

SECURITIES LAWS

DELISTING OF SHARES - A COMPREHENSIVE ANALYSIS

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The term 'Delisting' means the removal of a listed company from the stock exchange. Till June 10, 2009, the delisting of securities was governed by the SEBI (Delisting of Securities) Guidelines, 2003. On 10th June, 2009 the SEBI notified the SEBI (Delisting of Equity Shares) Regulations, 2009. The new Regulations have substituted the earlier Guidelines. This write-up presents a comprehensive analysis of delisting of shares.

Introduction

1. The term 'Listing' means the admission of the securities of a public company to trading privileges on a recognized stock exchange. Listing provides marketability and imparts liquidity to the shares, under proper supervision of a regulatory authority so as to protect the interest of the shareholders of the company as well as the interest of the general investing public. On the other hand, the term 'Delisting' means the removal of a listed company from the stock exchange. It may happen in case of non-compliance with the guidelines of the stock exchange or when the equity shares are infrequently traded at the stock exchanges or when the company/its promoters voluntarily want to get the shares delisted from the stock exchanges.

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Kinds of delisting

2. Delisting can be classified into two categories :—

- ◆ Voluntary delisting, where a company on its own applies to the stock exchange(s) for getting its equity shares delisted from the concerned stock exchange or all the stock exchanges. Voluntary delisting is not permitted in the following cases :—
 - (a) Pursuant to a buy back of equity shares by the company;
 - (b) pursuant to a preferential allotment made by the company;
 - (c) unless a period of three years has elapsed since the listing of that class of equity shares on any recognised stock exchange;

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(d) if any instruments issued by the company, which are convertible into the same class of equity shares that are sought to be delisted, are outstanding.

- ◆ Compulsory delisting, where a stock exchange delists the equity shares of a company on any ground prescribed in the Rules made under section 21A of the Securities Contract Regulation Act, 1956.

2.1 REASONS FOR VOLUNTARY DELISTING - The primary reasons which compel the promoters/companies to opt for voluntary delisting are :—

- ◆ Unwillingness to pay the listing fees to the regional stock exchanges as the same may be disproportionate to the benefits that may accrue to the company or its shareholders.
- ◆ Shares of the company are infrequently traded.
- ◆ The company may not have the investors' base in the region to which the concerned stock exchange caters.
- ◆ The promoters do not wish to comply with the listing agreement as considerable information has to be made public.
- ◆ The number of public shareholders may have been reduced to such a low level that it may be futile to continue to be listed.
- ◆ The company has become a sick industrial company.
- ◆ The promoters may want to delist the shares so that they can be listed after few years at a considerable premium.

Procedure for voluntary delisting

3. In case of voluntary delisting, a company has two options :—

- ◆ To get the shares delisted from all the stock exchanges.
- ◆ To get the shares delisted from some selected stock exchanges and continue to be listed at the other stock exchanges.

In case a company decides to get its shares delisted from all the stock exchanges, the public shareholders have to be given an exit opportunity. No exit opportunity needs to be given if after the proposed delisting from any one or more recognised stock exchanges, the equity shares would continue to be listed on any recognised stock exchange which has nationwide trading terminals, *i.e.*, BSE or NSE.

(I) In a case where no exit opportunity is to be given to the public shareholders, the procedure to be followed is as follows :—

- (a) Approval of the board of directors of the company at its meeting.
- (b) Public notice regarding the proposed delisting would have to be given in at least one English national daily with wide circulation,

one Hindi national daily with wide circulation and one regional language newspaper of the region where the concerned recognised stock exchange(s) are located. The public notice shall mention the names of the recognised stock exchanges from where the equity shares are intended to be delisted, the reasons for such delisting and the fact of continuation of listing of equity shares on recognised stock exchange having nationwide trading terminals.

