

Voluntary Delisting in India

On June 27, 2024, the Board of the Securities and Exchange Board of India (the “SEBI”) approved certain proposals to amend India’s existing legal framework governing delisting of equity shares from public markets (“**Proposed Amendments**”). These are expected to address concerns that have discouraged an attempt at delisting from the Indian public markets. The Proposed Amendments are expected to become law shortly and will amend the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021 (the “**Delisting Regulations**”) that govern the delisting process in India.

One of the key changes under the Proposed Amendments is the introduction of a fixed price as an alternative to the reverse book-building process to determine the exit price of the delisting offer. The fixed price offered by an acquirer must be at a minimum 15% premium over the floor price determined under the Delisting Regulations. The floor price calculation will now include, among other parameters, the calculation of an adjusted book value certified by an independent registered valuer. This reform provides more certainty to the delisting process, given that the acquirer is not subject to a reverse mechanism of pricing where the minority/public shareholders have a role in the determination of the exit offer price. The delisting will be successful if the post-offer shareholding of the acquirer, along with the shares tendered by public shareholders, reaches 90% of the total issued shares.

This note discusses the legal framework and the process involved for voluntary delisting under the Delisting Regulations and the implications of the Proposed Amendments.

RATIONALE FOR VOLUNTARY DELISTING

Voluntary delisting is a strategic move where a controlling shareholder seeks to delist the company’s equity shares from the Indian stock exchanges. Delisting in India can also be involuntary, where the equity shares are delisted by the regulators based on non-compliance with the listing regulations. A voluntary delisting provides an acquirer

with the flexibility to undertake strategic restructuring or increase efficiency without public shareholder participation. Globally, it is an important financial structuring tool, used by controlling investors to enhance the value of their investment.

PROCEDURE FOR VOLUNTARY DELISTING

The procedure for voluntary delisting in India varies depending on whether the company chooses to selectively delist from one recognized stock exchange or delist from all recognized stock exchanges where it is listed. The primary difference would be that the company is required to provide an exit opportunity to the public shareholders when it seeks to delist its equity shares from all the recognized stock exchanges where it is listed (there are primarily two recognized stock exchanges, the BSE and the NSE). If a listed company proposes to voluntarily delist itself from all recognized stock exchanges, the Delisting Regulations require the following key steps:

- (i) The acquirer is required to appoint a merchant banker registered with the SEBI as the manager to the offer (“**Manager**”) prior to the initial public announcement (discussed in (ii) below). The initial public announcement and subsequent activities under the Delisting Regulations are undertaken by the acquirer through the Manager.
- (ii) An initial public announcement is required to be made to the stock exchanges by the acquirer on the date when the acquirer decides to voluntarily delist the equity shares of the company.
- (iii) Within 21 days of the date of the initial public announcement, the board of directors of the listed company is required to approve the delisting proposal. While approving the delisting proposal, the board of directors is required to certify: (a) compliance of securities laws by the company and the promoters (essentially, identified controlling shareholders); and (b) that the delisting is in the best interests of the company.
- (iv) Prior to granting its approval, the board of directors is required to appoint a peer review company secretary to carry out specific due diligence of the listed company. The company secretary is required to submit a report to the board certifying that the buying, selling and dealing of equity shares of the company by the acquirer or its related entities, as well as the top 25 shareholders, is in compliance with the applicable provisions of securities laws, including compliance with Regulation 4(5) of the Delisting Regulations (which prohibits the acquirer to: (a) employ any device, scheme or artifice to defraud any shareholder or other person; (b) engage in any transaction or practice that operates as a fraud

or deceit upon any shareholder or other person; or (c) engage in any act or practice that is fraudulent, deceptive or manipulative in connection with any delisting sought or permitted or exit opportunity given or other acquisition of shares made under these regulations).

