PART FOUR: REGULATORY CHANGES

1. REGULATORY DEVELOPMENTS

I. Amendments to Acts

A) Amendments to the SEBI Act/ SC(R)A/ Depositories Act

i) The Securities Contracts (Regulation) Amendment Act, 2007

The Securities Contracts (Regulation) Act, 1956 (SCRA) was amended by the Securities Contracts (Regulation) Amendment Act, 2007 (No. 27 of 2007) on May 28, 2007 whereby a new sub-clause (ie) has been inserted in section 2(h) declaring securitisation certifications or instruments issued by a special purpose distinct entity as securities. Further, a new section 17 A was also inserted to provide that such securities can be offered to the public or listed on any RSE, if the issue fulfils such eligibility criteria and compliance with such other requirements as may be specified by regulations made by SEBI. Pursuant to above, SEBI has issued draft regulations as SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2007 for public comments.

II. New Regulations

i) SEBI (Certification of Associated Persons in the Securities Markets) Regulations, 2007

a) The SEBI (Certification of Associated Persons in the Securities Markets) Regulations, 2007, were notified on October 17, 2007 vide F. No. 11/LC/GN/207/4567. The Regulations seek to make the certification of employees and agents working with the intermediaries in certain posts such as the persons who deals or interacts with the investors, issuers or clients of intermediaries; deals with assets or funds of investor or clients; handles redressal of investor grievances; and responsible for compliance of any rules or regulations etc., mandatory from the date as may be specified by SEBI.

III. Amendments to the Existing Regulations

i) Securities and Exchange Board of India (Manner of Service of Summons and Notices issued by the Board) (Amendment) Regulations, 2007, notified on 23.04.2008

The amendment Regulations *inter-alia* provides that notices may be served by delivering or tendering to that person or his duly authorised agent. Further, apart from registered post, speed post and courier services, provision had also been made to avail the electronic mode of transmission of documents such as fax message and electronic mail services. In case of service upon stock broker, the same may be served through the concerned stock exchanges. In case of failure of all these mode of services of notice, provision had been made to serve the same by posting such notices on the Board's website, in addition to provision for affixing on the conspicuous part of premises.

ii) Securities and Exchange Board of India (Mutual Funds) (Amendment) Regulations, 2007

The amendment Regulations were notified on May 29, 2007, which capped the filling fees for offer documents for a new fund offer at a maximum of Rs. one crore.

iii) Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2007

The amendment Regulations were notified on May 29, 2007, which capped the fees, to be filed with draft offer documents filed under the regulations, at a maximum of Rs. 10 crore for offer above Rs. 5,000 crore.

iv) Securities and Exchange Board of India (Buy-Back of Securities) (Amendment) Regulations, 2007

The amendment Regulations were notified on May 29, 2007, which capped the fees, to be filed with draft letter of offer filed under the regulations, at a maximum of Rs. 10 crore for offer above Rs.5,000 crore.

v) Securities and Exchange Board of India (Merchant Bankers) (Amendment) Regulations, 2007

The amendment Regulations were notified on May 29, 2007, which revised the filing fees in case of public issue and rights issue to a flat charge of Rs. 10 crore for public issues above Rs. 25,000 crore and to flat charge of Rs. 25 lakh for rights issue above Rs. 500 crore.

vi) SEBI (Depositories and Participants) (Amendment) Regulations, 2007

The amendment Regulations were notified on October 10, 2007, whereby a proviso to the existing clause (c) of the Regulation 7 was inserted enabling a depository to carry on any activity assigned by either the Central Government or by any regulator in the financial sector. Such activity may be carried out by such depository only through the establishment of Strategic Business Unit with the prior approval of the Board.

vii) Securities and Exchange Board of India (Mutual Funds) (Second Amendment) Regulations, 2007

The amendment Regulations were notified on October 31, 2007, whereby a new clause (mn) has been inserted in Regulation 2 which defines "index fund scheme" as to mean a mutual fund scheme that invests in securities in the same proportion as an index of securities was introduced. This amendment further substituted sub-Regulation (4) of the Regulation 44 with new sub-Regulation (4) enabling a mutual fund to lend and borrow the security within the frame work for short selling specified by SEBI.

viii) SEBI (FII) (Second Amendment) Regulations, 2007

The amendment Regulations were notified on December 31, 2007, which allowed short selling by the FIIs in accordance with the framework specified by the Board in this regard. It further enabled the FIIs and sub-accounts to lend or borrow the securities in accordance with the framework specified by SEBI in this regard.

ix) SEBI (Depositories and Participants) (Amendment) Regulations, 2008

The amendment Regulations were notified on March 17, 2008, which provided for the shareholding such as sponsor should at all times hold at least 51per cent shares in the depository, no person either singly or together with persons acting in concert, can hold more than five per cent of the equity share capital in the depository, the combined holding of all persons resident outside India in the equity share capital of the depository shall not exceed, at any time, 49 per cent of its total equity share capital, subject further to the following:

- the combined holdings of such persons acquired through the foreign direct investment route is not more than 26 per cent of the total equity share capital, at any time;
- the combined holdings of foreign institutional investors is not more than 23 per cent of the total equity share capital, at any time;
- no foreign institutional investor acquires shares of the depository otherwise than through the secondary market; and

- no foreign institutional investor should have any representation in the Board of directors of the depository.

x) SEBI (Payment of Fees) (Amendment) Regulations, 2008

The amendment Regulations which were notified on March 31, 2008, sought to revise the fees which were payable to SEBI under various Regulations as per the recommendations of the committee constituted by SEBI to revisit the existing fee structure of SEBI. The following amendments were made to reduce the fees chargeable under earlier Regulations:

a) Securities and Exchange Board of India (Buy-back of Securities) Regulations, 1998.

