

SECURITIES AND EXCHANGE BOARD OF INDIA

Status of consent and compounding applications as on March 31, 2009

The Board in its meeting held on April 13, 2009 desired a memorandum detailing the regulatory framework governing consent, the consent process and the details of disposal of proceedings through this process so far, etc.

2. Under the SEBI Act, 1992, Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996, SEBI is empowered to take civil or criminal enforcement actions for violation of the securities laws. Civil enforcement actions include preventive or remedial directions, cease and desist orders, suspension or cancellation of registration and levy of monetary penalty. Criminal enforcement action involves filing of a prosecution case before a court of appropriate criminal jurisdiction.

3. The data on pending enforcement actions is being placed before the Board periodically. In its meeting held on February 17, 2007, the Board was inter alia apprised of the proposed action plan for reducing and preventing the piling up of enforcement actions. It included a proposal to introduce consent orders which would provide flexibility of wider array of enforcement actions and achieve the twin goals of appropriate sanction and deterrence without formal proceedings and prolonged litigation. This is in consonance with the provisions in section 15 T of the SEBI Act and section 23 A of Depositories Act which permit issue of consent orders and the provisions of section 24 A of the SEBI Act, section 23 N of the SCR Act and section 22 A of the Depositories Act which permit composition of offences.

4. Pursuant to the above, SEBI has issued a Circular dated April 20, 2007 for consent and compounding of pending enforcement actions. The said circular and the constitution of the High Powered Committee with former judge of a High Court and two other experts was put up to the Board for information in the meeting held on June 8, 2007. A copy of the said circular is **Annexed**.

5. The Circular provides the process for different kinds of enforcement actions such as prosecution, adjudication, section 11B proceedings, etc. The process broadly followed is as under:

On receipt of an application from the concerned entity for settlement, an internal Committee of Division Chiefs after meeting the applicant examines if the terms offered by it are appropriate for settlement. The terms finally offered by the applicant are placed before the High Powered Advisory Committee (HPAC), which is headed by a former Judge of a High Court, to ascertain if the terms are fair and reasonable. The HPAC, after taking into account facts and circumstances of the case and the factors specified in the Circular, makes its recommendations accepting, declining or suggesting modifications in the terms offered by the applicant. A panel of two Whole Time Members considers the recommendations of the HPAC and takes a decision whether to settle the enforcement action on the said terms or decline the settlement. On compliance of the terms of settlement, as approved by the panel, a consent order is passed by SEBI, if the matter is pending before it. In case the matter is pending before SAT/Court, the agreed consent terms are placed before them for appropriate orders. In case of compounding, the approved compounding terms are submitted before the Court for its consideration.

6. Till March 2009, SEBI has approved 540 applications settling various kinds of enforcement actions. These include 45 consent applications where after the consent terms were placed before the Securities Appellate Tribunal and the Supreme Court, consent orders were passed by the Securities Appellate Tribunal and the Supreme Court respectively. The number (540) also includes 58 compounding applications where the compounding orders were passed by the respective criminal courts. SEBI has also rejected 264 applications and declined to pass consent orders for various reasons including the reason that the terms of settlement proposed by the applicants were not found adequate by the HPAC. The details of disposal of consent and compounding applications under the said circular till March 31, 2009 are as under:

Disposal of cases through Consent and Compounding as on March 31, 2009

Applications	Consent	Compounding	Aggregate
Received by SEBI	1283	107	1390

Recommended by HPAC	550	76	626
Rejected	257	7	264
Withdrawn / infructuous	117	1	118
Pending	359	23	382
Applications disposed by settlement	482	58	540
Amount of Disgorgement (Rs.)	8,27,84,906	-	8,27,84,906
Settlement/Compounding Charges (Rs.)	38,98,65,636	99,13,000	39,97,78,636
Legal and administrative charges (Rs.)	61,00,150	33,90,800	94,90,950

