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Mergers and Acquisition Alert
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Exemption application under Regulation 11 (1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

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Background

- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulation) regulates the acquisition of shares of a listed company and/ or acquiring control over a listed company with effect from 22 October 2011.
- Regulation 11(1) of SAST Regulations, empowers SEBI to grant exemption from the obligation to make an open offer for acquiring shares. Further, as per Regulation 11(3) of SAST Regulations, the acquirer shall file an application with SEBI, supported by a duly sworn affidavit, giving details of the proposed acquisition and the grounds on which the exemption has been sought.
- By virtue of circular no. SEBI/HO/CFD/DCR1/CIR/P/2017/131 dated 22 December 2017, SEBI has provided a standard format for filing application under Regulation 11 of SAST Regulations in order to ensure uniformity of disclosures in such applications.
- Further, SEBI in the recent past has received multiple applications for exemption under Regulation 11(1) of SAST Regulation in relation to transfer of shares of listed company (held directly or indirectly through holding companies) by promoters to Trusts. Such applications were referred by SEBI to the panel of experts (Takeover Panel) as per Regulation 11 (5) of SAST Regulations.
- Apart from the procedural formalities for filing application under Regulation 11 of SAST Regulation, this circular also provides indicative guidelines that needs to be adhered to by the Trust and promoters for claiming exemption under Regulation 11 of SAST Regulation. The indicative guidelines are based on the exemptions granted by SEBI in past.
- This alert summarises the indicative guidelines prescribed by SEBI for claiming exemption on transfer of shares by promoters to Trust.

Highlights

The circular provides following indicative guidelines (based on previous approvals) as applicable to:

- **Trust**
  - Trust should be a mirror image of the promoters’ holdings and consequently, there should be no change of ownership or control of the shares or voting rights in the target company.
  - In case of dissolution of the Trust, the assets should be distributed only to the beneficiaries of the Trust or to their legal heirs.
  - Proposed acquisition of shares of the listed company by the Trust should be in accordance with the provisions of the Companies Act, 2013 and other applicable laws.

- There should be no layering in terms of trustees / beneficiaries in case of Trusts.
- Trust deed should not contain any limitation of liability of the trustees/ beneficiaries in relation to the provisions of the SEBI Act and all regulations framed thereunder.

- **Promoters/ beneficiaries**
  - Only individual promoters or their immediate relatives or lineal descendants should be the beneficiaries in the Trust.
  - The transferors are disclosed as promoters in the shareholding pattern filed with the stock exchanges for a period of at least 3 years prior to transfer (except for holding on account of inheritance).
  - Beneficial interest of the beneficiaries of the Trust should not be transferred, assigned or encumbered in any manner including by way of pledge/mortgage.

- **Trustees**
  - Only individual promoters or their immediate relatives or lineal descendants should be the trustees.
  - The trustees would not be entitled to transfer or delegate any of their powers to any person other than one or more of themselves.

- **Apart from the above-mentioned indicative guidelines, following undertakings should also form part of the Trust deed:**
  - Any change in the trustees / beneficiaries and any change in ownership or control of shares or voting rights held by Trust should be disclosed within 2 days to the concerned stock exchanges with a copy endorsed to SEBI for its record.
  - From SEBI perspective the ownership or control of shares or voting rights held by the Trust would be treated as vesting not only with the trustees but also indirectly with the beneficiaries.
  - The liabilities and obligations of individual transferors under the SEBI Act and the regulations framed thereunder would not change or get diluted due to transfers to the Trust.
  - The Trust should confirm, on an annual basis, that it is compliant with the exemption order passed by SEBI.
  - The Trust should get its compliance status certified from an independent auditor annually and furnish the certificate to the stock exchanges with a copy endorsed to SEBI.

It would be worthwhile to state that the Takeover Panel and SEBI would continue to scrutinize exemption application based on the above indicative guidelines. Additionally, compliance with the above guidelines would not guarantee automatic exemption from open offer and all applications would be considered by the Takeover Panel and SEBI on a case-to-case basis. However, the processing time could be significantly faster for applications where the above guidelines are adhered to.

Conclusion

- The circular clearly states SEBI's intention that transfer of shares by promoters to Trust requires specific exemption under Regulation 11 of SAST Regulations. However, there is no clarity on the existing Trust structure where SEBI approval was not sought.
- Further as more and more promoters are adopting the Trust structure for holding shares of the listed company, this circular is a welcome move as it provides clarity on the requirements for Trust, trustees and beneficiaries.

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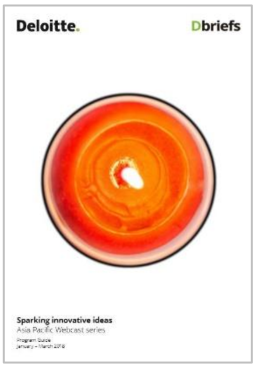

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