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SEBI'S MOVE TO SIMPLIFY SUCCESSION AND REDUCE UNCLAIMED ASSETS: AND THE NOMINEES ARE…

13 December 2024

On 28 November 2024, SEBI notified the Securities and Exchange Board of India (Depositories and Participants) (Third Amendment) Regulations, 2024, introducing a new Regulation 60A under Chapter VII of the SEBI (Depositories and Participants) Regulations, 2018 (SEBI DP Regulations). The amendment is an important milestone in introducing formal uniform nomination standards and smoothening the process for transmission of securities in case of death or incapacitation of beneficial owners. The changes are aimed to enhance investor protection by appropriately drawing from insights gained during the recent pandemic and incorporating safeguards and practices followed by the banking sector and depositories. Overall, they represent a move towards reduction of unclaimed assets in the Indian securities market.

Key provisions of Regulation 60A of the SEBI DP Regulations:

- **Nomination in case of demise:** Beneficial owners can now nominate a person to whom their securities will vest upon their demise.

- **Nomination for transaction authority in case of incapacitation:** The amendment mandates the participants to provide the beneficial owners an option to nominate a person who can transact on their behalf if they are incapacitated. While certain reliefs were available by way of a circular at the level of the depository, specifically permitting this as part of the regulation represents a significant change.

- **Joint account nomination:** All joint owners can now collectively nominate a person upon whom the securities held by them will vest, in the event of death of both the joint holders.

- **Depositories and participants not liable:** Depositories and participants are protected from liability for actions taken based on nominations made by beneficial owners.

Import of the amendment:

Allowing a nominee to operate an account of an incapacitated beneficial owner is beneficial from a macro-economic perspective and will further boost investor confidence. However, it is essential to implement additional standard operating procedures to prevent any potential misuse or abuse.

Also, it is ambiguous whether the amendment covers mental incapacity in addition to physical incapacity. If the scope does extend to mental capacity, it is unclear how this

provision should be reconciled with the Powers of Attorney Act, 1882 (POA Act). The POA Act governs power of attorney holders and specifically disallows an agent / attorney to act on behalf of an individual if such individual becomes mentally incapacitated (unlike the position taken in other countries, such as the UK). Here, if the nominee is standing in the capacity of an agent / attorney of the incapacitated beneficial owner (in respect of the demat account), it is imperative to reconcile this provision with the POA Act.

Comment

Dealing with assets and taking key decisions due to incapacity has been legislated upon in the fairly recent Mental Healthcare Act, 2017 as well as discussed in the Supreme Court's decision in *Common Cause v Union of India [AIR 2018 SC 1665]* – a decision on living wills. It remains to be seen whether the guidelines mentioned in these will apply to the actions of a nominee acting on behalf of an incapacitated account-holder.

The procedural details (which are effectively managed through circulars issued by SEBI and/or the depositories from time to time) would have to be read together with the amendments so that the changes are comprehensive and clear. The Master Circular for Depositories released by SEBI on 3 December 2024 could have been an excellent opportunity to align the legal position between the Master Circular and the SEBI DP Regulations. Further, the SEBI Press Release of 30 September 2024 contains some additional provisions regarding nomination – for instance regarding the increase of number of nominees in a demat account from 3 to 10. Had the provisions of this Press Release, which is not binding in itself, been reflected in the present amendment, it would have brought about better clarity on the nomination regime.

The SEBI Press Release also mentions amendments to the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, regarding nominations for investments in mutual fund units. These amendments, applicable to units not held in dematerialised form, will need to be incorporated into the regulations or relevant circulars. Separately, it is noteworthy that the number of nominees in a bank account is also sought to be increased from 1 to 4 through an amendment to banking laws – although this amendment is not yet enacted, it has been passed by the Lok Sabha and may soon see the light of day.

Significantly, it bears reiteration that the nominee of a demat account is not the heir or the beneficial owner of the shares – a position of law which was finally settled by the Supreme Court in *Shakti Yezdani v Jayanand Salgaonkar* (CA No. 7107 of 2017). A nominee is only a custodian or trustee of shares. After the depository participant transmits securities to the nominee, it is between the nominee and the heir (i.e., the legal heir who is entitled to the shares either under a will or as per intestate laws of succession) to re-align the ownership by an *inter se* transfer.

To avoid such a tedious process of transfers, which may or may not be contentious given family dynamics, it is always best to align the nominee with the heir. This can be best achieved by preparing a will where the testator can clearly specify who he/she wishes to bequeath the account to, i.e., who the heir will be.

Further, investors may also consider settling shares into a trust. This avoids any hassle of transmission post demise, making the question of nominee / heir moot. A robust succession-plan for trustees will ensure that there is always a trusted individual or entity who can manage and deal with the shares.

- *Arindam Ghosh (Partner); Aditi Sharma (Partner); Ipshita Bhuwania (Principal Associate); Jayantika Khanna (Principal Associate) & Vritika Lakhwani (Associate)*

For any queries please contact: editors@khaitanco.com

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