7. The year-wise details of consent and Compounding are as under:

Year	No. of applications received		No. of applications disposed by way of				Amount Received (Rs. crore)		
	Consent	Compounding	Consent	Compounding	Decline	Total	Consent	Compounding	Total
2007-08	617	81	54	47	27	128	2,17,50,000	91,58,800	3,09,08,800
2008-09	666	26	428	11	237	676	45,70,00,692	41,45,000	46,11,45,692
Total	1283	107	482	58	264	804	47,87,50,692	1,33,03,800	49,20,54,492

8. The above amount of Rs. 49.21 crore received through consent and compounding comprises of Rs. 8.28 crore towards disgorgement, Rs. 39.98 crore towards settlement charges and Rs. 0.95 crore towards administrative and legal charges. The amount received towards settlement charges is remitted to the Consolidated Fund of India.

9. Besides the above amount, the settlement in 51 cases included debarment from dealing in securities market / suspension of certificate of registration for different periods.

10. During April, 2009, 47 applications have been disposed of by way of consent order and a sum of Rs.19 crore has been realized towards settlement charges, disgorgement and legal and administrative charges.

11. As a part of its enforcement actions, SEBI has also been conducting adjudication proceedings. It has realized a total sum of Rs.14.64 crore as monetary penalty through adjudication during 1995-96 to 2008-09.

12. The consent orders passed by SEBI are put on its website.

This is put up for the kind information and guidance of the Board.

Securities and Exchange Board of India

Circular No. EFD/ED/Cir-1/2007

Sub: Guidelines for

- (i) Consent Orders and**
- (ii) For considering requests for composition of offences**

under SEBI Act, SC(R) Act and Depositories Act

1. Under the SEBI Act, 1992, Securities Contracts (Regulation) Act, 1956 (SCRA) and the Depositories Act, 1996, SEBI pursues two streams of enforcement actions i.e. Administrative/Civil or Criminal. Administrative/civil actions include issuing directions such as remedial orders, cease and desist orders, suspension or cancellation of certificate of registration and imposition of monetary penalty under the respective statutes and action pursued or defended in a court of law/tribunal. Criminal action involves initiating prosecution proceedings against violators by filing complaint before a criminal court.
2. The Parliament of India has recognised the powers of SEBI to pass consent orders under the SEBI Act and the Depositories Act. This will of the Parliament is apparent from Section 15T of the SEBI Act 1992 and section 23 A of the Depositories Act. Further, section 24A of the SEBI Act, section 23N of the SCRA and section 22A of the Depositories Act permit composition of offences.
3. Consent orders can not be construed as waiver of statutory powers by the Board. The Board always has the right to proceed for appropriate action if it cannot achieve its objectives through a consent order.
4. US Securities and Exchange Commission settles a substantial number (over 90%) of administrative/civil cases by consent orders. Consent orders may provide flexibility of wider array of enforcement actions which will achieve the twin goals of an appropriate sanction and deterrence without resorting to a long drawn litigation before SEBI/Tribunal/Courts. Passing of consent orders will also reduce regulatory costs and would save time and efforts taken in pursuing enforcement actions. This effort could more effectively be used for pursuing cases which require the full process of enforcement action and for policy work.

5. Therefore, it has been decided that all appropriate administrative or civil actions e.g. proceedings under sections 11, 11B, 11D, 12(3) and 15I of SEBI Act and equivalent proceedings under the SCRA and the Depositories Act, 1996 and other civil matters pending before SAT/courts may be settled between SEBI and a person (party) who may *prima facie* be found to have violated the securities laws or against whom administrative or civil action has been commenced for such violation. Compounding of offence may cover appropriate prosecution cases filed by SEBI before the criminal courts.
- 6 As the process of consent order involves exercise of due caution, the proposal of the party may be agreed by following the procedure and also taking into account the factors as set out below at para 11.

7. Commencement and scope of consent

Consent Order may be passed at any stage after probable cause of violation has been found. However, in the event of a serious and intentional violation, the process should not be completed till the fact finding process is completed whether by way of investigation or otherwise. Compounding of Offence can take place after filing criminal complaint by SEBI. Where a criminal complaint has not yet been filed but is envisaged, the process for consent orders will be followed.

