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SEBI introduces the option to confidentially Pre-File DRHPs and codifies additional disclosures on KPIs

Introduction

The latest amendment to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, (“SEBI ICDR Regulations”) introduced inter alia an option for issuers to confidentially file draft offer documents with SEBI (the “Pre-Filing Option”).

In May 2022 SEBI had released a consultation paper describing its reasoning for considering this option and inviting public comments, and has now introduced the Pre-Filing Option by way of this amendment. The Pre-Filing Option housed in Chapter IIA of the SEBI ICDR Regulations comprises the following stages:

- Confidential filing of the draft offer document (the “**Pre-Filed DRHP**”), including any re-filings, if required;
- Issuance of SEBI observations on the Pre-Filed DRHP (*within 30 days as specified*);
- Filing an updated draft offer document with SEBI incorporating observations from SEBI (“**UDRHP-I**”) (*within 16 months from issuance of SEBI observations*), including any re-filings, if required;
- Inviting public comments on UDRHP-I (*for a period of 21 days*);
- Filing of a further updated draft offer document with SEBI incorporating comments on the public received on UDRHP-I (“**UDRHP-II**”);
- Filing of the offer document with the Registrar of Companies (followed by copies to be filed with SEBI and the Stock Exchanges);
- Opening of the issue (*may be within 18 months of issuance of SEBI observations*).

In addition, SEBI also codified disclosures to be made in offer documents and price band advertisements in respect of [key](#)

performance indicators (“**KPIs**”) in line with observations it had recently been providing on draft offer documents filed with it.

The Pre-Filing Option – Key Features

- **Applicability** - The Pre-Filing Option is available to all issuers seeking to list on the main-board of the stock exchanges and will be available for draft offer documents intended to be filed with SEBI after November 23, 2022.
- **Impact on eligibility conditions** – Prior to this amendment, the absence of any right to receive equity shares of the issuer, was an eligibility condition. Only employee stock options and convertible securities were permitted (provided fully paid-up convertible securities were converted on or prior to the filing of the red herring prospectus). With the Pre-Filing Option, the **right to receive equity shares is permitted to subsist** until issuance of observations by SEBI. This would mean that such right would **mandatorily be required to be exercised and informed** to SEBI, prior to issuance of observations.
- **Impact on selling shareholders** – The one year holding period for selling shareholders under the Pre-Filing Option is to be considered from the date of filing of UDRHP-I (which would otherwise be counted from the date of filing of the draft offer document).
- **Confidential filing** – While a public announcement of the fact of a confidential filing is required to be made, the draft offer document itself will only be filed with SEBI and the Stock Exchanges and will not be made available to the public. Similar to a non-confidential filing, fees have to be paid, an offer agreement has to be entered into, and lead managers will be required to submit a due diligence certificate.
- **Marketing and Publicity** – No marketing or advertisement for the issue may be conducted (other than the public



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notice solely to mention that a confidential filing has been made and limited marketing as described below).

- **Conditional Marketing** – A **conditional interaction with qualified institutional buyers (“QIBs”)** is permitted, provided all information during the interaction is limited to the confidentially filed draft offer document, a list of such QIBs is maintained by the issuer and lead managers, and the closure of interactions with QIBs is informed to SEBI. It should be noted that such limited interaction with QIBs extends the 30-day time limit within which SEBI is required to issue observations, as UDRHP-I may only be filed with SEBI seven working days after SEBI is informed of the closure of interactions with QIBs.
- **SEBI observations** – May be provided on the Pre-Filed DRHP **within 30 days** of the later of: (i) filing of the Pre-Filed DRHP; (ii) the date of reply from the lead manager, where SEBI has sought the same; (iii) date of receipt of clarification or information from any regulator or agency, where SEBI has sought the same; (iv) date of receipt of in-principle approval from the Stock Exchanges; (v) date of intimation to SEBI of completion of interaction with QIBs; (vi) date of intimation to the Board on conversion of outstanding convertible securities/ exercise of rights to receive equity shares of the issuer.
- **Refiling events** – Fresh filing of the Pre-Filed DRHP would be required for reasons similar to existing re-filing triggers such as any change in promoters, more than half the board or in the main objects of the issuer. The difference being that under the Pre-Filing Option modifications to the use of proceeds are permitted until there is a 50% change in offer size whereas the existing trigger for draft offer documents is set at 20%. For UDRHP-I, the refiling events are the same as those already applicable to draft offer documents.

