

M&A Hotline

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SEBI CLARIFIES ON TIME GAP BETWEEN TWO BUY BACKS

In a recent informal guidance issued by Securities and Exchange Board of India (“SEBI”) to Supreme Petrochem Ltd (“Company”), SEBI has clarified that the 365 days cooling off period applicable between two buy backs under section 77A of the Companies Act, 1956 (the “Act”) is applicable only when two successive buy backs are authorized by Board.

INFORMAL GUIDANCE SOUGHT BY THE COMPANY

The Company had undertaken buy back of 1.56% of the paid up share capital pursuant to a Board resolution. The Company vide its letter dated December 24, 2009, requested SEBI, for an informal guidance under the SEBI (Informal Guidance) Scheme, 2003 with respect to the following issues:

- (a) Whether the 365 days period is to be reckoned from the date of public announcement of previous buy back or from the date of the opening of the previous buy back offer or from any other date? and
- (b) Whether the Company can undertake a second buy back by authorization through a special resolution passed in a general meeting of the shareholders, even though 365 days have not lapsed since the previous buy back offer made pursuant to a Board resolution?

SEBI'S RESPONSE

Based on the representations made by the Company, SEBI's views were as follows:

Response to (a): The second proviso to section 77A(2)(b) prescribes that the second 'offer of buy back' can only be made after expiry of 365 days reckoned from the date of the preceding 'offer of buy back'. In this context, SEBI clarified that the period of 365 days has to be reckoned from the date of *completion* of the preceding offer of buy back made pursuant to the Board resolution.

Response to (b): As mentioned earlier, a second 'offer of buy back' can only be made after expiry of 365 days reckoned from the date of the preceding 'offer of buy back'. Explanation to section 77A(2)(b) defines 'offer of buy back' to mean offer of such buy back made pursuant to a Board resolution. Accordingly, the cooling off period of 365 days is stipulated when two successive offers of buy back are authorized by resolution of the Board. Since the Act does not prescribe any cooling off period when the first offer of buy-back is made pursuant to a Board resolution and the second offer of buy-back is made pursuant to the special resolution passed by shareholders, the cooling off period of 365 days is not applicable to such subsequent shareholders approved buy back, subject to the total amount bought back in one financial year being less than or equal to 25% of the total paid up equity capital and free reserves of the company.

ANALYSIS

Section 77A(2)(b) of the Act prescribes that no offer for buy back can be made within 365 days of the preceding offer for buy back. However, there was no clarity on whether 365 days should be reckoned from the date of opening or closing date of the preceding offer or any other date. SEBI has provided clarity on this ambiguity that the 365 day period should be reckoned from the date of completion of the preceding offer for buy back. Under Section 77A of the Act, a company can buy back its shares upto 10% in one financial year with a Board resolution and upto 25% with a special resolution passed by the shareholders. SEBI, through this informal guidance, has also clarified that the cooling off period of 365 days shall not apply when a board approved buy back is followed by a shareholder approved buy back.

CONCLUSION

SEBI had earlier in January 2009, in case of informal guidance for Mastek Limited, clarified that 365 day cooling off period is not applicable if a shareholder approved buy back under section 77A(2)(c) is followed by a Board approved buy back under section 77A(2)(b) subject to the restriction that the buy back of equity shares in any financial year shall not exceed 25% of the company's paid up capital in that financial year. SEBI has once again reiterated its earlier stand in this informal guidance and held that 365 day cooling off period is applicable only in case of two successive Board approved buy backs.

- Vedant Shukla, Sadia Ashraf, Nishchal Joshipura

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