Amendment Act revised the fee to be charged under the Regulation as provided in Table 4.1**:**

Table 4.1: Revised Fee Structure: Buy-back of Securities

Offer size	Amount of fee (Rs.)
1	2
Less than or equal to ten crore rupees.	One lakh rupees (Rs. 1,00,000).
More than ten crore rupees, but less than or equal to one thousand crore rupees.	0.125 per cent of the offer size.
More than one thousand crore rupees, but less than or equal to five thousand crore rupees.	One crore twenty five lakh rupees (Rs. 1,25,00,000) plus 0.03125 per cent of the portion of the offer size in excess of one thousand crore rupees (Rs. 1000,00,00,000)
More than five thousand crore rupees.	A flat charge of three crore rupees (Rs. 3, 00, 00,000).

b) Securities and Exchange Board of India (Custodian of Securities) Regulations, 1996

This amendment revised the annual fees for Custodian of Securities to Rs. 10 lakh or 0.0005 per cent of the assets under custody of such custodian, whichever is higher.

c) Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992

Vide this amendment the fee to be charged under the Merchant Bankers Regulations has been revised as provided in Table 4.2:

d) Securities and Exchange Board of India (Mutual Funds) Regulations, 1996:

This amendment revised the registration fees to Rs. 25 lakh and filing fees for offer document to 0.005 per cent of the amount raised in the new fund offer, subject to minimum of Rs. 1 lakh and maximum of Rs. 50 lakh.

e) Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

The Amendment regulation revised the fee to be charged under the Regulation as provided in Table 4.3:-

f) Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 –

This amendment revised the registration fee for Venture Capital Fund to Rs. five lakh.

IV. Other Notifications

i. On July 05, 2007, vide notification no. SEBI/LE/98096/2007, SEBI withdrew the recognition granted to the Saurashtra and Kutch Stock Exchange Limited by notifying the order.

ii. On August 29, 2007, vide notification no. F.No. SEBI/LE/102158/2007, Pune Stock Exchange was granted renewal of

Table 4.2: Revised Fee Structure: Merchant Bankers

Size of the issue, including intended retention of over subscription	Amount / Rate of fees
1	2
A. Public Issues	
Less than or equal to ten crore rupees.	A flat charge of twenty five thousand rupees (Rs.25,000).
More than ten crore rupees, but less than or equal to five thousand crore rupees.	0.025 per cent of the issue size.
More than five thousand crore rupees, but less than or equal to twenty five thousand crore rupees.	One crore twenty five lakh rupees (Rs.1,25,00,000) plus 0.00625 per cent of the portion of the issue size in excess of five thousand crore rupees (Rs.5000,00,00,000).
More than twenty five thousand crore rupees.	A flat charge of three crore rupees (Rs.3,00,00,000).
B. Rights Issues	
Less than or equal to ten crore rupees.	A flat charge of twenty five thousand rupees (Rs.25,000).
More than ten crores rupees and less than or equal to five hundred crore rupees.	0.005 per cent. of the issue size.
More than five hundred crore rupees.	A flat charge of five lakh rupees (Rs.5,00,000).

Table 4.3: Revised Fee Structure: Substantial Acquisition of Shares and Takeovers

Offer size	Amount of fee (Rs.)
1	2
Less than or equal to ten crore rupees.	One lakh rupees (Rs. 1, 00,000).
More than ten crore rupees, but less than or equal to one thousand crore rupees.	0.125 per cent of the offer size.
More than one thousand crore rupees, but less than or equal to five thousand crore rupees.	One crore twenty five lakh rupees (Rs. 1,25,00,000) plus 0.03125 per cent of the portion of the offer size in excess of one thousand crore rupees (Rs.1000,00,00,000).
More than five thousand crore rupees.	A flat charge of three crore rupees (Rs. 3,00,00,000).

recognition for a period of one year commencing from September 02, 2007.

iii. On September 03, 2007, vide notification no. SEBI/LE/102396/2007, SEBI notified the order refusing the grant of renewal of recognition of Magadh Stock Exchange Limited.

iv. On September 24, 2007, vide notification no. SEBI/MRD/DSA/104459/2007, SEBI notified the appointed date for various stock exchanges by which they had to complete the corporatisation and demutualization processes as hereunder:-

Table 4.4: Appointed Date for Stock Exchanges

Sl. No.	Stock Exchange	Appointed date
1	2	3
1.	UPSE	21.08.2007
2.	Madras Stock Exchange Limited	25.08.2007
3.	Cochin Stock Exchange Limited	25.08.2007
4.	BgSE	27.08.2007
5.	Gauhati Stock Exchange Limited	27.08.2007
6.	CSE	28.08.2007
7.	DSE	28.08.2007

v. On December 31, 2007, vide notification no. SEBI/MRD/DSA/111917/2007 dates of completion of corporatisation and demutualisation of Pune Stock Exchange Ltd. and Madhya Pradesh Stock Exchange Ltd. were notified as August 25, 2007 and August 28, 2007, respectively. These dates were appointed as "appointed date" for the aforesaid exchanges.

