



COMMERCIAL/CORPORATE

# SEBI introduces provisions for exit offer to dissenting shareholders

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**PUBLISHED** 18 March 2016

## Introduction

The Companies Act, 2013 had introduced an exit option for those shareholders who do not agree with the change in the objects or terms of contract referred to in the prospectus<sup>[1]</sup> (“**Dissenting Shareholders**”). However, until recently, no mechanism was provided to stipulate the manner in which the exit option was to be provided.

The Securities Exchange Board of India (“**SEBI**”) has recently, amended certain regulations to deal with this scenario:

1. **Amendment to SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (“ICDR Regulations”)** – A new chapter, Chapter VI-A has been inserted in the ICDR Regulations which prescribe in detail, the manner of providing exit option to the Dissenting Shareholders <sup>[2]</sup>. These provisions are applicable only if the public issue has been made after April 1 2014.

**Obligation to make Exit Offer** – The obligation of the promoters and shareholders in control to make an exit offer would arise only if:

- the dissenting shareholders comprise of atleast 10% of the shareholders who voted in the general meeting; and
- the amount to be utilized for the objects for which the prospectus was issued is less than seventy five per cent of the amount raised. This would also include the amount earmarked for general corporate purposes as disclosed in the offer document.

**Eligibility of dissenting shareholders** – The dissenting shareholders of the issuer should be holding shares as on the relevant date to be eligible to avail the exit offer.

**Determination of Exit Offer price** – The promoters or shareholders in control, have to appoint a merchant banker registered with SEBI in order to finalize the price payable to the Dissenting Shareholders for exit (“**Exit Price**”). The Exit Price should be the highest of the following:

- the volume-weighted average price paid or payable for acquisitions, during the fifty-two weeks immediately preceding the relevant date;
- the highest price paid or payable for any acquisition, during the twenty-six weeks immediately preceding the relevant date;
- the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the relevant date as traded on the recognized stock exchange where the maximum volume of trading in the shares of the issuer are recorded during such period. Such shares should be frequently traded.
- where the shares are not frequently traded, the price determined by the promoters or shareholders having control and the merchant banker taking into account valuation parameters including book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such issuers.

**Passing of special resolution for Exit** – Any change in the objects of the issue or in the terms of contract referred to in the prospectus can only be brought after passing a special resolution<sup>[3]</sup>. The notice which proposes such a change (“**Notice**”) should contain information about the exit offer. The explanatory statement which is to be annexed to the Notice<sup>[4]</sup>, should also consist of a statement about providing an exit opportunity to the dissenting shareholders.

After passing of the special resolution, the issuer has to submit the voting results to the recognized stock exchange(s)<sup>[5]</sup>. The issuer must also submit the list of dissenting shareholders, as certified by its compliance officer, to the recognised stock exchange(s).

**Intimation of Exit Price to the public** – The issuer must intimate the recognised stock exchange(s) about the Exit Price. The recognised stock exchange(s) will immediately on receipt of such intimation disseminate the same to public within one working day.

**Tendering of shares and payment of Exit Price** – The tendering period shall start not later than seven working days from the passing of the special resolution and shall remain open for ten working days. The Dissenting Shareholders who have tendered their shares in acceptance of the exit offer will have the option to withdraw such acceptance till the date of closure of the tendering period.

The promoters or shareholders having control, have to create an escrow account and deposit the aggregate consideration in the escrow account at least two working days prior to opening of the tendering period. The promoters or shareholders having control must make payment of consideration to the Dissenting Shareholders, who have accepted the exit offer, within a period of ten working days from the last date of the tendering period.

**Disclosure obligations** – After the payment of consideration, the issuer has to furnish the following details to the recognised stock exchange(s) within two working days:

- disclosures giving details of aggregate number of shares tendered, accepted;
- details of payment of consideration;
- post-offer shareholding pattern of the issuer; and
- a report by the merchant banker that the payment has been duly made to all the dissenting shareholders whose shares have been accepted in the exit offer.

**Shares in Excess of Permissible Non-Public Shareholding** – There may be instances, after the acceptance of the shares of Dissenting Shareholders, that the maximum number of shares which can be held by promoters in the company exceeds the permissible level (“Maximum Permissible Non-public Shareholding”).

Maximum Permissible Non-public Shareholding is derived from the provisions of Securities Contract (Regulation) Rules, 1957 (“SCR Rules”). Rule 19A of SCR Rules requires all listed companies (other than public sector companies) to maintain public shareholding of at least 25% of share capital of the company. Thus by deduction, the Maximum Permissible Non-public Shareholding in listed companies (other than public sector companies) is 75% of the share capital.

As per the new amendment to the ICDR Regulations, if the Maximum Permissible Non-public Shareholding exceeds 75% of the share capital, after acceptance of the exit offer of Dissenting Shareholders, the promoter has an obligation to bring it down to 75% in accordance with the SCR Rules.

## **2. Amendment to SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2009 (“SAST Regulations”)**

– Regulation 3 of SAST Regulations provides for mandatory open offer to be made in order to provide an exit opportunity to the public. The primary purpose of an open offer is to provide an exit option to the shareholders of the target company on account of the change in control or substantial acquisition of shares, occurring in that company.

When shares are acquired upon exit of Dissenting Shareholders, as discussed above, there may be instances, which trigger open offer obligations under SAST Regulations.

It was felt that such increase in shareholding due to mandatory requirement of law should be exempted from open offer obligations. Moreover, the ICDR Regulations and the Securities Contract (Regulation) Rules, 1957 ensure that the maximum shareholding of the company shall not exceed the Maximum Permissible Non-public Shareholding.

Consequently, SEBI has amended the SAST Regulations to ensure that the open offer obligations, do not apply in case of acquisition of shares upon exit of Dissenting Shareholders under the amended ICDR Regulations.

[1] Section 13 and Section 27 of the Companies Act, 2013

[2] Vide Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2016 on 17 February 2016

[3] Rule 32 of the Companies (Incorporation) Rules, 2014 and Rule 7 of the Companies (Prospectus and Allotment of Securities) Rules, 2014

[4] Section 102, Companies Act, 2013

[5] Regulation 44(3) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015