

SEBI's new ICA guidelines face execution challenges, experts seek changes

Updated at October 21, 2020 00:59 IST

The Securities and Exchange Board of India's (Sebi's) new guidelines that enable holders of listed debentures to enter an inter-creditor agreement (ICAs) face several implementation challenges.

Industry players and legal experts have made a representation to the markets regulator seeking amendments to the circular issued on October 13, which also prescribes procedures to be followed by debenture trustees (DTs).

Among the key clauses in the circular is one that states that DTs can enter ICAs or agree to a resolution plan if it is in the best interest of investors. Also, trustees need to obtain the approval of a majority of investors — those holding 75 per cent of value of outstanding debt and 60 per cent by unitholders.

Experts say the 'best interest of investors' clause could prevent DTs from entering ICAs as it would put tremendous responsibility on them. "This appears to cast a responsibility on the trustee to determine whether signing the ICA is in the interest of investors and may deter trustees from taking any definitive steps. Once the majority investors have consented to signing the ICA, there should not be any further onus on the trustee. This requirement of the ICA being in the interests of the investors appears unnecessary and ought to be removed to facilitate the process," said Aashit Shah, a partner at J Sagar Associates (JSA), a leading law firm, in a note. Experts said most DTs would hesitate to say that a resolution plan is in investors' favour and would rather want investors to make that decision.

"Although, Sebi's circular is laden with ambiguity and lacks clarity on some aspects, it is a welcome move to facilitate the debt restructuring process. Therefore, the October 13 circular should be clarified so as to optimise and maximise its benefits and have wider reach," says Sonam Chandwani, managing partner, KS Legal & Associates.

In June 2019, the Reserve Bank of India (RBI) issued the framework for early recognition, reporting and time-bound resolution of stressed assets. These directions were only applicable to banks and certain financial institutions. More importantly, it kept out debenture holders, which created difficulties in implementing debt resolution packages. While Sebi's circular has taken care of this, it has led to an overlap of regulatory turf.

RESPONSIBILITIES ENTRUSTED TO DTs

- Can only enter ICA if it is in the best interest of investors
- Have to obtain nod from majority of investors
- Have to inform investors within 3 days of default
- Act as a link between an issuer and subscriber of debt securities

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Resource: Business Standard, 21 Oct 2020

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“The Sebi circular is also not clear on whether it applies to bank or financial institutions who are holders of listed debt securities. Prior to the Sebi circular... such entities signed the ICA as they were bound by RBI directions. However, now that Sebi has issued a specific circular in connection with listed debt securities, would such entities have to sign the ICA as per RBI directions or do they need to first complete the process set out in the Sebi circular before signing the ICA? Clarity on this from Sebi and the RBI would be useful,” adds Shah.

Experts said there are other areas where Sebi’s guidelines are at odds with the RBI directives.

“The RBI directions require the resolution plan to be implemented within 180 days of the review period. However, the Sebi circular only requires the resolution plan to be finalised within 180 days of the review period, thereby implying that implementation of the plan may take much longer. It is important for Sebi to clarify whether they require the resolution plan to be finalised or implemented within the period,” says Shah.