

Transfer between Who? SEBI GUIDANCE ON PROMOTER TRANSFERS

In an informal guidance issued by SEBI in October 2012 (made public on January 23, 2013), SEBI has yet again looked into the exemption available under the Takeover Code for inter-se transfer of shares amongst the Promoters. Regulation 10(1)(a)(ii) of the Takeover Code exempts acquisitions pursuant to inter-se transfer of shares amongst promoters from the obligation of making an open offer. This exemption is valid only if the parties are recorded as “promoters” under the listing agreement for at least 3 years. The facts in this matter assume importance in light of this condition.

In October 2010, the Bombay High Court sanctioned a composite scheme of arrangement amongst Weizmann Limited (‘Demerged Entity’), a listed company, Weizmann Forex Limited, Karma Energy Limited (both subsidiaries), Chanakya Holdings Limited (‘Target Company’) and Karma Wind Power Limited. Subsequently, certain businesses of the Demerged Entity were demerged into the Target Company and Karma Energy Limited with effect from April 2010. Post the scheme of arrangement, the shareholders of the Demerged Entity were issued shares in the resultant entities, including the Target Company. Thereafter, the Target Company was listed in June 2011. The Promoter Group for both the Demerged Entity and the Target Company was common.

In October 2012, the Promoters desired to transfer shares to another company within the promoter group. Hence, the Promoters sought SEBI’s clarification on whether the said transfer would be exempt under the Takeover Code as the Target Company was listed only in 2011. The Promoters also stated that though the Target Company came to be listed in June 2011, they have been disclosed as ‘promoters’ in the shareholding pattern filed by the Demerged Entity for more than 3 years prior to this proposed transfer.

SEBI, after considering the submissions, noted that all the transferors held shares in the Target Company for more than 3 years and some of the transferees had held shares for less than 3 years in the Target Company. However, in light of the fact that the Promoters were disclosed as ‘promoters’ by the Demerged Entity for last 3 years, SEBI opined that the proposed transfer will be eligible for an exemption under the Regulation 10 (1)(a) (ii) of the Takeover Code. The transferees were thus exempted from making an open offer under the Takeover Code.

IndusLaw Quick View: *In this informal guidance, SEBI exempted the proposed transfer from open offer obligations even though the Promoters were not listed as promoters of the Target Company for 3 years as required under the language of the Takeover Code. SEBI appears to have considered the disclosure requirement as being satisfied since the Demerged Entity was listed for more than 3 years, and the Promoters were common to the Target Company and the Demerged Entity. However, on an earlier occasion, in its informal guidance dated December 5, 2012 issued to Commercial Engineers and Body Builders Company Ltd., SEBI had chosen to enforce a literal interpretation of the Takeover Code and refused to exempt inter-se transfer between Promoters of a company from the obligation of making an open offer as the said company was not listed for 3 years. SEBI has attempted to tread a fine line with respect to interpretation of the Takeover Code in a manner that addresses commercial objectives, but still satisfies the intent of the regulations.*



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