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SEBI ISSUES A NEW GENERAL ORDER FOR ISSUANCE OF OBSERVATIONS ON DRAFT OFFER DOCUMENTS

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With a view to streamline the process and timeline involved in issuance of observations on draft offer documents (DOD) filed with the Securities and Exchange Board of India (SEBI), SEBI has issued the "Securities and Exchange Board of India (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) Order 2020" dated 5 February 2020 (General Order), which has come into force with immediate effect. The General Order provides clarity on instances where an investigation, enquiry, adjudication, prosecution, disgorgement, recovery or other regulatory action is pending against an issuer, its director(s), promoter(s) and group companies (Entities).

The General Order supersedes the "SEBI (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) Order 2006 (General Order 2006)" and the "SEBI (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) (Amendment) Order 2008" (Amendment Order 2008).

The key differences between the General Order 2006 and Amendment Order 2008 vis-à-vis the General Order are tabulated below:

General Order 2006/ Amendment Order 2008	General Order 2020
<i>Treatment where there is a probable cause for investigation or enquiry or when an investigation or enquiry is in progress against the Entities and no show cause notice (SCN) is issued</i>	
Observations on the DOD to be kept in abeyance for 45 days after probable cause of violation is found, or the date of filing of the DOD with SEBI, whichever is later.	Observations on the DOD to be kept in abeyance for <u>30 days</u> after such probable cause arises, or the date of filing of the DOD with SEBI, whichever is later. Issuance of observations on the DOD to be kept in abeyance: (a) for <u>additional 30 days</u> , where SEBI is unable to conclude the investigation, examination or enquiry against the Entities due to the reasons beyond its

	<p>control or due to the conduct of parties (<u>other than the Entities</u>); and</p> <p>(b) <u>until conclusion of the investigation</u>, examination or enquiry by SEBI against the Entities pending <u>due to the conduct of the Entities</u>.</p>
<p><i>Treatment where SCN has been issued</i></p>	
<p>DOD to be kept in abeyance for a period of 90 days from the date of SCN, or filing of DOD with SEBI, whichever is later. In appropriate cases, an interim order or final order after hearing the person affected may be passed provided that any time taken by the Entities shall be excluded while computing the 90 day period.</p> <p>Where no interim or final order is passed within the period of 90 days, SEBI may issue observations on the DOD subject to relevant disclosures about receipt of the SCN and the possible adverse impact of the order on the Entities being included in the DOD.</p>	<p>In case of issuers to whom SEBI has issued an SCN (other than SCNs described below), SEBI may process the DOD and issue observations and provide advice to the Entities to make necessary disclosures and statements in respect of adjudication proceedings and the possible adverse impact of an order on the Entities, in the offer document.</p> <p>Issuance of observations on the DOD shall be kept in abeyance where a SCN has been issued in respect of proceedings initiated under section 11(4) or section 11B(1) of the SEBI Act 1992 (proceedings dealing with interest of investors or securities market) for a period of:</p> <p>(a) <u>90 days</u> from the date of filing of the DOD in case a SCN has been issued by SEBI;</p> <p>(b) <u>additional 45 days</u> in case SEBI is unable to conclude the proceedings in 90 days due to the reasons beyond its control or due to the conduct of the parties other than the Entities. If no order is passed within 45 days, SEBI may provide observations and advise the Entities to make necessary disclosures and statements in respect of such proceedings and the possible adverse impact of an order on the Entities, in the offer document; and</p> <p>(c) <u>Till the conclusion</u> of the proceedings if the proceedings are not concluded in 90 days due to the conduct of the Entities.</p>

The General Order has also introduced the framework for the following instances:

- Where (a) SEBI has initiated proceedings for recovery against the Entities; (b) an order for disgorgement or monetary penalty has been passed against the Entities and is not complied with; or (c) in case of non-compliance with any direction issued by SEBI, the observations on the DOD shall be kept in abeyance till such proceedings are concluded or until the directions are complied with;
- Where proceedings have been sent back by the Securities Appellate Tribunal (SAT) or a court to SEBI, the same shall, in effect, be treated as proceedings covered under the General Order and SEBI may take appropriate action in respect of observations on the DOD under the provisions of the General Order. This would also be subject to any order passed by the SAT or a court, as the case may be, while sending the matter back to SEBI. The treatment regarding

issuance of observations on the DOD filed in such matters shall be on a case to case basis, depending on the criteria the matter falls under i.e. whether or not an SCN was issued by SEBI or if there is a probable cause of enquiry etc; and

- Where an issuer has been restrained by a court or tribunal from making an issue of securities or from issuing an offer document to the public, SEBI may examine the offer document and issue its observations on the DOD with a qualification that such observations are subject to further orders of a court or tribunal.

The General Order also clarifies that issuance of observations on DOD when an investigation or enquiry is pending or when any regulatory action is pending, does not indicate that the party has been exonerated in such proceedings or that action may not ultimately result from such proceedings.

Comments

An important change that the General Order has brought about is that in cases where SEBI has issued an SCN (other than SCNs issued in relation to interest of investors or securities market), SEBI shall not keep the DOD in abeyance and shall allow the issuer to go ahead with the fund raise, subject to adequate disclosures regarding the SCN being made in the offer document.

In addition to enquiry, adjudication, prosecution, SEBI has also included recovery proceedings and disgorgement orders within the ambit of the General Order. From a diligence perspective, it is imperative to check that such proceedings are either concluded and/or the issuer has complied with the directions provided in such order(s), else SEBI shall keep its observations on the DOD in abeyance. This change has been introduced in the General Order to further safeguard the interest of potential investors.

The General Order brings in clarity on the treatment of DODs where certain enquiries, proceedings, investigations are pending or an SCN has been issued to the Entities or recovery proceedings have been initiated or disgorgement order has been passed against or monetary penalty has been levied on the Entities. The General Order streamlines the timeline for providing observations on the DODs by SEBI and brings in coherence and rationale through the specific criteria laid down for necessary action by the regulator in the aforementioned instances.

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