

CONSENT ORDER

RECENT AMENDMENT BY SEBI

DATED 25TH MAY, 2012

PRESENTATION BY
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CONSENT ORDER – MEANING

Consent order means “an order settling administrative or civil proceedings between the regulator and a person (party) who may *prima facie* be found to have violated securities laws.”

In simple terms, consent order in relation to SEBI, it is an out-of-court settlement order between regulator and a company which has violated the prescribed rules as mentioned in SEBI Act. Consent is an alternative enforcement mechanism at SEBI'S disposal and allows companies to pay charges without having to admit guilt.

REASONS FOR PROMULGATION OF THE CONCEPT

Three major reasons can be ascribed to Consent Orders scheme being promulgated:

- (1) Prolonged and costly court litigations can be avoided.
- (2) If one loses in trials, one has to suffer the costs and efforts go waste, as well as incur penalty, which is likely to be stricter than what you one has to pay in consent orders.
- (3) There is no stigma in cooperating and confessing for a securities laws violation as these laws are so much complex that inadvertent violation do happen

It's generally based on the thought- Even if one commits a wrong knowingly, why aggravate it further?

KIND OF OFFENSE

Generally an offense relating to settling administrative or civil proceedings comes under consent order. Administrative/civil actions by SEBI includes issuing directions such as remedial orders, suspension or cancellation of certificate of registration and imposition of monetary penalty under the respective statutes and action pursued or defended in a court of law/ tribunal.

Apart from the above SEBI has been authorized to pass Consent orders in respect of all types of enforcement or remedial actions which are as follows:

1. Proceedings under Sections 11 relating to functions of the board in matters regarding protection of interest of the investor.

2. Proceedings under Section 11A(1)(b) relating to prohibition by any company from

(i) issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;

or

(ii) specify the conditions subject to which the prospectus, such offer document advertisement, if not prohibited, may be issued

3. Proceedings under Section 11B according to which the Board if satisfied may approach if it is necessary

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions,-

4. Proceedings under Section 11D relating to Cease and desist proceedings which are entirely based on any violations of provisions of the act done by any person upon a inquiry made by the board.

5. Cases that are pending under the Enquiry Proceedings Regulations

6. Adjudication Rules or equivalent proceedings under the Securities Contracts (Regulation) Act (1956), Depositories Act (1996)

7. Other civil matters pending before SAT/ courts.

It may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved. A Consent Order may or may not include a determination that a violation has occurred.

PERSON ELIGIBLE TO SEEK CONSENT ORDER

Any person who is notified that a proceeding may/will be initiated/instituted against him/her, or any party to a proceeding already initiated/instituted, may, at any time, propose in writing for settlement.

CONSENT ORDER- A JOURNEY IN DEPTH

A consent decree (also referred to as a consent order) is a judicial decree expressing a voluntary agreement between parties to a suit, especially an agreement by a defendant to cease activities alleged by the government to be illegal in return for an end to the charges. Consent decrees are used most commonly in criminal law and family law and sometimes in United States antitrust law.

It had been made clear that Consent orders cannot be construed as waiver of statutory powers by the Board. The Board always has the right to proceed for appropriate action if it cannot achieve its objectives through a consent order.

A consent decree can be either interlocutory or final. The former is given on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute, and a final decree has the same effect as a judgment at law.

Once entered, a consent decree is binding on the consenting parties and cannot be reviewed except on a showing that the consent was obtained by fraud or that the decree was based on mutual error or a failure of consent.

Consent Order can be passed either,

- Admitting the guilt
- Without admitting or denying guilt

A cause of action can arise at any stage of the violation of the Securities Laws; hence defaulters can make an application for Consent Order. Consent orders may be passed at any stage after probable cause of violation has been found. Where SEBI is of the view that there is a serious and intentional violation; the process shall not be completed till the fact finding process is completed after proper investigation or otherwise.

Consent orders are passed by the Competent Authority or SAT or court where proceedings are pending, subject to the party taking remedial action and consent terms. As discussed above consent orders can be passed by ***admitting guilt or without admitting or denying guilt***. If an order is passed without admitting or denying guilt, such a person should never represent subsequently that he is not guilty. If such a representation is made, the enforcement process may be reopened. Similar appropriate terms will be sought by SEBI from the court where the prosecution is pending.

The HPAC (High Powered Advisory Committee) which will vet the applications will consist of a Chairman who will be a retired judge of a High Court and three other external experts. In the case of rejection of the consent application, no subsequent application with respect to the same default will be considered by the SEBI at any stage thereafter. SEBI will dispose of the consent application expeditiously preferably within a period of six months from the date of registration of the consent application, it said.

