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AMENDMENTS TO SEBI MASTER CIRCULAR ON SCHEMES OF ARRANGEMENT BY LISTED ENTITIES

19 November 2021

The Securities and Exchange Board of India (SEBI) has issued circulars dated 16 November 2021 (Ref: SEBI/HO/CFD/DIL2/CIR/P/2021/0000000657) and 18 November 2021 (Ref: SEBI/HO/CFD/DIL2/CIR/P/2021/0000000659 (hereinafter together referred to as "**2021 Amendment Circulars**"), amending certain provisions of the SEBI Master Circular dated 22 December 2020 (Ref: SEBI/HO/CFD/DIL1/CIR/P/2020/249) (Master Circular), which is a compilation of operational circulars issued by SEBI dealing with schemes of arrangement by listed entities.

Background

SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations) *inter alia* provides that a scheme of arrangement/ amalgamation/ merger/ reconstruction/ reduction of capital, etc. (Scheme) to be presented to any court or tribunal should not in any way violate, override or limit the provisions of securities laws or requirements of the stock exchanges. It further requires a listed entity involved in a Scheme or desirous of undertaking a Scheme, to obtain a no objection letter from the stock exchanges before filing the Scheme with the relevant bench of National Company Law Tribunal.

Pursuant to the 2021 Amendment Circulars, SEBI has introduced certain additional requirements to be complied with by the listed entities while undertaking a Scheme. The amendments specified in the 2021 Amendment Circulars are aimed at ensuring that the recognized stock exchanges refer Scheme(s) to SEBI only upon being fully convinced that the listed entity, is in compliance with SEBI Act, 1992, rules, regulations and circulars issued thereunder.

The amendments proposed in the 2021 Amendment Circulars will be applicable to all the Scheme(s) filed with the stock exchanges from 16 November 2021.

Amendments to the Master Circular are detailed below.

Para A.2.(b) of Part I of the 2020 Circular stands revised as follows:

Valuation Report as per Para (4) below; accompanied with an undertaking from the listed entity stating that no material event impacting the valuation has occurred during the intervening period of filing the scheme documents with Stock Exchange and period under consideration for valuation

The listed entity involved in the Scheme will now be required to submit an undertaking to the stock exchanges specifying that, no material event has occurred during the intervening period of filing the Scheme documents with stock exchanges and period under consideration for valuation.

Typically, valuation report is obtained by listed entity, either on the day on which the Scheme is tabled before the audit committee/ board of directors of the listed entity or a couple of days prior to the date of meeting of the audit committee/ board of directors. Further, until now, no timeline was prescribed for filing the Scheme with the stock exchanges after approval to the Scheme by the board of directors of the listed entity.

However, recently, stock exchanges have issued circulars prescribing standard operating procedure (SOP) to be adopted by the listed entities for filing the application under Regulation 37 of the Listing Regulations¹. The SOP provides that, a listed entity, undertaking a Scheme, will have to submit all the documents with the stock exchanges within 15 (fifteen) working days from the date of the board meeting approving the Scheme. The SOP also requires the board of directors of the listed entity to consider the Scheme within 7 (seven) working days of the issuance of valuation report.

This newly introduced timeline under the SOP coupled with the aforesaid undertaking (to be provided by the listed entity) will provide reasonable assurance to the stock exchanges, to rely upon the consideration(s) mentioned under the valuation report, whilst reviewing the Scheme under Regulation 37 of the Listing Regulations.

Insertion of Para A.2.(j) of Part I of the 2020 Circular:

Declaration from the listed entity on any past defaults of listed debt obligations of the entities forming part of the scheme

The listed entity undertaking a Scheme will now be required to submit a declaration in relation to any past defaults of listed debt obligations of the entities forming part of the Scheme.

Insertion of Para A.2.(k) of Part I of the 2020 Circular:

No Objection Certificate (NOC) from the lending scheduled commercial banks/financial institutions/ debenture trustees

Along with filing application under Regulation 37 of the Listing Regulations, a listed entity undertaking a Scheme is now required to submit a no-objection certificate from its lending scheduled commercial banks/ financial institutions/ debenture trustees.

