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AN ODE TO THE CODE

From intent to content, it as taken close to five years. There is reason to hope that the final product will facilitate honest and speedy conduct of business.

2026 is here. We wish our readers a very Happy New Year.

Nearly 5 years ago, while introducing the budget, the Finance Minister indicated the Government's intention to consolidate and amend the laws relating to the securities markets. With a few years having elapsed, and with no major public consultation exercise, there was reason, at least for the skeptics, to believe that this was yet another budget announcement which would not be translated into action. The wait is over. We now have a Securities Markets Code of 2025 (SMC or Code), which has been referred to the Select Committee of Parliament for consideration. With a number of commentators having expressed diverse views and apprehensions, it is possible that the Standing Committee's recommendations will emerge after a few months. Thereafter, there would be a process of getting the revised Bill incorporating the recommendations, which have been accepted, of the Standing Committee, and getting the approval of both Houses of Parliament, before the President assents to the Bill. In a year of legislative hyperactivity, this is the last Bill to emerge.

While all this might take time, there is no reason not to give credit where it is due. 3 enactments, one of 1956 vintage, one of 1992 vintage, and one of 1993 vintage are sought to be combined into a single Code, eliminating conceptual confusion and the overlaps that exist in the 3 enactments. The Finance Minister needs to be complimented on giving effect to a budget announcement involving considerable complexity in execution, even if the draft Bill has taken a few years to surface. Even a prima facie reading of the Bill gives a clear indication that there is no major disconnect between what was sought to be achieved, and the Bill in its present form. It focusses deservedly on simplification of procedures, which will enable the honest conduct of business, and remove procedural and substantive cobwebs. That stated, it is useful to look at some of the specific aspects of the Bill. Limitations of space stand in the way of commenting on all provisions.

The preamble to the SMC states that it is a Bill to consolidate and amend the laws relating to the securities market. The preamble of the SEBI Act, 1992 was more focused, in that it specifically referred to the protection of the interest of investors, the regulation of the market, and the development of the market. This seems to have been shifted to Clause 11(1) which states that "Subject to the provisions of the Code, the Board shall protect the interest of investors in securities and promote the development of, and regulate the securities markets, by such measures as it may deem fit." Moving this principal objective from the Preamble to a mere Clause seems to be inappropriate.

Clause 2(k) defines the word “depository”. It might have been preferable to define “depository participant” in the said manner.

There are a number of provisions requiring details to be set out as “prescribed”. Care should be taken while framing the Rules to ensure that substantive powers which ought to be in the Act, do not find their way into the Rules. Excessive delegation has been the bane of quite a few enactments in recent times. Delegated legislation is not an instrument to fill gaps in legislation.

Clause 4(1) provides for the composition of the Board. The size is proposed to be increased to 15 members, including 6 members who are independent of SEBI. The question to ask is whether a 15 member Board is unwieldy, having regard to the responsibilities and activities contemplated by the Code. The proviso to Clause 11(4) states that the Central Government shall endeavour to appoint at least 3 persons with expertise in the securities market. Assuming that conflict of interest, as contemplated by the Code, is to be safeguarded against, it would be interesting to see from where at least 3 persons with expertise in the securities market, but no present involvement, would be sourced. In addition to the Chairperson, there will be **at least 5 Whole Time Members (WTMs).** Given the present size of SEBI, the possibility exists that this would be a top-heavy organisation, with resultant complexities in reporting structures.

Clause 5 provides that Chairperson and every WTM of the Board shall hold office for a term not exceeding 5 years. It would have been useful to clearly state that no extension or reappointment of the Chairperson or any WTM is contemplated.

The proviso to Clause 8(1) states that the Members of the Board may, by circulation, take decisions in such manner as may be specified by regulations. It is for the Board, and not for the Members of the Board, to take decisions in regard to the exercise of the powers vested by the Code.

Clause 9(1) provides for the appointment of such other officers or employees, as the Board considers necessary, for the efficient discharge of its functions under the Code. With markets having grown, and the complexity of instruments and the number of market participants having increased, one major problem has been the bandwidth available to SEBI for timely discharge of its duties. Whether the authority vested by Clause 9(1) will quickly translate to creating an organisation of the right size, and expertise, needs to be addressed without loss of time.

Clause 11(2)(q) vests in the Board the powers to lay down principles for the implementation of the Code. Considering that we have transited, or are transiting, to a principles-based regime, it might have been worthwhile to state the principles in a separate chapter, as a part of the Code, as has been done in the SEBI LODR Regulations, 2015.

One interesting provision which features in Clause 11(3) states that the Board shall review its performance and functioning, including the proportionality and effectiveness of the regulations made in this behalf. It would seem that the review of the performance of the organisation, and the regulatory impact assessment of regulations, have been telescoped into the same provision. While performance review on an annual basis, is a welcome development, it would have been useful to set out in the Code the manner in which the the performance review will take place, rather than leave it to the Rules or regulations to be

made later. A leaf could be taken out of the provisions of Schedule IV of the Companies Act, 2013.

Clause 13(2) states that the investigation undertaken by the Investigating Officer should be completed within a period of 180 days. The proviso thereto states that where the investigation report is not submitted within the said period, the Investigating Officer shall provide the status of the investigation to the Board, and record the reasons for the delay, and request the WTM concerned for extension of time. It seems odd that the status report would be presented to the Board, and the WTM concerned would be the authority to grant extension of time. Surely, this entire matter of ascertaining the status, and granting extension, where necessary, could have been left to the WTM concerned. With the legal expertise that is available to entities that are the subject matter of investigation, it is a moot question as to how many investigations would be completed within the period of 180 days, though the intent in proposing a time limit is honourable.