- (v) Within 45 days of the date of the approval of the board of directors, shareholders' approval is required to be obtained. This is required to be a special resolution through postal ballot (at least 75% votes in favor), with the additional requirement that the number of votes cast in favor of the resolution by the minority or public shareholders (i.e., non-promoter shareholders) to be at least twice those against it.
- (vi) An application to the stock exchanges for in-principle approval is required to be made within 15 days of the shareholders' approval, accompanied by an audit report as required under Regulation 76 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018, in respect of the equity shares sought to be delisted, covering a period of six months prior to the date of the application. The stock exchanges are required to dispose the application within 15 days of receipt of such application (subject to any comments of the exchanges that need to be addressed).
- (vii) An escrow account is required to be opened within seven days of obtaining the shareholders' approval. An amount equal to 25% of the total estimated consideration of the exit offer is required to be deposited in the escrow account. The exit offer price is calculated on the basis of the number of equity shares outstanding with the public shareholders multiplied with the higher of the price offered by the acquirer and the minimum floor price (the floor price is calculated in accordance with Regulation 8 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Regulations**")).

Under the Proposed Amendments, a new parameter is being added to calculate the floor price, which is the adjusted book value of the listed company certified by an independent registered valuer. Also, currently, the reference date for calculation of the floor price is the date on which the recognized stock exchange(s) was required to be notified of the board meeting where the delisting proposal was considered and approved. Under the Proposed Amendments, the SEBI has approved changing the reference date to be considered as the date of initial public announcement for voluntary delisting.

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- (viii) A detailed public announcement is required to be made by the acquirer within one day of receiving in-principle approval of the stock exchanges, containing specified information about the delisting process in accordance with Regulation 15 of the Delisting Regulations. Prior to making such detailed public announcement, the promoter is required to deposit the remaining 75% of the consideration amount in the escrow amount.
 - (ix) The acquirer is then required to dispatch the letter of offer to the public shareholders, within two days of the date of public announcement, containing the required disclosures for the public shareholders to make an informed decision as per Regulation 16 of the Delisting Regulations.
 - (x) Under the current regulations, the determination of offer price for purchase of equity shares from public shareholders has followed the reverse book-building process of price discovery, where the public shareholders can propose an exit price higher to the one originally proposed by the acquirer. The discovered price through this process is determined as the price at which shares are accepted by the acquirer from public shareholders such that the shareholding of the acquirer reaches at least 90% of the total issued shares. The reverse book-building process is required to commence within seven working days of the public announcement and remain open for five days. The outcome of the reverse book building process is required to be announced within two hours of the closure of the bidding period by the Manager. The acquirer is required to make a public announcement within two days of the closure of the bidding period, disclosing the success or failure of the reverse book-building process, along with the discovered price accepted by the acquirer in case of success of the process.

Pursuant to the Proposed Amendments, the SEBI's Board has approved the introduction of a fixed price process as an alternative to the reverse book-building process for delisting companies whose shares are frequently traded. The fixed price offered by an acquirer must be at a minimum 15% premium over the floor price. Accordingly, an acquirer can use either the fixed price method or the reverse book-building method to determine the exit price.

- (xi) Under the reverse book-building process, the acquirer has the option of making a counter-offer in accordance with Regulation 22 of the Delisting Regulations. Such counter-offer is made in case the proposed discovered price (determined by the minority shareholders) is not acceptable to the acquirer. The counter-offer price cannot be lower than the book value of the company.
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Presently, under the Delisting Regulations, an acquirer may make a counter-offer only if the post-offer shareholding of the acquirer (along with shares tendered in the delisting offer) will reach 90% of the total issued shares. This has resulted in situations when the delisting offer fails because the necessary thresholds are not fulfilled, even though the majority of public shareholders have tendered their shares and are in favor of delisting.

Under the Proposed Amendments, a counter-offer by the acquirer can be made earlier, if the post-offer shareholding through the reverse book-building price discovery process reaches 75% (provided at least 50% of the public shareholders have tendered). However, delisting would be successful only when the post-offer aggregate shareholding of the acquirer reaches 90%. The counter-offer price cannot be less than the higher of: (a) the volume weighted average price of the shares tendered/offered; and (b) indicative price, if any, offered by the acquirer.

