is less for each such failure. Failure to comply could also result in the company being delisted⁴³.

5.5 **What is the external assurance regime for reporting on a company's impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.**

It is not mandatory for companies to obtain external assurances for reporting on the company's impacts on stakeholders. However, as a matter of practice, many listed companies do obtain external assurances to verify their BRR reports.

³⁹ Chapter XIV, Companies Act.

⁴⁰ Clause 49, Listing Agreement.

⁴¹ Section 21, Securities Contract Regulation Act, 1956.

⁴² Section 23A, Securities Contract Regulation Act, 1956.

⁴³ Section 21A, Securities Contract Regulation Act, 1956.

Please summarise any regulatory guidance on reporting that relates to impacts on non-shareholders stakeholders.

The annexures to the Listing Agreement and the rules framed under the Companies Act provide formats and checklists for preparing and publishing reports that relate to impacts on non-shareholders and stakeholders. The details of these formats are discussed above.

VI. **STAKEHOLDERS**

6.1 **Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?**

No.

6.2 **Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is the legal duty that pension funds owe with regard to investment decisions in this regard?**

Investors are not under an obligation to take into consideration stakeholder impacts while making investments. However, companies intending to issue shares to the public must publish their prospectus to the public. As per the Securities and Exchange Board of India (issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR) the prospectus must provide details regarding the company and the impact of its operations on the environment⁴⁴. The ICDR is mainly aimed at providing investor and shareholder protection. As the concept of stakeholder protection has been only recently introduced, more detailed obligations as to the nature of public disclosures that are required to be made may be introduced in the future.

Pension funds have no such legal obligations with regard to their investment decisions. As the concept of protection of stakeholders has been introduced recently, guidelines on investment decisions may be released in the future.

6.3 **Can non-shareholders address companies' annual general meetings?**

No.

What is the minimum shareholding required for a shareholder to raise a question at a company's AGM?

All shareholder members have the right to speak at the AGM and ask questions.

VII. **OTHER ISSUES ON CORPORATE GOVERNANCE**

7.1 **Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or**

⁴⁴ Schedule VII, Part A, ICDR

through adherence to particular sustainability principles (for example the UN Global Compact, OECD Guidelines for Multinational Enterprises ("OECD Guidelines") etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

(a) *International voluntary Guidelines*

Some Indian companies follow international corporate governance norms on sustainable reporting on a voluntary basis:

- (i) *The Global Reporting Initiative's G3 and G4 Guidelines* are sustainability reporting guidelines which have the main aim of ensuring that there is transparency in the sustainable operations of an organization through a standard reporting mechanism for this purpose. The Guidelines provide an international reference standard for governance models of organizations. The G3 guidelines contain two parts, namely the Guidelines on the Principles of Reporting and the Disclosure Requirements. Performance indicators cover the three categories of economic, social, and environmental, and some categories covered within this are labour, human rights, and society. In 2013, GRI introduced the G4 Guidelines to substitute for the G3. Organizations following the G3 Guidelines will be expected to make a transition by the end of 2015 to the new G4 Guidelines. The G4 Guidelines additionally contain an Implementation Manual that extensively explains how to implement the reporting principles.
- (ii) *The Carbon Disclosure Project (CDP)* has created a global natural capital disclosure system, under which organisations disclose their current dependency and impact on natural resources, and their resource management strategies. This information is shared with the market with the aim of incentivizing the companies and organizations to reduce their dependence and impact on such resources. It focuses mainly on water use, deforestation, climate change, and environmental risks as its requested information. CDP has been inviting top NSE-listed companies to respond to their questionnaire.
- (iii) *United Nations Global Compact* consists of ten (10) universally accepted principles on labour, human rights, environment, and anti-corruption to which interested businesses may align their policies and engage with the initiative. It requires explicit commitments from participant companies to produce an annual public Communication on Progress (**CoP**). A CoP is a public communication to stakeholders (consumers, employees, organised labour, shareholders, media, government, etc.) on the progress that the company has made in implementing the 10 principles in their business activities and, where appropriate, in supporting broader UN goals through partnerships. The purpose of the CoP requirement is to ensure the commitment of Global Compact participants and to create a rich repository of corporate practices.
- (iv) *Principles for Responsible Investment* is an initiative that attempts to implement six (6) principles of responsible investment and encourage sustainability for

investors. Among the principles is the requirement that participating organisations disclose their ownership policies, enter into standardized reporting, and integrate its social environmental and government impacts into their annual financial reports in line with the principles, etc. As of now, there are three Indian signatories to these principles.

