Shooting sparrows with cannons?

(Author - Cyril Shroff)

Sebi's amendments aimed at strengthening corporate governance fail to reconcile the virtues of public disclosure and protection of private domains

The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations came into effect on July 14, 2023, following consultations on strengthening corporate governance at listed companies. The amendments seek to enhance transparency and reduce asymmetry among shareholders in terms of both information as well as empowerment for decision-making.

One of the key amendments is the introduction of the disclosure obligation under Regulation 30A, read with clause 5A of Paragraph A of Part A of Schedule III. It mandates the disclosure of agreements entered into by shareholders, promoters, related parties, directors, key managerial personnel or KMPs of the listed company or of its holding, subsidiary and associate companies, among themselves or with the listed entity or with a third party, which: (i) impact the management or control of the listed entity; or (ii) impose any restriction or create any liability oupon the listed company. A plain reading makes apparent the wide sweep of the regulation. While the heading of Regulation 30A suggests coverage of only agreements binding on listed entities, the operative language of the provision extends to qualifying arrangement, irrespective of whether the listed company is a party.

Regulation 30A is consistent with the overall focus and endeavour of the regulator to strengthen corporate governance by ramping up regulations and enforcing stricter compliance. The merits of improved disclosure stanards and transparency in engendering greater trust and security in public markets are also undeniable. However, on a careful reading of regulation 30A, the philosophical question must be asked: Has due consideration been given to: (i) concerns accompanying an expansion of public disclosure obligations; (ii) practical challenges of implementation; and (iii) unintended consequences?

Let's take the coverage of Regulation 30A - arrangements of promoters and public shareholders are pegged at the same level, and arrangements inter-se between identified categories of persons are covered. The problem statement identified in the consultation paper of February 2023 alluded to arrangements by promoters with third parties, disclosure of which would have been amply justified. However, the ambit of Regulation 30A is deliberately wider. This raises a few fundamental issues in the Indian context, where there exists a unique and pre-determined controlling shareholder – the “promoter”. More often than not, it is the family synonymous with the listed company.

Anchored by the promoter, the stakeholders are well aware of the control matrix of the company. Collective control is implicit, and attributed by the regulatory framework. In the absence of a trigger for a change in control (already the domain of a sophisticated takeover regime), why should the plumbing of inter-se arrangements between promoters be exposed in

public? Would it alter shareholder conduct or pricing in a meaningful way? Have we regulated for the exception, without making compelling exceptions?

The concern is heightened by the reality that promoter arrangements, rather than mere shareholder agreements, are likely to be broader family arrangements or constitutions, covering extremely delicate and sensitive matters. These are inherently confidential and private to the family. Do the benefits of greater transparency sufficiently justify the parading of the succession framework for the private wealth of a patriarch? Would the regulator then require a testamentary document to be disclosed? What of the conflicting claims and disputes that follow in the wake of such disclosures being made prematurely? These would serve well a reality show but would only be detrimental to the raison d'etre for a shareholder's foray into the public markets-that is, value creation.

Ironically, a protest can also be expected on the grounds of symmetry and fairness. Regulation 30A calls for disclosure of all arrangements subsisting on June 14, 2023, without any past cut-off date. While future arrangements are aware of the requirement and extent of disclosure, existing arrangements caught in the net are deprived of this luxury. The fundamental premise of confidentiality has been altered post-facto. The reference to future family arrangements may well be a fanciful one. The chilling effect of Regulation 30A will certainly compromise the recording of succession plans due to fear of disclosure. The outcome doesn't need one to be Oppenheimer. The lack of definitive agreements and clarity, along with adoption of sub-optimal alternatives, means increased risk of disputes and value destruction.

Let alone the proliferation of future disputes, regulation 30A poses a curious conundrum in the case of existing disputes-the arbitration proceedings may be confidential but not the salient features of the underlying documentation.

The two-step disclosure framework may stumble on the implementation front. What mechanisms can the company employ to enforce the disclosure obligation on the universe of people covered? This is compounded by the diverse range of suspects, from promoters to public shareholders to employees. Global arrangements, spanning multiple jurisdictions and international parties and assets may be an altogether different kettle of fish.

Confidentiality concerns also extend to protection of competitive information and advantages. Would an international fund that is a public shareholder be required to disclose internal arrangements? Or a governance/consultation model that offers a multigenerational family a strategic advantage? Business rivals would undoubtedly beat the most conscientious proxy advisory firm in the dash to access this information.

Bolstering of transparency norms to make markets a safer and fairer place for all stakeholders is essential and laudable. It is equally imperative to maintain the keen balance between the virtues of public disclosure and protection of private domains. Transparency is not an untrammelled obligation; it needs to be tempered with reasonable restrictions and safeguards. Broad strokes instead of calibrated refinements of materiality, timing and exceptions could lead Regulation 30A to the brink of a constitutional challenge, pitted against the fundamental

right to privacy under Articles 14, 19 and 21 of the Indian Constitution. It may be tested for both, reasonableness and proportionality. The due date for disclosure of subsisting agreements to listed companies was Monday, July 31. The corresponding public disclosures by the listed companies will follow by August 14, 2023. One of the leading indicators of whether Regulation 30A has acquitted itself would be the quality, relevance, and impact of the disclosures that come through.

The writer / author is managing partner, Cyril Amarchand Mangaldas. The views are personal.

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