Regulatory Update | Covid-19

Relaxations announced by Securtities and Exchange Board of India due to Covid-19 – Changes in Law

The Securities and Exchange Board of India (SEBI) has granted several reliefs / relaxations to ease the compliance burden on listed companies and other market intermediaries to enable them to cope with the unprecedented lockdown.

The measures announced by SEBI include relaxation from certain fund raising norms, relaxations from procedural requirements for rights issue, open offers and buy-backs etc.

The key measures announced by SEBI pertaining to changes in law are summarized hereunder:

Changes in Law

1. SEBI Listing Regulations (LODR)

- Exemption from publication of newspaper advertisement for calling of board meeting for approving financial results, financial results etc. till 30 June 2020.
- Relaxation from dispatching physical copies of annual report for listed entities who conduct their AGMs during the calendar year 2020.
- Relaxation from dispatching proxy forms for listed entities who conduct their AGMs through VC / OAVM during the calendar year 2020.
- The listed entity shall endeavor to use the electronic transfer mode for payment of dividend to those shareholders whose email address is available with it. However, for those shareholders whose email address is not available, the listed entity can issue the dividend warrants or cheque, upon normalization of postal services.

2. Relaxation in procedural matters for Open offer and Buy-back opening upto 31 July 2020:

- Letter of offer / tender offer can be sent electronically to the shareholders, subject to the following conditions:
  - The acquirer / company shall publish the letter of offer and tender form on its website, as well as on registrar, stock exchange and lead manager's website
  - The acquirer / company along with lead manager shall undertake all adequate steps to reach out to its shareholders through other means such as ordinary post or SMS or audio-visual advertisement on television or digital advertisement, etc.
  - The acquirer / company shall make an advertisement containing details regarding the dispatch of the letter of offer electronically and availability of such letter of offer along with the tender form on the website of the company, registrar and manager to the offer in the same newspapers in which (i) detailed pubic statement was published or (ii) public announcements was published

- The acquirer/ company may have the flexibility to publish the dispatch advertisement in additional newspapers, over and above those required under the respective regulations
- The acquirer/ company shall make use of advertisements in television channels, radio, internet etc. to disseminate information relating to the tendering process. Such advertisements can be in the form of crawlers/ tickers as well
- All the advertisement issued should also be made available on the website of the company, registrar, managers to the offer and stock exchange

3. Relaxation from certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (SEBI ICDR)

- Validity of SEBI observation on public issues / rights issue extended by 6 months, where such observation expires any day between 1 March 2020 and 30 September 2020.

- For issues opening before 31 December 2020 – issuer can increase or decrease the fresh issue size by up to 50% of the estimated issue size without requiring to file fresh draft offer document with SEBI, subject to conditions.

- Relaxations for rights issue to be opened on or before 31 March 2021:
  - Fast-track rights issue:
    - The eligibility requirement of average market capitalisation of public shareholding of INR 2.50 billion has been reduced to INR 1 billion
    - The requirement related to period of listing of equity shares of the issuer for at least 3 years has been reduced to listing for 18 months only
    - The condition related to no audit qualifications on issuer's audited accounts has been replaced with the requirement to disclose the impact of audit qualifications on issuer's financials
  - Requirement of minimum subscription reduced to 75% of the offer size, subject to conditions.
  - The conditions prescribed in SEBI ICDR Regulations shall not apply in case of rights issue carrying an issue size of less than INR 250 million.