vi. On January 03, 2008, vide notification no. F.No. SEBI/LE/112072/08(E), recognition was granted to Vadodra Stock Exchange for a period of one year commencing from January 04, 2008.

vii. On March 31, 2008, vide notification no. F.No. 11/LC/GN/2008/21670 under clause (u) of sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI), it was notified by SEBI to consider non-banking financial companies (NBFCs), registered under section 45-IA of the Reserve Bank of India, 1934, as a qualified institutional buyer for the purposes of the SARFAESI Act, which satisfy following conditions :

a) systemically important non-deposit taking NBFCs with asset size of Rs. 100 crore and above; and

b) other non-deposit taking NBFCs which have asset size of Rs. 50 crore and above and "Capital to Risk-weighted Assets Ratio" (CRAR) of 10 per cent as applicable to non-deposit taking NBFCs as per the last audited balance sheet.

V. Consent Order

Consent order scheme was introduced by SEBI on April 20, 2007. The powers are derived by SEBI for the same under the SEBI Act and Depositories Act. The details are provided in Box 4.1.

VI. Compounding of Offences

Under Section 621 A of Companies Act, the Company Law Board (CLB) is empowered to compound the offences under the said Act. On producing the order of CLB, the court before which the case is pending discharges the accused. Similarly, under Section 24A of SEBI Act, power to compound the case is conferred on the court before which the case is pending. Similar provisions are there in Securities Contracts (Regulation) Act and Depositories Act. Under the said provisions, the accused persons can make application in this regard to the court, which is decided after considering the facts and circumstances of the case and the reply filed by SEBI.

For ensuring uniformity in the matters, SEBI specified the procedure to be followed on receipt of the application for compounding of offences under the securities laws, and the factors to be taken into account while considering such applications. Accordingly, a High Powered Advisory Committee (HPAC) headed by a former Judge of Bombay High Court, Justice H. Suresh was constituted for examining the compounding applications and making appropriate recommendations to the Board. On approval of the said recommendations by the Board, reply is filed in the concerned court thereby either opposing the application or agreeing to it subject to the conditions specified by HPAC.

2. SIGNIFICANT COURT PRONOUNCEMENTS

I. Supreme Court

i. Civil Appeal 1672/2006- G.L.Sultania & Others. vs. SEBI & others; Civil Appeal 1704/2006- H.L. Somany & Others. Vs. SEBI & others; Civil Appeal 1740/2006- R.K. Somany & Others. Vs. SEBI & others

The Supreme court held that the valuation of shares is not only a question of

Box 4.1: Consent Order

The Parliament of India recognises the powers of SEBI to pass consent orders under the SEBI Act 1992 and the Depositories Act 1996. The powers are derived by SEBI under 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 also permit composition of offences. However, consent orders cannot be construed as waiver of statutory powers by the SEBI Board.

Consent orders are passed by Competent Authority/SAT/Court where proceedings are pending, subject to the party taking remedial action and on such further consent terms including consent bars or settlement penalties as the Competent Authority/SAT/Court where proceedings are pending, may find appropriate in the facts and circumstances of the case. Consent orders can be passed either a) admitting 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. Similar appropriate terms will be sought by SEBI from Court where the prosecution is pending.

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 taken up 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.

The consent orders are binding on the party and failure to obey consent orders invites appropriate action under the respective statute, revival of the pending administrative/civil action.

Where a matter is pending before SAT/Court, the same consent process is to be undertaken and the draft consent terms recommended by the High Powered Advisory Committee and approved by the panel of two Whole Time Members is to 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.If SEBI rejects the offer of settlement, the person making the offer shall be notified of the same and the offer of settlement shall be deemed to be withdrawn.

fact, but also raises technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares.

The parameters laid down in the Regulation 20 (5) of SEBI Takeover Regulations are by no means exhaustive. The Regulation itself does not prescribe the weightage to be assigned to different enumerated parameters. The weightage to be given to different factors that go into the process of valuation must be left to the wisdom, experience and knowledge of the experts in the field of share valuation. Such being the method of share valuation which involves subjective and objective considerations, there is considerable scope of difference of opinion even amongst experts.

Regulation 20 (5) is meant to provide guidance to arrive at a fair value of shares objectively which the acquirer is expected to offer to the shareholders of the target company. The offer price shall be determined

by the acquirer and the merchant banker taking into account the factors mentioned therein. The Board as a regulator is not bound to accept the offer price which is required to be incorporated in the public offer, if it suspects that the offer price does not truly represent the fair value of the shares determined in accordance with Regulation 20 (5).

There is nothing in the Regulations which requires SEBI to pass a reasoned order for all it does as a regulator. SEBI must approve the price offered unless it is shown that the valuation arrived at must be faulted for non-compliance with the regulations which lay down the norms and parameters which must be observed. In the present case, SEBI had acted in a reasonable manner and in consonance with the regulations. Only after considering all relevant matters it approved the offer price to be incorporated in the public offer document.

It was also held that "*unless it is shown that some well accepted principle of valuation has been departed from without any reasons, or that the approach adopted is patently erroneous or that the relevant facts has not be considered by the valuer or that the valuation was made on a fundamental erroneous basis or that the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter, this court would not interfere with the valuation of the expert*."