- (v) *The Equator Principles (EP)* were created by the International Finance Corporation and form a framework which is adopted by financial institutions (**FI**s) globally for the purpose of accounting for environmental and social risk in projects and creating a basic standard of factors to be achieved by projects for investment. They include social standards including indigenous peoples, labour standards, and consultation with locally affected communities. These Principles have been adopted recently by investors in India on a voluntary basis.

(b) ***National Guidelines***

As discussed above, India has formulated the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011, which are mandatory for the top 100 listed companies. Further, the Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises, 2013 have to mandatorily be adhered to by CPSEs.

The "Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting" released by the RBI, encourages banks to formulate a suitable and appropriate plan of action towards helping the cause of sustainable development, with the approval of their Board at a board meeting. These reports can be part of the Bank's annual report or can be published on their website.

(c) ***Voluntary credit rating***

SEBI and RBI encourage Micro, Small, and Medium Enterprises to undertake the SMERA Green Rating. Green Ratings will examine subject units' current processes and technology and its impact on ecology (i.e., air, land and water).

Investment Information and Credit Rating Agency of India Limited (**ICRA Ltd**) provides for a "Corporate Responsibility and Sustainable Business Grading" (**CRSB**). In arriving at a CRSB Grade, ICRA Ltd evaluates the entity's approach and commitment to, and its actual performance in, being a financially, socially, and environmentally responsible corporate citizen. This is a voluntary initiative that many companies undertake in India.

Credit Rating Information Services of India Limited (**CRISIL**) Inclusix is a pro bono index released by CRISIL which is in line with the United Nations Development Program's Human Development Index. It measures companies on critical parameters of banking services. The index uses parameters that focus only on the "number of people" whose lives have been touched by various financial services, rather than on the "amounts" deposited or loaned.

(d) ***Environment Impact Assessment***

As per the Environment Protection Act, 1986 and the rules framed thereunder it is mandatory for companies undertaking certain activities such as mining, oil and gas

exploration, airport infrastructure, river valley projects etc. to undertake an Environment Impact Assessment (**EIA**). The process involves the publication of a preliminary report which is made available to the public. Stakeholders may comment and suggest changes to this report. The company must respond to these suggestions and comments in the draft EIA report is submits for approval. Once this report is published by the Regulatory Authority, it must be made available to the public.

7.2 Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company board?

No.

7.3 Are there any laws requiring gender, racial/ethnic, religious or other stakeholder constituencies (i.e., employees, representatives of affected communities) on company boards?

Section 149 of the Companies Act makes it mandatory for listed companies, and companies having a paid up share capital of 100 crore rupees or more or turnover of 300 crore or more to appoint a woman director on the board of the company.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**Sexual Harassment Act**) imposes an obligation on the employer to constitute an Internal Complaints Committee to handle complaints by aggrieved women. This Act applies to all public and private sector organisations, hospitals, games, venues, dwelling places, and employer provided transportation.

7.4 In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?

Courts in India may lift the corporate veil of the company and investigate the relationship of the parent company and its subsidiary. If it is found that the subsidiary is an alter ego or agent of the parent company, the courts may pin liability on the parent company for the acts of its subsidiaries⁴⁵. The Supreme Court of India in the case of *State of Uttar Pradesh v Renusagar and Co*⁴⁶ stated that the corporate veil can be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern.

If the corporate criminal liability involves public interest and environment liability, courts are more inclined to lift the corporate veil and impose liability on the parent company for the negligence of the subsidiary company. In the case of *MC Mehta v. Union Carbide*⁴⁷, the court pinned liability on the parent company for the criminal negligence of the Indian subsidiary company. The Court held that holding the parent company liable is an effective measure to ensure full compensation to the victims of the

⁴⁵ *Novartis AG v. Adarsh Pharma*, 2004 (29) PTC 108 (Mad); *Life Insurance Corporation of India v Escorts Limited* AIR 1986 SC 1370.

⁴⁶ *State of U.P. and Ors. vs. Renusagar Power Co.*, AIR 1988 SC 1737.

⁴⁷ AIR 1987 SC 1086.

criminal wrong and to make such corporations responsible. The veil can be pierced even solely on equitable considerations, when faced with situations of mass disaster, and where the assets of the subsidiary are grossly deficient to satisfy the just claims of the victims. Similarly in the famous Bhopal Gas case, the Supreme Court of India held the parent U.S. company liable for the negligent acts of its subsidiaries in India⁴⁸.

7.5 Are you aware of any incoming law proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

As the law on CSR and sustainability reporting in India is relatively new, there are not many guidelines or proposals that have been formulated. However, in the future, to give more clarity to the existing regime, the law may be amended and detailed guidelines may be released by the relevant government authorities.

⁴⁸ *Union Carbide Corporation v. Union of India* AIR 1992 SC 248.