- (c) Application to the concerned stock exchange for delisting of equity shares. The delisting application, complete in all respects, has to be disposed of by the stock exchange within a period not exceeding thirty working days from the date of receipt of such application.
 - (d) The fact of delisting has to be disclosed in the first annual report of the company prepared after the delisting.
- (II) In a case where exit opportunity is to be given to the public shareholders, the procedure to be followed is as follows :—
- (a) Approval of the board of directors of the company at its meeting.
 - (b) Prior approval of the shareholders of the company by way of special resolution passed through postal ballot. The special resolution shall be deemed to have been passed if and only if the votes cast by **public shareholders** in favour of the resolution are at least twice the number of votes cast by public shareholders against it. 'Public Shareholders' have been defined as the holders of equity shares other than the promoters and holders of depository receipts issued overseas against underlying shares.

Thus, the process of obtaining the shareholders' approval for delisting of shares has been made much more stringent as compared to the earlier guidelines, since earlier the :

- (i) Special Resolution had to be passed at a General Meeting, which is usually attended by a handful of shareholders, thus promoters could easily get the Special Resolution passed. However, now the Resolution would have to be passed through postal ballot in which a shareholder staying anywhere in India can easily participate.
- (ii) Promoters were allowed to vote on the Special Resolution seeking delisting of shares, but now promoters have been debarred from voting on such resolutions. Therefore, only time would tell us whether at all any company would be able to get the Special Resolution passed through postal ballot for the purpose of getting its shares delisted from all the stock exchanges.

At the same time, one can also argue that although listing provides liquidity to the shareholders and as such delisting seems to be prejudicial to the interest of the public shareholders, yet the public shareholders may still cast their vote in favour of the delisting resolution since delisting would also bring with itself exit opportunity at an attractive price to be determined through reverse book building.

- (c) Application to the concerned stock exchange for in-principle approval for the proposed delisting of shares. The Regulations provide that the stock exchange shall not unfairly withhold such an application, but may require the company to satisfy it as to —
- (i) the passing of the Special Resolution.
 - (ii) the redressal of investor grievances.
 - (iii) payment of listing fees.
 - (iv) the compliance of the listing agreement.
 - (v) any litigation or action pending against the company pertaining to its activities in the securities market or any other matter having a material bearing on the interests of its equity shareholders.
 - (vi) any other relevant matter as the stock exchange may deem fit to verify.

The application for in-principle approval, complete in all respects, has to be disposed by the concerned stock exchange within thirty working days from the date of receipt of the application.

- (d) Exit Opportunity, *i.e.*, purchase of equity shares from the public shareholders by the promoters at a price to be determined through reverse book building method. This has been discussed in detail in the following paragraphs.
- (e) Within one year of passing the Special Resolution, the final application has to be made to the concerned stock exchange.

Exit opportunity & offer document

4. Exit opportunity & offer document have following parts :

- (a) *Public Announcement* - The process of exit opportunity has to be commenced soon after the receipt of in-principle approval for delisting from the concerned stock exchange(s). The promoters have to appoint a SEBI registered merchant banker. The promoters of the company have to make a public announcement in at least one English national daily with wide circulation, one Hindi national daily with wide circulation and one regional language newspaper of the region where the concerned recognised stock exchange is located.

The public announcement shall contain all material information including the information specified in Schedule I of the Regulations and shall not contain any false or misleading statement. The public announcement shall also specify a date, being a day not later than thirty working days from the date of the public announcement, which shall be the 'specified date' for determining the names of shareholders to whom the letter of offer has to be sent.