In result, the appeal was dismissed finding no merit in the case.

ii. Civil Appeal No. D3753/2008- ASK Financial Services Ltd. vs. SEBI, Civil Appeal No. D5971/2008- BRICS Securities Ltd. vs. SEBI, before the Hon'ble Supreme Court of India

Investigations in the case of IDFC revealed that certain entities had adopted a *modus operandi* of making applications in fictitious names for cornering the retail proportion of the IPO shares which would have otherwise gone to genuine retail applicants, and had thus abused the IPO allotment process.

SEBI passed an interim order dated January 12, 2006, directing Mr. Manojedev Seksaria to refrain from buying, selling or dealing in the securities market, either directly or indirectly, till further directions. The said order was posted on the SEBI website and was also communicated to the media through press release.

However, M/s Brics Securities Ltd. and M/s ASK Financial Services Ltd. executed transactions for their client Manojedev Seksaria. The Adjudicating Officer (AO) imposed a penalty of Rs. 10 lakh each against M/s BRICS Securities and M/s ASK Financials.

Aggrieved by the order of the AO, both appellants filed separate appeals before the Hon'ble Securities Appellate Tribunal (SAT). By order dated October 29, 2007, the Hon'ble SAT dismissed the said appeals. In the case of BRICS Securities, the Hon'ble SAT held that the broker had defaulted in not carrying out due diligence by accessing the website of SEBI or the NSE which had clearly published the restraint order. The act of BRICS Securities in not accessing the website amounted to culpable negligence which resulted in a barred entity being permitted to trade in the securities market.

In the case of ASK Financials, the Hon'ble SAT pointed out that ASK should have sought clarification from the authorities regarding the barred entity's name and details before it had executed the trades on behalf of Seksaria. Further, SAT held that the factors to consider while levying penalty under Section 15J are not exhaustive and it is open to the adjudicating officer to take into consideration such other relevant facts which

may go to determine the gravity of the default committed by the delinquent.

The appellants, through separate appeals, approached the Hon'ble Supreme Court against the decision of the Hon'ble SAT. The Hon'ble Supreme Court dismissed both the appeals.

iii. SLP Civil No. 5197/2008- Saurashtra Kutch Stock Exchange Ltd. vs. SEBI, before the Hon'ble Supreme Court of India

SEBI vide Order dated July 05, 2007, withdrew the recognition granted to the appellant, Saurashtra Kutch Stock Exchange Ltd. (SKSE) under section 5 of the Securities Contracts (Regulation) Act, 1956. The said SEBI order was challenged before the Hon'ble SAT wherein the SAT upheld the impugned order and dismissed the appeal. Upon rejection of the application for renewal by SEBI, SKSE filed a special civil application before the Hon'ble High Court of Gujarat held that the SAT was empowered to hear the appeal under Section 15T of the SEBI Act, 1992 and also under Section 23L of the SCRA. The exercise of power by the Whole-Time member of SEBI is not only under Section 5 of the SCRA but also under Section 11 and Section 19 of the SEBI Act, 1992 read with Government of India Notification dated September 13, 1994, issued under Section 29A of the SCRA. Since the SEBI order is a composite one and since SEBI may in writing delegate its power to any member of the Board, even an order withdrawing recognition under Section 5 of the SC(R)A cannot be said to be unjust or arbitrary or *de hors* the provisions of the Statute. Therefore, the contention of SKSE, that the remedy of appeal to the Tribunal was not available to it, was not accepted by the Hon'ble High Court. Further, the Hon'ble Court held that as against the order passed by the Hon'ble SAT, the only remedy available was to approach the apex court.

The appellant preferred an appeal before the Hon'ble Supreme Court against the decision of the Hon'ble High Court of Gujarat. The said appeal too, was dismissed by the Hon'ble Supreme Court.

iv) Civil Appeal No. 4164 of 2006 with Civil Appeal Nos. 4182, 4183, 4186, 4189, 4191, 4204, 4205 & 4206 of 2006: Ketan Parekh & Others Vs SEBI – Before the Hon'ble Supreme Court. – Order dated May 18, 2007.

SEBI vide its order dated December 12, 2003 in exercise of powers conferred upon it u/s 11B and 11(4) (b) of SEBI Act read with regulation 11 and 13 of SEBI (PFUTP) Regulations, 2003 had prohibited Shri Ketan Parekh, Kartik K Parekh,Classic Credit Ltd., Panther Fincap and Management Services Ltd. Luminant Investment Ltd., Chitrakut Computers Pvt. Ltd., Saimangal Investrade Ltd., Classic Infin and Panther Investrade Ltd. from buying, selling or dealing in securities in any manner directly or indirectly and also debarred them from associating with the securities market for a period of 14 years.

The aforesaid entities filed separate appeals against the said order of SEBI which were heard together whereupon SAT vide its order dated July 14, 2006 observed that the appellants had rigged the market in a big way and the penalty imposed on them is quiet reasonable having regard to the gravity of the charges proved, SAT agreed with SEBI and dismissed all the appeals in toto.

