BACKGROUND

Closing the loop on corporate liquidation, the Central Government has, on 30 March 2017, notified, *inter alia*, Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) which deals with voluntary liquidation of corporate entities with effect from 1 April 2017. On the following day, the Insolvency and Bankruptcy Board of India (Board) has also, *vide* its notification dated 31 March 2017, notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Regulations) with effect from 1 April 2017. This has set the ball rolling for the voluntary liquidation of a corporate person under the Code, which includes companies, limited liability partnerships and any other persons incorporated with limited liability.

To put things into perspective, prior to the aforesaid notifications, voluntary liquidation was governed by the provisions of the Companies Act, 1956 (1956 Act) as neither the relevant sections of the Companies Act, 2013 (2013 Act) nor the Code were in force. Further, by virtue of the notification of the Eleventh Schedule of the Code (notified with effect from 15 November 2016), various winding up provisions of the 2013 Act had been amended and voluntary winding up sections under the 2013 Act were omitted. Accordingly, under the previous voluntary liquidation regime, the provisions of the 1956 Act continued to apply in relation to voluntary winding up proceedings before the High Courts.

To analyse the effect of the notification of the relevant provisions of the Code as well as the Regulations on voluntary liquidation proceedings, we have segregated our analysis for the proceedings already pending and those which will be initiated on and from 1 April 2017.

PENDING VOLUNTARY WINDING UP PROCEEDINGS

Rule 4 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (Transfer Rules), which has been notified on 7 December 2016 and brought into force from 1 April 2017, prescribes that all applications and petitions relating to voluntary winding up of companies pending before a High Court prior to 1 April 2017, shall continue to be dealt with by the High Court in accordance with the provisions of the 1956 Act.

FRESH VOLUNTARY WINDING UP PROCEEDINGS TO BE INSTITUTED UNDER THE CODE

On a conjoint reading of Section 59 of the Code, Sections 434 (1) (c) and 465 of the 2013 Act and Rule 4 of the Transfer Rules, all fresh proceedings for voluntary winding up on and
from 1 April 2017 shall be instituted before the NCLT and shall be governed as per the provisions of the Code and the Regulations.

Some of the important aspects of the voluntary liquidation process under the Code and the Regulations have been set out below:

**Initiation of the process**

As per Section 59 of the Code read with the Regulations, any corporate entity may initiate a voluntary liquidation proceeding if it satisfies the following conditions:

- it has not committed any default;
- if majority of the directors or designated partners of the corporate person make a declaration verified by an affidavit to the effect that (i) the corporate person has no debt or it will be able to pay its debts in full out of the sale proceeds of its assets under the proposed liquidation; and (ii) liquidation is not initiated to defraud any person;
- such declaration is accompanied by the audited financial statements and valuation report of the corporate person;
- within 4 (four) weeks of such declaration, a special resolution (an ordinary resolution would suffice in cases of voluntary liquidation by reason of expiry of its duration or occurrence of any dissolution event) is passed by the contributories requiring the corporate person to be liquidated and appointing an insolvency professional as a liquidator (Contributories’ Resolution); and
- creditor(s) representing two-thirds in value of the total debt owed by the corporate person, approve the Contributories’ Resolution within 7 (seven) days of its passage (Creditors’ Approval).

* As per the Regulations, a ‘contributory’ means a member of a company, partner of a limited liability partnership, and any other person liable to contribute towards the assets of the corporate person in the event of its liquidation.

**Liquidation Commencement Date**

Subject to the Creditors’ Approval (if required), the voluntary liquidation proceedings in respect of a corporate person shall be deemed to have commenced from the date of passing of the Contributories’ Resolution (Liquidation Commencement Date).

On and from the Liquidation Commencement Date, the corporate person shall cease to carry on its business except as far as required for the beneficial winding up of its business.

**Public announcement and Collation of Claims**

The Regulations prescribe that immediately (and not later than 5 (five) days) upon his appointment, the liquidator shall make a public announcement for calling upon operational creditors, financial creditors, workmen, employees and any other stakeholders of the corporate person to submit their claims as on the Liquidation Commencement Date within 30 (thirty) days of the Liquidation Commencement Date. The liquidator is required to verify the claims within 30 (thirty) days of the last date of receipt of the claims. The liquidator may either admit or reject a claim, in whole or in part, and prepare a list of stakeholders, basis the claims admitted.

**Primary functions of the Liquidator**

- To value, sell, recover and realize all assets of and monies due to such corporate persons in a time-bound manner;
- Opening a bank account for the purpose of receiving all moneys due to the corporate person;
Distribution of proceeds to the stakeholders within a period of 6 (six) months of receipt of the proceeds; and

To preserve a physical or an electronic copy of the reports, registers and books of account for at least 8 (eight) years after the dissolution of the corporate person, either with himself or with an information utility.

Completion of liquidation

Once the affairs of the corporate person have been completely wound up and its assets fully liquidated, an application shall be made by the liquidator to the NCLT for its dissolution along with a final report (inter alia consisting of audited liquidation accounts, statement(s) demonstrating details of the disposed assets and their manner of sale, and statement(s) that all debt has been discharged and sufficient provision has been made in case of any adverse outcome of a pending litigation). Pursuant to this application by the liquidator, the NCLT shall pass an order for dissolution and the entity shall stand dissolved from the date of NCLT’s order.

Khaitan Comment

The Code and the Regulations provide a comprehensive regime for the companies and other corporate persons such as limited liability partnerships alike, and the NCLTs are now armed to deal with all voluntary liquidation proceedings initiated from 1 April 2017, whilst taking the power away from the High Courts.

While the process remains largely similar as under the previous regime, the most substantive change in law is that while under the 1956 Act, an application for voluntary winding up could be filed by the company or any of its creditor(s) or contributories or the Registrar, the Code provides that a declaration for initiating voluntary liquidation may be made by directors, designated partners or by persons responsible for exercising its corporate powers (if the corporate person is not a company or a limited liability partnership). Therefore, in terms of entities covered in its ambit, the Code is far more comprehensive and wider in its operation as against the 1956 Act. Additionally, under the 1956 Act no creditors’ approval was required in the case of members initiating voluntary winding up proceedings. However, the Code mandates that creditor(s) representing two-thirds in value of the total debt owed by the corporate person also approve the initiation of voluntary liquidation proceedings within 7 (seven) days of the Contributories’ Resolution being passed.

In line with the spirit of the Code, the time frame for passing of the Contributories’ Resolution (after the declaration) has been reduced to 4 (four) weeks under the Code from the 5 (five) week time frame available under the previous regime.

To conclude, provisions of the Code relating to voluntary liquidation coupled with the Regulations being notified has given finality to the measures aimed at overhauling of the winding up regime in India and it is waited to be seen if the voluntary liquidation process before the NCLTs is completed in a more time-effective manner under the Code.

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