

Draft SEC Bill under Scrutiney

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A bill to amend the Securities & Exchange Commission (SEC) Act No 36 of 1987 is to be tabled in parliament shortly. The draft of this bill was circulated among

members of the Colombo Stock Brokers Association who have expressed concern over a few of the amendments. Some have gone so far as to say that they are positively draconian.

The two main changes seen in this draft bill is the regulation of market intermediaries and the enhancing of the investigative powers of the SEC. The following is an analysis that highlights and discusses some of the main amendments proposed in the draft bill.

An amendment to Section 13 which deals with the Commission's right to inquire into any activity of a market operative has caused quite a stir. The amendment says that the SEC has the right 'to inquire and conduct investigations into any activity of a licensed stock exchange, a licensed stock broker or licensed stock dealer, a licensed managing company and a trustee of a unit trust, a registered market intermediary or any listed public company..."

The words 'any activity' has disturbed some as they fear that the SEC may use this clause to meddle in the activities of a company, in areas which would not be directly under their purview.

Despite all these fears, the offending words will remain, as the SEC feel they need broader powers to investigate the activities of a listed company. At present this section only allows the Commission to investigate the 'business affairs' of licensed stock brokers etc. Be that as it may, market operatives must know that the SEC can only act within the objects of the commission which are spelt out in Section 12 as follows:

12 The objects of the Commission shall be (a) the creation and maintenance of a market in which securities can be issued and traded in an orderly and fair manner; (b) the protection of the investors. (e) the operation of a Compensation Fund to protect investors from financial loss arising from the failure of a licensed stock broker or licensed stock dealer to meet his contractual obligations; and (d) the regulation of the securities market and to ensure that professional standards are maintained in such market." Other important amendments to Section 13 are '(n) to examine and approve proposals in relation to new issues of securities by listed public companies whether such issues of securities are to be by way of public issues or otherwise; (o) to regulate takeovers and mergers where the offeree is a listed public company; (p) to conduct investigations into any violation or contravention of the provisions of this Act or any rule or regulation made thereunder by any person; (q) to do all such other acts as may be incidental or conducive to, the attainment of the objects of the Commission or the exercise of its powers under this Act.'

Even though these clauses were not in the SEC Act previously, they were already being exercised by the Commission and therefore the amendment is a mere formality.

Amendment to Section 14 of the principal enactment is another amendment that has caused some concern among market operatives. Paragraph (a) of this section has been repealed to read as '(a) carry out inspections of the activities of brokers, licensed stock dealers, licensed managing companies and trustees of unit trusts, or registered market intermediaries in order to determine whether they are operating in conformity with the provisions of this Act or any regulations or rules made thereunder and to charge the costs incurred in carrying out such inspections from the licensed stock exchange, licensed stock broker, or licensed stock dealer or licensed managing company and trustee of a unit trust or registered market intermediary as the case may be, whose activities are being inspected.'

In this case, brokers have expressed concern over the fact that the SEC could charge the cost incurred in carrying out inspections. However, SEC sources say that so far they haven't charged any fee for inspections carried out.

The levying of cess has now been written into the statute. Presently, the SEC levies a cess but this is done by way of an administrative arrangement with the Colombo Stock Exchange. The insertion of a new section in 14A in the principle enactment says:

14A - (1) There shall be charged, levied on trading and paid a cess of such rates as may be turnover, determined by the Minister from time to time, by Order published in the Gazette, on the daily trading turnover of a licensed stock exchange.

(2) Every order made by the Minister under this section shall come into force on the date of its publication in the Gazette or on such later date as may be specified therein, and shall be brought before Parliament for approval within four months of the date of its publication. Any such Order which is not so approved shall be deemed to be revoked from the date of its disapproval, but without prejudice to the validity of anything previously done thereunder.

(3) The cess imposed under this section shall be in addition to any other tax or cess levied under any other written law.

(4) Monies received by the Commission as proceeds of the cess imposed under this section, shall be utilized by the Commission for the purpose of developing the securities market and to defray the expenditure incurred by the Commission in the exercise discharge and performance of its powers, functions and duties.

(5) For the purpose of this section “trading turnover” in relation to a licensed stock exchange means the total purchases and sales of listed securities at such licensed stock exchange.’ The cess collected in the past has been put to good use, one of which is that the SEC footed 50% of the bill which went for the automated screen-based trading in the Colombo Stock Exchange.

Section 19A is a new section added to the act which deals solely with the registration of market intermediaries. This section is inserted immediately after section 19 and shall have effect as section 19A of the principal enactment.

19A (1) Any person who is carrying on or who intends to carry on business as a market intermediary shall register with the Commission for that purpose.

(2) An application for the purpose of registration under subsection shall be made to the Commission in such form, together with such documents and such fee as may be specified by the Commission from time to time in that behalf.

(3) On receipt of an application for registration, the Commission having considered the The SEC is moving towards disclosure which is the general trend in the world today. particulars stated therein and where it deems necessary having given the applicant an opportunity of being heard, shall by written notice inform the applicant whether he is being registered as a market intermediary or not, and where he is registered as a market intermediary, issue him with a certificate of registration valid for a period of one year effective from the date of issue of such certificate. Every person issued with a certificate of registration is hereinafter referred to as a ‘registered market intermediary.’

(4) No person shall be registered as a market intermediary unless he complies with the terms and conditions set out in Part V of the schedule hereto.’

Another amendment to facilitate the SEC’s processing of the registration of licensed stock brokers, dealers or market intermediaries is that they would have to apply for registration 3 months prior to their license expiring. The rule so far enabled them to apply anytime within a period of 3 months to expiry, which led to some of them applying a few days before the expiry date, causing a lot of disruption on the part of the Commission due to the short space of time given for processing.

