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SECURITIES AND INVESTMENT REGULATIONS

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Shortening the Listing Timeline for Public Offers

To reduce the time taken for listing of equity shares and convertible securities in an IPO, from 12 days to 6 days, SEBI had recently amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. In furtherance of this, SEBI has provided an indicative timeline of activities as per the revised schedule in its circular dated November 10, 2015.

The major change is in relation to the mode of payment of subscription monies in public offers. Previously, acceptance of physical cheques led to significant delays in the processing of bids and consequently delayed the finalisation of the basis of allotment. In addition, physical cheques were also misused to support fraudulent applications in order to generate artificial demand for public offers. SEBI has now done away with the practice of accepting cheques for subscribing to IPOs and has made it mandatory for all investors to use the Application Supported by Blocked Amount (ASBA) facility for paying subscription monies. Under the ASBA facility, the necessary funds are blocked in the investor's bank account to ensure successful payment upon allotment, after which, the funds are either transferred to the issuer or released in the investor's account. This has shortened the listing timeline by 5 days. If the date of closure of an issue is taken to be "T", the basis of allotment would now be prepared in T+3 days, as opposed to the earlier time of T+8 days. The ASBA mechanism also eliminates the need for refunding money in case of oversubscriptions or if the issue fails. This has shortened the timeline by another day.

In addition to shortening the timeline, SEBI has also widened the catchment area for public offers by enabling various additional classes of intermediaries, such as share transfer agents and depository participants, to collect public offer applications. This would potentially make public offers more accessible and increase retail participation.

The Delisting Price of Essar Energy Holdings Limited

SEBI passed an order on November 06, 2015, in relation to the ongoing delisting of Essar Energy Holdings Limited. Essar is in the process of delisting and had obtained the necessary approvals of its board of directors and of its public shareholders by way of special resolution. However, there were some delays in obtaining the green light from the stock exchanges and SEBI. As a result, Essar required relaxation from the strict enforcement of certain provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009, such as, the requirement to make final delisting application with the stock exchange within one year of the special resolution of the public shareholders, the requirement to make a public announcement within one day of receiving in-principle approval from the stock exchanges, etc. Essar made an application to SEBI seeking such relaxation.

In the meantime, SEBI received complaints from certain minority shareholders alleging that the promoters had entered into an agreement with an entity named OJSC Rosneft Oil Limited to sell 49% of their stake in Essar after the completion of the delisting. The concern was that the promoters may unfairly benefit from the stake sale at a high price without factoring the sale into the calculation of the delisting price, thereby affecting the interests of minority shareholders. SEBI sought Essar's reply to these complaints before they considered the company's application seeking relaxation.

While the promoters admitted to having entered into a non-binding agreement, they stated that the agreement was silent on financial details such as the price. Despite this, the promoters voluntarily undertook to pay any difference in price between the final delisting price, arrived at pursuant to the reverse book building process, and the price per share received by the promoters pursuant to the completion of the Rosneft transaction, to the tendering shareholders, provided the transaction takes place within one year of the delisting. SEBI, observing that the one year time limit is not in the interest of shareholders, granted the relaxation sought by Essar subject to the payment of the price difference as discussed above irrespective of when the transaction with Rosneft takes place.

This order may have successfully shielded minority shareholders from the ills of information asymmetry between them and the promoters. However, the requirement on the promoters to pay the difference in delisting price and sale price to the tendering shareholders, irrespective of when the Rosneft transaction takes place, seems onerous.

Review of FDI Policy

The Government released a press note on November 10, 2015 outlining significant reforms in the Consolidated FDI Policy Circular of 2015 and the DIPP issued another press note on November 24, 2015 to operationalize such changes in the FDI Policy with immediate effect. In private sector banking, a composite cap has been implemented by removing the sub-limits for FDI and FII, thereby allowing FIIs/FPIs/QFIs to invest upto the sectoral limit of 74%, provided there is no change of control and management of the investee company. The existing foreign portfolio limit of 49% was hindering fund raising plans of private sector banks. The new rule will provide considerable flexibility and help small finance banks and payment banks to tap the overseas market.

Some of the other significant reforms brought in by the press note are as follows:

- FDI upto 100% has been allowed in limited liability partnerships, which would provide considerable ease in establishing or investing in LLPs.
- FIPB approval is not required for investment in automatic route by way of swap of shares.
- Investment by companies / trusts / partnerships owned and controlled by NRIs on non-repatriation basis will now be treated as domestic investment.
- The monetary limit for FIPB to approve FDI proposals has been raised from Rs 3,000 crore (Rs. 30 billion) to Rs 5,000 crore (Rs. 50 billion), for facilitating faster approvals.
- Other broad-based reforms pertaining to fifteen sectors, including news broadcasting, plantation, civil aviation, defence, construction development, retail have been made.