KPIs – Additional Disclosures and Action Required

The requirements to comply with the additional disclosures in respect of KPIs applies where the red herring prospectus has been filed on or after November 23, 2022. A summary of these requirements, broadly in line with recent SEBI observations, is as follows:

Disclosures in the offer document (other than in Basis for Offer Price):

- KPIs and any terms used re KPIs are to be defined and explained in simple English in the Definitions section;
- KPIs to be comprehensive and given for the same period as the restated financial information included in the offer document;
- Historical use of KPIs by the management to analyse, track or monitor operational and/or financial performance;

- Impact of additions or disposition of businesses on KPIs;
- Past 18 month information on, (a) price per share (adjusted for any corporate actions) for all allotments (excluding ESOP or bonus), which are equal to or more than 5% of the fully diluted paid-up share capital (as prescribed); and (b) price per share (adjusted for any corporate actions) of all acquisitions involving promoters, promoter group, selling shareholders and shareholders with nominee director rights (excluding ESOP or bonus), which are equal to or more than 5% of the fully diluted paid-up share capital (as prescribed). If none, then the same information is to be provided for the last 5 allotments/acquisitions irrespective of size;
- Disclosure (as prescribed) of the floor price and cap price being x times the weighted average cost of acquisition based on the above allotments/acquisitions (“WACA”), together with a detailed explanation and comparison of KPIs and financial ratios for the last three financial years and any stub period;
- Explanation of offer price/ cap price being x times of WACA in view of any external factors which may have influenced pricing.

Disclosures in the Basis for Offer Price:

- KPIs disclosed to investors in the past 3 years, with the Audit Committee confirmation of the same;
- Cross reference to other sections disclosing KPIs;
- Comparison of KPIs with India/global listed peers;

Other actions required:

- Approval of KPIs by the Audit Committee (to facilitate inclusion of the confirmation that details of KPIs disclosed to investors in the last 3 years have been verified and audited);
- Certification of KPIs by the statutory auditor or peer reviewed chartered/cost accountant;
- Above certificate to be included in the material documents for inspection;
- Annual disclosure of KPIs for at least a year after listing or until all issue proceeds have been utilized;
- Disclosure of floor price and cap price being x times of WACA in the price band advertisement.
- Recommendation of a committee of independent directors of the issuer that the price band is justified based on quantitative factors / KPIs vis-à-vis the WACA, each as disclosed in the Basis for Offer Price section.

Key Takeaways

Of the various amendments introduced, the newly introduced Pre-Filing Option is one to watch. Of course, whether or not



to avail of the Pre-Filing Option would require a case-to-case analysis. The Pre-Filing Option allows for discussions with SEBI on a confidential basis, and for that time allows for prospective selling shareholders to meet the one-year holding period requirements and for rights to receive equity shares to subsist. At the same time, the Pre-Filing Option likely adds an audit cycle and prolongs the overall IPO process, while restricting the investor interaction permitted during the Pre-Filing process.

In respect of the amendments related to KPIs, while market participants have some level of familiarity with these requirements in view of interactions with SEBI in the past few months, prospective issuers may consider what data would be characterised as KPIs for them and contemplate the availability of related operational information given the requirement for KPIs to not only be provided for the last 3 years but also for it to be comparable. Also important, would be considering the KPIs

that would be relevant for inclusion in the basis for offer price discussion as compared to those which would be best featured in a discussion of the issuer's overall business. It would also be advisable to familiarize independent directors with the now codified requirement for them to collectively recommend a price band on the basis of an analysis of KPIs and WACA.

Of the other amendments introduced, monitoring agencies (credit rating agencies) are now also required to be appointed for QIPs and preferential issues where issue size exceeds ₹ 100 crore.

SEBI has also provided some logistical relief to prospective issuers by doing away with the requirement of filing with the concerned regional office of SEBI and directing all filings to its head office in Mumbai.

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