Insertion of a new Section 28A of the principal enactment prohibits the listing of shares in certain cases.

'28A. Where shares in any public company are allotted to any person, prior to its listing in a licensed stock exchange, no shares in any such company shall be listed on a licensed stock exchange within a period of two years from the date of such allotment unless the written approval of the Commission is obtained for that purpose prior to such listing."

However, it is reliably understood that the SEC is now considering reducing the 2-year period to 1 year. This section would prevent unscrupulous companies taking advantage of bull runs.

Whoever formulated Sections 29A and 29B seems to have got their wires crossed on one issue i.e., in no instance should the Commission be involved in the listing of companies, as this falls under the purview of the Colombo Stock Exchange. The new Sections dealing with issues of securities and granting approval for listing of securities in a licensed stock exchange states the following: 29A says

'No listed public company or any public company intending to obtain a listing in a licensed stock exchange shall make any issue of securities unless the issue has been approved by the Commission."

Whilst 29B reads

'(1) For the purpose of obtaining approval under section 29A, any listed public company or any public company intending to obtain a listing, in a licensed stock exchange shall make an application to the Commission for the issue of securities.

(2) In this section "issue of securities" means,

(a) in relation to a public company intending to obtain a listing, the listing of and quotation for securities on a licensed stock exchange;

b) in relation to a listed public company - (i) new issues or offers for sale of securities to the public, whether such issues or offers for sale, are by way of public issues or otherwise; (ii) rights issues of securities; (iii) bonus issues of securities other than issues by way of the capitalization of appropriated profits of the company; (iv) schemes of arrangement, schemes of reconstruction, take over schemes, share option schemes and acquisition of assets by way of issues of securities.

(3) The Commission shall, within two weeks of the receipt of the applications made under subsection (1), and having regard to (a) the viability of such company and its suitability for listing on a licensed stock exchange; and (b) the protection of the interests of the investors

and public, approve such applications on such terms and conditions as the Commission may deem necessary or refuse such application.

(4) Any public company aggrieved by the decision of the commission refusing approval under subsection (2) may appeal to the Commission against such decision within two weeks from the date on which such decision was communicated to such public company."

In this section, the SEC is considering removing the word "listing" and inserting the words 'issue of securities. Commission sources say their interests in the market is purely from the point of view of disclosure and not on merit. The SEC is moving towards disclosure which is the general trend in the world today.

29B: where it is said that the issue of securities means in relation to a public company intending to obtain a listing, it is reliably understood that the SEC is to take remedial steps.

Also the paragraphs 'the viability of such company and its suitability for listing on a licensed stock exchange; and any public company aggrieved by the decision of the commission refusing approval under subsection (2) may appeal to the commission against such decision within two weeks from the date on which such decision was communicated to such public company,' will be deleted from the draft bill.

A new section 33A has been included to prevent insider dealing '33A: Any person who contravenes any provision of this Part of this Act shall be guilty of an offense and shall on conviction after summary trial by a Magistrate be liable to a fine not less than one million rupees or to a sentence of imprisonment of either description for a period not less than two years and not exceeding five years or to both such fine and imprisonment.'

New addition Section 46A is on inquiries and investigations and lists the new powers given to the SEC. 46A:

(1) For the purpose of any inquiry or investigation as the case may be held by the Commission or such Committees shall name the powers of a District Court:

- a) to summon and compel the attendance of any witness
- b) to compel the production of such books or documents in the possession or control of such witness
- c) to administer any oath or affirmation to any witness.

(2) where any person:-

a) without sufficient reason published any statement or does anything during the progress or after conclusion of any inquiry or investigation as the case may be which may bring Commission or Committee or any member thereof into disrepute or

b) interferes with the lawful process of the Commission or the Committee as the case may be; or

c) in the course of any inquiry or investigation held or carried on under the provisions of this act :-

i) fails without course, which is the opinion of the Commission or Committee is reasonable, to appear before the Commission or such Committee at the time and place specified in any summons issued by the Commission or the Committee to such person; or

ii) refuses to be sworn or having been duly sworn refuses or faith without cause, which in the opinion of the Commission or Committee as the case may be is reasonable, to answer any questions put to him relating to any matters being inquired into or investigated as the case may be, by the Commission or such Committee; or

iii) refuses or fails without course which is the opinion of the Commission or such Committee as the case may be is reasonable to guidance and show to the Commission or Committee any document which is in his possession, control or powers, and which is the opinions of the Commission or such Committee as the case may be is relevant any matter being inquired into or investigated as the case may be by the Commission or such Committee, such person shall be guilty of any offense of contempt against or in disrespect of the authority of the Commission or such Committee as the case may be and every such offense if contempt shall be punishable by the court of appeal.

(3) where the Commission or such Committee determine that a person has committed any offense of contempt against or in disrespect of its authority, the Director-General of the Commission shall transmit to the Court of Appeal a certificate getting out the determination of such Commission or Committee as the case may be, as every such certificate shall be signed by the Chairman of the Commission.

(4) In any proceeding for the punishment of an offense of contempt in the Court of Appeal, a document property to be a certificate signed and transmitted to the court of Appeal under subsection (3) shall be evidence of the facts stated in the determination set out therein and

be inclusive evidence that of such determination was made by the Commission or the Committee as the case may be.

(5) In any proceeding for the punishment of any alleged offense of contempt against or in disrespect of the authority of the Commission or such Committee as the case may be, no member of such Commission or Committee shall except with his own comment be summoned and examined as a witness.'

The new powers given to the SEC in the entire section above, some market operatives think are severe in the extreme. But SEC sources point out that the clauses added in this section are very similar to the investigative powers of the Fair Trading Commission. However, the Commission is willing to reconsider and will take market comments and suggestions into consideration in order to adopt a different procedure.