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Bombay Chartered Accountants' Society

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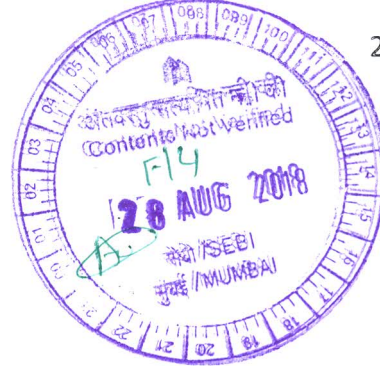
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27th August 2018

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SEBI Bhavan, Plot No. C4-A,
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Respected Sir,

Sub: **CONSULTATIVE PAPER ON PROPOSED SEBI (FIDUCIARIES IN THE SECURITIES MARKET)
(AMENDMENT) REGULATIONS – REPRESENTATION**

This communication is with reference to the Public comments sought with respect to the proposed amendment in various Regulations concern with regard to those entities who undertake third party fiduciary duties/assignments/engagements under the securities laws, in respect of any Issuer; Pooled Investment Vehicle, Restructuring, Intermediaries, Market Infrastructure Entities or investors in the securities.

In this proposed Regulation the definition of "Fiduciary" includes a Chartered Accountant including a Statutory Auditor. The expression "Certificates / Reports issued by a Fiduciary" includes (a) Audit Report, (b) Certificate in respect of maintenance or utilization of Funds, (C) Certificate or Report for utilization of proceeds of a public or rights issues, (d) Compliance Certificate of Corporate Governance (e) Any other Report or Certificate etc. It is further stated that if the C.A or a firm of Chartered Accountants does not exercise due care, skill and diligence and ensure proper care while issuing such Certificate or Report or ensure that the same is true in all material respect, SEBI will take action for contravention of the Regulation.

It is further provided that SEBI will conduct an inquiry or investigation in the matter and if SEBI finds that the person (including the C.A Firm) has issued a false Certificate or Report or has violated the provisions of the Regulations, SEBI will take appropriate action against such person. It is not clear as to what appropriate action is proposed to be taken by SEBI. It is not clear as to who will conduct such inquiry or investigation.

We as a body of Chartered Accountants, representing 9000+ CAs will like to strongly object to the proposed amendment to various regulations seeking to regulate the profession of Chartered Accountants who act as auditors, advisors, etc. to companies.

The reasons for raising the strong objection and not agreeing to be regulated by one more regulatory authority regulating the CAs are listed down here in below:

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Provisions of CA Act

1.1 The Chartered Accountants Act, 1949, as amended in 2006, (C.A. Act) and the Rules provide for a detailed procedure for taking Disciplinary action against a Chartered Accountant who is grossly negligent in discharging his professional duty. Similarly, there are provisions for taking action against a member of the Institute for Other Misconducting by a member. Section 21, 21A, 21B, 21C, 21D of the CA Act and the Rules framed thereunder provide for the procedure to be adopted for conducting the inquiry on receipt of a "Complaint" or "Information" against the member.

1.2 Section 22 explains what is "Professional Misconduct" is and what "Other Misconduct". There are two Schedules in the CA. Act. The First schedule explains the conduct by a member in practice in relation to his conduct with another member which is considered as a Professional Misconduct. This schedule also deals with the conduct of a member in service and with Other Misconduct by a member of the Institute.

1.3 The Second Schedule deals with Professional Misconduct by a member in practice. In this Schedule Part I Paras (5) to (8), as reproduced below, deal with the expression of opinion in a Report or Certificate given by a C.A. in practice where the C.A is deemed to be guilty of Professional Misconduct.

"(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;

(6) fails to report a material misstatement known to him to appear in a financial statement with which he is concerned in a professional capacity;

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

(8) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion"

1.4 From the above it is evident that the Institute of Chartered Accountants (ICAI), which is set up by an Act of Parliament in 1949, is charged with the function of taking action against a Member of ICAI (whether in practice or not) for any professional or other misconduct. Members of the Public, any Government organization, any company or corporation or any other Regulatory Body such as SEBI, RBI etc., has to refer any incident of Professional Misconduct or Other Misconduct to ICAI. This can be done by filing a regular complaint or by way of information. For this purpose, as explained above, a Professional Misconduct will include any wrong statement or any deficiency in the statement certified by a member of ICAI. This will also include any deficiency in the audit report given on the Financial Statements of any entity.

1.5 ICAI has power to debar a member in practice for any period and / or to levy monetary penalty on the erring member.

1.6 Sections 22A to 22G provides for setting up of a Appellate Authority. An appeal can be filed against any order passed by ICAI against a member holding him guilty of Professional or Other Misconduct. The Appellate Authority has power to give any relief to the Member. Further appeal can be filed in the High Court / Supreme Court.

