Article

SEBI makes amendment to Takeover Code to iron out difficulties in the Regulations

SEBI (SAST) (Amendment) Regulations, 2013

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Primer

SEBI has vide notification no. No. LAD-NRO/GN/2012-13/36/7368 dated March 26, 2013[1] brought in amendments to the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [the Regulations]. The amendments seek to bring clarity to certain existing provisions apart from introducing new provisions. Clarification has been provided in relation to time period of making public announcement in case of passive acquisitions in case of buy-back, disclosure requirements. Provision has been amended in relation to time period for making public announcement in case of preferential allotments. It is apparent that the amendments have been done only to bring in clarifications so as to remove ambiguity to the existing provisions, though we cannot say that all the requisite clarifications have been made. On one hand where the regulator has sought to clarify, on the other hand few amendments have also brought in certain queries and confusions. We discuss and analyse the amendments below.

Amendments

In case of acquisition pursuant to buy-back [Regulation 10 (3), Reg 10 (4) (c), Reg 13 (2) (h)]

Earlier, if the voting rights of a shareholder go beyond the prescribed threshold limit on account of buyback by the target company, the open offer requirement will not be triggered if voting rights are brought below the threshold limit within ninety days **from the date on which the voting rights so increase.** The regulation has now been amended to mean that the period of ninety days will reckon from the date of closure of the buy-back. The amendment now reads as:

> "An increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back of shares ***by the target company[inserted]*** shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in sub-regulation (1) of regulation 3 within ninety days from the date ***of the closure of the said buy-back offer (deleted-on which the voting rights so increase)***." [10 (3)]

Further, the second proviso of the sub-regulation (4) has been amended to give effect to the above change in sub-regulation 3. Exemption is to be provided on the condition that the shareholding is reduced within the threshold within the period of 90 days from ***the date of closure of the buy-back offer*** below the level at which obligation to make an open offer

[1] http://www.sebi.gov.in/cms/sebi_data/attachdocs/1364298060536.pdf

would have been attracted instead of within 90 days from the date on which the voting rights increase. [Second proviso to Reg 10 (4) (c)]

In case the shareholding is not brought below the trigger limit then the public announcement should be made shall be made not later than the ***ninetieth day from the date of closure of the buy-back offer by the target company.*** [Reg 13 (2) (h)]

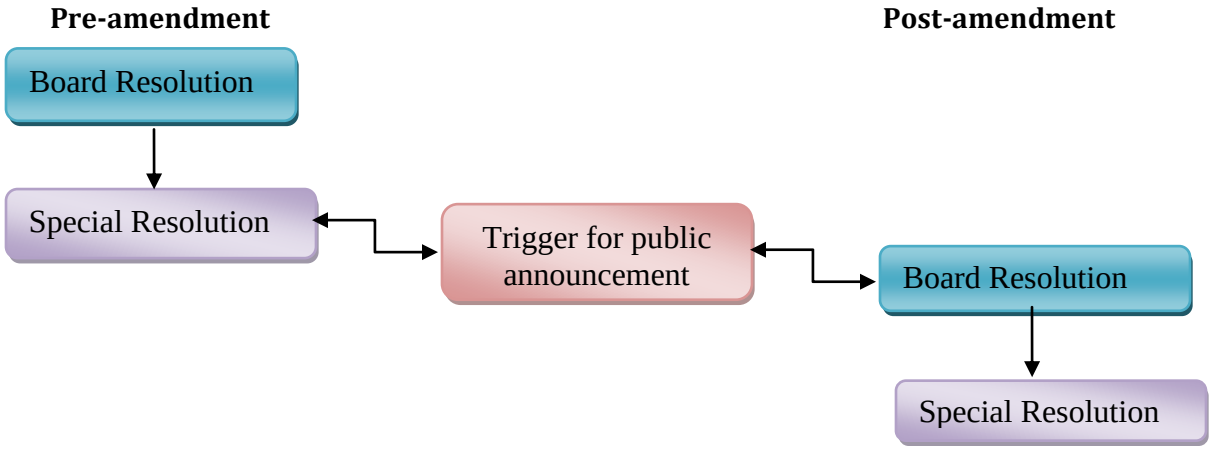
Through the above substitutions SEBI has sought to bring in clarity to the language of the provision of existing provisions.

