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An Analysis of the SEBI Settlement Mechanism

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ABSTRACT

This article provides an in-depth analysis of the Securities and Exchange Board of India's (SEBI) settlement mechanism. The article highlights the scope of the settlement mechanism, including the types of violations resolved through settlements, such as AIF, mutual fund, insider trading, PFUTP, and LODR violations. Overall, this article provides a comprehensive analysis of the SEBI settlement mechanism, its significance, and the proposed modifications aimed at making the mechanism more effective and efficient in resolving violations of securities laws in India.

KEY WORDS

SEBI, Dispute Settlement, Investors, Securities Market, India.

INTRODUCTION

The Securities and Exchange Board of India (SEBI) collected INR 59 crore through settlement mechanism in 2021-22 after settling 107 petitions involving violations of securities law. According to the most recent information made public by SEBI in its annual report, the agency revealed that it collected INR 68.23 crore in 2020-21 after settling 216 applications through the settlement mechanism.[1] The number of applications received, and the amount recovered in FY 2021-22 were significantly less in comparison to FY 2020-21. "AIF (Alternative Investment Funds), mutual fund, insider trading, PFUTP (Prohibition of Fraudulent and Unfair Trade Practices), and LODR (Listing Obligations and Disclosure Requirements) violations were among the" allegations resolved by the settlement mechanism.[2]

By agreeing to pay a settlement fee to the regulator, a suspected wrongdoer can conclude an open case against them without having to admit or

deny guilt. The settlement mechanism is a process for resolving conflicts quickly and effectively. The firms that were subject to enforcement procedures by SEBI for engaging in "reverse trades in the stock options[3] market on BSE in the year 2014 & 2015 were given a one-time opportunity to settle their cases through Settlement Scheme 2020.[4]

Scope of Settlement Mechanism

SEBI issued a circular in the year 2007[5] (which was amended in 2012[6]) establishing the "consent mechanism" as "*an alternative and efficient dispute resolution tool for violations of securities law*". With the goal of clearing up any doubts about the legality of the settlement process, "the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014" (2014 Regulations) were enacted after "the Securities Laws (Amendment) Act of 2014" was notified. The resolution procedure under this regime did not apply to certain major offences, namely, insider trading or fraud. To lessen the administrative load and cost borne by SEBI, provisions were included to allow for settlement actions to be initiated prior to the issuing of a show cause notice.

By December 14, 2017, SEBI had formed a "High-Level Committee" (Committee), headed by Justice A. R. Dave, to assess the current settlement mechanism and make recommendations for improvement based on lessons learned from the expansion and maturation of the Indian and international securities markets. The Committee's suggestions and the comments of interested parties led to the notification of "the SEBI (Settlement Proceedings) Regulations, 2018" (2018 Regulations), which became effective on 1.1.2019, replacing the 2014 Rules. The regime has become principle-based according to the 2018 Rules, which have given SEBI more leeway to settle certain significant offences, except for those that have impact over market, causes loss to substantial group of investors', or compromise the market rectitude. Furthermore, it introduced "Confidential Settlement" in exchange "for cooperation with SEBI in its investigations" and aimed to increase the clarity of investor-related settlement problems such as disclosure violations, refund or exit alternatives to investors.

SEBI began "a consultative process in September" 2021[7] regarding suggested changes, the majority of which got accepted in on Dec. 28 of the year 2021 and thereby notify on Jan. 14 of year 2022, based on its experience implementing the 2018 Regulations and considering the dynamic nature of the Indian securities market. There is a consistent thread running through the revisions: shorter deadlines, less potential for abuse, and a check on compensation sums to make sure they are proportional to the seriousness of any infractions.

Establishment of Settlement Mechanism

Evolution of SEBI's Settlement Mechanism

The Securities and Exchange Commission (SEC) in the United States of America (USA) pioneered the settlement route, which benefited the Courts because Settlements or consent judgements would save court resources and time.[8] This formed the underlying rationale behind the regulation in the USA favoring acceptance and enforcement of "consent decrees". This made it possible for them to get their work done in a timely fashion while still being fair to the plaintiffs.[9]

The same goal/benefits led to the introduction of a settlement process in India. In 2007, India became the first country in the world to establish the notion of settlement for violations of securities law.[10] The idea behind it was to lessen the workload of both litigants and courts by giving defaulting entities a chance to settle their disputes outside of court. Without sacrificing either deterrent or the provision of equitable remedies to injured investors, it has given the fundamental concomitants of legal process.[11] While its implementation presented some difficulties, the Settlement procedure ultimately helped the regulator of the market provides a more efficient tool. The Settlement procedure has been revised several times since 2007 in the form of rules and was finally codified in 2014 as "the SEBI (Settlement of Administrative and Civil Proceedings) Regulations".[12]