2 Provisions of the Companies Act, 2013

2.1 Section 132 of the Companies Act, 2013, provides for the constitution of a National Financial Reporting Authority (NFRA) by the Central Government. Section 132(3) Provides that NFRA shall consist of a Chairperson who shall be a person of eminence and having expertise in accountancy, auditing, finance or law and such other members, not exceeding fifteen, consisting of part-time and full-time members as may be prescribed.

2.2 NFRA has the following powers:

- (i) *Recommend to the Central Government to issue Accounting and Auditing Standards.*
- (ii) *Monitor and enforce the compliance with Accounting and Auditing Standards.*
- (iii) *Oversee the quality of Service of the professionals associated with ensuring compliance with such standards and suggest measures for improvement in quality of service by professionals.*
- (iv) *To investigate, either suo moto or on a reference made by the Central Government into the matters of professional or other Misconduct by any member (C.A) or a Firm of Chartered Accountants. If any such matter is referred to NFRA, the ICAI cannot take any action in that matter against its member.*

2.3 NFRA has been given powers to conduct a judicial inquiry against the Member of ICAI or a Firm of Chartered Accountants for any Professional or Other Misconduct. NFRA can debar any C.A or Firm of Chartered Accountants from continuing the practice and / or levy monetary penalty. There is also a provision for appeal before an Appellate Authority against any order passed by NFRA.

1. RBI Circular

3.1 Recently RBI has issued a Circular on 29.06.2018 laying down a framework in respect of Statutory Auditors of Banks for the lapses in the statutory audit of Commercial Banks. Para 3 of this Circular reads as under:

"Types of lapses to be considered

3. The lapses on the part of the Statutory Auditors that would be considered for invoking the enforcement framework would, illustratively, cover the following areas:

a) Lapses in carrying out audit assignments resulting in misstatement of a bank's financial statements:

b) Wrong Certifications given by the auditors with respect to list of certifications as advised by the RBI to banks:

c) Wrong information given in the Long Form Audit Report (LFAR)

d) Issue related to misconduct by auditors in respect of their bank audit assignments:

e) Any other violations/lapses vis-à-vis the RBI's directions / guidelines regarding the role and responsibilities of the SAs in relation to banks."

This circular further gives details of process of enforcement, types of lapses to be considered, the adjudication procedure etc. Para 9 of the circular provides for the quantum of punishment to Statutory Auditor as under:

"9. The quantum of enforcement action shall be determined based on the materiality of lapses / violations by audit firms. Lapses / violations that are determined to be not material enough would lead to the issuance of a Cautionary Advice to the audit firm. In case of a violation determined to be material, the enforcement action could be in RBI not approving the audit firm for undertaking statutory audit assignments of banks for such period as may be decided by the RBI"

In view of the above it is suggested that SEBI should not take any direct action against members of C.A. Profession and award punishment to them. It is essential to respect the two bodies like ICAI and NFRA which are entrusted by the Parliament to take action against erring members of C.A Profession. If SEBI finds any mistake in a Certificate or Report issued by a member of C.A Profession, the same should be referred to ICAI or NFRA by way of complaint or by giving information so that appropriate action can be taken against the member or firm by ICAI or NFRA. There should be no multicplity of action by different bodies when the parliament has provided a Forum for taking action against erring members of C.A. Profession.

Without prejudice to the generality of what we have stated above, we also humbly submit that the Bombay High Court ((2010) 103 SCL 96) in the case of Price Waterhouse/Satyam had

Without prejudice to the generality of what we have stated above, we also humbly submit that the Bombay High Court ((2010) 103 SCL 96) in the case of Price Waterhouse/Satyam had held that SEBI has powers to act against auditors only if the auditors was himself involved in the fraud or manipulation. The Kotak Committee on corporate governance affirmed this and stated that expansion of this scope should be done only after amending the law. It is submitted that such powers to act against auditors in cases where auditors is not himself involved in a fraud can be given only by Parliament by amending the SEBI Act, 1992. Any provision introduced through subordinate regulations would be ultra vires. This will also create uncertainty amongst auditors

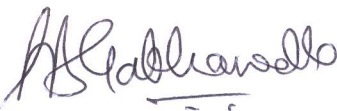
We humbly request your honour to consider our representation in the right earnest and remove the CAs from being further regulated and drop the proposed amendments to the various SEBI regulations.

We shall be keen to meet you in person to advocate this matter if granted an opportunity.

Thanking You,

Yours Sincerely,

For Bombay Chartered Accountants Society



Sunil Gabhawalla
President



Chetan Shah,
Chairman, Corporate and Allied Laws Committee