In case of acquisition pursuant to preferential issue/preferential allotment [Regulations 13 (2) (g), 22 (2A), 23]

Regulation 13(2) (g) of the Regulations provides that if the open offer obligation is triggered pursuant to the allotment of shares on preferential basis, then public announcement shall be made on the date on which special resolution is passed for allotment of shares under sub-section (1A) of section 81 of the Companies Act, 1956.

However, there is sufficient time gap between the date of passing of resolution by the Board and the special resolution to be passed. Now SEBI has clarified that the relevant date for the purpose of triggering public announcement obligations will be the date of passing of the board resolution authorizing such preferential issue. Hence, the same may have impact on the market price of the shares and the transaction in substance. In addition, pricing of offer shall also be affected as minimum offer price is calculated considering the public announcement date.

A graphical comparison of situation pre and post amendment:



It is important to analyse the ambiguity in this provision. The preferential issue will be approved only through the special resolution, however, with the amendment it is now proposed that the public announcement will be made at the time of approval by the Board itself. Though unlikely but what if the general meeting turns down such a proposal? Will the public offer be taken back? What happens to the transaction in between the board resolution and the general meeting date? This ambiguity is much perpetuated by the next amendment discussed below.

Withdrawal of the public offer [Regulation 23]

Regulation 23 provides for situation for withdrawal of the public offer in certain cases. It is now proposed vide proviso to sub-regulation (1) (c) that that an acquirer shall not withdraw an open offer pursuant to a public announcement made under clause (g) of sub-regulation (2) of regulation 13, even if the proposed acquisition through the preferential issue is not successful.

So in other words after passing of the resolution by BoD and making the public offer [pursuant to Regulation 13 (2) (g)], in case the issue is not successful due to any reason, the offer will not be withdrawn. This is surely vague as to what happens to the entire transaction. Does the same become valid or goes void? This provision is sure to create chaos and SEBI should surely come up with some clarification on the same. Critically speaking, the purpose of such provision remains inexplicable and unwarranted.

Acquisition through preferential allotment and stock exchange mechanism [Reg 22 (2A)]

Sub-regulation 2A has been inserted in Regulation 22 that provides an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, other than through bulk deals or block deals, subject to such shares being kept in an escrow account and the acquirer not exercising any voting rights over such shares kept in the escrow account. Further, these shares can be transferred from the escrow account to the name of the acquirer after the expiry of 21 working days from the date of the detailed public statement, provided the acquirer deposits 100 percent of the consideration payable in cash in the escrow account.

Unlike the earlier requirement, it is now an additional requirement that the shares should also be kept in escrow account.

Primer

Public announcement in case of acquisition by multiple modes

There was no clarity as regards making of the public announcement in case of acquisition by combined modes. In order to bring in transparency a new sub-regulation 2A under Regulation 13 has been inserted that provides that where the open offer obligation is triggered pursuant to an agreement or otherwise in combination of any modes of acquisition, the 'relevant date' for making the public announcement shall be the earliest date on which obligation is triggered; such as in case where there are both for example market purchase as well as conversion of securities at close dates attracting trigger. In such cases, the earliest date shall be the relevant date for making of public announcement.

Disclosure requirements for change in holding under the Regulations

Sub-regulation 2 of Regulation 29 has been amended to the effect that the change of 2% would be calculated from the last disclosure made by the acquirer. It has been further clarified that the disclosure in respect of change in shareholding is required to be given even if the shareholding of acquirer falls below 5%. The language of existing provision was not clear and some could have said that the disclosure is not required in case of disposal of shareholding aggregating to 2% or more but where the shareholding fell below 5% after such disposal. . With this clarification it is clear that inspite of shareholding falling below 5%, disclosure requirements get attracted.

Conclusion

The amendments of SEBI as discussed are more in the nature of clarifications. After introduction of all together a new code for takeover and acquisitions in the year 2011, this is the first amendment circular issued by SEBI and seems that amendments are based on experiences so far on the new code and to make the ambiguous language of certain regulations clearer now. For example, Regulation 29(2) has been replaced with more clear language on the basis of SAT's judgment in *Bhavesh Pabari v. SEBI (2012) 24 Taxman 64 (SAT).*