

- SEBI

SECURITIES AND EXCHANGE BOARD OF INDIA ("SEBI")

A. Applicability of Delisting Regulations- Transitional Provisions

The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 ("Delisting Regulations") were notified by SEBI on June 10, 2009. Regulation 31 of the Delisting Regulations outlines certain situations under which the provisions of the earlier Securities and Exchange Board of India (Delisting of Securities) Guidelines, 2003 ("Delisting Guidelines") would still be applicable to a particular delisting transaction.

In this regard SEBI, vide its circular dated September 14, 2009¹, has clarified that in cases where a special resolution has already been passed under the Delisting Guidelines prior to commencement of the Delisting Regulations, the delisting process shall be governed by the provisions of the Delisting Guidelines, provided the said resolution is acted upon within a period of three months from the date of this circular. Otherwise, the company would be required to pass a fresh special resolution in terms of Delisting Regulations and proceed for delisting in terms of Delisting Regulations.

For more information please refer to

<http://www.sebi.gov.in/circulars/2009/delistingcircular.pdf>

¹ SEBI/CFD/DCR/DL/01/2009/14/09

B. Compliance with Regulation 16(8) of SEBI (Portfolio Managers) Regulations, 1993

SEBI, vide circular dated September 10, 2009², has informed portfolio managers that they may undertake new clients subject to fulfillment of certain conditions as stipulated in the said circular. Further, portfolio manager have been permitted to discontinue the services to those clients who are not co-operating for opening separate client accounts, after serving at least three notices, and return the securities/funds to the client. The portfolio manager is required to maintain such client-wise records for a period of eight years.

For more information please refer to

<http://www.sebi.gov.in/circulars/2009/cir0609.pdf>

C. SEBI Order: In the Matter of Matrix Laboratories Limited Whether by mere declaration by an investor, in the disclosure made pursuant to the terms of Regulation 8(2) of the Takeover Code, that it forms part of the promoters/persons in control, the

investor shall be said to fall under the category of promoters/persons in control.

The Adjudicating Officer on October 1, 2009 passed an order in respect to India Newbridge Investments Limited, India Newbridge Coinvestments Limited, India Newbridge Partners FDI Limited and Maxwell (Mauritius) Private Limited (collectively referred to as “noticees”) in the matter of Matrix Laboratories Limited (“Target Company”).

Facts-

The Target Company has its shares listed on the Bombay Stock Exchange (“BSE”). The noticees acquired 15.16% equity shares of the Target Company vide separate agreements (dated April 15, 2004) through a preferential allotment. Subsequently, the noticees issued a public announcement in compliance with Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997 (“Takeover Code”) on April 18, 2004. In the letter of offer it was stated that the provision of Regulation 12 of the Takeover Code were not applicable to the said offer i.e. the noticees had not acquired control of the Target Company. A disclosure dated December 31, 2004 was made by the noticees, pursuant to the terms of Regulation 8(2) of the

² IMD/DOF-1/PMS/CIR-6/2009

Takeover Code, disclosing themselves as forming part of the promoter/persons in control. The Target Company also vide its letter to the BSE dated March 8, 2005 disclosed the noticees as having control over the Target Company and forming part of the promoter group.

Issues-

1. Pursuant to the disclosure dated December 31, 2004 under Regulation 8(2) of the Takeover Code, the noticees have acquired control over the Target Company. Therefore, the notices had triggered and thereby violated Regulation 12 of the Takeover Code as on December 31, 2004.
2. Acquisition of control by the notices happened on December 31, 2004 i.e. subsequent to the completion of the open offer and not as a result of acquisition of shares through public offer.

