Bloomberg BNA

WORLD SECURITIES LAW REPORT >>>

News and analysis of securities law developments around the world.
For the latest updates, visit www.bna.com

International Information for International Business

VOLUME 20, NUMBER 12 >>> DECEMBER 2014

India's SEBI Approves New Regulations on Insider Trading, Delisting, Listing Obligations and Disclosure Requirements

By Tanya Pahwa, Arun Scaria, Simone Reis and Pratibha Jain, of Nishith Desai Associates.

In its continuing efforts to revamp the existing capital market regulatory framework, the Securities and Exchange Board of India ("SEBI"), at its board meeting on November 19, 2014 ("Board Meeting"), finally approved three much awaited regulations:

- the SEBI (Prohibition of Insider Trading) Regulations, 2014;
- amendments to the SEBI (Delisting of Equity Shares) Regulations, 2009; and
- the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2014.

The full texts of these three sets of regulations are expected to be published shortly.

This article provides an overview of some of the key decisions taken in the Board Meeting.

Introduction of SEBI (Prohibition of Insider Trading) Regulations, 2014

The 22 year old SEBI (Prohibition of Insider Trading) Regulations, 1992 ("1992 Insider Trading Regulations") have finally been replaced with the SEBI (Prohibition of Insider Trading) Regulations, 2014 ("2014 Insider Trading Regulations") in light of the recommendations made by an 18 member committee ("Committee") constituted by SEBI under the chairmanship of Justice N.K. Sodhi, former Chief Justice of the High Courts of Kerala and Karnataka.

At its Board Meeting, SEBI highlighted the following key changes in the forthcoming 2014 Insider Trading Regulations:

Definition of 'Insider'

The definition of "insider" has been made wider by including persons connected on the basis of being in any contractual, fiduciary or employment relationship that allows such person access to "unpublished price sensitive information" ("UPSI"). Immediate relatives are also deemed to be insiders, with the ability to rebut such presumption. In the case of connected persons, the onus of establishing that they were not in possession of UPSI shall lie on such connected persons.

Definition of 'Unpublished Price Sensitive Information'

UPSI has been defined as information not generally available and which may impact the price. The definition of UPSI has been strengthened by providing a test

to identify price sensitive information, aligning it with the Listing Agreement and providing a platform of disclosure. Previously, the definition of price sensitive information had reference only to a company; now it has reference to both a company and securities. Generally available information will be information that is accessible to the public on a non-discriminatory platform, which would ordinarily be a stock exchange platform.

Communication and Procurement of UPSI Now Prohibited

The 2014 Insider Trading Regulations also prohibit the act of procuring UPSI.

Facilitating Legitimate Business Transactions

The requirement to communicate UPSI in the case of legitimate business transactions has been recognized in law, and a carve-out with safeguards has been provided. Accordingly, in order to facilitate legitimate business transactions, UPSI can be communicated, with safeguards.

Trading Plans

In line with the concept of "pre-arranged trading plans" prevalent in the United States, the 2014 Insider Trading Regulations have now introduced the safe harbour provision of trading plans by virtue of which an "insider" who is liable to possess UPSI year-round may deal with securities in pursuance of trading plans formulated and disclosed on a stock exchange platform in advance, with appropriate safeguards.

Disclosures

Considering every investor's interest in the securities market, advance disclosure of UPSI at least two days prior to trading has been made mandatory in the case of permitted communication of UPSI.

Valid Defences

The 2014 Insider Trading Regulations also provide for valid defences, *i.e.,* certain circumstances which can be demonstrated by an insider to prove his or her innocence.

Alignment with SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Regulations') and Companies Act, 2013 ('Companies Act')

Since the Takeover Regulations already prescribe relevant disclosures, persons holding more than 5 percent of the shares or voting rights in a listed company are not required to make repeated disclosures under the 2014 Insider Trading Regulations of every change of 2 percent in their shareholding or voting rights. Section 194 of the Companies Act, which prohibits derivative trading by directors and key managerial personnel on securities, has been specifically incorporated in the 2014 Insider Trading Regulations.

