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SECURITIES AND INVESTMENT REGULATIONS

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Amendments to the Delisting Regulations

Through an amendment dated March 24, 2015, SEBI has changed several provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009, the regulations that govern the delisting of public listed companies in India. The following are the significant amendments:

Process for approving delisting: The board of the company is now required to appoint a merchant banker immediately after it informs the stock exchanges of its intention to delist. The primary role of the merchant banker, after carrying out its due-diligence exercise, is to certify that the promoter/ promoter group entities have been in compliance with the applicable provisions of securities law during all their trading in the shares of the company and that they have not carried out any fraudulent transaction in order to facilitate the success of the delisting offer. The board of the company, based on the report of the merchant banker, may then approve the delisting.

Threshold for successful delisting: The Delisting Regulations specify certain thresholds relating to the shareholding of the promoter post offer, i.e., after acceptance of shares through eligible bids for the delisting to be considered successful. The earlier regulations specified that the threshold would be the higher of: (a) 90% of the total issued shares; or (b) the aggregate of the pre offer promoter shareholding and 50% of the offer size. The amendment simplifies the calculation by omitting the second threshold. An additional condition has been included to determine the success of delisting a minimum of 25% of the public shareholders need to have participated in the book building process. If this is not satisfied, it is sufficient for the promoter and the merchant banker to demonstrate that the letter of offer has been delivered to all public shareholders.

Final offer price: The final offer price is to be determined through the book building process as per Schedule II of the Delisting Regulations. All bids at the final offer price and those below the offer price are required to be accepted. The earlier regulations stated that the offer price would be the price at which the maximum number of equity shares is tendered by the public shareholders. However, the amendment now states that the offer price shall be the price at which shares accepted through eligible bids take the promoter shareholding to 90%.

Relaxations in certain cases: The amendment also provides relaxations on the applicability of the Delisting Regulations in certain circumstances. Firstly, small companies whose shares have not been traded for a period of one year may undertake delisting without adhering to the onerous obligations of providing an exit opportunity to their public shareholders. The amendment has now expanded the definition of small companies by increasing the paid-up capital requirement from Rs. 1 cr. (10 million) to Rs. 10 cr. (100 million) with maximum net worth of Rs. 25 cr. (250 million). Secondly, the amendment has added a new provision to the Delisting Regulations whereby SEBI has been empowered to grant relaxation from strict enforcement of the provisions by recording the reasons for the same in writing. The promoter of the company must file an application seeking such relaxation and the same will be decided by SEBI after hearing the applicant.

Restriction on sale by promoters and Timelines: The amendment imposes certain trading restrictions on the promoter / promoter group entities. In addition, the amendment has tried to shrink the timeline for the delisting process.

Stock exchange mechanism: The amendment now requires the acquirer or promoter to facilitate tendering of shares by the shareholders and settlement of the same through the stock exchange mechanism. The procedure for this mechanism has been specified in SEBI's Circular dated April 13, 2015. The new mechanism envisions a separate 'acquisition window' wherein selling public shareholders may place their bids through their stock brokers during the delisting process.

"*Going private*" through a Takeover

SEBI has recently on March 24, 2015, amended the Takeover Code to allow promoters / acquirers to take companies "private" by way of a takeover. SEBI has introduced Regulation 5A which allows acquirers to potentially acquire all of the company's shares from its public shareholders through a voluntary / compulsory open offer made under Regulations 3, 4 and 5 of the Takeover Code.

Prior to this amendment, the Takeover Code required acquirers / promoters to comply with minimum public shareholding norms when their holdings crossed 75% of the total equity capital of the target within a year of such increase, through an offer for sale or a rights issue. Acquirers / promoters who wished to take their companies private were required to wait for a year after the completion of the open offer to begin the process of delisting. This amendment has ended the wait and now acquisition and delisting of public companies can both happen simultaneously.

However, the delisting offers under the Takeover Code are still subject to the SEBI Delisting Regulations, which takes the sheen off this new amendment. The acquirer will still have to obtain the prior approval of the board of directors of the target company as well as the approval of the shareholders through a special resolution and comply with other requirements of the Delisting Regulations. It is important to remember that open offers, whether voluntary or compulsory, under Regulations 3, 4 and 5 do not necessarily require the acquirer to take the prior approval of the board or the company's shareholders to complete the acquisition or the open offer.

