

Amendment to SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Regulations”)

1. Objective

1.1. This memorandum is placed before the Board to seek its approval to amend SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, in respect of-

1.1.1. Dispensation of Volume Weighted Average Market Price (hereinafter referred to as “**VWAMP**”) based parameter for determination of Open Offer Price in case of divestment of Public Sector Undertaking companies (hereinafter referred to as “**PSU**”) resulting in change in control;

1.1.2. Permitting bank guarantee as an alternative for completing the acquisition of shares or voting rights in, or control over the target company.

2. Dispensation of VWAMP based parameter for determination of Open Offer Price in case of divestment of PSU companies

Background

2.1. Substantial acquisitions of shares and takeovers in case of listed companies are being regulated through SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as “**Takeover Regulations**”). One of the fundamental objectives of the Takeover Regulations is to provide each shareholder an opportunity to exit his investment in the target company, when a substantial acquisition of shares in, or takeover of a target company takes place, on terms that are not inferior to the terms on which substantial shareholders exit their investments.

2.2. Accordingly, one of the parameters prescribed in Takeover Regulations to determine open offer price of a frequently traded scrip is volume-weighted average market price (hereinafter referred to as “**VWAMP**”) of such shares for a period of 60 trading days immediately preceding the date of the public announcement. Extract of the provisions is placed at **Annexure I**.

Representation by DIPAM

- 2.3. Department of Investment and Public Asset Management, Ministry of Finance, Government of India (hereinafter referred to as “**DIPAM**”) has made a representation to SEBI, bringing out the key differences between the process followed in PSU’s strategic disinvestment by Government and divestment of substantial shareholding through privately executed agreements.
- 2.4. It has been stated that the announcement of takeovers/ change in control in private transactions is made only upon execution of binding agreements and thus there is not much impact on the traded price of such target companies, while the deal is being worked out, as the entire transaction is kept away from the knowledge of public until its public announcement.
- 2.5. In contrast to this, PSU strategic disinvestment process requires public announcements to be made at different stages viz. at the time of approval of the transaction by Cabinet Committee on Economic Affairs’ (CCEA), Expression of Interest (Eoi) stage, Shortlisting of bidders and subsequently when the Request for proposal (RFP) is released and such disinvestment is subject to an open competitive bidding process. Given the public nature of the competitive bidding involved in the strategic disinvestment of PSUs, the market price of such company is highly impacted by the different stages of developments in the transaction.
- 2.6. Further, the government divestment is a long drawn affair, getting culminated only when an acquirer is identified which may even happen year(s) later from the date when the information was first brought in public domain. Thus it is highly likely that by the time the share purchase agreement between the Government and the buyer is executed, the traded price gets inflated and may lead to an overvalued open offer price requirement basis the prescribed 60 trading days’ VWAMP.
- 2.7. Due to the upswing in the share price of such PSU on account of it being in public domain much before the actual disinvestment transaction, it is highly likely that the bidder’s interest may wane by the time the open offer time approaches since the high open offer price requirement based on 60 trading days VWAMP would make the bidder’s business case unviable. This may lead to possibility of withdrawal of bid by the bidder, due to which the traded price

of the company under disinvestment may reduce substantially which would rather prove to be counterproductive to minority shareholder interests.

Proposal for consideration to Primary Markets Advisory Committee (PMAC)

2.8. In view of the foregoing, it is felt proper that the requirement of determining the volume-weighted average market price for a period of 60 trading days' immediately preceding the date of public announcement in case of divestments of PSU companies, which results in change in control in the target company, either by way of direct acquisition or indirect acquisition, may be dispensed with.

PMAC Recommendation

2.9. PMAC deliberated on the agenda in its meeting held on February 11, 2022 and March 16, 2022. Pursuant to the deliberations, PMAC agreed with the proposal of dispensing with the requirement of considering 60 days VWAMP pricing parameter for determination of open offer price and desired that comments from public be sought on the proposals.

Public Consultations

2.10. Accordingly, a consultation paper was put on the SEBI website, for public comments to be submitted by April 15, 2022. The consultation paper is placed at **Annexure-II** for reference.

2.11. Two comments have been received and both the commentators have agreed with the proposal. The analysis and SEBI's comments on the public comments received is placed at **Annexure-III**.

3. Permitting bank guarantee as an alternative for completing the acquisition of shares or voting rights in, or control over the target company.

Background

- 3.1. The provision of sub-regulation (1) of Regulation 22 of Takeover Regulations restricts acquirer to complete the acquisition of shares or voting rights in, or control over, the target company which triggered the obligation to make an open offer, until the expiry of the offer period.
- 3.2. However, sub-regulation (2) of Regulation 22 of Takeover Regulations permits acquirer to act upon the agreement and complete the acquisition of shares or voting rights in, or control over the target company earlier than the expiry of the offer period in case the acquirer deposits cash of an amount equal to the entire consideration payable under the open offer in the escrow account after the expiry of twenty-one working days from the date of detailed public statement i.e. during the offer period.
- 3.3. In this regard, SEBI has received feedback from the market participants and also suggestion from DIPAM that bank guarantee should also be permitted which may reduce the funding cost for the acquirer to submit a more competitive bid and also to consummate the transaction early.

Analysis

- 3.4. It is noted that arranging large amounts of liquid funds for entire consideration payable upfront in cash by the acquirer may be onerous.
- 3.5. It is also worth mentioning that as per the provisions of Regulation 17 of Takeover Regulations, bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank is accepted as one of the means by which escrow account can be created towards security for performance of obligations by Acquirer. This bank guarantee is in addition to cash and collateral in the form of freely transferable equity shares or securities.
- 3.6. Guarantees executed by banks comprise both performance guarantees and financial guarantees, which ensures that the obligations of open offer are met by the acquirer.
- 3.7. Thus, creating bank guarantee for the entire sum payable under the open offer will provide an alternative to the acquirer to consummate the transaction without the need to arrange such large amounts of funds at an early stage and

complete the acquisition which triggered the obligation to make an open offer during the offer period.

4. Proposal for consideration of the Board:

4.1. With respect to views expressed respectively under para 2 and para 3 above, following is proposed-

- a) In case of divestments of PSU companies which results in change in control in the target company, either by way of direct acquisition or indirect acquisition, considering VWAMP for a period of 60 trading days' immediately preceding the date of public announcement for determining open offer price, may be dispensed with.

- b) As an alternative to deposit of cash for entire consideration payable under the open offer in an escrow account, Acquirer may provide unconditional and irrevocable bank guarantee issued by scheduled commercial bank having 'AAA' rating from a credit rating agency registered with the Board, on any of its long term debt instrument for the entire consideration payable under the open offer under sub-regulation (2) of regulation 22, which will facilitate all acquirers to act upon the agreement and complete the acquisition of shares or voting rights in, or control over the target company as contemplated.

4.2. The Board is requested to consider and approve the proposals mentioned in para 4.1 supra and the related amendments to SEBI (Substantial Acquisition of Shares and Takeover Regulations), 2011, as contained in the draft amendments placed at **Annexure-IV** and also authorize the Chairman to take consequential and incidental steps to give effect to the decision of the Board.

Annexure I

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 is available on SEBI Website.

Annexure II

Consultation paper is available on SEBI Website.

Annexure III

This has been exercised on the reasons of confidentiality.

Annexure IV

This shall be notified at a later date.