Takeaways

- The scope of the term "insider" has been broadened. While this is *prima facie* a positive step intended to bring more people within the ambit of the term, such a wide definition should not impede the operations of a company or the performance of professional obligations. It is not clear from the minutes of the Board Meeting if the wide definition of the term "insider" is qualified by certain exceptions and defences that could strike a balance between the interests of public shareholders and the business requirements of the company.
- The uncertainty under the 1992 Insider Trading Regulations with respect to disclosure of UPSI for the purposes of genuine merger and acquisition ("M&A") and private equity ("PE") transactions has been a constant source of concern for the corporate sector in India and foreign investors. The demand for permission to share UPSI in PE/M&A backed diligence seems to have been accepted finally. The carve-out for facilitating legitimate transactions with safeguards is a huge step representing progress for Indian capital markets.

Amendments to SEBI (Delisting of Equity Shares) Regulations, 2009 ('Delisting Regulations')

SEBI had released a discussion paper in May 2014 on "Review of the Delisting Regulations" after consultation with various market participants and investor associations to safeguard the interests of investors.

SEBI has now broadly approved the following amendments to the Delisting Regulations ("Delisting Amendments"):

Threshold Limit

SEBI has streamlined the threshold limit for a delisting offer to be successful. As per the Amendments, following an offer, once the shareholding of the promoter/acquirer reaches 90 percent of the total issued capital and at least 25 percent of the number of public shareholders tender in the reverse book building process, the offer is deemed successful.

Price Discovery

SEBI has modified the price discovery process under the Delisting Regulations. As per the Amendments, the offer price determined through reverse book building shall be the price at which the shareholding of the promoter, after including the shareholding of the public shareholders who have tendered their shares, reaches the threshold limit of 90 percent.

Restrictions on Delisting

To further ensure that acquirers do not side-step the price discovery mechanism, SEBI has introduced a new restriction for making a delisting proposal. The Amendments provide that the promoter/promoter group is prohibited from making a delisting offer in case any en-

   ISSN 1357-0889

tity belonging to the same group has sold shares of the company during a period of six months prior to the date of the board meeting which approves the delisting proposal.

Platform

SEBI has approved the use of stock exchange platforms for offers made under the Delisting, SEBI (Buyback of Securities) Regulations, 1998 and the Takeover Regulations.

Timeline for Completion

SEBI has indicated that the timeline for completion of the delisting process has been reduced to only 76 working days from 137 calendar days (approximately 117 working days).

Onus on the Board of Directors

The Delisting Amendments cast an obligation on the board of directors of a company to ensure that the delisting proposal is approved only if it is in the interests of the shareholders and the company is in compliance with all the applicable securities laws. The board of the company is further required to appoint a merchant banker for compliance under the Delisting Regulations.

Small Companies and Delisting

The Delisting Amendments raise the threshold limit for "small companies" so as to exclude all companies with paid up share capital of less than INR 10 crores (U.S.$16.7 million) and net worth of less than INR 25 crores (U.S.$41.7 million) from following the reverse book building process, provided that there is no trading activity during one year prior to the board meeting approving the delisting proposal and trading of the shares of the company was not suspended for any non-compliance during such period.

Delisting Directly Pursuant to Open Offer

SEBI has now allowed the acquirer to delist shares of the company directly pursuant to an open offer in case the post-acquisition shareholding of the promoter crosses the threshold limit provided under the Delisting Regulations. It must be noted that, in case the delisting attempt fails, the acquirer would be required to complete the mandatory open offer process under the Takeover Regulations and pay interest at the rate of 10 percent per annum for the delayed open offer.

Harmonizing Delisting Amendments with the Existing Regulatory Framework

One of the other amendments introduced is that SEBI, for reasons recorded in writing, may relax or exempt strict compliance with any requirements under the Delisting Regulations, in line with the provisions existing in the Issue of Capital and Disclosure Requirements and the Takeover Regulations.

Takeaways

- Not many open offers in India have been successful in the recent past. One of the biggest contributors to the failure of open offers has been the fact that open offers have been treated as off-market transactions, with consequent tax disadvantages. Now, the use of the stock exchange platform for delistings, open offers and buy-backs has been approved by SEBI. India's corporate sector should now witness more successful open offers and delistings.
- Since the Takeover Code allowed parties to seek exemption from compliance with the provisions of the Takeover Code, there was a natural urge to seek exemption from compliance with certain requirements under the Delisting Regulations, especially because many Indian promoters faced practical difficulties in adhering to the technicalities of the Delisting Regulations. However, there was no express provision under the Delisting Regulations for seeking such an exemption, as there was under the Takeover Code. Therefore, the move to permit the seeking of exemptions from meeting the requirements under the Delisting Regulations is commendable, and could lead to more delistings, though at the cost of increasing SEBI's workload.

