

Capital Markets Hotline

June 16, 2009

DELISTING OVERHAULED: TRANSPARENT YET SKEWED!

Till June 9, 2009, the delisting of securities from the Indian stock exchanges was done as per the SEBI (Delisting of Securities) Guidelines, 2003 (“**Delisting Guidelines**”) issued by Securities and Exchange Board of India (“**SEBI**”) under powers granted to it by the SEBI Act 1992.

However, with the maturing of Indian stock markets, India needed a comprehensive framework for delisting that addressed the balance between promoters’ overzealousness to own a company and public shareholders’ rights to continue to participate in the growth of the company.

Securities Contracts (Regulation) Act, 1956 was amended in the year 2005 that laid out path for creation of a delisting framework, whereby the Government of India has notified on June 15, 2009, the Delisting Rules (“**Delisting Rules**”) dealing with the substantive aspects of delisting and SEBI on June 10, 2009 has notified SEBI (Delisting of Equity Shares) Regulations, 2009 (“**Delisting Regulations**”) that pertain to the procedural nuances relating to delisting.

STRUGGLE AREAS

■ Voluntary Delisting: Success criteria revamped

Earlier, for a delisting offer to be successful, it was required that the public float of the company should fall below 25%/10%¹, as the case may be. However, under the new delisting framework, for a ‘**Voluntary Delisting**’ (i.e., delisting of equity shares of a company from all the stock exchanges in India at the volition of the promoter/ company) of equity shares by the promoters of a company to be successful, the process should result in promoters’ acquiring the higher of either 90% of entire shareholding (post all acceptance) or 50% of the delisting offer size. The consequence of failure of a Voluntary Delisting process is that the promoter must bring the public float in the company’s shares above 25%/10%¹ within 6 months from the date of failure of the Voluntary Delisting process.

■ Voluntary Delisting: Qualitative higher threshold for shareholders’ approval

Voluntary Delisting has further been tightened with the introduction of a new qualitative threshold that provides that the shareholders’ resolution should be approved by a special resolution passed by least 75% of the shares held in the company through postal ballot, provided that the votes cast in favour of the resolution by public shareholders’ are at least two times the votes cast against by public shareholders. This particular requirement may prove to be extremely cumbersome for the companies/ promoters to comply with as it shall be both, costlier to arrange postal ballots and difficult to achieve the higher threshold of two-thirds majority of public shareholders.

MOVE TOWARDS TRANSPARENCY & EFFICIENCY

■ No delisting pursuant to preferential allotment

One of the principal changes in the new delisting framework is that a clear obligation has been cast upon the promoters and the company to not breach the minimum prescribed public float requirement¹ by their own volition and then apply for delisting. Thus, promoters/ company cannot now make a preferential allotment of shares resulting in public float below 25% (10%)¹ to delist the company. Even earlier buyback of shares could not be resorted to for the purposes of reducing the public float so as to delist a company. Inclusion of preferential allotment into the list of non-permitted grounds for seeking delisting is thus a furtherance of the same jurisprudential thought.

It may be noted that reduction of public float below the minimum prescribed limit pursuant to either a rights issue² or open offer by the promoter under takeover regulations still continue to be routes with which promoter/ company may first dilute the public float and then apply for delisting under the Delisting Regulations.

■ Definition of ‘promoter’ rationalized

Peculiarly earlier the definition of ‘promoter’ included any acquirer (other than the promoters) desirous of getting the securities of a company delisted. This enabled third party acquirers to make offer for acquisition of shares and seek delisting of the company under the Delisting Guidelines, with little or no role of either the controlling promoter or the

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company. Now, the definition of 'promoter' has been rationalized to bring it in line with the takeover regulations. Therefore, delisting of equity shares of a company cannot be sought by anyone other than the promoters of the company.

■ **Partial delisting made efficient**

Partial Delisting, i.e., delisting of equity shares of a company from one or more stock exchanges in India provided that the company continues to remain listed on either National Stock Exchange or Bombay Stock Exchange, though even earlier did not require the company to provide an exit offer to the shareholders, it nevertheless required a prior shareholders' approval and an application to the concerned stock exchange. Now, this process is further streamlined by doing away with a shareholders' approval and putting a timeline of maximum 30 working days on the concerned stock exchange for the purposes of grant of approval to delist from such stock exchange.

■ **Voluntary Delisting: 2 stage approval from stock exchanges**

Voluntary Delisting has now been made subject to a two stage approval process from the concerned stock exchanges. At the first stage, an in-principle approval from the concerned stock exchange shall be required. While the regulator has with good intent both attempted to address the interests of the public shareholders' by empowering the stock exchanges at the first stage to consider pending investor grievances, compliance with listing requirements and litigation under securities laws, the regulator has also provided a clear direction on time³ to be taken for disposing the said application, in order to keep the delisting process efficient and fast.

■ **Voluntary Delisting: Pricing mechanism rationalized**

While earlier the floor price for the exit offer to be made in case of Voluntary Delisting was based on average of 26 weeks traded price, it has now been brought in line with the takeover regulations and stipulates 26 weeks/ 2 weeks average of weekly high and low of closing prices.

■ **Voluntary Delisting: Exit offer process made transparent**

Voluntary Delisting process has been provided in greater detail to ensure transparency. The process has been aligned to the process provided and well understood by the industry under the takeover regulations. For example, obligation to issue letter of offer pursuant to public announcement; obligation not to use company funds for delisting; introduction of concepts like specified date, special account and inclusion of shares held in physical form in the exit offer process.

■ **Voluntary Delisting: Remaining public shareholders' timeline enhanced**

The right of remaining shareholders to tender equity shares pursuant to a Voluntary Delisting process post-delisting has been increased from earlier 6 months to now 1 year from the date of delisting.

■ **Delisting of small companies**

Simpler norms have been provided for Voluntary Delisting of small companies (like companies having 300 or lesser shareholders totaling to paid-up value of less than Rs. 10 million) whereby the book building process may be escaped if 90% of the public shareholders' agree to the proposal to delist.

■ **Cooling off period enhanced**

Cooling off period for a delisted company has been increased from earlier 2 years to now 5 years, in case of Voluntary Delisting and 10 years, in case of compulsory delisting.

■ **Compulsory delisting revisited**

Compulsory delisting has been revamped too. As compared to earlier Delisting Guidelines, the new delisting framework has brought in *statutory delisting grounds* for compulsory delisting and also laid out a detailed *delisting criterion* that must be followed by a stock exchange while it takes decision on delisting.

FINALE

The new delisting framework has brought about a paradigm shift from the delisting process being promoter driven to it being public shareholder driven.

It has introduced abundant measures to make the delisting process transparent and time bound, however, we shall have to wait and see as to how the tougher threshold for public shareholders' nod and the higher success criterion for the entire delisting process, actually, play out in practice. If they prove to be time intensive or difficult to achieve, then it shall frustrate the purpose of the new framework to a large extent.

Nevertheless, the intent and attempt of the regulator appears to be in the positive direction and the new framework seems to achieve the critical balance between protection of public shareholders' and private interests of the promoters.

1 25% in all cases except Clause 40A(ii) & (iii) of the Listing Agreement issued by stock exchanges in India

2 Earlier the price for delisting offer pursuant to rights issue was at the price of such rights issue, however, now the

price for the delisting offer must comply with the same pricing mechanism as provided under the Delisting Regulations.

3 30 working days from the date of receipt of application complete in all respects.

- Sahil Shah, Nirvaan Gupta & Vaidhyanadhan Iyer
You can direct your queries or comments to the authors

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