The proviso to Clause 14(6) states that where the Investigating Officer is satisfied that the issuance of notice will cause undue delay in investigation, or there is an apprehension that records, books etc may be destroyed, mutilated, concealed etc, he may, for reasons to be recorded in writing, dispense with the issue of notice. While urgency in specific cases can be appreciated, it would have been useful to provide for a post-hoc notice, rather than dispense with the issuance of notice.

The element of proportionality has been introduced in Clause 19. This is a very welcome step.

In a departure from the budget statement, the Government Securities Act, 2006 has not been incorporated in the SMC. This non-inclusion is a welcome move since the said Act is not of a piece with the 3 enactments that are being consolidated.

Clause 73 provides that the Board may designate one or more **of its officers** as Ombudsperson to receive and redress grievances of investors. This seems to be a needless provision considering that SEBI already has a fairly elaborate mechanism to deal with grievances of investors. If it is believed that the mechanism is not measuring up, the logical step would have been to tweak or refine what exists, without creating a new institution in the form of Ombudspersons. Further, conceptually an Ombudsperson should not be on the rolls of an organisation, grievances relating to which are expected to be gone into. The expectation of neutrality and impartiality in the functioning of the Ombudsperson could itself give rise to challenges if they are insiders.

Clause 85(h) provides that any person aggrieved by an order passed by the Insurance Regulatory and Development Authority of India (IRDAI), the Pension Fund Regulatory and Development Authority (PFRDA) or the International Financial Services Centres Authority (IFSCA) may prefer an appeal to the Tribunal having jurisdiction in the matter. Considering the expanded jurisdiction of the Tribunal, it might have been worthwhile to rename it as a Financial Services Appellate Tribunal, rather than to retain the original name of the Securities Appellate Tribunal (SAT).

Clause 127(1) provides that the Board shall, after the end of each FY, within a period of 90 days, submit to the Central Government, a report giving a true and full account of its activities, policies and programmes during the previous FY. An annual report is necessarily a postmortem exercise. To ensure accountability to the legislature, it might have been useful to

prescribe that the Chairperson and the WTMs shall appear before the Standing Committee once in 6 months, to brief the Committee on what transpired in the previous 6 months, and what is planned by way of policy measures for the next 6 months. This direct reporting, with a prescribed periodicity, will ensure that the functional autonomy of the organisation vis-à-vis the administrative ministry is ensured.

Clause 129(1) states that the National Institute of Securities Market (NISM), a public Trust, established by the Board, shall be deemed to have been established under this Code. Resultantly, NISM also has a place in the statute. Clause 129(2) states that the Board shall regulate the NISM for capacity building of intermediaries. The NISM was set up with 6 separate schools to address different requirements in the securities market ecosystem. It should not be converted to a training school for intermediaries, since it would then take its eyes of the ball of investor education, which is the most critical requirement in India's securities market. In the same breath, it might be worthwhile considering whether the transfer of funds from the General Fund to the Consolidated Fund of India should be preceded by setting apart a significant amount for meaningful investor education throughout the country, and for promoting a class of qualified investment advisors.

Clause 131(1) provides that "Without prejudice to the foregoing provisions of this Code, the Board shall, in exercise of its powers or the performance of its duties under this Code, be bound by such directions on questions of policy as the Central Government may give in writing to it, from time to time". Though this power, which exists under the present Act, has not been exercised, it is a sword hanging over the head of the regulatory organisation, and at least, in theory, impacting on its functional autonomy. Admittedly, the power of the Central Government to give directions is confined to questions of policy. What constitutes a question of policy could itself be a matter of doubt, and the provision in Clause 131(2) stating that the decision of the Central Government, whether a question is one of policy or not shall be final, gives extraordinary powers, which mercifully have not been exercised till now. Observers of the financial scene might recall that some years ago, there was a distinct possibility of the issue of directions, under a similar provision, to the RBI.

Clause 146(2) provides for the matters in relation to which the Board may make regulations. It might be useful to examine whether the tendency to make substantive provisions is safeguarded against.

Clause 147 provides that the Board shall, while making regulations, publish the draft regulations, in order to invite public comments. It is worth considering whether the details of the proposal, and the reasons for making these regulations, are put out in the public domain so that the consultation exercise starts before the draft regulations have been given shape to.

Clause 2(zo) defines "subsidiary instructions" as instructions made under Clause 149, and includes any circular, master circular, guideline and such other instrument. Clause 148 provides that every Rule, regulation and bye-law made, and subsidiary instructions issued, under the Code shall be laid before each House of Parliament. This is clearly excessive. It would have been sufficient to provide that only Rules and regulations are laid before both Houses of Parliament.

Clause 150 provides for the constitution of one or more Advisory Committees to advise on matters relating to the making of subsidiary instructions, and any other issue relating to the

administration of the Code. It is not necessary to provide for Advisory Committees in a statute. Setting up of Advisory Committees is, and should be, an inherent power vested in the organisation.

Market Infrastructure Intermediaries (MIIs) have been given significant powers in the Code. They are subject to regulation by SEBI. One of the welcome moves in the Code is that it has subsumed the Depositories Act of 1993. There was no reason to have a separate Act for Depositories, and the problems that arose by giving a separate legislative standing to Depositories, as distinct from other MIIs, have surfaced on quite a few occasions in the past.

There is no certainty on the manner in which the Code will emerge finally through the Select Committee and the two Houses of Parliament. A skeptic might well say *"mischief thou art afoot. Take what course thou wilt"*.

The Code is clearly intended to ensure that it is a means to the end of enabling the honest and speedy conduct of business. Time will tell whether this intention translates to reality.