Introduction of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2014 ('Listing Regulations')

In order to enhance the enforceability of the Listing Agreement, SEBI also approved the Listing Regulations, which provide for a comprehensive framework governing various types of listed securities, thereby replacing the extant Listing Agreement. The Securities Contract (Regulations Act), 1956 mandatorily requires every person whose securities are listed on a stock exchange to comply with the conditions of the Listing Agreement with that stock exchange, which essentially provides for the initial and continual disclosure norms for such persons. In May 2014, SEBI had released its approach paper on draft SEBI Listing Regulations.

The Listing Regulations have been sub-divided into three parts:

1) the main body of the Regulations, which provides for substantive provisions;

2) schedules to the Regulations, which provide for procedural requirements; and

3) circulars by SEBI, which would prescribe the forms of disclosures.

More importantly, most of the provisions of the Listing Regulations have been well aligned with the provisions of the Companies Act, 2013 (*see analysis at WSLR, September 2013, page 21*).

SEBI has introduced overarching common obligations with respect to the filing of information, responsibilities of compliance officers, fees, *etc.*, applicable to all types of listed securities, and also has provided for specific ob-

ligations for each type of securities. SEBI has further indicated in the Board Meeting that a shortened version of the Listing Agreement within six months of publication of the Listing Regulations is necessary.

Principles Governing Disclosures and Obligations

A chapter has been included at the beginning of the Listing Regulations governing disclosures and obligations of all listed entities. These principles are broadly in line with the International Organization of Securities Commissions (IOSCO) principles for periodic disclosures by listed entities.

Corporate Governance

SEBI had already issued a revised corporate governance framework via its circular dated April 17, 2014, which came into effect from October 1, 2014, and has now been included in the Listing Regulations as well.

Filing of Information

Filing on stock exchanges through their electronic platforms has been made mandatory, in order to promote electronic filing through technologically updated platforms.

Compliance Officer

The Listing Regulations provide for the mandatory appointment of the company secretary as the compliance officer, except for units of mutual funds listed on stock exchanges.

Registration with SEBI Complaints Redress System (SCORES)

All listed companies are required to register with SCORES in order to handle investor complaints electronically. This requirement, introduced by SEBI in August 2014, has now been incorporated in the Listing Regulations.

Co-operation with Intermediaries

In order to enable registered intermediaries to fulfil their obligations under the Listing Regulations, cooperation with such intermediaries has been made mandatory for all listed companies.

Annual Information Memorandum

An enabling provision for all listed entities to submit to the stock exchange an Annual Information Memorandum, as specified by SEBI from time to time, has been incorporated in the Listing Regulations.

Small and Medium Enterprises

Various provisions of the equity Listing Agreement have now been extended to small and medium enterprises, in order to ensure uniformity in the disclosure requirements.

Provisions of Equity Listing Agreement also Applicable to Non-Convertible Redeemable Preference Shares ('NCRPS') and Non-Convertible Debt Securities ('NCDS')

Certain provisions of the equity Listing Agreement, such as the submission of Form B (audit reports), transfer and transmission of securities, *etc.*, which previously were not applicable to NCRPS and NCDS, have now also been made applicable to them.

Takeaway

- The replacement of the Listing Agreement with the Listing Regulations now provides for a more consolidated framework for the disclosures to be made by all listed entities, and gives statutory recognition to the listing norms in India.

Conclusion

As part of SEBI's ongoing efforts to provide a clearer and stricter regulatory framework for the capital market, these new sets of regulations are intended to protect and safeguard the interests of investors, boost market participation in India and, more importantly, bring the Indian capital market in line with global standards.

Once the new regulations are published, we will provide a more detailed analysis of their key provisions.

The text of SEBI's announcement of the decisions taken at its November 19, 2014, board meeting is available, in English, at http://www.sebi.gov.in/cms/sebi_data/pdffiles/29593_t.pdf.

Tanya Pahwa is an Associate in the New Delhi office, Arun Scaria is a Senior Associate in the Bangalore office, Simone Reis is Co-Head of the M&A Practice and based in the Mumbai office, and Pratibha Jain is a Partner and Head of the Regulatory Practice and based in the New Delhi office of Nishith Desai Associates. The authors may be contacted at tanya.pahwa@nishithdesai.com, arun.scaria@nishithdesai.com, simone.reis@nishithdesai.com and pratibha.jain@nishithdesai.com.

   ISSN 1357-0889