Held-

The noticees have not acquired control of the Target Company due to the following reasons:

1. If the noticees had acquired control, then there should have been some change in the position of the noticees at any time after the public offer; there was no change in the status of the

noticees except for the noticees disclosing themselves as promoters/persons in control;

2. Declarations are only an expression of the state of affairs. A mere disclosure in terms of Regulation 8(2) of the Takeover Code cannot effect acquisition of control onto the noticees until and unless it was coupled with some definitive and factual changes such as:
 - increase in the number of directors appointed by the noticees;
 - change in management in favor of the noticees;
 - change in shareholding;
 - any amendment or rescinding of shareholders' agreement; or
 - any other material change which could have actually given effect to acquisition of control leading such a disclosure being made.
3. Pursuant to the terms of the Shareholder's Agreement dated April 15, 2004 entered into by noticees, the noticees (a) had a restricted right to appoint a maximum of three directors on the Board of the Target Company; and (b) did not have any right to nominate any officer or manager of the Target Company. The Adjudication Officer observed that the number of directors appointed by the noticees remained unchanged even

subsequent to the public announcement and completion of the open offer.

Hence, the Adjudicating Officer held that no change in the position of the noticees could be established from the date of noticees entering the agreements till the date of declaration made. Therefore the allegation on the noticees of having acquired control over the Target Company on December 31, 2004 was not established.

For more information please refer to

<http://www.sebi.gov.in/adjorder/matrixadj.pdf>

D. SEBI Order: In the Matter of Tata Tea Limited

Whether non-compete consideration paid by an acquirer to the promoters of the target company need be taken into consideration while calculating the open offer price under the Takeover Code.

The issue was addressed by the Securities Appellate Tribunal ("SAT") in an order passed the matter of Tata Tea Limited v. SEBI and DSP Merrill Lynch Limited.

Facts-

Tata Tea Limited ("Acquirer") acquired a 24.25% stake in Mount Everest Mineral Water Limited ("Target") pursuant to a combination of a primary issuance by the Target and a secondary sale of shares by the promoters of the Target ("Sellers"), and accordingly announced a public offer for the Target under the terms of the Takeover Code. As part of the acquisition terms, apart from the purchase price of Rs.43.54 crores paid by the Acquirer to the Sellers for the shares purchased from them (at a consideration of Rs.140 per share), the Acquirer paid a separate consideration of Rs.3 crores to the Sellers on account of them agreeing to be bound by certain non-compete obligations with respect to the Target's business ("Non-compete Fee"). The open offer price announced by the Acquirer was Rs.140 per share, which was computed in accordance with Regulation 20(4) of the Takeover Code and did not take into account the Non-compete Fee.

SEBI took a view that the open offer price to be paid by the Acquirer to the public shareholders of the Target would need to take into consideration the Non-compete Fee (which would have resulted in increasing the open offer price by Rs.9.46 a share). However, pending its final decision and pursuant to the Acquirer

depositing the differential amount (Rs.6.56 crores) in an escrow account, SEBI allowed the open offer to proceed. SEBI subsequently decided that the Non-compete Fee would need to be paid to the public shareholders of the Target who had tendered their shares in the open offer, along with a 10% interest for the delayed payment. The Acquirer appealed against this decision before SAT, Mumbai.

Issues-

Whether the Non-compete Fee paid to the Sellers would need to be included in determining the open offer price payable by the Acquirer to the public shareholders of the Target.

Held-

SAT held that a Non-compete Fee would be valid (and therefore would not be a device to reduce the public offer price) if the underlying non-compete obligation is itself valid. In this context, SAT held that non-compete obligations would be valid if the outgoing sellers are capable of providing competition to the business alone or in association with third parties' and in making such a determination, the dependency of the business on the outgoing seller is irrelevant (i.e. there would be an assumption that the sellers would have special business knowledge and

access to trade secrets of the target, which would provide the sellers with the ability to compete with the business of the target). In the facts of the instant case, SAT ruled that (a) by virtue of their knowledge of the business of the Target, the Sellers did indeed have the capability to compete with the Target; and (b) the Acquirer thus had a right to protect his investment in the Target from the Sellers, and it was therefore legitimate for the Acquirer to have entered into a non-competition agreement with the Sellers and pay the Non-compete Fee to the Sellers.

SAT'S decision has affirmed the validity of a non-compete fee in cases where the outgoing sellers are capable of offering competition to the business of the target company. Consequently, where there is a legitimate non-compete obligation and the non-compete fee does not exceed 25% of the offer price, there is no obligation on the acquirer to pay a non-compete consideration to the public shareholders of the target company.

For more information please refer to

<http://www.sebi.gov.in/satorders/tatatea.pdf>

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