- (xii) A delisting process will be successful if the post-offer shareholding of the acquirer, along with the shares tendered by public shareholders accepted as eligible bids at the discovered price or the counter-offer price, as the case may be, reaches 90% of the total issued shares.
- (xiii) Payment to the public shareholders is required to be made in accordance with Regulation 24 of the Delisting Regulations upon the success of the delisting offer:
 - (a) if the discovered price is equal to the floor price or the indicative price; through the secondary market settlement mechanism; and
 - (b) if the discovered price is higher than floor price or indicative price; within five days of the date of public announcement.
- (xiv) The final application to the stock exchanges for delisting is required to be made within five days of the date of making the payment to the public shareholders. The final application for delisting is required to be disposed of by the stock exchanges within 15 days from the date of receipt of such application. Upon such disposal of the final application, the equity shares of the company are permanently delisted from the stock exchanges.

PRICING MECHANISM AND CONCERNS WITH THE EXISTING REVERSE BOOK-BUILDING PROCESS

The price discovery process under the current Delisting Regulations only prescribes a floor price (calculated with reference to Regulation 8 of the Takeover Regulations) and not a maximum price, which may result in other factors that could influence the

delisting price. The reverse book-building price discovery process provides the ability to public shareholders (especially entities with large positions) to have a say in determining the delisting price. In the past, as a result of these factors, acquirers have faced the consequences of an unsuccessful delisting. Further, the announcement of delisting of the equity shares of a company may result in a spike in volatility and increased speculative activities in the shares of such company. The fixed price mechanism may provide price certainty and simplify the process of delisting.

ROLE OF THE BOARD OF DIRECTORS

As discussed above, Regulation 10 of the Delisting Regulations requires the board of directors to appoint a peer review company secretary to carry out due diligence and then take a decision on whether or not to approve the delisting proposal within 21 days of the initial public announcement. Similar to the Takeover Regulations, Regulation 28 of the Delisting Regulations requires that upon receipt of the detailed public announcement, the board of directors constitute a committee of independent directors to provide its reasoned recommendation on the delisting proposal. This ensures that the interests of minority shareholders are considered by all directors and, in particular, independent directors at the time of approving any voluntary delisting offer from the promoters.

ROLE OF PUBLIC SHAREHOLDERS AND RISK OF FAILURE

While the interests of minority shareholders need to be protected, it is also imperative that the commercial interests of genuine and strategic delisting offers are not ignored. The Delisting Regulations provide for a high threshold for successful delisting and public shareholders enjoy substantial rights under the Delisting Regulations to control the delisting process including the ability to reject unattractive or opportunistic offers. Among other requirements, Regulation 21 of the Delisting Regulations provides that an offer for purchase of equity shares will be considered successful only if the post offer shareholding of the acquirer, along with shares tendered by public shareholders, reaches 90% of the total issued shares. Also, as discussed above, the delisting offer needs to be approved by two-thirds majority of public shareholders, making a successful delisting difficult. There is a minimum floor price that must be considered by the acquirer. Accordingly, the role of public shareholders in approval, price discovery and the entire voluntary delisting is an important consideration and can at times derail the process.

DIFFICULTY OF MINORITY SQUEEZE OUT

A successful delisting from the stock exchanges, at the end of which the acquirer (promoter) holds more than 90% of the share capital may not completely squeeze out all minority shareholders. The promoter may need to take additional steps such as a court approved scheme or selective buy back. Such steps to squeeze out the remaining minority shareholders add to the time and cost of the process to completely take private the company.

*This insight has been authored by **Sandip Bhagat** (Partner), **Mohit Gogia** (Partner), **Kanika Khanna** (Counsel) and **Sakshi Jain** (Associate). They can be reached on sbhagat@snrlaw.in, mgogia@snrlaw.in, kkhanna@snrlaw.in and sakshijain@snrlaw.in, respectively, for any questions. This insight is intended only as a general discussion of issues and is not intended for any solicitation of work. It should not be regarded as legal advice and no legal or business decision should be based on its content.*

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S&R
ASSOCIATES
ADVOCATES



NEW DELHI

Max House
Tower C, 4th Floor
Okhla Industrial Estate Phase III
New Delhi 110 020
Tel: +91 11 4069 8000

MUMBAI

One World Center
1403 Tower 2 B
841 Senapati Bapat Marg, Lower Parel
Mumbai 400 013
Tel: +91 22 4302 8000