Aggrieved by the said order of SAT, all these nine entities had preferred appeals before the Hon'ble Supreme Court. The Hon'ble Supreme Court after hearing the matter dismissed all the appeals in toto holding that it is proved that Ketan Parekh

and associated entities indulged in manipulation.

v. Appeal Nos. 502 and 544 of 2007 - Triumph International Finance India Limited. – Order dated January 21, 2008.

SEBI investigation had revealed that during market scam all the KP entities manipulated the market while conducting transactions through specified set of their own/associated broking entities. Therefore, after conducting enquiry proceedings, the registration granted to Triumph International Finance India Limited as stock broker was cancelled by SEBI. Aggrieved by this order Triumph International Finance India Limited appealed before SAT and SAT vide its order dated 04.05.2007, dismissed the appeal and upheld the cancellation of its registration. This SAT Order was challenged before the Hon'ble Supreme Court and the Apex Court while agreeing with SEBI and SAT upheld the cancellation of registration and dismissed the appeal.

vi. Appeal No 2 of 2004 – SEBI vs. Rakesh Agarwal – order dated January 23, 2008.

SEBI vide order dated June 10, 2001, had directed Rakesh Agarwal to deposit Rs. 34 lakh in the Investor Protection funds of BSE and NSE for violating the provisions of the Insider Trading Regulations. When appealed before SAT, it set aside SEBI order and aggrieved by the same, SEBI filed the captioned appeal in the Supreme Court.

Meanwhile, SEBI came out with the circular dated April 20, 2007, whereby the parties to the dispute can get the same settled on the basis of the consent terms arrived at between the parties.

The apex court vide its order dated January 23, 2008, was pleased to dispose off the matter on the basis of the consent terms arrived at between SEBI and Rakesh Agarwal.

vii) Sumedha Fiscal Services Ltd. Vs SEBI and Ratnabali Capital Markets Ltd. vs. SEBI

The appellants are in the category of Merger/Amalgamation. The appellant in this matter had initially filed an appeal before the SAT claiming the fee continuity benefit as envisaged in the circular dated September 30, 2002 issued by the SEBI since the appellant had merged itself into another entity. The said circular dated September 30, 2002, issued by the SEBI prescribes that, "*Where mergers/ amalgamations are carried out as a result of compulsion of law, fees would not have to be paid afresh by the resultant transferee entity provided that majority shareholders of such transferor entity continue to hold majority shareholding in transferee entity. The Exchange would have to enumerate what constitutes "compulsion of law" resulting in such merger/ amalgamations, for consideration of SEBI.*"

The Hon'ble SAT had dismissed the appeals filed by the appellants. When the appeals have been preferred against the order of SAT, the Hon'ble Supreme Court had dismissed the appeals and held, "…....*Under circular dated September 30, 2002 what SEBI intends to say is that fresh turnover/registration fees would not be payable by a company which goes for amalgamation/merger as an alternative to liquidation……..The difference between the amount recorded as fresh share capital issued by the transferee company on amalgamation and the amount of share capital of the transferor company to be reflected in the Revenue reserve (s) of the transferee company was the sole object behind the amalgamation. Therefore, SEBI was right, in the present case, in refusing to give the benefit of exemption to the transferee companies……*"

II. High Court

i) Writ Petition 174/1998- Harinarayan G. Bajaj vs. Union of India & others- Before the Hon'ble Bombay High Court

The above Writ Petition was filed challenging the order of the Appellate Authority dated October 09, 1997, whereby the Appellate Authority had upheld the SEBI's order dated March 06, 1997. SEBI had by order dated March 06, 1997, rejected the complaint filed by the petitioner holding that indirect acquisition of Sesa Goa Ltd. by Mitsui & Company through Finsider International Co. Ltd. (FINCO) did not trigger the Takeover Code, 1994.

On the issue of maintainability, the Hon'ble Court held events which have taken place subsequent to the presentation of the W.P. would not refrain the Court from addressing the key issue in the W.P.

The concept of indirect acquisition of shares and change in control has been introduced for the first time by the 1997 Takeover Regulations.

From the Bhagwati Committee Report, it is evident that indirect acquisitions were not covered by the 1994 Regulations, the 1994 Regulations did not cover the transaction in the present case. The Committee had acknowledged that cases such as the present one were not covered by the 1994 Regulations.

The acquisition of shares must be of the target company not only formed and registered under the Companies Act, 1956 or earlier Companies Act but shares of such company should be listed on a stock exchange in India, for the provisions of Chapter III of the 1994 Regulations relating to Takeovers to become applicable. If there is no acquisition of shares in the target company the provisions of Chapter III of the 1994 Regulations do not get triggered.

The 1994 regulations on being repealed will be restricted in operation as provided under regulation 47 of the 1997 regulations. Regulation 47 of 1997 Regulations nowhere provide for retrospective application of the 1997 Regulations.

ii) W.P. No. 18384/2007- Harikishore Bhattad & Others vs. SEBI, before the Hon'ble Andhra Pradesh High Court

As per the Corporatisation and Demutualisation Scheme approved and notified by SEBI for the erstwhile Hyderabad Stock Exchange (HSE) under Section 4B(1) of Securities Contracts (Regulation) Act, within 12 months from August 29, 2005 (date of publication of Notification), the HSE had to either by fresh issue of equity shares to the public or in any other manner specified by Regulations made by SEBI, ensure that at least 51 per cent of its equity share capital is held by the public other than the share holders having trading rights. This period expired on August 28, 2006. By invoking the proviso to Section 4-B (8), SEBI extended time to comply with the demutualisation process within the next 12 months i.e. on or before August 28, 2007. However, HSE could not complete the process of demutualisation before August 28, 2007 and therefore, by operation of law, i.e., Section 5 (2) of the SC(R)A, the recognition stood automatically withdrawn w.e.f. August 29, 2007.

