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SEBI Board approves amendments to Takeover Code, buy-back Regulations & IPO norms

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Introduction

1. In its first board meeting in the financial year 2018-2019, the SEBI Board resolved to amend the Takeover Code, Buy-back of securities, regulations relating to public issue. These decisions will have a significant impact on the corporate compliance mechanism and disclosures by companies. The SEBI Board has resolved to discontinue the category of sub-brokers as Market Intermediaries and directed the migration of sub-brokers to Authorised Persons or Trading Members. In a move that will directly impact the practicing professionals, SEBI Board has approved the proposal to issue consultation paper to amend various regulations in respect of entities which undertake third party fiduciary duty/assignment/engagement under the securities laws. This article gives an analysis and compilation of the decisions taken by the SEBI Board at its meeting and its impact on the securities market.

Review of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Code')

2. SEBI Board approved amendments to the Takeover Code. The amendments include granting additional time for upward revision of open offer price till 1 working day before the commencement of the tendering period. SEBI had issued a discussion paper on March 28, 2018 soliciting public comments for reviewing the Takeover Code. The amendments are mainly aimed at simplifying the language, removing redundant provisions and inconsistencies, updating the references to the Companies Act, 2013/other new SEBI Regulations, and incorporating the relevant circulars, FAQs, informal guidance in the Code.

The disclosures made by the promoters and directors under Takeover Code shall be aligned with the disclosures made by them under SEBI (Prohibition of Insider Trading) Regulations. There should be uniformity in the disclosures, as ultimately the purpose is 'disclosures to public at large'. The same can be achieved by harmonious disclosure practices. Also, in quite a few SEBI adjudication orders for non-disclosure under Takeover Code, listed company/directors/promoter's defence is that requisite disclosure is made but under different SEBI Regulations.

Replacing SEBI (Buy-back of Securities) Regulations, 1998

3. SEBI Board approved reframing a new set of SEBI (Buy-back of Securities) Regulations, 2018 in lieu of the extant Buyback Regulations, 1998. Relevant provisions outlined under Sections 68 and 70 of the Companies Act, 2013 have been incorporated in the new Buyback Regulations to make it self-contained. Under the new Regulations, the buy-back period has been defined as the period between board of directors resolution/date of declaration of results for special resolution authorizing the buyback of shares and the date on which payment consideration is made to the shareholders. SEBI earlier had issued a discussion paper on March 28, 2018 soliciting public comments for reviewing the said Regulations. The review was carried out with an objective to simplify the language, remove redundant provisions and inconsistencies, update the references to the Companies Act, 2013/other new SEBI Regulations, and incorporate the relevant circulars, FAQs, informal guidance in the said Regulations.

With respect to the buy-back *vis-à-vis* compromise and arrangement schemes under Companies Act, 1956, in a landmark judgment, the Bombay High Court[1] observed that "*The non obstante clause in section 77A, namely, 'notwithstanding anything contained in this Act....' only means that notwithstanding the provisions of section 77 and sections 100 to 104, the company can buy-back its shares subject to compliance with the conditions mentioned in that section without approaching the Court under sections 100 to 104 or section 391. There is nothing in the provision of section 77A to indicate that the jurisdiction of the Court under section 391 or 394 has been taken away or substituted. It is well-settled that the exclusion of the jurisdiction of the Court should not readily be inferred; such exclusion should be explicitly or clearly implied. There is nothing in the language of section 77 that gives rise to such an inference. Therefore, section 77A is merely an enabling provision and the Court's powers under sections 100 to 104 and section 391 are not in any way affected. The conditions provided in section 77A are applicable only to buy-back of shares under section 77A. The conditions applicable to sections 100 to 104 and section 391 cannot be imported into or made applicable to a buy-back under section 77A. Similarly, the conditions for a buy-back under section 77A cannot be applied to a scheme under sections 100 to 104 and section 391. The two operate in independent fields.*" The Bombay High Court further stated that "*It is not disputed that reduction in the capital can be effected under section 77, read with sections 100 to 104 and 391 even in the case of buy-back of shares. Even in cases where capital is reduced by optional sale reduction results after the option is exercised to the extent of the shares cancelled. This is as equally a reduction of capital as in the case of compulsory cancellation of shares. There is no distinction between the two on the aspect of the reduction. The word 'arrangement' is of wide import and is not restricted to a compulsory purchase or acquisition of shares there is no reason as to why a cancellation of shares and the consequent reduction of capital cannot be covered by section 391, read with section 100 merely because a shareholder is given an option to*

cancel or to retain his shares. In view of the foregoing discussion, the objection of the appellants based on section 77A must be rejected."

Pursuant to sub-section (10) of section 230 of the Companies Act, 2013, compromise or arrangement in respect of any buy-back of securities under section 230 of the Act shall not be sanctioned by NCLT unless such buy-back is in accordance with the provisions of section 68 of the Companies Act, 2013. Keeping in mind the background of the Bombay High Court's judgment (*supra*) and sub-section (10) of section 230 of the Companies Act, 2013, there should be adequate clarity in the revised SEBI Buy-Back Regulations.