- (b) *Escrow Account* - The promoters have to open an escrow account and deposit therein the total estimated amount of consideration calculated on the basis of floor price and number of equity shares held by the public shareholders. On determination of the final price through reverse book building method and making of public announcement accepting the final price, the promoter shall forthwith deposit in the escrow account such additional sum as may be sufficient to make up the entire sum due and payable as consideration in respect of equity shares outstanding with public shareholders. The escrow account may consist of either cash deposited with a scheduled commercial bank or a bank guarantee in favour of the merchant banker or a combination of both.
- (c) *Letter of offer* - The promoters have to despatch the letter of offer to the public shareholders not later than forty five working days from the date of the public announcement, so as to reach them at least five working days before the opening of the bidding period. The letter of offer shall contain all the disclosures made in the public announcement and such other disclosures as may be necessary for the shareholders to take an informed decision. The letter of offer shall be accompanied with a bidding form and the form to be used by the shareholders for tendering shares.
- (d) *Bidding period* - The date of opening of the offer shall not be later than fifty five working days from the date of the public announcement. The offer shall remain open for a minimum period of three working days and a maximum period of five working days. All the public shareholders are entitled to participate in the book building process. A promoter or a person acting in concert with them or any ADR/GDR holder cannot submit bid. However, if an ADR/GDR holder wishes to participate in the bidding process, he has to first convert the ADRs/GDRs into equity shares.

Determination of offer price

5. The offer price has to be determined through the reverse book building process after fixation of floor price. Under the reverse book building method, the price at which the maximum number of shares are tendered

by the public shareholders for purchase by the promoters is fixed as the offer price.

The floor price shall not be less than —

- (a) where the equity shares are frequently traded in all the recognised stock exchanges where they are listed, the average of the weekly high and low of the closing prices of the equity shares of the company during the *twenty six weeks* or *two weeks* prior to the date on which the recognised stock exchanges were notified of the board meeting in which the delisting proposal was considered, whichever is higher, as quoted on the recognised stock exchange where the equity shares of the company are most frequently traded;
- (b) where the equity shares of the company are infrequently traded in all the recognised stock exchanges where they are listed, the floor price shall be determined by the promoter and the merchant banker taking into account the following factors :
 - ◆ the highest price paid by the promoter for acquisitions, if any, of equity shares of the class sought to be delisted, including by way of allotment in a public or rights issue or preferential allotment, during the twenty six weeks period prior to the date on which the recognised stock exchanges were notified of the board meeting in which the delisting proposal was considered and after that date up to the date of the public announcement; and
 - ◆ other parameters including return on net worth, book value of the shares of the company, earning per share, price earning multiple *vis-a-vis* the industry average.
- (c) where the equity shares are frequently traded in some recognised stock exchanges and infrequently traded in some other recognised stock exchanges where they are listed, the highest of the prices arrived at in accordance with clauses (a) and (b) above.

The Regulations provide that the equity shares shall be deemed to be infrequently traded on a stock exchange, if the annualised trading turnover in such shares during the preceding six calendar months prior to month in which the recognised stock exchanges were notified of the board meeting in which the delisting proposal was considered, is less than five per cent (by number of equity shares) of the total listed equity shares of that class.

Acceptance/rejection of offer price

6. The promoter is not bound to accept the offer price determined through the book building process. In case the promoter accepts the final price, then he shall accept all the shares tendered, where corresponding bids

placed are at the final price or at a price lesser than the final price. Moreover, the promoter may if he deems fit, fix a higher final price.

On the other hand, if the promoter declines to accept the offer price so determined, then—

- (a) the equity shares deposited by the shareholders would have to be returned to them within ten working days of the closure of the bidding period.
- (b) the company shall not make the final application to the exchange for delisting of its equity shares.
- (c) the escrow account may be closed.
- (d) in case the public shareholding at the opening of the bidding period was less than the minimum level of public shareholding required under the listing agreement, the promoter shall ensure that the public shareholding shall be brought up to such minimum level within a period of six months from the date of closure of the bidding through any of the following ways :
 - ◆ by issue of new shares of the company.
 - ◆ through an offer for sale of promoters' holding.
 - ◆ by sale of promoters' holding in the secondary market.

Success/failure of the offer

7. The success or failure of an offer depends upon the following :

- (a) *Minimum acquisition of shares under the offer* - An offer made by the promoters to the public shareholders shall be deemed to be successful if post offer, the shareholding of the promoter group reaches the higher of the following -
 - (i) 90 per cent of the total issued shares of that class.
 - (ii) (pre-offer promoter shareholding + 50 per cent of the offer size), otherwise the offer shall be deemed to have failed.

