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Co boards must agree that M&A price is fair to investors

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Topics: sebi Securities Appellate Tribunal

MUMBAI: Indian companies that become buyout targets must seek a second opinion to assess if the terms of the deal are in the fair interests of shareholders, a panel constituted by market regulator Sebi to advise it on new takeover rules has suggested.

The use of outside counsel to offer a fairness opinion on a bid, notably the price, is historically a feature of the US market and becoming increasingly common in Europe. The board of directors typically asks an investment bank to evaluate a bid while weighing potential mergers and acquisitions and passes on the recommendation to shareholders to help them take informed decisions.

The committee, which will unveil its recommendations on Monday, aims to protect the interests of minority shareholders with the fairness opinion, said a person with knowledge of its working.

“It is emulating the best corporate governance practice followed globally. It will bring in a lot of transparency in the process,” said Siddharth Shah, who heads the corporate and securities practice group at law firm Nishith Desai Associates.

“Today, the board may act in its own interests. But if the board is required to give its view on whether the price is fair or not, it will bring more accountability on the board,” he said.

If Sebi considers the key suggestion from the panel headed by C Achuthan, former head of Securities Appellate Tribunal, numerous litigations by upset minority shareholders, and investors attempting to control assets for a song, could be history. The fairness opinion proposal is among the many recommendations, treatment of all shareholders of the target company, including promoters, on par, being another, that Sebi may heed to while framing new guidelines in place of a feckless 13-year-old takeover rule.

Even so, boards of some of the large corporate houses in India have in the past voluntarily sought fairness opinion from investment banks.

“We have given fairness opinion to a few large corporates for some mid-sized deals which they did themselves without the help of an advisor,” says Jacob Mathew, managing director of MAPE Advisory Group.

A recent instance of a fairness opinion involved Singapore hospital chain Parkway Holdings in which Fortis Healthcare and Malaysia’s Khazanah are locked in a battle for control. Parkway appointed an investment banker seeking a fairness opinion on the price offered and then informed the shareholders about the same.

Skeptics among investment bankers believe fairness opinion is irrelevant in the Indian context because boards are controlled by promoters, unlike globally where shareholding is widespread.
Threshold for mandatory offer to buy more should rise to 25%, from 15%, the panel has proposed. Once a buyer, or associated people, buy 25%, they should offer to buy out the remaining 75%, instead of the current 20%, said the person.
Investment bankers welcomed the recommendation, saying it would be extremely investor-friendly as M&A valuations are often double the capital market valuation. The proposed rule will ensure that all investors rather than just promoters enjoy the strategic premium that acquirers are willing to offer.

In the Ranbaxy-Daiichi Sankyo deal, only 20% shareholders received the same premium as the Singh family, bankers said.

The panel has also provided for continuous listing. If the public holds 10% despite the total offer, the buyer can raise the holding to the stipulated 25% as prescribed in the listing norms.

But if the shareholding falls below 10%, companies will be free to delist without having to use the reverse book-building mechanism. The second offer for delisting the shares can be made at the open offer price.
“By allowing the company to delist at the same price as the initial open offer price will actually make transactions more practical,” said Mr Shah.

Besides, in case of a voluntary offer, the panel has proposed a minimum cap on the offer size, which could be 10%, and an upper limit of 75%.

The committee has also proposed to reduce the timeline for completing the offer. Public offer would be completed within 90 days of public announcement against 120 days now.