The members of the erstwhile HSE filed a writ petition contending that while the Scheme was notified on August 29, 2005, the Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations, 2006, which were meant for implementing the Scheme were issued only on November 13, 2006. Further, if HSEL was de-recognised, the post-derecognition procedure had not been contemplated or indicated anywhere. The petitioners hence challenged the notification of de-recognition

as being arbitrary, illegal and contrary to the provisions of the SC(R)A, 1956.

The Hon'ble High Court did not accept the reasons highlighted by the petitioners and held that Section 5 (2) of the Act is not controlled by Section 4B (8) of the Act and Section 5 (2) of the Act being mandatory, the same would be operative. Hence, in light of the same, the Hon'ble High Court upheld the order passed by SEBI stating that it was neither arbitrary nor contrary to the provisions of the SC(R)A.

iii. Order dated July 13, 2007 in W.P. No. 14837 of 2007; K. Venkateshwaralu vs. SEBI & others.- Before the High Court of Andhra Pradesh at Hyderabad.

In this writ petition the petitioner had prayed for issuance of writ of *mandamus* to the Board to initiate an enquiry in the alleged price manipulation in the scrip of M/s Unitech Ltd. and to file a report into the High Court.

The Court *inter-alia* observed as under :

"….Merely because there is fall in the price of shares, there cannot be any automatic inference that same is on account of manipulation by the Company, Lanco Infratech as alleged by the Petitioner. The share price will depend upon many circumstances and if one invests in the stock market, he has to take risk of the fluctuations in the share prices. Merely because the price of the share had fallen subsequently, there cannot be any inference of manipulation. …….. As such, in absence of bringing to the notice of the first respondent-Board, any specific information of manipulation by the second respondent-Company, there is absolutely no basis for the petitioner to approach this Court, by way of this petition filed under Article 226 of the Constitution of India, for directions, to investigate in the matter. The Writ Petition is totally devoid of merits and is accordingly dismissed."

III. Securities Appellate Tribunal

i. Appeal No. 97/2006- Blue Chip Tex Industries Vs. Bombay Stock Exchange – Before Hon'ble SAT

The price of preferential shares is fixed with reference to the "relevant date" which has to be the date thirty days prior to the date on which the meeting of the general body of shareholders is convened in terms of section 81(1-A) of the Companies Act. It was further observed that in the present case the relevant date could have been either the one referred to in the explanation to Para 4 of the guidelines dated August 04, 1994 issued on preferential issues or it could be a date thirty days prior to the date on which the holder of the warrants becomes entitled to apply for the said shares. The Board of Directors are bound to inform the shareholders the basis on which the price of the shares arising out of warrants shall be determined. Thus, the issuer company should exercise the option of fixing the "relevant date" in the meeting of the general body of shareholders itself as that alone will give them the basis of determining the price of those shares. The "relevant date" cannot be fixed at any later point of time. In preferential allotment made under section 81 (1-A) of the Companies Act, the general body of shareholders is excluded from that allotment and therefore the law requires that the Board of Directors must obtain their sanction by way of a special resolution before such allotment is made.

Having obtained the authority from the shareholders on the basis that the resultant shares would be allotted to the preferential allottees at the rate of Rs.14.63 per share, the Board of Directors is not justified to allot those shares at the reduced price of Rs.10 per share. The company in the EGM had to fix the relevant date and that it did fix the same as the date being thirty days before the meeting of the shareholders under section 81(1-A) of the Companies Act and having

done so, it was not open to the Board of Directors to change that date subsequently as that would alter the basis of determining the price of the converted shares. Merely because the company had the option at the time of EGM would not justify the subsequent change. This is clearly contrary to the mandate given by the shareholders in the EGM besides being contrary to the guidelines. It was held that the Board was right in observing that the company could call for the remaining amount of Rs.4.63 per share from such allottees to make the preferential shares eligible for listing.

ii. Appeal No. 137/2006 - Mathew Easow Vs. SEBI, before the Hon'ble Securities Appellate Tribunal

SEBI vide Order dated September 26, 2006, imposed a penalty of Rs.20 lakh against Mathew Easow, an analyst, for providing misleading tips to the investors through CNBC TV Channel and its portal www.moneycontrol.com thereby violating Regulation 4 (2) (f) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003. The primary finding against Mathew Easow was that he had been advising the market to buy certain stocks while, he himself, had taken contrary positions.

An appeal was filed by Mathew Easow against the order of the Adjudicating Officer before the Hon'ble SAT. The Tribunal set aside the order passed by the Adjudicating Officer stating that the latter had misread the investment recommendations made by the appellant. The Hon'ble SAT observed that the recommendations made by the appellant were not only a 'buy' recommendation and that a 'sell' recommendation was inherent in it. Also, the Tribunal held that the Adjudicating Officer had failed to note that the appellant had only sold a part of his portfolio and not the whole of it. The SAT disagreed with the findings of the Adjudicating Officer that the appellant had taken an opposite trading position to what had been recommended by him to the investors at large or that he had misled the investors through his investment recommendations. Further, the SAT imposed costs of Rs. one lakh on SEBI.

