

M&A Hotline

February 15, 2011

CAN CREEPING ACQUISITIONS UNDER REGULATIONS 11(1) AND 11(2) BE MADE IN THE SAME FINANCIAL YEAR?

On February 07, 2011, the Securities and Exchange Board of India (“SEBI”) issued an informal guidance¹ to M/s. Cera Sanitaryware Limited (“Company”) under the SEBI (Informal Guidance) Scheme 2003 (“Guidance”) on Regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997, (the “Takeover Regulations”). In this informal guidance, SEBI has dealt with issue of whether promoters of the Company (“Promoters”) can avail the creeping acquisition limits under Regulation 11(1) and Regulation 11(2) in the same financial year without having to make an open offer under the Takeover Regulations.

FACTUAL BACKGROUND

- Promoter shareholding in the Company as on September 30, 2010 was 53.70% of the issued and paid up equity share capital of the Company (“Share Capital”).
- Promoters intend to increase their shareholding in the Company from 53.70% to 60% in the financial year 2010-2011 without making an open offer under the Takeover Regulations, in the following manner:
 - Increase the shareholding from 53.70% to 55% through creeping acquisition of 1,64,220 equity shares of the Company (1.30% of the Share Capital) under Regulation 11(1) in the financial year 2010-2011;
 - Further, increase the shareholding in the Company from 55% to 60% through creeping acquisition of 6,32,744 equity shares of the Company (5% of the Share Capital) under Regulation 11(2) in the same financial year.

QUERY POSED TO THE SEBI

Can Promoters exhaust the creeping acquisition limits under Regulations 11(1) and 11(2) in the same financial year?

SEBI'S RESPONSE

SEBI has expressly clarified that the creeping acquisition limits of 5% each, under Regulations 11(1) and 11(2) of the Takeover Regulations are two distinct and mutually exclusive limits under two separate regulations of the Takeover Regulations. Hence, Promoters are permitted to avail and exhaust the creeping acquisition limits under Regulations 11(1) and 11(2) in the same financial year as two different transactions subject to fulfillment of other conditions prescribed under the Takeover Regulations.

ANALYSIS

Regulation 11(1): Any acquirer whose current shareholding in the target company is between 15% and 55% is permitted to acquire additional shares / voting rights entitling the acquirer to exercise up to 5% of voting rights of the target company, **in any financial year** ending March 31st without making an open offer. However, an open offer should be made in case the proposed acquisition exceeds 5% of the voting rights of the target company in any financial year.

Regulation 11(2): Any acquirer whose current shareholding in the target company equals to or exceeds 55% but is less than 75% of the shares / voting right of the target company can acquire additional shares / voting rights only after making an open offer under the Takeover Regulations. However, such acquirer can acquire additional shares or voting rights entitling him up to 5% voting rights in the target company, without making an open offer, if:-

- such acquisition of 5% is made through open market purchase in normal segment on the stock exchange but not through bulk deal / block deal / negotiated deal / preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buyback of shares by the target company; and
- post acquisition shareholding of the acquirer shall not increase beyond 75%.

The creeping acquisition limit of 5% under Regulation 11(1) is available to an acquirer in every financial year ending March 31st while the creeping acquisition limit of 5% under Regulation 11(2) is available to an acquirer only once in the life time of the target company. Creeping acquisition under Regulation 11(1) can be made by the acquirer under any mode including a preferential allotment of shares. However, creeping acquisition under Regulation 11(2) is conditional upon the mode of acquisition, as provided above.

CONCLUSION

- *Creepers under Regulations 11(1) and 11(2) can be availed in the same financial year as two distinct transactions*

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The language of the second proviso to Regulation 11(2)² clearly provides that notwithstanding any acquisition made by the acquirer under Regulations 10 or 11(1), the acquirer shall be entitled to make creeping acquisition up to 5% of voting rights in the target company under Regulation 11(2) subject to fulfillment of the prescribed conditions. Hence, it is clarified that the creeper under Regulation 11(2) is an independent right of the acquirer irrespective of any earlier acquisition made under Regulation 10 or Regulation 11(1) of the Takeover Regulations provided the acquirer fulfills the conditions under Regulation 11(2).

Creeping acquisition limits of 5% each, under Regulations 11(1) and 11(2) are two distinct and mutually exclusive limits to which an acquirer is entitled to at two different stages of shareholding in the target company. Therefore, if in a financial year, the acquirer exhausts the limit under Regulation 11(1) and due to such acquisition, acquirer becomes eligible for creeping acquisition window under Regulation 11(2) then the acquirer can further exhaust the limit under Regulation 11(2) also in that very financial year but as a separate transaction.

· *Creepers under Regulations 11(1) and 11(2) cannot be availed under the same transaction*

Acquirer may not be allowed to avail the creeping acquisition limits under Regulations 11(1) and 11(2) under the same transaction. What would constitute a single or same transaction is case specific and shall vary from acquisition to acquisition depending upon the facts and circumstances of each case. Typically, the acquirers may not be allowed to club the creeping acquisition limits under Regulation 11(1) and Regulation 11(2) in one acquisition. Therefore, the acquirers may structure the acquisitions under Regulation 11(1) and Regulation 11(2) in two different tranches. Acquisition under Regulation 11(1) should clearly precede the acquisition under Regulation 11(2) and each of the acquisitions should be distinguishable from each other.

In light of the abovementioned considerations, SEBI permitted the Promoters to exhaust the creepers under Regulations 11(1) and 11(2) in the same financial year, as two distinct and separate transactions to increase their aggregate shareholding in the Company from 53.70% to 60%.

SEBI had earlier clarified this legal proposition through an informal guidance dated **September 09, 2010** issued to Kamdhenu Ispat Limited (“**KIL**”) whereby SEBI had permitted the promoters of KIL to make creeping acquisitions under Regulation 11(1) and Regulation 11(2) in the same financial year 2010-2011 without making an open offer under the Takeover Regulations.

- Arun Scaria & Vaidhyadhan Iyer

¹ <http://www.sebi.gov.in/informalguide/Cera/cerasebiletter.pdf>

² “Provided further that such acquirer may, **notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11**, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him up to five per cent (5%) voting rights in the target company subject to the following conditions”

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