nota bene

UPDATE

20 October 2023

This Update has been prepared by Suhana Islam Murshedd and Ronodeep Dutta

Key Amendments to the SEBI Listing and Disclosure Regulations 2023: Strengthening Corporate Governance and Enhancing Shareholder Protection in India Inc.

With a view to strengthen corporate governance and enhance disclosure requirements applicable to listed companies in India, the Securities and Exchange Board of India ("**SEBI**" or "**Board**") has introduced significant changes to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**") through the SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023 ("**Amendment Regulations 2023**"). These Amendment Regulations follow several consultation papers issued by SEBI, during the past one year, seeking stakeholder responses on the many corporate governance related proposals that it sought to implement. The Amendment Regulations have been made effective with effect from 14 July 2023, unless otherwise specifically provided therein.

The said amendments are of significance particularly, in light of many references received by SEBI regarding inadequate, inaccurate, and delayed disclosures by a few listed entities.

In this edition of the *nota bene*, we have discussed below certain key amendments made to the LODR Regulations, which in our view has far reaching impact on a listed entity's corporate governance framework.

A. Verification of rumours and reported events

The Amendment Regulations 2023 has introduced the concept of 'Mainstream Media' which includes print or electronic mode of, (i) newspapers registered with the Registrar of Newspapers for India; (ii) news channels permitted by Ministry of Information and Broadcasting, Government of India; (iii) content published by the publisher of news and current affairs content as per the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021; and (iv) newspapers, news channels, news and current affairs content similarly registered, permitted or regulated, as the case may be, in jurisdictions outside India.

Prior to the Amendment Regulations 2023, a listed entity was permitted to confirm or deny any reported event or information to the stock exchanges on a discretionary basis. However, with the introduction of the Amendment Regulations 2023, with effect from 1 October 2023, it is mandatory for the top 100 listed entities (by market cap) to verify rumours and confirm, deny or clarify any reported event or information in the mainstream media, along with the latest status of such event/ information, no later than 24 hours from the reporting of the event or information. Such obligation will thereafter become applicable to the top 250 listed companies (by market cap) with effect from 1 April 2024. That said, events or information reported in such mainstream media which are routine in nature or cannot be categorized as "*rumours regarding any impending specific material event or information circulating amongst the investing public*" are outside the scope of such disclosure.

While the intent of the amendment seems to be aimed at avoiding false market sentiment or impact on the traded securities of the entity; the obligation seems to be far-reaching in nature. As mentioned earlier, the scope of '*Mainstream Media*', which includes for example, news, whether offline or online, published in jurisdictions outside India, is very wide and may lead to a compliance rigmarole for many multi-national companies. Further, this could increase the cost of compliance as one must consider establishing a more robust vigilance mechanism and infrastructure in terms of technology, manpower mobilisation, etc., to allow for such real time tracking of news and subsequent disclosures. That said, the fact that the aforesaid reporting

obligation does not apply to information which is general and routine in nature could be of some reprieve to the reporting entities. However, it would be a welcome move to receive additional clarifications from SEBI to set out relevant disclosure boundaries.

One may also enquire the scope of the phrase 'investing public' and in the absence of any objective criteria for determining such investing public, the amendment appears to be ambiguous. For example, one needs to consider whether, in case of a materially significant information circulating amongst a small group of persons who may not be shareholders of the relevant listed company would be construed as an event requiring disclosure under the Amendment Regulations 2023.

B. *Disclosures for certain types of binding agreements*

The Amendment Regulations provide that, agreements entered into by shareholders, promoters, promoter group entities, related parties, directors, key managerial personnel and/ or employees of a listed entity or of its holding, subsidiary and associate company, whether amongst themselves or with a third party, have to be disclosed to the listed entity by the relevant contracting party in all such cases where the listed party is not privy to such agreement. The amendment extends to only such agreements which are not in the normal course of business and/ or which impact management or control of the listed entity or impose restrictions or create liability upon the listed entity (including revisions, modifications, terminations thereof). Such information is required to be provided by the relevant contracting party to the listed entity within two working days of entering into such agreements. To clarify, such disclosure obligation would apply irrespective of materiality thresholds which may otherwise be applicable for certain transactions under LODR Regulations.

It is pertinent to note, that such compliance is required even for agreements which *indirectly* or *potentially* impact the management or control of the listed entity or impose restrictions or create liability upon the listed entity.

