

## M&A Hotline

February 17, 2009

### TAKEOVER CODE - RELAXATION IN DISTRESSED TIMES

Considering the present economic crisis and the loss of investor confidence, which was further aggravated by the Satyam scandal, the Securities and Exchange Board of India (“SEBI”) has been bringing in various amendments in the securities laws to assuage the twin impact of economic crisis and the Satyam debacle. At the same time SEBI has been providing a stout regulatory framework to prevent a subsequent debacle. SEBI in its previous amendment to the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers), Regulations, 1997 (“SEBI Takeover Code”) dated January 28, 2009 had mandated disclosures for pledged shares (our hotline titled [Satyam Aftermath: SEBI mandates disclosures for pledged shares](#)). At the same time, SEBI has stepped in and has amended the securities laws to ensure that distressed companies can look forward to an expeditious revival.

On February 13, 2009, SEBI vide its Circular No. LAD/NRO/GN/2008-09/34/154082 (“Amendment”) has amended the provisions of SEBI Takeover Code and has carved out provisions to deal with distressed companies like Satyam. Now, an exemption can be created for investors, who intent to render assistance to a distressed company, but were apprehensive due to the legal complexities relating to open offer requirement viz., pricing mechanism, elongated competitive bids etc.

With the present Amendment, SEBI has introduced Regulation 29A under the SEBI Takeover Code, by virtue of which, a company whose incumbent board has been superseded by Central Government or State Government or any other Regulatory Body, as the case may be (“Government”) and whose shares are to be acquired can make an application to SEBI, seeking relaxation from the strict compliance with the provisions of Chapter III of the SEBI Takeover Code.

The aforesaid amendments are discussed herein under:

Relaxation from strict compliance of provisions of Chapter III

The Chapter III of the SEBI Takeover Code provides for regulations pertaining to substantial acquisition of control over a listed company. Chapter III details mechanisms, for substantial acquisition of shares by a person (“Acquirer”) in a Company (“Target Company”), including guidelines relating disclosure of substantial acquisition of shares; open offer to other existing shareholders and the pricing mechanism for offer of shares. The SEBI Takeover Code also provides for competitive bid process which permits another Acquirer, intending to acquire a substantial shareholding in the same company, an opportunity to offer acquisition shares at a higher price.

As per the Amendment, prerequisite for a Target Company, for seeking relaxation from the provisions of Chapter III of the SEBI Takeover Code, is subject to the fulfillment of the following:

1. Government appointed board: Only, a company whose board has been superseded by a Government appointed board, is eligible to seek exemption under the provisions of the SEBI Takeover Code. This move provides relaxation to distressed companies which would, as a corrective measure would like an external investor to provide support to the company. Whilst, at the same time providing the Acquirer the incentive to invest in the company, without any fear of its investment process being stalled due to procedural complications and an apparent threat to litigation by any competitive bidder.
2. Mechanism for the continued operation of the company: In order to avoid a situation, where the acquirer strips the Target Company of its assets and eventually liquidates the Target Company, SEBI has obligated the board of the Target Company to devise a plan which provides for transparent, open and competitive process for continued operation of the Target Company in the interests of all shareholders of the Target Company. The board of the Target Company is also required to satisfy SEBI that the plan is in the best interest of the Target Company and is not intended to benefit any particular Acquirer.
3. Public interest: A general clause has been inserted in the Amendment to meet any unforeseen situation, by encompassing situations under the eligibility criteria, where it can be shown that the exiting provisions of Chapter III are likely to act as an impediment to implementation of the plan of the target company and relaxation from one or more of such provisions is in the interest of investors, the securities market and public at large.

Restriction of competitive bids

Under the SEBI Takeover Code any person, in an open offer for acquisition of shares, any person other than the person making the open offer can make a competitive bid. The present Amendment creates a further exception in favour of companies, which have been provided relaxations pursuant to the Regulation 29A of the Takeover Code. As per the Amendment, no public announcement for a competitive bid can be made after an Acquirer has already made the public announcement pursuant to relaxation granted by SEBI in terms of Regulation 29A. A similar relaxation was made in 2001 by the SEBI, for expediting the government’s disinvestment process in Public Sector

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The restriction of competitive bid, would ensure that the distressed companies, which are in urgent need for an investor, who would apart from infusing liquidity in the company, would also provide certainty to the management of the company, are not delayed due to complex pricing and open offer requirements.

#### Conclusion

The Amendments, shifts the onus on the Target Company, subject to satisfaction of conditions to seek relaxations from SEBI, provided a specific case is made out and the exemption is a necessity for the revival of the company. If satisfied, SEBI can provide such relaxation, if it is in the best interest of the investors and public at large.

Also, it can be argued that restrictions on competitive bid may diminish the possibility of deriving a better price for the shares of the distressed companies. Nonetheless, the restrictions on competitive bid would fast-track the acquisition process for distressed companies, which are in dire need of funds. While, at the same time, it may bring certainty in terms of the management of the distressed company.

- **Shikhar Kacker** & Vyapak Desai

Source: **SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2009**

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