The reforms seek to simplify, smoothen and rationalize the FDI process with a view to boost the ease of doing business in India. Liberalizing the FDI regime wherein a greater number of activities are under the automatic route will send a positive signal to global investors, accelerate economic growth and supplement domestic capital.

The Revamped External Commercial Borrowings (ECB) Framework by the RBI

The RBI has recently notified the revised ECB framework with an aim to make the ECB regime more liberal, with most ECBs now coming under the automatic route, fewer restrictions on end use, higher all-in-cost ceiling to facilitate viable and sustainable long term foreign currency borrowings for Indian borrowers.

In relation to ***rupee denominated ECBs***, the revised ECB framework has adopted a more liberal regime where the currency risk is borne by the lender. Earlier, RBI had issued detailed guidelines for issuing Indian rupee denominated bonds overseas. Under the revised ECB framework, Indian rupee denominated ECBs have also been brought in line with the circular dealing with rupee denominated bonds.

The RBI has expanded the list of ***eligible ECB lenders*** to include foreign insurance companies, pension funds and sovereign wealth funds. Under the revised framework, borrowers may avail medium term foreign currency denominated ECB with minimum average maturity of 3-5 years, long term foreign currency denominated ECB with minimum average maturity of 10 years and Indian rupee denominated ECB with minimum average maturity of 3-5 years. Overseas branches / subsidiaries of Indian banks have been forbidden from lending to Indian borrowers as far as long term foreign currency denominated ECB and medium term Indian rupee denominated ECB loans are concerned.

The revised framework allows ***change of currency of ECB*** from one convertible foreign currency to any other convertible foreign currency, including the Indian rupee. However, change of currency from INR to any foreign currency is not permitted. The revised framework has also narrowed down the ***list of activities for which ECB cannot be availed*** to just five, viz. investment in real estate activities, capital markets, use of proceeds for equity investment domestically, on-lending to other entities with any of the above objectives and purchase of land.

The revised framework not only helps corporate India avail foreign loans in an easier manner, there are also fewer regulatory hurdles and reporting requirements that need to be complied with by these entities. The onus on compliance with the revised framework has been put on the borrowers themselves with the Authorized Dealer banks acting as watchdogs to ensure that the regulations are complied with. Corporate India is sure to embrace this initiative with open arms.

Scope of Aggrieved Person Clarified

The High Courts of Andhra Pradesh and Bombay, in 2011, approved the scheme of arrangement and amalgamation between Nagarjuna Fertilizers & Chemicals Limited and certain other entities, and the company was granted 'in-principle approval' by the stock exchanges for listing of its shares. However, before the company could proceed with the listing, it required waiver/ relaxation of the conditions set out under Rule 19 (2) of Securities Contracts (Regulation) Rules, 1957, and it made an application to SEBI, through the stock exchanges, seeking such relaxation. Instead of passing any order in this regard, SEBI filed an application before the High Court of Bombay seeking review of the order approving the Scheme on the grounds that the company deliberately and wilfully suppressed vital and material facts while obtaining the High Court's approval.

Aggrieved by this, the company filed an appeal before SAT under Section 15T of the SEBI Act. However, SAT was inclined to keep the matter pending until the High Court came to a conclusion. The High Court finally passed an order dismissing SEBI's application holding that the company had not suppressed any information and that SEBI had no locus to intervene in a petition filed for a scheme of arrangement. The company approached SAT again, armed with the order of the High Court, requesting them to direct SEBI to pass appropriate orders. Before SAT, SEBI submitted that the appeal is not maintainable as they had not passed any order that would warrant an appeal. SEBI further submitted that it had filed an appeal before the Division Bench of the High Court and that SEBI cannot be compelled to pass an order until the appeal was disposed of.

On considering the rival submissions, SAT concluded that, once the court which sanctioned the Scheme has rejected SEBI's contentions, SEBI cannot again refuse to pass an order on the applications submitted by the company merely because it has filed an appeal before the Division Bench. In regard to maintainability of the appeal, SAT held that section 15T allows any person who is aggrieved by an action or inaction on the part of SEBI to file an appeal before SAT. It observed that acceding to SEBI's contentions would leave persons aggrieved by SEBI's inaction remediless. Through this order dated October 30, 2015, SAT directed SEBI to pass an order on the application seeking relaxation submitted by the company within the stipulated time. This is a landmark decision by SAT which has shed some clarity on the scope of Section 15T of the SEBI Act.

About Us

Finsec Law Advisors is a financial sector law firm which provides regulatory advice and assistance focusing on the securities, investments and banking industry.

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