

## M&A Hotline

November 16, 2009

### SEBI ADJUDICATES THAT DISCLOSURES UNDER REG. 8(2) NOT CONCLUSIVE PROOF OF ACQUISITION OF CONTROL

#### INTRODUCTION

Securities and Exchange Board of India (“SEBI”) in its recent adjudication order held that a mere disclosure of acquirers as “promoters” in terms of Regulation 8(2)<sup>1</sup> of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Regulations”) does not result in acquisition of control under Regulation 12 by the acquirers. The order elucidates that such an acquisition of control needs to be substantiated by some actual change in circumstances that would have the effect of conferring control onto the acquirers.

#### BACKGROUND & FACTS

India Newbridge Investments Limited, India Newbridge Coinvestments Limited, India Newbridge Partners FDI Limited and Maxwell (Mauritius) Pte. Limited (collectively referred to as “Acquirers”) acquired 22,50,000 equity shares constituting 15.16% of the total equity capital of Matrix Laboratories Limited<sup>2</sup> (“Target Company”) through preferential allotment vide an agreement dated April 15, 2004.

Subsequently, the Acquirers made a public announcement in terms of Regulation 10 of the Takeover Regulations on April 18, 2004. On the question of applicability of Regulation 12<sup>3</sup>, the Acquirers clarified in the letter of offer that since they do not wish to acquire control over the Target Company, Regulation 12 does not apply to the offer (“Open Offer”). The letter of offer issued in relation to the said acquisition elucidated that post Open Offer shareholding of the Acquirers would be 40.46% of the total equity capital of the Target Company, as opposed to 32.35% held by the existing promoter group.

Thereafter on August 28, 2006, M.P. Laboratories (Mauritius) Limited and Mylan Laboratories Limited acquired 51.5% shares from the promoters of the Target Company. It was observed that the names of the Acquirers appeared in the ‘promoter group’ category of the Target Company in the letter of offer that was issued pursuant to which this acquisition of 51.5% took place.

A similar classification of the Acquirers (as ‘promoter group’ having controlling/ strategic holdings) figured in the shareholding pattern of the Target Company for the quarter ended on December 31, 2004 which was filed<sup>4</sup> by the Target Company.

#### SEBI’S ALLEGATION

In view of the above, SEBI noted that when the Acquirers acquired stake in the Target Company and made the Open Offer in 2004, the said Open Offer was made in terms of Regulation 10 and not in terms of Regulation 12. However, with regard to the classification of the Acquirers as ‘promoter group’ in the aforementioned shareholding pattern, SEBI alleged that the Acquirers acquired control over the Target Company as on December 31, 2004 and failed to make the triggered open offer in terms of Regulation 12 read with Regulation 14(3)<sup>5</sup> of the Takeover Regulations thereby violating the said provisions.

#### ACQUIRER’S DEFENSE

While responding to a show cause notice<sup>6</sup> issued by SEBI, the Acquirers clarified that the Target Company [as recommended by the Bombay Stock Exchange (“BSE”)] named the Acquirers under the ‘foreign promoter’ category purely for the computation of ‘free float’ under the Listing Agreement. Besides this, based on BSE’s advice, the Target Company also advised the Acquirers to file declarations under Regulation 8(2) of the Takeover Regulations.

Placing reliance upon the definition of the term ‘control’ as described under the Takeover Regulations, the Acquirers pointed out that they had a restricted right to appoint a maximum of three directors to the Board and had no right to nominate any officer or manager of the Target Company. The Acquirers emphasized that in order to determine whether any control was acquired, one would have to evaluate whether there has been any change in circumstances or occurrence of any new event after the Open Offer, that would have the effect of conferring control upon the Acquirers.

Therefore, it was submitted on behalf of the Acquirers that there has been no fresh trigger of any of the charging provisions of Regulation 10, 11, 12 of the Takeover Regulations after the Open Offer took place in 2004. Further the disclosure under Regulation 8(2) was not supported by other facts like increase in the number of directors appointed by the Acquirers or change in management in favour of the Acquirers, change in shareholdings’ or any amendment or rescinding of shareholders agreement or any other material change, which could have actually given effect to

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acquisition of control leading to such a disclosure being made. Hence in such circumstances, acquisition of control by the Acquirers post Open Offer cannot be established.

FINDINGS OF ADJUDICATING OFFICER

In light of the issues raised, the Adjudicating Officer was appointed under the provisions of Rule 5 of SEBI (Procedure for holding inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 read with Section 15 I of SEBI Act, 1992 and he concluded that declarations under Regulation 8(2) of the Takeover Regulations are merely an expression of the state of affairs and they do not effect acquisition of control by the Acquirers until and unless it is coupled with some definitive and factual changes which would entail such a disclosure leading to acquisition of control.

In the instant case, since there was no substantial evidence on record to establish the fact that the Acquirers acquired control over the Target Company subsequent to the Open Offer, it was held that they did not violate Regulations 12 and 14(3) of the Takeover Regulations.

ANALYSIS

Through this order, it has been made clear that a mere disclosure of acquirers in ‘promoter group’ category cannot provide ample credence to the question of acquisition of control under Regulation 12 unless it is coupled with factual and definitive changes entailing change in control.

1 Regulation 8(2) of the Takeover Regulations states that a promoter or every person having control over a company shall within 21 days from the financial year ending on March 31 as well as on the record date of the company, for the purposes of declaration of dividend, disclose the number and percentage of shares or voting rights held by him and by persons acting in concert with him in that company, to that company.

2 The shares of the Target Company are listed on the Bombay Stock Exchange and its total paid up equity voting capital as on December 31, 2004 was 1,49,68,321 shares.

3 Regulation 12 of the Takeover Regulations states that irrespective of whether or not there has been any change in the shares or voting rights in a company, no person shall acquire control over the target company unless such person makes a public announcement to acquire shares in accordance with the Takeover Regulations

4 According to clause 35 of the Listing Agreement, the companies are required to file certain details (including shareholding pattern) with the stock exchange on a quarterly basis, within 21 days from the end of each quarter.

5 Regulation 14(3) of the Takeover Regulations states that the public announcement referred to in Regulation 12 shall be made by the merchant banker not later than 4 working days after any changes are decided to be made as would result in acquisition of control over the target company.

6 The show cause notice was issued pursuant to Rule 4(1) of SEBI (Procedure for holding enquiry and imposing penalties by Adjudicating Officer) Rules, 1995.

- Harshita Srivastava, R. Vaidhyanadhan Iyer & Nishchal Joshipura

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