- Relaxation in procedural matters for rights issue opening upto 31 December 2020:
  - Rights issue related documents can be shared electronically with the shareholders. Issuer shall also publish the same on its website, as well as on registrar, stock exchange and lead manager's website
  - Rights issue related advertisement shall contain additional details as regards the manner in which the shareholders who have not been served notice electronically may apply. Issuer need to publish the advertisement on its website, as well as on registrar, stock exchange and lead manager's website
  - Shareholders holding shares in physical form shall be allowed to submit rights issue application subject to certain stipulated conditions
  - Issuer shall along with lead manager and registrar, institute an optional mechanism (non-cash mode only) to accept the applications of the shareholders

subject to ensuring that no third party payments shall be allowed in respect of any application

- The issuer along with lead manager shall create an FAQ, online dedicated investor helpdesk, and helpline to guide investors in gaining familiarity with the application process and resolve difficulties faced by investors on priority basis and shall be responsible for all investor complaints
- For offer documents filed until July 31, 2020, following relaxations have been granted:
- Authentication/ certification/ Undertaking in respect of offer documents, may be done using digital signature certifications
- The issuer along with lead manager shall provide procedure for inspection of material documents electronically

Note: In view of the above relaxation, MCA vide circular dated 11 May 2020 relaxed the requirement to dispatch notice to shareholders through registered post or speed post or courier for a listed company for rights issues opening upto 31 July 2020.

- **Fast Track - Further Public Offer (FPO):**
  - In order to undertake a fast track issue, one of the eligibility condition that the issuer needs to satisfy is the average market capitalization of public shareholding. The average market capitalization of public shareholding has been relaxed to INR 500 crore (as against the current requirement of INR 1000 crore).
  - Pending show cause notices (SCN):
    A listed company could not undertake a Fast Track FPO if SEBI had issued an SCN or had initiated prosecution proceedings, against an issuer, its promoters or whole-time directors. The Circular has provided a relaxation for cases in which: (a) SCNs have been issued under adjudication proceedings; or (b) where prosecution proceedings have been initiated by SEBI, subject to requisite disclosures regarding such actions in the offer document, along with its potential adverse impact on the issuer. This exemption provides relief to companies attempting to raise funds while the matters are sub judice. In our view, this relaxation should be a general exemption and not a temporary relaxation due to the ongoing COVID-19 pandemic.

Accordingly, the Circular implies that: (a) a company with a public holding of lesser than 25% of their paid-up capital would naturally have a lesser market capitalisation of public shareholding – such companies can now consider a Fast Track FPO to fund their growth plans/ deleverage; and (b) a relatively smaller company can access public funds through this route.

- Relaxation from compliance with the certain procedural requirements with respect to filing following documents with SEBI or Stock exchange:
- Filing draft offer document (DOD)
- Certificate confirming that an agreement has been entered into between the issuer and the lead manager, due diligence certificate, certificate confirming certificate confirming compliance of the conditions specified in Part C of Schedule VI of SEBI ICDR etc.
- Details of Promoters such as PAN, bank account number, registered address etc.

- **Qualified Institutional Placement (QIP):** SEBI reduces the time gap between two QIPs from 6 months to two weeks.

4. SEBI relaxes fund raising norms for financially stressed companies

SEBI on 22 April 2020 had issued a consultation paper proposing relaxation in pricing of preferential issues and exemption from open offer requirements for acquisitions in companies having stressed assets.

SEBI observed that the companies having stressed assets are generally in need of funds to revive themselves from stress situation and avoid insolvency. One of the avenues for such companies to raise funds is through preferential issue to willing investors. Given the extant pricing pricing regulations under SEBI ICDR, it is practically difficult if not impossible for such companies to raise funds on preferential basis.

SEBI issued two circulars on 22 June 2020 amending SEBI ICDR and Takeover code (respectively) in order to provide a breather from compliance with stringent fund raising norms to the financially stressed companies.

A. Amendment to SEBI ICDR Regulations – insertion of regulation 164A:

- **Pricing of shares:** In case of frequently traded shares, price of shares to be issued on preferential basis shall not be less than the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the 2 weeks preceding the relevant date.

- **Eligibility criteria for issuer:**

  - The issuer has disclosed all the defaults relating to the payment of interest/ repayment of principal amount on loans from banks / financial institutions/ Systemically Important Non-Deposit taking Non-banking financial companies/ Deposit taking Non-banking financial companies and /or listed or unlisted debt securities in terms of SEBI Circular dated November 21, 2019 and such payment default is continuing for a period of at least 90 calendar days after the occurrence of such default;

  - Existence of inter-creditor agreement in terms of Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 dated 7 June 2019

  - The credit rating of the financial instruments (listed or unlisted), credit instruments / borrowings (listed or unlisted) of the listed company has been downgraded to "D".