PROCEDURE FOR CONSENT ORDERS

STEP 1: Application For Proposal Of Settlement To Be Made In Prescribed Form With Prescribed Fees To SEBI

STEP 2: Proposal will be examined by High Powered Committee headed by a Retired High Court Judge

STEP 3: The Committee may ask the party to revise the consent terms

STEP 4: The committee will submit its views/ recommendations before Competent Authority where proceedings are pending

Step 5: If the matters is pending with SAT/ Court, the draft consent terms recommended by Committees and approved by Competent Authority will be filed with SAT/Court for its determination. In such case even the party is liable to pay legal expenses incurred by SEBI

Step 6: The amount payable by the party will be decided depending upon the facts & circumstances of the case, gravity of alleged violation, interest of investors and the securities market and deterrent affect

Step 7: The consent order will be published through press release and would be put up on SEBI website.

WAIVERS

The party seeking consent order has to furnish as a condition precedent a written waiver from taking any legal proceedings against SEBI concerning any of the issues covered by the consent order. The party shall waive all hearings pursuant to the statutory provisions under which the proceeding has been instituted; the filing of proposed findings of fact and conclusions of law; proceedings before the Board or any officer; all post-hearing procedures; and appeal/review before/by SAT/ courts. Further the party shall waive such provisions of the Regulations or other requirements of law which may be construed to prevent any officer of SEBI from participating in the preparation of, or advising the Competent Authority as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and any right to claim bias or prejudgment by SEBI based on the consideration of or discussions concerning settlement of all or any part of the internal proceedings. In addition, the party will undertake to waive a plea of limitation for reopening the case, if the party violates the consent order subsequently.

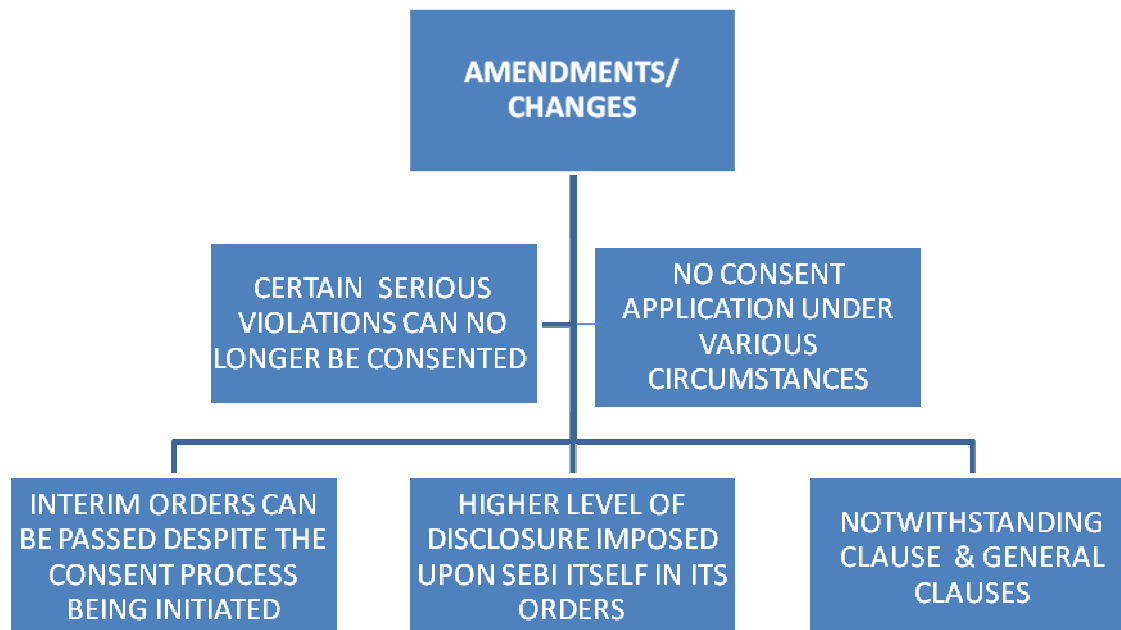
CONSEQUENCE OF NON-ACCEPTANCE

- (i) In case the proposal is not acceptable to the Committee it rejects the proposal and inform the party and the offer of settlement shall be deemed to be withdrawn.
- (ii) The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers.
- (iii) SEBI and the Party will be free to resort to legal recourse as may be available to them under law and neither SEBI nor the Party would be entitled to use any information relating to the settlement process in such proceedings.
- (iv) Any proceeding which had been kept in abeyance pending the consent process will begin from the stage at which it was kept in abeyance.

CHANGES TO CONSENT ORDER- A WALK THROUGH

With Respect to the Consent Order, SEBI has issued a Circular bearing number **CIR/EFD/1/2012** dated **25th May,2012**. The new system links the penalty under consent proportionate to the loss to the investors, the gain to the violators and the repetitiveness of violations, Under the consent order system, first introduced in 2007, charges against companies accused of regulatory violations are dropped once a settlement charge is paid, without admitting or denying guilt.

