

PROPOSALS BY THE SEBI AWAITING IMPLEMENTATION

Securities and Exchange Board of India has issued a press release highlighting certain vital outcomes of its meeting held on 22nd September 2009. The Board has proposed certain amendments in the Listing Agreement, the newly introduced SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 and Takeover Regulations,

Enforcing accounting standards through Listing agreement: A new cap of accounting regulator for SEBI

We are seeing an increasing tendency among regulators to encroach into areas which are preserve of other regulators. This is particularly so in case of accounting standards – there is already an autonomous statutory body, viz., the ICAI, and a statutory body, the National Advisory Committee on Accounting Standards (NACAS), as also the Ministry of Company Affairs which anyway enforces accounting standards through sec 211 of the Companies Act and the rules thereunder.

It is interesting to see that SEBI still sees the need and the scope to enforce accounting standards, in case of mergers, through stock exchanges as a part of the listing agreement. The proposal, broadly speaking, is as follows:

A listed company undergoing corporate restructuring (merger, demerger or amalgamation) under a scheme of arrangement shall submit an auditors' certificate to the stock exchange to the effect that the accounting treatment followed in respect of financials contained in the scheme is in compliance with all the applicable accounting standards. This requirement will be prescribed through amendments to listing agreement.

An unlisted company undergoing similar corporate restructuring and proposing to make an IPO shall make disclosures in the DRHP in terms of AS 14. This will be mandated through the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

It is notable that as accounting standard AS 14 dealing with mergers/amalgamations is mandatory anyway, every company's annual accounts will have to contain a qualification from auditors if the company has deviated from the accounting standard. On top of this, stock exchanges are supposed to ensure compliance with the very same accounting standards. It is questionable whether other than through the auditors' certificate or similar audit check, what other mechanism can the stock exchanges have to ensure compliance with merger accounting, which is largely a post-merger affair. If the auditors anyway certify compliance or departure by way of audit report, it is questionable as to what purpose will the new requirement serve at all?

SEBI in September 2008 brought in the requirement of obtaining "fairness opinion" from an independent Merchant Banker on valuation of assets/shares done by the valuer. A

valuer does a valuation, which is anyway supposed to be fair, since otherwise, the valuation has no meaning. On top of the valuer's certificate, what value is the merchant banker's fairness opinion adding? The merchant banker may possibly put up his own valuer – just in case the valuer appointed by the company/companies may not be doing an independent job. But then, after all, any valuation is the job of a valuer, and not the merchant banker. SEBI's stipulations are only putting merchant bankers under responsibilities that they were never trained or geared to handle.

Changes proposed in Takeover Regulations: mixed bag of proposals

- SEBI has proposed that in case of ADR or GDR holders who are entitled to voting rights on the underlying shares pursuant to depository agreement or otherwise, open offer obligations will be triggered if the limits mentioned in Chapter III of the Takeover Regulations are crossed. At present, obligations under Chapter III of the regulations did not apply to the acquisition of Global Depository Receipts or American Depository Receipts so long as they are not converted into shares carrying voting rights in terms of the exemption granted under regulation 3(2) of the Takeover Regulations. Therefore, SEBI proposes to withdraw the exemption granted in case of ADR/GDR.
- The range for disclosure requirement under regulation 7(1A) has been broadened to make it 15-75%. The rationale for such a proposal is however, not clear. Whereas, where the holding of an acquirer is between 15-55%, he can acquire further 5% without making public announcement, however, in case of an acquisition of any additional shares by an acquirer having holding between 55%-55%, such an acquisition cannot be made without making public announcement. Hence, there seems no relevance to disclose (+/-) 2% acquisition where the acquisition itself is by way of making public announcement.
- To bring in clarity to the existing regulation 11(1) is an objective amendment proposed by the SEBI. In case where the holding of an acquirer together with PACs is, say, 52% (i.e., between 15-55%), can acquisition of 5% without making public announcement to make the post-acquisition shareholding beyond 55% will be said to be in compliance with the requirement of the Takeover Regulations? The question has been answered in negative. SEBI, by amendment has sought to clarify that any acquisition under Regulation 11(1) cannot increase the post-acquisition shareholding of the acquirer along with PACs beyond 55%. This, however, shall not effect any acquisition under second proviso to Regulation 11(2).

Changes proposed in ICDR Regulations:

- In case of unlisted company proposing to make an IPO and carrying out similar corporate restructuring, disclosures are required to be made in the DRHP as per Accounting Standard 14. The said requirement shall be mandated through SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

- Facilities of anchor investors to be extended to issue of Indian Depository Receipts on similar terms as applicable to public issues made by domestic companies

Note that the above proposals are yet to be notified by SEBI. For full text of the Press Release, please visit <http://www.sebi.gov.in/press/2009/2009300.html>