Further, the aforesaid agreements, if subsisting as on the date of notification of the amendment, are required to be disclosed by the relevant contracting party to the listed entity and in turn is required to be disclosed by the listed entity to the stock exchanges and on its website. Moreover, the listed entity shall disclose the number of agreements that subsist as on such date, their salient features, including the link to the webpage where the complete details of such agreements are available in the Annual Report for the relevant financial year.

The aforesaid obligation would typically include documents such as shareholder agreements, share purchase agreements, settlement agreements, non-compete arrangements, indemnity undertakings, or other non-routine agreements, which impact management or control of the listed entity or impose restrictions or create liability upon the listed entity, executed by the listed entity's promoters or significant stakeholders, but not the listed entity itself. The amendment seeks to overcome the challenges posed by such agreements being entered into by key stakeholders of a listed entity with third parties or amongst themselves, without the knowledge of the remaining shareholders of the listed entity.

The scope of this compliance is wide given it includes agreements, which not only directly but indirectly and even potentially, impact the management or control of the listed entity or impose restrictions or create liability. The amendment also raises some moot questions being debated in board rooms – for example, would a potential liability created by a purchase order or a supply agreement issued by a promoter group entity or related party need to be disclosed by the listed entity? While the consultation paper issued by SEBI on 21 February 2023 indicates that agreements entered into by listed entity for its business operations are proposed to be carved out from the ambit of such disclosure, the Amendment Regulations 2023 do not include any such express exclusion. Additionally, given the mandatory requirement for providing the salient features of the agreement in the Annual Report, one undesired consequence of such disclosure would be leakage of confidential information in the public domain.

While the amendment seeks to ensure that a level playing field is provided to all stakeholders, one needs to examine the locus of the listed entity (not being a party to the relevant agreement) to either enforce or object to any onerous arrangement in absence of any privity of contract with the listed entity.

C. *Special Rights to Shareholders*

Often, to attract investments in a company prior to its listing, special rights are offered by the company to its pre-IPO investors and the promoters. These special rights are included in the shareholder agreement executed between the company and its shareholders and promoters. Some of the common types of special rights include nomination rights, veto rights/ affirmative voting rights, information rights, anti-dilution rights, right of first refusal, tag along rights, divestment rights, etc.

Under the LODR Regulations, every listed entity shall ensure equitable treatment of all shareholders, belonging to the same series of a class, including minority and foreign shareholders. If any shareholder enjoys special rights and privileges, the same should have been agreed upon by all the other shareholders of a company.

Consequently, Regulation 31B has been inserted in LODR Regulations vide the Amendment Regulations 2023, wherein special rights granted to shareholders of a listed entity are subject to an express approval from the shareholders of such company in a general meeting by way of a special resolution. Such approval must be sought once in every five years starting from the date of grant of such special right.

Further, special rights available to the shareholders of a listed entity as of 14 July 2023 shall also be subject to the approval by its shareholders by way of a special resolution in a general meeting within a maximum period of five years from such date. However, this requirement is not applicable to any special rights made available by the listed entity to a financial institution registered with or regulated by the Reserve Bank of India under a lending arrangement in the normal course of business or to a debenture trustee registered with SEBI under a subscription agreement for the debentures issued by the listed entity, subject to prescribed conditions.

SEBI has always been cautious about the provision of special rights to a select group of shareholders in listed companies, particularly to safeguard the interests of public shareholders. This amendment serves as an effective measure to prevent a few shareholders from enjoying permanent special rights in a listed company. However, an opposing view would be that the absence of guaranteed special rights to investors would deter significant investments in listed companies, going forward. Additionally, the five-year duration may be considered excessively long considering the rapid pace of business dynamics, and a shorter period could have better served the intended purpose.

Conclusion

The Amendment Regulations 2023 are aimed at enhancing governance, transparency, and protection of shareholder interests. If implemented well and followed in spirit, the said regulations would to a large extent address existing issues such as rumours and opaque transactions. However, the feasibility of effective compliance remains to be seen. Given the consistent demand for *Ease of Doing Business* by corporate India, one would hope to receive necessary clarifications from the regulator in the near future.

This Update has been prepared by Suhana Islam Murshedd and Ronodeep Dutta who can be reached at suhana.islam@aquilaw.com and ronodeep.dutta@aquilaw.com This Update is only for informational purposes and is not intended for solicitation of any work. Nothing in this Update constitutes legal advice and should not be acted upon in any circumstance.