

Funds Hotline

January 03, 2011

SEBI RISK: NON-INTIMATION OF CHANGE IN INFORMATION BY FIIS

In recent times, SEBI has noted various instances of non-intimation by FIIs / sub-accounts of material changes to information being previously furnished to SEBI at the time of their registration as FIIs / sub-accounts.

Under the SEBI (Foreign Institutional Investors) Regulations, 1995 ("**FII Regulations**"), upon grant of registration as FII / sub-account, FIIs / sub-accounts are required to adhere to the provisions of the FII Regulations. One of the often overlooked provisions of the FII Regulations is Regulation 10(c), which imposes an obligation upon the FII to forthwith intimate to the Securities and Exchange Board of India ("**SEBI**") of any '*material change*' in information previously furnished with SEBI at the time of seeking registration, which has a bearing on their registration with SEBI under the FII Regulations. Further, under their respective application forms, the FIIs and sub-accounts are required to provide an undertaking that they will immediately notify SEBI of any change in the information provided.

While, the term '*material change*' has not been defined under the FII Regulations, from SEBI's perspective it means any change in the information already provided in the respective application forms for FIIs / sub-accounts. We have come across numerous instances, where due to inadvertence, FIIs / sub-accounts have failed to intimate SEBI of the changes in the information being previously furnished. The most common examples being:

- Failure to intimate change in name of FII / sub-accounts;
- Failure to intimate change in address of FII / sub-accounts;
- Failure to intimate change in name of the compliance officer of FII;
- Failure to intimate reorganization / restructuring of FII; and
- Failure to intimate any instance of violation or non-adherence to the securities laws, code of ethics/conduct, code of business rules, for which the FII / sub-account, or its parent / holding company or affiliate may have been subjected to economic or criminal liability or suspended from carrying out its operations or the registration, has been revoked, temporarily or permanently;

At the moment SEBI does not have a mechanism to monitor any change in information furnished by FIIs / sub-accounts and it is the sole responsibility of the FII / sub-account to forthwith intimate SEBI of any changes in the information being previously furnished. The typical circumstances where SEBI comes across the change in information, is either through news reports or at the time of renewal of registration, when the FIIs / sub-accounts are required to re-submit the application forms.

Consequences

The FII Regulations in its present form do not provide any specific consequences for failure to intimate in the change in the information being previously furnished to SEBI. However, SEBI may, in its discretionary powers and after analyzing the impact of the change in information, take such action against FII / sub-account as it may deem necessary, which may extend from imposing a monetary penalty to suspension or cancellation of the registration with SEBI.

Once SEBI becomes aware of the non-intimation of any change in the information previously provided, depending upon the materiality of the change, SEBI may either condone the non-compliance or take action against the FII / sub-account. In case of latter, in the first instance SEBI serves show cause notice to the FII / sub-account providing an opportunity to present their case. Furthermore, SEBI grants an option to avail the consent application process, per which the FII / sub-account may settle the dispute by opting for consent order proceedings, on a '*without admission of guilt or denial of guilt basis*' and upon payment of settlement amount which may typically range between USD 5,000 to USD 15,000 depending upon the dispute and the time lapse.

In the past, we have observed that for cases relating to non-intimation of change in the address or change of the compliance officer of the FII, SEBI has taken a lenient view and let off the FIIs / sub-accounts with caution. For failure to intimate change in the name, reorganisation or restructuring of the FII etc., SEBI has asked FIIs / sub-accounts either to pay penalty or settle the dispute by way of opting for consent order proceedings. However, in circumstances, where the violation is intentional or there is a history of non-compliances and where SEBI feels appropriate that change in the information would render the FII / sub-account ineligible for continuing its registration with SEBI, SEBI may cancel the registration of such FII / sub-account and impose such fine as it may deem appropriate.

It is pertinent to note that FIIs / sub-accounts which are in non-compliance cannot at their will request for consent order proceedings. It is only upon SEBI taking cognizance of the non-compliance and serving of the show cause notice or instituting proceedings under the SEBI Act, that FIIs / sub-accounts can avail consent order proceedings for settlement of the dispute.

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In light of the above, it is our request to all the FII/ sub-accounts to instruct their compliance teams to ensure that if there is any material change in the information being previously furnished with SEBI, the same should forthwith be intimated to SEBI. Further, FIIs / sub-accounts must follow-up with their global as well as domestic custodians and ensure that all the information required to be furnished with SEBI has actually been filed with SEBI and due acknowledgement of the same has been received from SEBI.

Exercise of caution and stricter internal compliances would assume significance going forward, as pursuant to amendment to FII Regulations in May 2008, SEBI has been granting perpetual registration to FII and their sub-accounts, consequently, FIIs and their sub-accounts would not be required to furnish the applications forms and merely pay renewal fee after every three years.

- Shikhar Kacker, Divaspati Singh & Kishore Joshi

You can direct your queries or comments to the authors

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