"The SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014" and the Enforcement procedure of SEBI was examined by the Committee chaired by Justice A. R. Dave and including Shri Pratap Venugopal, Advocate on Record, Supreme Court of India, as Member of the Committee (Report) in 2018,

which resulted in the creation of "the SEBI (Settlement Proceedings) Regulations, 2018" (Settlement Regulations).[13]

During the formulation of Settlement process design, it was considered that the "justice delayed is justice denied as it is of paramount importance whenever the subject of meeting out justice is broached. Every judicial system's battle to maintain this legal dictum has been an uphill one, as they seek to strike a balance between delivering justice quickly and doing so fairly."[14] As a result, SEBI has reviewed the Settlement Rules and provided recommendations for improvement in a consultation document.

Settlement circumstances under this mechanism must also be evaluated in light of the changing "techno-regulatory paradigm" in the Indian securities market, including the introduction of the system driven disclosures mechanism.[15] Taking all of this into account, rationalizing settlement procedures could pave the way for absorbing shifts in the dynamic nature of the Indian securities market.

Significance of the Settlement Regulation

Under the "Securities and Exchange board of India (Settlement Proceedings) Regulations, 2018" ("Regulation of 2018"), a new concept called the "settlement schemes" has been introduced under which the SEBI has the responsibility to establish the terms and method of settlement of the "specified proceedings" under the "settlement scheme".[16] This then would be applicable to the identified group of people who have been affected by a comparable default in order to resolve any said proceedings. Any order made as part of such a settlement scheme would be treated as a settlement order for the purposes of the rules.

"Specified Proceedings" is defined in Regulation 2(1)(f) of the Regulation of 2018 as "proceedings which can be initiated by the Board or have been initiated and are pending before the Board or any other forum for the violation of securities laws under Section 11, Section 11B, Section 11D, Section 12(3), or Section 15-l of the SEBI Act, 1992; or Section 12A or Section 23-l of the Securities Contracts (Regulation) Act, 1956; or Section 19 or Section 19H of the Depositories Act, 1996."[17]

The SEBI shall constitute a "High-Powered Advisory Committee" (HPAC), "Internal Committee" (IC) and "Panel of Whole Time Members" (WTM) to review the proposed settlement application and make recommendations.[18]

The applicant, against whom certain "specified proceedings" have been commenced, or are pending, or may be initiated, can in Part A of the Form apply to the Board. The applicant must accompany a non-refundable application fee of INR 15,000/- along with the application.[19] The form's Part-C comprising of undertakings and waivers must be included with the application. All relevant information on the alleged default must be disclosed in application in its entirety.

The applicant must submit a single application to settle all pending and future procedures arising out of the single cause of action. "Any application that does not fully comply with these regulations or is incomplete is liable to be returned".[20] The applicant shall within fifteen days from the date of intimination from Sebi, resubmit a "complete and updated application" that complies with provisions of the said 2018 Regulations.

In case of a business, an application for settlement of defaults related to disclosures shall to the extent required be executed by the person in charge of, and responsible for the conduct of the business of such association, firm, body corporate, or limited liability partnership, and the same shall bind the association, firm, body corporate, and any officer who is in default.[21]

Brief of the Settlement Procedure[22]

The first step in determining the conditions of the settlement is for IC to review the application. The IC can either request pertinent information and documents and/or request the physical presence of the applicant. It may also grant the applicant ten business days to file revised settlement terms from the date of the IC meeting. The settlement application will then go to HPAC for consideration. The HPAC has two options for addressing applications it receives, firstly, to request that the settlement terms be revised and sent back to IC;

or secondly, propose suggestions that will be brought before the WTM panel. The WTM Panel will thereby have to respond to HPAC's suggestion. The WTM can either approve or disapprove the same. The applicant will be then served with a "notice of demand" within seven business days from the date of the decision. The applicant must either pay the settlement sum or provide a written commitment to adhere by the other settlement requirements. The applicant will be then served with a "notice of demand" within seven business days from the date of the decision, if the recommendations are rejected. The applicant is required to, thereby, send back the application for re-examination and henceforth IC and HPAC shall follow the same procedure as they would for a brand-new submission.