Review of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

4. SEBI Board approved the amendments to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('SEBI ICDR Regulations'). Some of the key proposals approved by the SEBI Board are as follows:

(*i*) The requirement of announcing price band 5 working days before opening of the issue would be reduced to 2 working days before opening of the issue,

(*ii*) With reference to the financial disclosures in case of public issues/rights issues, such disclosures to be made for 3 years (as against the present duration of 5 years),

(*iii*) Restated and audited financial disclosures in the offer document to be made on consolidated basis only,

(*iv*) Incorporation of the principles governing disclosures of Indian Accounting Standards (IndAS) on Indian GAAP (IGAAP) Financials,

(*v*) The threshold for submission of draft letter of offer to SEBI in case of rights issues to be increased to Rs. 10 Crores (as against the earlier prescribed Rs. 50 Lakhs),

(*vi*) Shortfall of up to 10% in minimum promoters' contribution may be met by institutional investors[2],

(*vii*) For a company to be eligible to make a fast track rights issue, it should not have any audit qualifications or adverse opinion,

(*viii*) The Chapter relating to Institutional Placement Programme and provisions pertaining to Safety net and IPO grading are proposed to be deleted,

(*ix*) With reference to the SME-IPO, the minimum anchor investor size is proposed to be reduced to Rs. 2 Crore (from the existing Rs. 10 Crore),

(*x*) With reference to the definition of the 'promoter group', the concept of 'immediate relative' is to be retained as against the proposed concept of 'relative'. The shareholding threshold for identifying promoter group has been revised from 10% to 20%. Now in case the promoter is a body corporate, any body corporate in which the promoter holds 20% or more or which holds 20% or more of the promoter would be classified as being part of the same promoter group. Also, in case the promoter is a

body corporate, any body corporate in which a group of individuals or companies or combinations thereof, which holds 20% or more of the equity share capital in that body corporate, also holds 20% or more of the issuer, can be classified as promoter group only if they are acting in concert,

(*xi*) Definition of 'group companies' has been made more specific by clarifying that group company(ies), shall include such companies (other than promoter(s) and subsidiary (ies)) with which there were related party transactions, during the period for which financial information is disclosed (3 years), as covered under the applicable accounting standards and also other companies as considered material by the board of the issuer,

(*xii*) With reference to the underwriting provisions (w.r.t. Main Board IPO), it is proposed to be aligned to requirements of minimum subscription, i.e., if 90% of the fresh issue is subscribed in a main board IPO, underwriting will be restricted to that portion only and, accordingly, the requirement to underwrite 100% of the issue without regard to the minimum subscription requirements has been deleted,

(*xiii*) The provisions of the Companies Act, 1956 (wherever applicable), the Companies Act, 2013, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the SEBI (Share Based Employee Benefits) Regulations, 2014 have been suitably incorporated. Various informal guidance/interpretative letters/FAQs/Circulars regarding interpretation of various provisions of the regulations issued by the SEBI from time-to-time have been suitably incorporated.

The proposed amendment to modify the definition of 'promoter'/'promoter group' in SEBI (ICDR) Regulations is a very significant amendment. Such changes in the definition of 'promoter' and 'promoter group' have got corresponding impact on the following Regulations:

(*i*) SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

(*ii*) SEBI (Prohibition of Insider Trading) Regulations, 2015,

(*iii*) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

'Promoter' or 'Promoter Group' is not specifically defined in the above Regulations. However, requisite corresponding reference is given to the definition in SEBI (ICDR) Regulations. The amendment approved by the SEBI Board will further have an impact on the disclosures and compliances of 'promoter'/'promoter group' under Takeover Code, Prohibition of Insider Trading Regulations and Listing Regulations.

It is also noteworthy that by the Companies (Amendment) Act, 2017, the specific disclosures in prospectus under the Companies Act, 2013[3] have been deleted and necessary reference is given in the SEBI Regulations.

The amendments to SEBI (ICDR) Regulations got us rid of a lot of archaic disclosure requirements. It helps make disclosures in an offer document

more meaningfully for an investor to take an informed decision. The reduction in time period between advertising the price band and issue opening would also help issuers in pricing deals better in a volatile market.