SEBI has challenged the SAT order before the Hon'ble Supreme Court. The Hon'ble Supreme Court has stayed the costs imposed on SEBI and the appeal is pending.

iii. Appeal No.188/2004 - Millennium Equities (India) Pvt. Ltd. vs. SEBI, before the Hon'ble Securities Appellate Tribunal

SEBI vide Order dated September 13, 2004, suspended the certificate of registration granted to Millennium Equities (I) Pvt. Ltd., for a period of six months for indulging in market manipulation by executing synchronized transactions in the scrip of DSQ Software.

The Hon'ble SAT vide Order dated November 29, 2006, set aside the order passed by SEBI. The SAT reached a conclusion that matching of trades in price, quality and time did not lead to a conclusion that the stock broker had knowledge of fictitious trades being executed between buyer and seller. The SAT also concluded that SEBI needed to have some material on record other than the trade logs in order to infer such knowledge on the part of the stock broker and hence set aside the order of SEBI.

SEBI preferred an appeal to the Hon'ble Supreme Court challenging the order passed by the Hon'ble SAT. The appeal has been admitted by the Hon'ble Supreme Court.

iv. Appeal No.55/2007- Alok Ketan vs. SEBI, before the Hon'ble Securities Appellate Tribunal

In this case, the appellant transferred the letter of allotment of the shares of Padmini

Technologies Ltd. off the market before they were listed and received payment for the same on the date of the transaction. The question that arose before the Hon'ble Tribunal was what would amount to a transfer of security. The Hon'ble Tribunal concluded that a transfer of allotment letters, as was done in this case, amounted to a transfer of security.

v. Appeal No. 96/2004 – Triumph Securities Limited vs. SEBI and Appeal No 98/2004 – Classic Share & Stock Broking Ltd vs. SEBI and Appeal No.99/2004 – NH Securities Limited–

Appeals were filed against the order of SEBI dated March 08, 2004, whereby the certificates of registration of the appellants were cancelled for the alleged violations of the provisions of SEBI Fraudulent and Unfair Trade Practices (FUTP) Regulations and Broker Regulations. The appellants were found guilty of manipulating the market by trading in the scrips of Lupin Laboratories Ltd., Global Trust Bank Ltd., and Aftek Infosys Ltd., Global Trust Bank, Himachal Futuristic Communications Ltd., Zee Telefilms Ltd. and Padmini Polymers Limited.

SAT vide order dated May 05, 2007, dismissed the appeals in toto. SAT, while rejecting the contention of the appellants that they are not entities connected to or controlled by Ketan Parekh, opined that "*it was Ketan Parekh who was running the show on behalf of the appellant*".

vi. Appeal no. 116 of 2006 – Shravan Kumar Goyal vs. SEBI

The appellant traded in large quantities in the scrip of Radaan Mediaworks India Limited (RMIL) during the period of 03- 03- 2003 to 07- 07- 2003. It was alleged that the appellant while trading in the scrip of the RMIL had executed structured deals with the four parties. The charges levelled against the appellant that he violated the provisions of Regulations 4(1), (2) (a), (b) (e), (n) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating To Securities Market) Regulations, 2003. As the charges stood established, AO imposed a penalty of Rs. five lakh on the appellant. In appeal, SAT found that appellant and four clients had been executing trades among themselves in the scrip of RMIL. SAT held that matching buy and sell orders were placed by them on the screen of the Exchange and these orders matched in all respects i.e. in quantity, time, price and disclosure volumes on the screen- SAT further held that the amount of penalty that could be levied U/s 15 HA of SEBI Act 1992 can be Rs. 25 crores or three times the amount of profit made out of such trades, whichever is higher. Tribunal was satisfied that appellant along with aforesaid four clients had executed matching trades for the purpose of creating artificial volumes without intending to transfer beneficial ownership in the traded scrip. Vide order dated August 20, 2007, SAT dismissed the appeal.

vii. Appeal No. 131 of 2006 – Gautam N. Jhaveri, Sole Proprietor of M/s Rajesh N. Jhaveri Vs. SEBI

SEBI carried out investigations in the trading in the scrip of the RMIL for the period from March 03, 2003 to July 07, 2003. Investigations revealed that the appellant traded in the scrip of the RMIL from May 27, 2003 to July 07,2003 through his broker Grishma Securities Pvt Ltd. with one Nrupesh C. Shah who in turn was acting through his broker Anil Mistry. Both the appellant and Nrupesh C. Shah carried on circular trading in the scrip of the RMIL and executed structured and synchronized trades. The charges levelled against the appellant were that he violated the provisions of Regulations 4(1), (2) (a), (b) (e), (n) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market)

Regulations, 2003. Adjudicating Officer, after considering the material available,' imposed a penalty of Rs. 5 lakh on the appellant under section 15 HA of the SEBI Act, 1992 holding that the appellant had indulged in fraudulent and unfair trade practices. The appellant challenged the order of AO before SAT. SAT examined the trade executed in detail and found that appellant with Nrupesh C. Shah carried on circular trading in the scrip of the RMIL and executed structured and synchronized deals. The price of the security punched into the system both by the buyer and seller was the same, the quantity of the shares to be sold was also the same and the time at which the two orders were punched in is almost the same. There were as many as 327 trades executed between the appellant and Nrupesh C. Shah. SAT did not accept the plea of the appellant that the penalty imposed on his client was on the higher side and that the same to be reduced. SAT did not find any scope for reducing the penalty and vide order dated 23-08-2007 was pleased to dismiss the appeal in toto.