- **Other Conditions:**

  The issuer company making the preferential issue is required to comply with the following conditions:

  - The preference issue shall be made to a person not part of the promoter or promoter group as on the date of the board meeting to consider the preferential issue.

  - The preference issue shall not be made to:
    a. Undischarged insolvent in terms of the Insolvency and Bankruptcy Code, 2016;
    b. 'Wilful defaulter' as per the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
    c. Person disqualified to act as a director under the Companies Act,2013;
    d. A person debarred from trading in securities or accessing the securities market
    e. A person declared as a fugitive economic offender;
    f. A person who has been convicted for any offence punishable with imprisonment for two years or more under any Act specified under the Twelfth Schedule of the Insolvency and Bankruptcy Code, 2016; or for seven years or more under any law for the time being in force. However, such restriction shall not be applicable after the expiry of two years from the date of his release from imprisonment;
    g. A person who has executed a guarantee in favour of a lender of the issuer and such guarantee has been invoked by the lender and remains unpaid in full or part.

  - The resolution for the preferential issue and exemption from open offer shall provide the following:
    a. The votes cast by the shareholders in the 'public' category in favour of the proposal shall be more than the number of votes cast against it.
    b. The proposed allottee(s) in the preferential issue that already hold specified securities shall not be included in the category of 'public' for this purpose:

    Provided that where the company does not have an identifiable promoter; the resolution shall be deemed to have been passed if the votes cast in favour are not less than three times the number of the votes, if any, cast against it.

- **Restriction on use of proceeds:**

  The proceeds of such preferential issue shall not be used for any repayment of loans taken from promoters/ promoter group/ group companies. The proposed use of proceeds shall be disclosed in the explanatory statement sent for the purpose of the shareholder resolution.

- **Appointment of monitoring agency:**

- The issuer to appoint public financial institution or schedule commercial bank, which is not a related party, as monitoring agency

- Monitoring agency to submit its report in prescribed format on quarterly basis until atleast 95% of the proceeds of the issue have been utilized.

- The board of directors and the management of the issuer shall provide their comments on the findings of the monitoring agency

- The issuer shall, within 45 days from the end of each quarter, publicly disseminate the report of the monitoring agency by uploading the same on its website as well as submit the same to the stock exchange(s) on which the equity shares of the issuer are listed.

- The proceeds of the issue shall also be monitored by the Audit Committee till utilization of the proceeds.

- **Lock-in requirements:**

  The allotment made shall be locked-in for a period of three years from the last date of trading approval.

- **Responsibilities of statutory auditors and audit committee**

  The amendments require the statutory auditor and the audit committee to certify about the meeting of all conditions stipulated above at the time of dispatch of notice and at the time of allotment.

B. Amendment to SEBI Takeover Code:

The acquirer will be exempted from open offer obligation in case of acquisition of shares or voting rights or control of the target company (being a financially stressed company) by way of preferential issue in compliance with regulation 164A of the SEBI ICDR, irrespective of the fact that equity shares are frequently traded or not.

5. SEBI introduces optional pricing in preferential issue

SEBI has regulation 164B to SEBI ICDR to provide an additional option to the existing pricing framework for preferential issues of frequently traded shares. The new regulation allows the issuer to reckon the preferential issue price based on an average of 12 week price of equity shares as against the existing 26 week price. Specified securities allotted on a preferential basis using the optional pricing method determined shall be locked-in for a period of three years. The optional pricing may be availed for preferential issues made between 1 July 2020 and 31 December 2020.

Conclusion:

The above temporary relaxations will aid the issuers for fund raising and provide much needed relief to the issuer / acquirers from compliance with strict procedural norms during these unprecedented times.