It is worthwhile to note here that as per clause 40A of the listing agreement, minimum public shareholding for the purpose of continued listing must be at least 10 per cent or 25 per cent of the total issued shares (depending upon the market capitalization or the nature of business of the company). However, in order to achieve the delisting objective, the public shareholding must be reduced below 10 per cent, which may be difficult to achieve in some cases.

- (b) *Post offer public announcement* - Within eight working days of closure of the offer, the promoter and the merchant banker have to make a public announcement in this regard, in the same newspapers

in which the earlier public announcement was made giving details such as :—

- (i) The success of the offer and the final price accepted by the promoters ; or
- (ii) the failure of the offer ; or
- (iii) rejection of the final price by the promoters.

Where the offer is rejected by the promoters or is not successful, the offer shall be deemed to have failed and as such the equity shares deposited by the shareholders shall be returned to them within ten working days from the end of the bidding period and final application shall not be made to the stock exchange for delisting of the equity shares.

- (c) *Payment of consideration* - When the offer is successful, the promoter shall immediately open a special bank account and transfer thereto the entire amount due and payable as consideration in respect of the equity shares tendered in the offer, from the escrow account. All the shareholders whose equity shares are verified to be genuine have to be paid the consideration amount within 10 working days from the closure of the offer.
- (d) *Rights of remaining shareholders* - Where the equity shares are delisted, the remaining public shareholders still have the option to tender their shares to the promoter up to a period of one year from the date of delisting at the same final/exit price. Such payments have to be made out of the balance amount lying in the escrow account. Under the erstwhile SEBI Guidelines, the public shareholders could tender their shares for a period of six months from the date of delisting of shares. Thus, this provision has been made investor friendly.

It is worthwhile to note here that as per the new Regulations, in case of voluntary delisting of shares, no application for listing can be made for a period of five years from the date of delisting, whereas the earlier SEBI Guidelines prohibited relisting of shares for a period of two years only. This would help in checking the tendency of the promoters who want to get their shares delisted in order to get them listed again through public offer at hefty premium.

Compulsory delisting

8. A stock exchange may delist the equity shares of a company on any of the grounds prescribed under the Securities Contract Regulation Rules, 1957 after giving a reasonable opportunity of being heard to the concerned company. Some of the grounds for compulsory delisting can be :—

- ◆ Non-compliance with the provisions of the listing agreement despite show-cause notice.
- ◆ Negligible trading in the shares of the company.
- ◆ Non-redressal of investors' complaints despite repeated reminders.
- ◆ Unfair trading practices by the promoters or top management of the company.
- ◆ Public shareholding has fallen below the minimum level of public shareholding prescribed under clause 40A of the listing agreement.
- ◆ Non-payment of listing fees.

Before proceeding with the compulsory delisting, the stock exchange has to ensure the following :—

- (a) Reasonable steps should be taken to trace the promoters of the company.
- (b) Nature and extent of the alleged non-compliance of the company has to be looked into and the number and percentage of shareholders who may be affected by such non-compliance.
- (c) Reasonable efforts should be made to verify the status of compliance of the company with the office of the concerned Registrar of Companies.
- (d) The names of the companies whose equity shares are proposed to be delisted and their promoters shall be displayed in a separate section on the website of the recognised stock exchange for a brief period of time. If delisted, the names shall be shifted to another separate section on the website.
- (e) The stock exchange shall in appropriate cases file prosecutions under the relevant provisions of the Securities Contract (Regulation) Act, 1956 or any other law for the time being in force against identifiable promoters and directors of the company for the alleged non-compliances.
- (f) The stock exchange shall in appropriate cases file a petition for winding up of the company under section 433 of the Companies Act, 1956 or make a request to the Registrar of Companies to strike off the name of the company from the register under section 560 of the said Act.