The new system could also introduce the minimum consent amount. Besides, all violation cases of a corporate group or one person will be taken into account, prior to passing a consent order rather than discussing these on individual basis. The changes can be described into 5 heads as under:



A. CERTAIN SERIOUS VIOLATIONS CAN NO LONGER BE CONSENTED

SEBI shall not settle the defaults listed below:

- i. Insider trading i.e. violation of Regulation 3 and 4 of the SEBI (Prohibition of Insider Trading) Regulations, 1992;
- ii. Serious fraudulent and unfair trade practices which, in the opinion of the Board, cause substantial losses to investors and/or affects their rights, especially retail investors and small shareholders or have or may have market wide impact, except those defaults where the entity makes good the losses due to the investors;
- iii. Failure to make the open offer (except where the entity agrees to make the open offer or if in the opinion of the Board, the open offer is not beneficial to the shareholders and / or the case is referred for adjudication);
- iv. Front-running; for the purpose of this circular, front running means usage of non public information to directly or indirectly, buy or sell securities or enter into options or futures contracts, in advance of a substantial order, on an impending transaction, in the same or related securities or futures or options contracts, in anticipation that when the information becomes public; the price of such securities or contracts may change;
- v. Defaults relating to manipulation of net asset value or other mutual funds defaults where the actions of the asset management company (AMC)/ mutual fund (MF)/sponsor, result in substantial losses to the unit holders, except cases where the entity has made good the losses of the unit holders to the satisfaction of the Board;
- vi. Failure to redress investor grievances (except cases where the issue involved is only of delayed redressal)
- vii. Failure to make such disclosures under the ICDR and Debt Securities Regulations, which in the opinion of the Board, materially affect the right of the investors;
- viii. Non-compliance of summons issued by SEBI;
- ix. Non compliance of an order passed by the Adjudicating Officer (AO), Designated Member (DM) or Whole Time Member (WTM);

x. Any *other* default by an applicant who continues to be non-compliant with any order passed by the (AO) or (DM) or (WTM).

B. NO CONSENT APPLICATION UNDER VARIOUS CIRCUMSTANCES

- i. No consent application shall be considered-
- ii. Before the completion of any investigation / inspection or contemplated in respect of the alleged default;
- iii. ***If an alleged default is committed within a period of two years from the date of any consent order except where the default is minor in nature;***
- iv. ***If the applicant has already obtained more than two consent orders, for a period of three years, from the date of the last consent order;***
- v. Where more than one proceeding arising out of the same cause of action is pending, unless it is for all the proceedings.
- vi. if filed, after 60 days from the date of-
 - (a) service of the notice to show cause, including supplementary notices, if any, issued by the Designated Authority (DA)/AO, DM and WTM, whichever is later.
 - (b) this circular, if the proceedings before the DA/AO, DM and WTM are pending as on that date.

Provided that the Competent Authority may condone the delay, if the delay is beyond the control of the applicant. Provided further that the said condition shall not apply in respect of cases pending before the Tribunal/Courts. Where multiple proceedings have been initiated for the same cause of action, a consent application filed within the limitation period specified above, for any one proceeding, shall be deemed to have been made within the prescribed time for the remaining proceedings also, for which the settlement is sought.

E. NOTWITHSTANDING CLAUSE & GENERAL CLAUSES

Notwithstanding anything contained in this circular, based on the facts and circumstances of the case, the HPAC/Panel of WTMs may settle any of the defaults listed above.

GENERAL CLAUSES

1. All consent applications shall be accompanied with a non refundable processing fee of 5,000/- (Rupees five thousand only) per applicant, by way of a “Demand Draft” in favour of “Securities and Exchange Board of India” payable at Mumbai.
2. The consent application in the prescribed format, containing all the necessary details/documents, shall be assigned a registration number, which shall be communicated to the applicant and quoted for future correspondence.
3. The applicant shall be granted not more than one opportunity to resubmit the rectified application, if it so desires, within a period of 15 days from the date of service of the letter from SEBI.
4. The applicant shall within 15 days from the date of receipt of the intimation send its acceptance of the said terms and remit the SA in lump sum. In case of non-acceptance of the SA and directives, if any or non-communication of acceptance within the stipulated time, the application shall be treated as rejected.
5. A consent application may be withdrawn only once, at any stage prior to the consideration of the application by the HPAC.

CONCLUSION

It appears that SEBI's objective is to exclude serious types of violations listed above at the outset rather than to leave the discretion to the various authorities managing the consent order process. This introduces objectivity and transparency in the process, which were arguably missing in the erstwhile guidelines. However, this also has the effect of substantially limiting the scope of the consent order mechanism to minor offences that are technical in nature and do not substantially affect investor rights. In such circumstances, alleged violators in serious cases may be unable to resort to the consent order mechanism and will be compelled to go through the entire enforcement process.

While the reforms will have the effect of streamlining the process and making it more transparent, it is also likely to substantially reduce the availability of the process to persons who have been charged with securities law violations. The key outcome of the reforms appears to be that the consent order process will now be largely available for minor technical violations, but not for the more serious ones.
