



Date: 04 February 2020

To,
Mr. Rajesh Gujjar
General Manager
Securities and Exchange Board of India

Sub: Representation on the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (“Regulations”)

Dear Sir,

The CFO Board is a group of senior finance professionals in the country to share their knowledge/ experience and to deliberate on various regulatory developments affecting the industry. The Board acts as a sounding board between the government and industry to highlight the concerns and suggestions to improve the regulatory framework for advancement of industry and commerce.

We understand that, SEBI has floated a draft paper for amending the following provisions of the Regulations:

- a. Completion of acquisition through bulk and block deals during the open offer period
- b. Depositing 100% escrow in case of open offers made pursuant to indirect acquisitions
- c. Payment of interest in case of delay in open offers

While this is a welcome step from SEBI with respect to proposing the aforesaid amendments especially on allowing consummation of transaction using the bulk and block deal mechanism, there are still certain areas which need to be reviewed for improvement.

In the current form, the Regulation appears to be more target company supportive than acquirer friendly. In this context, The CFO Board has made suggestions on payment of interest in case of delays and other areas of concern under existing SAST regulations.

It is our humble request that the suggestions made in this whitepaper be considered favourably. We would be glad to present our views in person if an opportunity of such meeting is granted by your office.

Warm regards,
The CFO Board

A) Time taken for Regulatory approvals:

One of the constraints is receiving approval from SEBI within the prescribed time period of 15 days.

Usually, SEBI sends standard questionnaire in the initial 15 days period. Thereafter, if there are queries on the replies given by the acquirer, a fresh timeline of 5 working days for each such clarification is taken. This delays the SEBI approval process.

We observe that SEBI tends to synchronise its approval with other regulatory approvals like the one from Competition Commission of India.

Competition Commission of India (CCI) takes anywhere between 30 days to 210 days to give its order, depending on the complexity of the transaction.

Suggestion:

- 1) SEBI should approve the draft offer document within 30 days of filing (including clarifications) without waiting for other statutory approvals.
- 2) CCI should consider the following timelines for granting approval viz:
 - a) Within 30 days for transactions not having any adverse effect on competition
 - b) Within 90 days in all other cases.

B) Standstill Obligations of the Target Company:

Much against the spirit of “stand still” obligations, we observe that the Target Company announces capital restructuring decisions like buyback/payment of Special Dividend etc. the midst of an Open Offer Period. This would cloud the judgement of shareholders as to whether they should tender shares in the open offer or not. Presently, the restriction is for the Target Company to fix any record date for corporate actions between three working days prior to the commencement of the tendering period and until expiry of the tendering period. This covers only a period of approx. 18-20 days during the Offer Period. To make the stand still provisions more effective, no capital restructuring decision is to be announced post open offer announcement. Secondly, announcement of corporate actions like a buyback is not prohibited, only its implementation is prohibited. The Target Company can announce and get the shareholders approval during the Open Offer period and can perform the actual implementation of buyback after the Offer Period.

Employees of the Target Company/ its group company being awarded out of turn special bonuses or increments, after the open offer is made, may affect the valuation. Such actions are to be prohibited post announcement of the open offer.

There could be possibilities of resignation of Key Managerial Personnel (KMPs) of the Target Company before the acquirer has taken actual control. Such separation of KMPs during the period of open offer should not be permitted.

Suggestions:

- 1) Directors of Target Company shall not be allowed to resign from the Board of Directors from the date of Public Announcement until the completion of the takeover process.
- 2) Capital Restructuring should not be allowed during the Offer Period. For eg: presently the term “implement buyback” is vague since companies can announce the Buyback and this may affect investor interest who wish to tender in the offer announced by the Acquirer
- 3) Special Corporate Actions like special dividend which is not in the ordinary course of business and Special Bonuses to employees to utilise the surplus cash of the target company would defeat the interests of the Acquirer and should not be undertaken during the Offer Period.

C) Offer tendering period:

The tendering period of ten working days for the open offer process is too long. It is apparent that the investors would not tender shares in the initial period as the shares end up being locked in once the same are tendered. As a practice, major chunk of shares tendered are at the end of the tendering period.

Suggestion:

The tendering period should be reduced to three working days as in the case of an IPO.

D) Shareholders having vested interests:

SEBI may be misguided by complaints lodged by some shareholders (including minority shareholders) who have vested interest in the Company not being acquired. This may delay the acquisition process.

Suggestions:

SEBI should have a process for weeding out frivolous complaints. It should only take up complaints which allege violation of any law including SEBI (SAST) Regulations with some preliminary evidence of the same.

Shareholders having vested interest, who publicly support the outgoing promoters during the period of open offer, should be treated as Persons Acting in Concert, triggering a competing offer.

E) Advice by Merchant Bankers to the Independent Directors of the Target Company:

The Independent Directors are required to provide their written reasoned recommendation to the shareholders of the Target Company with respect to the open offer.

Suggestions:

Presently, the recommendations are subjective. Hence, a structured format based on prescribed criteria for the Independent Director Committee to evaluate should be provided.

The criteria could cover areas viz. price, prospects of the offer, acquirer's status, advantages/disadvantages to the target company, etc. Under the current provisions of SAST, the recommendations of Independent Directors are required more to comply with Regulations than to provide reasoned recommendations to the shareholders of the Company being acquired.

F) Definition of Persons Acting in Concert (PAC):

The definition of PAC requires amendment as there could be few shareholders who by their conduct during the offer process try to influence the outcome of the offer.

Suggestions:

- 1) There can be cases of Company having subsidiaries engaged in mutual fund business. The Mutual Fund manager takes independent investment decisions on the open offer proposal and hence mutual fund subsidiaries should be excluded from the definition of PAC.
- 2) Any investor openly supporting the promoter should be treated as Persons acting in concert and in the event the collective holding is 25% or more of the total shareholding, they must be compelled to provide a competing open offer or else be penalised for violation. One or two large investors colluding with the promoters can derail the acquisition process if the oversight over such developments is less than robust.

G. Payment of Interest in case of delay in open offers:

The draft discussion paper provides to charge an interest of 10% p.a on acquirers for delay in case of open offers due to reasons, including but not limited to the following:

- a. Inter-se Dispute amongst parties to the agreement
- b. Valuation disputes
- c. Investor complaints
- d. Delay in tendering process
- e. Delay in making payment by acquirer upon tendering the shares
- f. Various stages of litigation

There could be also situations of delay happening from the Authorities side, SEBI, CCI, etc. which needs to be addressed.

Suggestions:

- 1) Interest should not be charged in case of events which are outside the control of the acquirer eg: investor complaints or frivolous litigation. Corporate Restructuring exercises may not be welcome to some section of the investors who may make efforts to derail the exercise by lodging frivolous complaints or filing suits, which may be time consuming to attend thereby leading to a delay.

- 2) There should be a system to ensure that there is no delay from the Authorities (SEBI, CCI), once the required information is received by them. The suggestion is that the maximum timelines for SEBI and CCI made in item A above, should be enforced.