8 Procedure for consent orders where Adjudication Proceedings are pending

- a. If the party against whom an adjudication proceeding is pending proposes passing of a consent order, the proposal may be referred to a high powered Committee consisting of a retired judge of a High Court and two other external experts.
- b. The Committee will consider the proposal of consent, requisite waivers by the party, the facts and circumstances of the case, material available on records and take into account the factors and guidance as set out below at para 11. Where the Committee finds the terms for passing a consent order inadequate, it may ask the party to revise the consent terms.
- c. The consent terms finalized by the Committee and agreed to by the party shall be forwarded to the Adjudication Officer for passing a suitable order in line with the consent terms.

9 Procedure for consent in other cases

- (I) Any person (party) who is notified or who has reasonable grounds to believe that a civil/ administrative proceeding may or will be instituted against him/her, or any party to a proceeding already instituted, may, at any time, propose in writing along with requisite waivers for an offer of consent. All communications in this regard should be addressed to the Division of Regulatory Assistance, Enforcement Department, SEBI, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051, which would forward the same to the High Powered Committee.

- (II) Any person (party) who is notified or who has reasonable ground to believe that a criminal proceeding may or will be instituted against it, may, before filing a criminal complaint by SEBI before any criminal court, propose in writing along with requisite waivers for consent. All communications in this regard should be addressed to the Prosecution Division, Enforcement Department of SEBI at Mumbai, which would forward the same to the high powered Committee.
- (III) The Committee will consider the proposal of consent, requisite waivers by the party, the facts and circumstances of the case, material available on record and take into account the factors and guidance as set out below at para 11. Where the Committee finds the terms for passing a consent order inadequate, it may ask the party to revise the consent terms. If the Committee agrees with the proposal, suitable consent terms shall be recommended to a panel of two Whole Time Members, who may pass a suitable order in view of the recommendation of the Committee.

10. The concerned Operational Department shall extend all assistance to the Committee and make all records of the case available to the Committee. The Committee shall be assisted by an officer not below the rank of Division Chief.

11. Factors to be considered for consent

While considering the proposal of consent from any party, the Committee shall have due regard to the objective of the respective statute, the interests of investors and securities market and factors including but not limited to the following, where-ever applicable:

- i. Whether violation is intentional.
- ii. Party's conduct in the investigation and disclosure of full facts.
- iii. Gravity of charge i.e. charge like fraud, market manipulation or insider trading.
- iv. History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.
- v. Whether there were circumstances beyond the control of the party.
- vi. Violation is technical and/or minor in nature and whether violation warrants penalty.
- vii. Consideration of the amount of investors' harm or party's gain.
- viii. Processes which have been introduced since the violation to minimize future violations/lapses.
- ix. Compliance schedule proposed by the party.
- x. Economic benefits accruing to a party from delayed or avoided compliance.
- xi. Conditions where necessary, to deter future non-compliance by the same or another party.
- xii. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them.
- xiii. Compliance of the civil enforcement action by the accused.

- xiv. Party has undergone any other regulatory enforcement action for the same violation.
- xv. Any other factors necessary in the facts and circumstances of the case.

12. Waivers

As a condition for consent, the party shall furnish a written waiver from taking any legal proceedings against SEBI concerning any of the issues covered by the consent order.

- (I) The party shall waive:
 - 1. all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;
 - 2. the filing of proposed findings of fact and conclusions of law;
 - 3. proceedings before the Board or any officer;
 - 4. all post-hearing procedures; and
 - 5. appeal/review before/by SAT/ courts.
- (II) The party shall further waive:
 - a. such provisions of the Regulations or other requirements of law as may be construed to prevent any officer of SEBI from participating in the preparation of, or advising the Competent Authority as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and
 - b. any right to claim bias or prejudgment by SEBI based on the consideration of or discussions concerning settlement of all or any part of the internal proceedings.
- (III) In addition, the party will undertake to waive a plea of limitation for reopening the case, if the party violates the consent order subsequently.