The Adjudicating Officer concludes the case based on the approved settlement conditions by issuing an appropriate order. WTM's Panel issues a proper order concluding any new or planned proceedings. The claimed default, as well as any other pertinent facts and requirements, along with the settlement terms, should be specified in the order entered pursuant to these regulations.[23] After the Board issues the settlement order, it should be served on the applicant and posted on SEBI's website. The identity of the applicant should be kept discreet in such proceedings, although the nature of the default may be published.[24]

Orders Passed Under the Settlement Regulations

In the matter of Sharepo Services(I) Private Limited[25]

It has been reported that transfers were permitted without the necessary documentation, which is a breach of "the Listing Agreement" as well as "Regulation 103" of the "SEBI (Listing Obligations and Disclosure Requirements) Rules 2015". The applicant had been served with a "show cause notice" by SEBI. Finally, in January of 2020, the applicant registered an application for settlement. The High-Powered Advisory Committee offered and settled on INR 4,621,875 as the settlement amount, and the Sebi's Panel of WTM authorized this sum in compliance with the Settlement Rules. After the Applicant paid the agreed-upon sum, the case was closed per the conditions of the settlement as outlined in the Settlement Rules.

In the matter of Bombay Burmah Trading Corporation Limited[26]

One of the Applicant's promoters was convicted of felony and sentenced to two years in prison; however, he was granted a five-year suspension of his sentence. The applicant was accused of violating the "SEBI (Listing Obligations and Disclosure Requirements) Rules 2015" by failing to disclose material information after it became aware of it. Hence, the applicant was served with a show cause notice to begin adjudication proceedings. "The applicant then submitted a settlement application requesting to settle the ongoing adjudication procedures"; this was reviewed by the HPAC, wherein INR 2,167,500 was suggested and approved as an amount of settlement in compliance with "the Settlement Regulations". The SEBI Full-Time Members agreed with the recommendation. According to the Settlement Rules, the applicant paid the agreed-upon sum, and the case was closed.

In the matter of Mr. Ness Wadia[27]

In this case, the applicant was convicted of a felony and sentenced to two years in prison; however, he was granted a five-year suspension of his sentence. The applicant was a promoter as well as "a non-executive director of three listed companies" and "a promoter as well as managing director of some other listed company". However, it was claimed that he violated the "SEBI (Listing Obligations and Disclosure Requirements) Rules 2015" by failing to make timely disclosures of the same to the abovementioned firms. As a result, SEBI issued a show cause notice and began the adjudication process against the applicant. The applicant then submitted a settlement proposal, which was reviewed by HPAC and ultimately accepted by SEBI's panel of Full Time Members, who determined that the settlement sum should be set at INR 2,342,750. According to the Settlement Rules, the applicant paid the agreed-upon sum, and the case was closed.

Analysis of the Existing Framework

"Consultation Paper on Review of the SEBI (Settlement Proceedings) Regulations, 2018" was issued in a circular dated September 14, 2021.[28] With the commencement of the 2018 Regulations and the entire

experience with dealing with the settlement applications under the said regulation, made the concerned authorities feel that the settlement terms should be amended to be more in accordance with the specific type and severity of the companies' breaches.[29] Further, it made them realize that a more effective settlement system that allows SEBI to better employ its resources may help reduce the limits of the enforcement proceedings for all parties. "So, in order to provide a meaningful and effective and efficient alternative to SEBI's enforcement procedures, several criteria, notably in respect to specific kinds of violations in the entities, were considered, and timeframes were further modified".[30] Thus, the SEBI has advised updating the settlement norms to parallel them with the stipulated methods of breaches committed by enterprises, considering all variables that would make the mechanism more effective. SEBI has proposed adjusting the cost structure and settlement time frames.[31] A settlement is an agreement reached outside of court to resolve potential violations of securities legislation. There is no admission of guilt or rejection of responsibility in the fee-based agreement agreed between the regulator and the organization at issue.

In most cases, the applicants submit their settlement requests near the conclusion of the allotted period. Disruptions to the enforcement process like these not only undermine its goals, but also postpone the completion of enforcement activities. The suggestions would alter the treatment of violations of securities law if they were put into effect. According to reports, the consultation document proposes adjusting the multiplier and mitigating factor used to calculate settlement sums, as well as giving the IC and HPAC more leeway in deciding settlement circumstances.[32]

Settlements were reached primarily to alleviate SEBI's unmanageable workload and to lessen the cost of litigation on people. Timekeeping provides no relevant divisions for bargaining. It may take weeks or months of inspections before a person can make an informed decision on whether to settle.[33]

Certain proposed amendments to the existing Regulation 2018 are following:

Time Limit on Settlement

The current system is consistent with the goal of providing even less wiggle space, as the old regime allowed SEBI to ignore any late submission even after 60 days, that is, up till 120 days after the notice has been served, whereas the new regime caps the timetable at 60 days[34] This aims to eliminate the scenario where the applicants keep waiting until the deadline has passed before beginning settlement.