Review of regulation and relevant circulars pertaining to Market Infrastructure Institutions

5. SEBI Board noted the recommendations of the Gandhi Committee constituted by the SEBI for 'Review of regulation and relevant circulars pertaining to Market Infrastructure Institutions (MIIs[4])'. SEBI Board approved of the following proposals:

(*i*) In order to bring parity across MIIs, the shareholding limits, which can be held by both eligible domestic and foreign entities in MIIs have been harmonized across MIIs,

(*ii*) Given the special role of Public Interest Directors and Managing Director in the governance of a MII, norms relating to their tenure and directorships at MIIs have been modified,

(*iii*) The composition of the Governing Board and regulatory committees of MIIs has been modified with an aim to balance between the number of Public Interest Directors, who serve the interest of public at large and the number of shareholder-directors,

(*iv*) In order to enhance the transparency in the utilization of resources, a MII should disclose the resources committed towards regulatory functions and towards ensuring regulatory compliance, backed-up by activity based accounting,

(*v*) To avoid the requirement of repetitive regulatory approvals and to provide adequate flexibility to the MIIs in deciding their day-to-day investments, SEBI Board decided that activities in the nature of treasury investment may be as per the investment policy approved by the Governing Board of a MII. Any other activity, whether involving deployment of funds or otherwise, would need prior permission of the regulator,

(*vi*) Considering the fundamental importance of the role played by Key Management Personnel, the definition and norms relating to disclosure of their compensation have been modified,

(*vii*) Considering that the scope of work of some of the existing committees of MIIs is inter-related and overlapping, the various committees of MIIs have been merged/restructured, reducing the number of committee from existing 15 to 7,

(*viii*) In order to adequately capture the risks faced by a Clearing Corporation, SEBI Board decided to adopt a risk based approach towards computation of Net- worth of a Clearing Corporation, i.e., instead of a higher minimum net worth of INR 300 crores, the Clearing Corporations may be required to maintain a net worth at all times of either INR 100 crores or such other amount to cover the various risks (operational, market, credit, etc.) as notified by SEBI from time-to-time.

Role of Sub-broker *vis-a-vis* Authorized Person

6. SEBI Board considered and approved the proposal to discontinue the category of sub-brokers as Market Intermediaries. SEBI Board resolved to grant no fresh registration to sub-brokers. SEBI Board stated that the existing registered sub-brokers shall migrate to Authorised Persons or Trading Members, as the case may be, and sub-brokers, who do not choose to migrate, shall be deemed to have surrendered their registration as Sub-Brokers.

Consultation Paper for the Amendment to various SEBI Regulations in respect of entities undertaking third party assignment under securities laws

7. SEBI Board noted that investor's confidence is fundamental to the successful operation of the securities market and it stems largely from credible and reliable reporting of disclosure, financial information, compliance with securities regulations. In this regard, fiduciaries in the securities markets have a very significant role to play. The absence of credible and reliable reporting of such information has the potential to adversely impact confidence of the securities markets and the financial system. SEBI Board noted that while some fiduciaries such as Merchant Bankers, Credit Rating Agencies, Custodian, Debenture Trustees, Registrar to an Issue, etc., are registered with SEBI under specific Regulations notified for the purpose, certain other fiduciaries such as practicing Chartered Accountants, practicing Company Secretaries, Cost Accountants, Valuers, Monitoring Agencies, etc., who undertake third party fiduciary duty/assignment/engagement from Issuers or Intermediaries as required under various SEBI Regulations, are not registered with SEBI. SEBI Board approved the proposal to issue consultation paper to amend various regulations in respect of entities who undertake third party fiduciary duty/assignment/engagement under securities laws, in respect of any issuer, pooled investment vehicle, intermediaries, market infrastructure entities.

This move will directly affect the practising professionals and in near future they would be accountable to SEBI and their respective professional institutes. SEBI Board is proposing to amend its Regulations and direct registration for 'entities who undertake third party fiduciary duty/assignment/engagement under securities laws, in respect of any issuer, pooled investment vehicle, intermediaries, market infrastructure entities'. Some critical questions are: Whether such registration is required even if the firm of practising professionals is peer-reviewed under respective Institute's Regulations/Code of Conduct?, Whether such registration is required for statutory audit, internal audit, secretarial audit, etc.?, Whether such registration is required for only opinion related services to listed entities?, Whether certification of certain e-Forms/Forms under different law would require registration under the proposed Regulations?

Conclusion

8. The SEBI Board's decision to amend Takeover Code, regulations relating to buy-back of securities and public issue are significant decisions. Presently, the amendments are in consultation phase and would be a reality during financial year 2018-2019. Another significant decision of the SEBI Board is discontinuance of the category of sub-brokers as Market Intermediaries and migration of existing sub-brokers to Authorised Persons or Trading Members. SEBI Board has rightly observed that, presently, the practising professionals who undertake third party fiduciary duty/assignment/engagement under the securities laws. SEBI Board proposes to introduce an appropriate mechanism to regulate the practising professionals. It will require compliance of SEBI Regulations in addition to the Regulations of respective professional institute.

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1. *SEBI* v. *Sterlite Industries (India) Ltd.* [2003] 45 SCL 475 (Bom.)
2. i.e. Foreign venture capital investors, scheduled commercial banks, public financial institutions and IRDA-registered insurance companies
3. i.e. Section 26 of the Act relating to 'Matters to be stated in the Prospectus'
4. MIIs refer to the Stock Exchanges, Clearing Corporations and Depositories.