The decision regarding compulsory delisting shall be taken by a panel to be constituted by the stock exchange consisting of two directors of the stock exchange (one of whom shall be a public representative), one representative of the investors, one representative of the Ministry of Corporate Affairs or the Registrar of Companies and the Executive Director or Secretary of the stock exchange.

Before passing the order for delisting of shares, the stock exchange shall also publish a notice in one English national daily with wide circulation and one regional language newspaper of the region where the concerned stock exchange is located, giving a time period of not less than fifteen working days from the notice, within which representations may be made to the stock exchange by any person who may be aggrieved by the proposed delisting.

Where equity shares of a company are compulsorily delisted, the stock exchange shall appoint independent valuer(s) who shall determine the fair value of the delisted equity shares. The promoter of the company shall acquire delisted equity shares from the public shareholders by paying them the value determined by the valuer, subject to the option of the public shareholders to retain their shares.

It is worthwhile to note here that where a company has been compulsorily delisted; the company, its whole-time directors, its promoters and the companies which are promoted by any of them shall not directly or indirectly access the securities market or seek listing for any equity shares for a period of ten years from the date of such delisting.

Special exemptions for small companies

9. Small companies having paid up capital of up to Rs. 1 crore or having less than or equal to 300 shareholders who together hold shares of paid up value lesser than Rs. 1 crore, need not follow the reverse book building method for determining the exit price. However, the other compliances are more or less the same as in the case of voluntary delisting. The promoter would have to write individually to all public shareholders of the company informing them of his intention to get the equity shares delisted, indicating the exit price together with the justification therefor and seeking their consent for the proposal for delisting. The communication shall specifically mention that consent to the proposal would include consent for dispensing with the exit price discovery through book building method. At least 90 per cent of such public shareholders have to give their positive consent in writing to the proposal for delisting.

Conclusion

10. Due to the easy accessibility to nationwide trading terminals of BSE and NSE, the investors prefer to execute their trades through the brokers of these stock exchanges. This has resulted in minuscule turnover at the other stock exchanges and that too may be in a select few scrips. As a result of this, most of the scrips listed at the regional stock exchanges are either not traded continuously for several years or infrequently traded, but still the companies have to bear the burden of payment of listing fees. The SEBI (Delisting of Securities) Guidelines, 2003 had eased the process of

voluntary delisting for such companies as it was provided that exit opportunity need not be given to the investors if the shares continue to be listed at either BSE or NSE. The new Regulations have further exempted companies from obtaining the approval of the shareholders. This will help in saving time and cost involved in conducting the shareholders' meeting since approval for delisting of shares from regional stock exchanges was a mere formality.

Every coin has two sides. The amendments made in the year 2003 facilitated the delisting of shares but the guidelines were misused by the promoters of some of the blue chip companies as they opted for delisting of shares from all the stock exchanges including BSE and NSE. Consequently, the small investors had only two options either to continue to hold the unlisted shares or to sell their shares to the promoters at a price which was not fair in many cases. Where the small investors exercised more patience, by not participating in the buy back offer, they lost liquidity since after delisting selling the shares in the market became a dream. The new provision which requires approval of public shareholders by means of a special resolution through postal ballot is likely to remedy the situation. Thus, the new Regulations attempt to strike a balance between the interest of the companies, their promoters and the shareholders.

The new Regulations also provide that in case of compulsory delisting by the stock exchanges, the promoters will have to buy the shares of the public shareholders. A similar provision was there in the SEBI (Delisting of Securities) Guidelines, 2003 also, but the million dollar question is whether so far the stock exchanges or the SEBI have invoked this provision and compelled any promoter to buy back the shares from public shareholders in case of compulsory delisting of shares. Thus, this provision seems more of theoretical nature rather than practical since the promoters may not be traceable in many cases or they may not have enough funds for purchasing the shares from the public.

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