It seems that SEBI feels that corporate India is still not ready for hostile takeovers, as it would be procedurally impossible for a rival to take a company private using this route. Further, if there is a competitive offer made under the Takeover Code after the announcement of the delisting offer, none of the parties will be able to take the company private. In the event that the acquirer fails to make a successful delisting offer, as per the Delisting Regulations, they will still have to make the open offer for the minimum size of offer as determined under Regulation 7 of the Takeover Code; further if the shareholding of the acquirer exceeds 75%, they will then have to make an offer for sale or a rights issue in terms of the equity listing agreement and the SCRR and bring their shareholding down to 75% and observe a cooling-off period of one year before making another attempt at taking the company private.

An Examination of SEBI's Power to Arrest

The High Court of Bombay, in a writ petition, considered the extent of SEBI's power to arrest defaulters. The matter commenced when SEBI passed orders against the petitioner imposing penalties amounting to Rs. 1.10 cr. (11 million) for violations of the PFUTP Regulations. Subsequently, in accordance with the powers under Section 28A of the SEBI Act, SEBI initiated recovery proceedings against the petitioner and directed him to show cause as to why he should not be committed to civil prison for the default in payment of the dues. The Recovery Officer, in his order, stated that the petitioner failed to establish substantial cause for not committing him to the civil prison and directed that the petitioner be arrested. The Recovery Officer justified the arrest on the grounds of non-payment of dues, as only an amount of Rs 5,160 was recovered from the sole bank account in the name of the petitioner, and for not making a proposal for payment.

The High Court observed that Section 28A of the SEBI Act provides that during the exercise of powers for recovery of dues, the provisions of the Income Tax Act, 1961 are applicable. The Income Tax Act provides a detailed procedure which the Recovery Officer is required to strictly comply with in cases of arrest and detention. It was further observed that these powers may be exercised only in situations where the Recovery Officer is satisfied that (1) the defaulter, with the object or effect of obstructing the execution of the certificate, has dishonestly transferred property; or (2) the defaulter, despite having means, refuses or neglects to pay the dues.

In relation to the facts of the present case, the High Court held that the Recovery Officer is not empowered to arrest and detain the defaulter simply for non-payment of dues or for not giving a proposal for payment of dues. It was held that the Recovery Officer must also satisfy himself that either of the conditions stated above is met and must record reasons for reaching this conclusion in his order. The High Court termed the order of the Recovery Officer to be an instance of sheer abuse of power and held that the arrest was patently illegal and arbitrary.

Exclusively listed companies on De-recognized/Non- operational/ Exited Stock Exchanges

SEBI, through its Circular dated May 30, 2012, had issued guidelines for exit of de-recognized/ non-operational stock exchanges, wherein exchanges that had an annual turnover of under Rs 1,000 cr. (10 billion) before May 30, 2014 would be derecognized. On April 17, 2015, SEBI issued another Circular allowing further time of 18 months to companies listed on these regional exchanges to migrate to national stock exchanges such as the BSE or NSE. This was done pursuant to representations made by companies that were eligible to migrate to the national stock exchanges, but could not do so due to the lack of time. The latest Circular prescribes certain additional criteria for listing of such companies:

Firstly, listing is permitted only in respect of those classes of securities that were already listed in the non-operational stock exchanges. Further, the shareholding pattern of such companies shall not change materially in a manner that suggests change of control at the time of listing on nationwide stock exchanges. However, the promoters and directors of companies which fail to provide either the trading platform or an exit to their shareholders even after 18 months, will be subject to stricter scrutiny for any future association with securities markets. In such cases, any company that proposes to make a public offer or get registered with SEBI in any other capacity has to demonstrate that it has made adequate efforts for providing its shareholders an exit. This is a step in the right direction to help ensure that small investors are not left in the lurch by virtue of holding illiquid shares and companies that do not meet listing norms do not get away scot free. However, the latest Circular does not specifically provide exit options for shareholders. For instance, it may have been prescribed that in case of compulsory delisting, shareholders have received the exit price in accordance with Section 21 (Delisting of securities) of the Securities Contracts Regulation Act, 1956 and relevant guidelines.

Further, under the latest Circular, all nationwide stock exchanges need to have a dedicated cell to process the applications of exclusively listed companies of non-operational and exiting stock exchanges, and dispose of the applications within 2 months from the date of the same. While, SEBI had earlier directed nation-wide stock exchanges to immediately create a separate dedicated cell to expedite such listing process, no specific time period had been prescribed. SEBI needs to oversee that the processes required for such relisting have been properly instituted and eligible companies actually get listed on a priority basis and in a time-bound manner, to effectively serve the larger interest of investors of such companies.

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