While it is presumed that a window of 60 days is more than enough to register settlement application, there can be a number of factor that one might need to be mindful about while choosing the settlement process, which might take longer hours, such as, the gravity of the accusations, the complex fact of the case, the participation of multi-party, the timeline to which the accusations is related to, the delay caused to initiating settlement proceeding, and the time-consuming processes.[35] The applicants' capacity to utilize the settlement mechanism may be hindered by the lack of flexibility in the timeframe. It remains to be seen if the "twin objectives behind the advent of the settlement mechanism, that of a suitable sanction, remedy, and deterrence without having to resort to litigation, lengthy proceedings, and consequent delays", can continue to be served by sanction of such strict deadlines at SEBI.[36]

Other Methods of Time Management

Putting in a request for revised settlement terms (RSTs): When the applicant files the RST, post the meeting of the IC, which is duly rationalized to fifteen working days (from ten working days up to a maximum of twenty days subject to a ten percent increase in expenses) to guarantee settlements are reached within an acceptable schedule. According to SEBI's findings, applicants frequently used this to drag out the enforcement procedure for their own benefit. A new reason for denying a settlement request has been recommended, that is, failing to provide RST within 15 business days. Overall, this justification benefits SEBI and the applicants, who may take advantage of the time allotted to them to carefully analyze their settlement choices without worrying that SEBI will consider providing more time, even if they pay a higher cost.

Remittance of Settlement Amount: After receiving a demand notice, applicants no longer have the

option of requesting an extension of time to pay the settlement amount, and instead must pay the whole sum within 30 days. The reasoning behind this was that it was rarely utilized, and that the applicant would have a good idea of the amount before applying thanks to the RSTs they had already provided.[37] While that's possible, it's still possible that applicants could face unforeseen difficulties that prevent them from paying the RST in full. Due to the lack of certainty in the timing of the demand notice, it is essential that applicants be given adequate time to acquire such monies. Although SEBI's effort to clarify the rules is admirable, it is unclear whether eliminating all discretion is the best course of action.[38]

The IC must impose Preconditions

The IC may now also reject a settlement application for failure to satisfy any pre-requisite term for settlement in a particular time frame as laid down by the IC.

Significantly, while SEBI has always had the authority to consider any circumstances it seems fit during settling proceedings, this change formalizes the IC's authority to declare condition precedents before settling any case.[39] This topic came up at a recent board meeting for SEBI, with regards to the necessity of "an open offer" before settlement. For applicants, this makes it clear that they must meet certain conditions before their settlement applications may move further[40].

'Name lenders' are treated differently than Core Entities.

The SEBI has proposed a more rationalized approach to determining settlement terms for such name lenders, in addition to varied formula for calculation used for individual and corporate entity, while making sure that the ones who have a much more active part shall be put to a greater threshold in the process of settlement. The Board would need to be assured that the "name lenders" involved knew nothing about the unlawful activity and were merely providing the primary company with access to the account[41]. In most settlements, the parties avoid talking about the merits of the case.[42] Considering these intricacies, it is reasonable to expect SEBI to proceed with caution while implementing this adjustment, so as to prevent any abuse.[43]

Estimating a Rough Settlement Sum

The variables used to determine the amount involved in the settlement have been updated. For example,[44]: values associated with the beginning of the process are revised down. Revision of the settlement factors upward (from 1.20 to 1.50) to discourage late-stage settlement filings.[45] Base amounts due to "disclosure violations" under "the Takeover Code" and "Regulations prohibiting Insider Trading" have also been rationalized considering the shift in the regulatory landscape brought about by the introduction of system driven disclosures.[46]

CONCLUSION

It's important to remember that the company's shareholders and other stakeholders get impacted by the control group's decisions. Consonance between these two departments is crucial to a company's success. Many of the suggestions in the consultation paper aim to shield shareholders' interests, reducing the impact of the control group's choices on everyone else.

To further entice international investors, the consultation document is a part of a bigger push to raise India's standing in the "World Bank's Ease of doing Business" index. After the COVID-19 outbreak, several businesses refocused their attention on other parts of Asia, particularly South Asia. Experts attribute this primarily to the streamlined legal structure with minimal formalities. Investors were drawn to the project because they anticipated increased productivity and decreased costs as a result. As a result of this pattern becoming apparent, the "Government of India" has taken a number of legislative reforms in the last four to five years to streamline processes, boost efficiency, lessen fines for procedural errors, and better reflect the realities of the country's enterprises. The consultation paper has as one of its primary goals the enhancement of the securities law settlement procedure.

Beyond questions of procedure, SEBI's authority to approve or reject the settlement applications remains vague and undefined. The guidelines allow SEBI to reject any settlement application where a breach seems to

have a market-wide effect, creates investor losses, or involves repeat offenders. These ideas, however, can be construed in many ways, allowing for a more personalized settlement. SEBI has to better formalize its criteria for accepting and rejecting settlement proposals in order to increase the legitimacy of the settlement process. Because of this, the SEBI's comments in the consultation document are appreciated. What final adjustments are made to the Settlement Rules is an intriguing question.

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