13 It will be the endeavor of the Committee to settle a case before it, subject to the party taking remedial action and on such further consent terms including consent bars or consent penalties as the Committee may find appropriate in the facts of the case. Consent orders may be passed depending on the nature of the violation by either a) admission of the guilt or b) without admitting or denying guilt. Where an order is passed without admitting or denying guilt, such person shall never represent subsequently that he/she is not guilty. In the event such a representation is made, the enforcement process may be reopened. Consent Order may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved.

14. If the Committee believes that the proposal of consent is not commensurate with the violation or the factors mentioned above are not satisfied or the waivers are

not given, it may decline to consider the proposal of the party. In such an event, the Board and the party will both be free to resort to legal recourse as may be available to them under the law.

- 15 Depending upon the facts and circumstances of the case, gravity of violation/ offence, interest of investors and the securities market and deterrent effect, settlement/ compounding charges have to be paid by the party including legal expenses incurred by SEBI. The Committee will recommend the charges payable by the party for mitigating the violation/ offence taking in to account the factors set out above.

16. Consequence of non-acceptance

- (i) If the Committee rejects the proposal of the party, the person making the offer shall be notified of the same and the offer of settlement shall be deemed to be withdrawn.
- (ii) The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers.
- (iii) SEBI and the Party will be free to resort to legal recourse as may be available to them under law and neither SEBI nor the Party would be entitled to use any information relating to the settlement process in such proceedings.
- (iv) Any proceeding which had been kept in abeyance pending the consent process will begin from the stage at which it was kept in abeyance.

17. Settlement before Securities Appellate Tribunal (SAT)/Courts

Where a matter is pending before SAT/Court, the same process will be undertaken and the draft consent terms recommended by the Committee and approved by the panel of two Whole Time Members will be filed before the SAT/ Court. The SAT/Court may if found fit, pass an order in terms of the consent terms and subject to such further terms as the SAT/ Court may find appropriate in the facts and circumstances of the case.

18. Notice to the party

In all notices/ show cause notices sent by SEBI or its officers to the party, it should clearly be mentioned that the party may, if it so desires, propose for suitable order for agreed penalty/ action by consent along with requisite waivers and undertakings.

19. Composition of Offences

The above procedure and factors and waivers shall be applied for considering the proposals of composition of offences under the SEBI Act, SCRA and the

Depositories Act, 1996, wherever applicable. Any party who wishes to compound an offence shall file an appropriate application before the court where complaint is pending with a copy addressed to the Prosecution Division, Enforcement Department of SEBI's Mumbai office (address is given above) which will forward the application/ request to be placed before the High Powered Committee. The terms of compounding as recommended by the Committee and approved by the Panel of WTMs would be placed before the court by the Prosecution Division by way of written submissions or application, as appropriate, for passing orders as the court deems fit.

20. Publication

The consent order shall be published through a press release and put on SEBI's website. In cases where a Party undertakes compliances as per agreed schedule, the concerned operational department shall monitor the same.

21. Enforceability

- (i) The consent order shall be binding on the party and in cases where the party undertakes any compliances, it has to comply with the same as per agreed schedule.
- (ii) Failure to obey consent orders shall invite appropriate action under the respective statute, revival of the pending administrative/civil action. In this context any proceeding which had been kept in abeyance pending the consent process will revive from the stage where it was kept in abeyance.

22 All information submitted and discussions in pursuance of the consent orders shall be in a fiduciary capacity and may not be released to the public, as it would prejudice SEBI and/or the party.

23. This circular is intended to supplement and not to supplant the SEBI Act, SCRA and the Depositories Act and the Rules and Regulations framed thereunder as also the Guidelines, Circulars and other declarations of policy issued by SEBI from time to time.

24. This Circular is issued with the approval of the Chairman, SEBI, and shall come into force with immediate effect.