

## ERGO

*Analysing developments impacting business*

### DELISTING | PROMOTERS AND ACQUIRERS ALLOWED TO MAKE COUNTER OFFERS

26 November 2018

#### Introduction

The Securities and Exchange Board of India (**SEBI**) has issued regulations dated 14 November 2018 (Ref. No. SEBI/LAD-NRO/GN/2018/46) (**Amendment Regulations**) further amending the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 (**Delisting Regulations**).

Key changes in the Amendment Regulations include:

- Promoter(s) / acquirer(s) (the **Acquirer**) are now entitled to make a counter-offer to the public shareholders post the price discovery process in case the discovered price is not acceptable.
- Frequently asked question issued by SEBI to clarify certain regulations have been suitably incorporated in the Delisting Regulations thereby making them binding.
- Definitions have been aligned with other regulations and statutes including the Companies Act 2013.

#### Background

The Delisting Regulations were notified by SEBI on 10 June 2009 for facilitating delisting of shares of listed entities, while protecting the interest of investors / public shareholders by providing such public shareholders exit with fair compensation. One of the key criticisms of the Delisting Regulations was that the price discovered through reverse book building price typically was at significant premium to prevailing market. The Amendment Regulations tackles this issue.

The Amendment Regulations have been notified pursuant to the board meeting dated 18 September 2018 of the SEBI.

#### Key Highlights of the Amendment Regulations

- Right of counter-offer pursuant to price discovery through reverse book building process.
  - Previously, if the 'offer price', which was determined through reverse book building was not acceptable, the Acquirer could only reject the

offer price and, consequently, decline to acquire the equity shares from the public shareholders.

- Pursuant to the Amendment Regulations, the Acquirer now has a right to make a counter offer to the public shareholders within two days of the discovery of the 'offer price'; provided, however, that the price in the counter offer is not less than the book value of the target company as certified by a merchant banker.

➤ Following clarifications / explanations from SEBI's frequently asked questions (FAQs) have been incorporated into the Delisting Regulations.

- The merchant banker conducting due-diligence on behalf of the target company can also act as the 'Manager' to the Delisting Offer.
- An 'acquirer' now expressly includes a third party acquirer making a delisting offer pursuant to regulation 5A (Delisting Offer) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 which permits a Delisting Offer along with a mandatory open offer.
- The cash component of the escrow account in the delisting offer process can be maintained in an interest bearing account; provided, however, that the merchant banker is required to ensure that the funds are readily available at the time of making payments to the public shareholders.
- It will be sufficient if letter of offer is dispatched by registered or speed post of India Post and a detailed account regarding the status of delivery of the letters of offer is provided (i.e., whether delivered or not), to demonstrate compliance with the requirement of delivering the letter(s) of offer to all the public shareholders.
- Reference date for computing the floor price will be date on which the recognized stock exchanges were required to be notified of the board meeting in which the delisting proposal would be considered.
- In case of a small company, the delisting of equity shares from all recognised stock exchanges can be successful if the public shareholders, irrespective of their numbers, holding 90% or more of the public shareholding give their positive consent in writing to the proposal for delisting, instead of the earlier consent threshold of 90% of the total number of public shareholders.

➤ Other changes.

- **Specified Date:** The 'specified date' for determining the names of shareholders to whom the letter of offer for Delisting Offer is to be sent, cannot be later than one day after the date of the public announcement, compared to a 30-day period previously prescribed.
- **Compulsory Delisting:** (a) the independent valuer who will determine the fair value of the delisted equity shares should be from the panel of expert valuers appointed by the recognised stock exchange; (b) a time limit of three months has been prescribed for giving an exit offer at the price determined by the independent valuer by the promoters (Exit Offer) to public shareholders of the delisted company; and (c) in case of a company whose fair value is positive, the equity shares held by the promoter / promoter group cannot be transferred (whether by way of sale, pledge or otherwise) nor can benefits such as dividends, bonus shares, split, etc., be granted to the promoter / promoter group till the

time the Exit Offer is not completed and is certified by the stock exchanges. Additionally, the whole-time directors of the compulsorily delisted company are not eligible to become directors of any listed company until Exit Option has been completed.

#### Comment

The Amendment Regulations have attempted to make the delisting process fair by giving the Acquirer a right to make a counter offer once the price is discovered through the reverse book building process. This is a positive step, as it will allow the Acquirer to make a counter offer if the price discovered through the book building process is not acceptable to it. It allows the Acquirer to take another shot at delisting at a price that is acceptable to it. It will be interesting to see how markets react to such counter offers, whether it will temper the expectations of shareholders, or fuel them further knowing that even if the discovered price is rejected by Acquirer, they will get a chance to participate in the counter offer.

- Sudhir Bassi (Executive Director), Rishabh Bharadwaj (Principal Associate) and Neil Deshpande (Associate), Khaitan & Co LLP

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).

#### For private circulation only

The contents of this email are for informational purposes only and for the reader's personal non-commercial use. The views expressed are not the professional views of Khaitan & Co and do not constitute legal advice. The contents are intended, but not guaranteed, to be correct, complete, or up to date. Khaitan & Co disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

© 2018 Khaitan & Co. All rights reserved.

#### Mumbai

One Indiabulls Centre, 13<sup>th</sup> Floor  
Tower 1 841, Senapati Bapat Marg  
Mumbai 400 013, India

T: +91 22 6636 5000  
E: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)

#### New Delhi

Ashoka Estate, 12th Floor  
24 Barakhamba Road  
New Delhi 110 001, India

T: +91 11 4151 5454  
E: [delhi@khaitanco.com](mailto:delhi@khaitanco.com)

#### Bengaluru

Simal, 2nd Floor  
7/1, Ulsoor Road  
Bengaluru 560 042, India

T: +91 80 4339 7000  
E: [bengaluru@khaitanco.com](mailto:bengaluru@khaitanco.com)

#### Kolkata

Emerald House  
1 B Old Post Office Street  
Kolkata 700 001, India

T: +91 33 2248 7000  
E: [kolkata@khaitanco.com](mailto:kolkata@khaitanco.com)