viii. Appeal No.99/2007 in the matter of HSBC Securities and Capital Markets (India) Pvt. Ltd. Vs. SEBI

HSBC Securities and Capital Markets (India) Pvt. Ltd. Vs SEBI - was filed against the order of SEBI dated March 07, 2007, whereby a minor penalty of censure on the certificate of registration of the appellant was imposed by SEBI for violation of Clauses 1, 2 and 7 of the Code of Conduct specified in Schedule III of the Merchant Banker Regulations, and Regulation 24(4) of the Takeover Regulations.

The main charge on the appellant was that as a merchant banker it failed to comply with regulation 24(4) of the Takeover Code and clauses 1, 2, 7 and 9 of the Code of Conduct prescribed in Schedule III to the Merchant Bankers Regulations in as much as in the letter of offer dated September 15, 2000, there was a wrong disclosure that all 2,44,94,200 issued equity shares of the target (Saptarishi Agro Industries Ltd.) company were listed on the stock exchanges of Chennai, Mumbai, Delhi and Ahmedabad whereas 1,40,30,000 shares were, in fact, not listed on the Bombay Stock Exchange and these included 59,80,000 shares not listed on any stock exchange.

This inaccuracy came to the notice of SEBI from the letter of offer issued in August 2003, in connection with the takeover of the same target company by another acquirer.

The Hon'ble Tribunal agreed with the contention of SEBI that ensuring the truth and correctness of the letter of offer is a fundamental responsibility of the merchant banker which he has to discharge by exercising due diligence and vide its order dated February 20,2008, was pleased to dismiss the said appeal.

ix. National Securities Depository Limited Vs. SEBI, SAT Appeal No. 147/ 2006 (decided on 22.11.2007)

SEBI vide its order dated November 21, 2006, directed the appellants in these cases to jointly and severally disgorge an amount of Rs.115.82 crore in two sets within six months from the date of the order for their role in the Initial Public Offerings (IPO) irregularities.

The investigation carried out by SEBI into the dealings in the shares allotted in various IPOs before their listing on the stock exchanges revealed that certain entities had cornered IPO shares reserved for retail applicants by making applications in retail category through the medium of fictitious/ benami applicants with each application being for small values as to be eligible for allotment under the retail category. Subsequent to the receipt of IPO allotment,

these fictitious/ benami allottees transferred the shares to their principals who in turn transferred those shares to the financiers who financed the whole game plan. The financiers then are alleged to have sold most of these shares on the first day of listing thereby realizing a windfall gain because of the difference in price between the IPO issue price and the price on the listing date.

In view of the preliminary finding, the Board passed a comprehensive ex-parte ad-interim order dated April 27, 2006 and issued directions, among others, to various entities prohibiting them from dealing in the securities market till further orders. After the investigations were completed, the Board initiated various proceedings / actions against the concerned entities including the appellants in the form of enquiries, adjudication and prosecution under the SEBI Act, 1992. The Board, as a remedial measure, to protect the interest of securities market and investors and to prevent the perpetrators of the unlawful activity along with other market participants who facilitated the same from enjoying the fruits of their ill gotten gains, passed the impugned order dated November 21, 2006.

The Hon'ble SAT observed as follows:

"We have heard the learned senior counsel for the parties who have taken us through the record. It is not in dispute that the proceedings against the appellants are still pending at different stages and the question whether they are guilty or not of the charges levelled against them has yet to be decided. Strangely enough, even before determining the guilt, if any, of the appellants, the Board has directed them to disgorge a sum of Rs.115.82 crore. In other words, the amount which the appellants have to disgorge has been determined in the impugned order though their guilt has yet to be established. It has also not been established whether they made any ill gotten gains. Having done this, the Board has observed that in case the appellants are found guilty of any wrong doing in the final order which has yet to be passed, they shall become liable to disgorge the amount without any further hearing being afforded to them and in case they are exonerated they shall be free from any liability under the impugned order. Not only that the appellants will not be heard, they have also been directed to deposit the amount within six months of the passing of the impugned order. It is, thus, clear that the appellants will not be heard any further in the matter of disgorgement. They have not been issued any notice to show-cause why they should not be called upon to disgorge the amount. This is clearly in violation of the principles of natural justice. We do not think that the Board could direct the appellants to disgorge the aforesaid amount without first determining their guilt and whether they had made any illegal gains. Again, it is not that every erring entity is held liable to disgorge the amount. Persons who have made illegal or unethical gains alone could be asked to disgorge their ill gotten profits. We are further of the view that all these issues should have been determined only after the passing of the final order holding the appellants guilty of the alleged wrong doings for which proceedings are still pending. In this view of the matter, we have no hesitation in setting aside the impugned order qua the appellants which we hereby do leaving it open to the Board to initiate, in accordance with law, disgorgement proceedings against such entities as may become liable to disgorge. The appeals are accordingly allowed with no order as to costs."