Interestingly, Sections 230 to 232 of the Companies Act, 2013 (Act) provides a threshold (majority in number representing 3/4th in value) for each class of creditors (which includes banks/ lending institutions/ debenture trustees) of a company to approve a Scheme. Further, if a particular class of creditors being at-least 90% (in value), consent to a Scheme, by way of affidavit, the requirement of holding their class meeting to approve the Scheme can be dispensed with by the National Company Law Tribunal.

Upon conjoint reading of the provisions of the 2021 Amendment Circulars and Sections 230 to 232 of the Act, the requirement of obtaining no-objection certificate from all the lending scheduled commercial banks/ financial institutions/ debenture trustees will also

¹<https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20211101-8> and https://static.nseindia.com/s3fs-public/inline-files/NSE_Circular_02112021.pdf

need to be complied with in addition to the requirement of obtaining consents as prescribed under Sections 230 to 232 of the Act.

Insertion of Para D to Part I:

1. The fractional entitlements, if any, shall be aggregated and held by the trust, nominated by the Board in that behalf, who shall sell such shares in the market at such price, within a period of 90 days from the date of allotment of shares, as per the draft scheme submitted to SEBI.

2. The listed company shall submit to the designated stock exchange a report from its Audit Committee and the Independent Directors certifying that the listed entity has compensated the eligible shareholders. Both the reports shall be submitted within 7 days of compensating the shareholders.

3. The Exchange shall ensure compliance of the above and non-compliance, if any, shall be submitted to SEBI on a quarterly basis.

4. Any misstatement or furnishing of false information with regard to the said information shall make the listed entity liable for punitive action as per the provisions of applicable laws and regulations.

Previously, there was no provision/ guidance by SEBI on the exact time period within which fractional entitlements were required to be sold by the trustee, appointed by the board of directors on their behalf, and proceeds thereof to be disbursed to the shareholders. This seemed to have created uncertainty in the minds of shareholders as to the timing for receiving the sale proceeds of fractional entitlements. Pursuant to the 2021 Amendment Circulars SEBI has plugged that uncertainty and introduced the timeframe to ensure that small shareholders receive proceeds arising out of fractional entitlements within the stipulated timeline.

Further, SEBI has cast additional responsibilities on the audit committee and the independent directors of the listed entity, who are required to monitor and report to the designated stock exchange that proceeds of fractional entitlements are distributed to eligible shareholders within the stipulated timeframe.

Comment

In order to protect and promote the interests of shareholders of listed entities SEBI has issued the 2021 Amendment Circulars. Introduction of statutory timelines along with undertakings/ declaration from the listed entity will effectively streamline and accelerate the process of implementing Scheme(s). However, the inter-play between the strict timelines prescribed for submitting the Scheme to the stock exchanges along with no-objection certificate from all the lending scheduled commercial banks/ financial institutions/ debenture trustees and time taken to obtain approval of said lenders/ debenture trustee could be problematic in practice.

Another important factor to be noted is that provisions of Section 230 of the Act specifically provide for the process of seeking consent of the creditors. It also prescribes that, only a creditor whose outstanding debt is 5% or more of the total outstanding debt of the company has a right to object to the Scheme. The newly introduced requirement of obtaining no-objection certificate from all the lending scheduled commercial banks/ financial institutions/ debenture trustees, empowers each and every scheduled commercial bank/ financial institution/ debenture trustee to object to the Scheme, regardless of the quantum of outstanding debt owed to it, effectively nullifying the statutory safeguard.

Further, it is to be noted that not every Scheme is an arrangement with the creditors and in such cases consent of creditors to such arrangement is not required. It will be

therefore interesting to see how the listed entities involved in the Scheme deal with such an onerous condition of requirement of obtaining no-objection certificate from lending scheduled commercial banks/ financial institutions/ debenture trustees, within 15 (fifteen) working days from the date of the board of directors approving the Scheme.

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