The Delisting of equity shares has always been a sensitive and controversial issue. It is not only a structuring tool but also a possible corporate strategy to achieve greater control with less accountability to public (shareholders) at large. In the year 2003 the Securities and Exchange Board of India (SEBI) introduced the SEBI (Delisting of Securities) Guidelines, 2003 (the Delisting Guidelines) which provided a framework of rules to be followed for delisting of securities. The Delisting Guidelines laid down the rules relating to voluntary delisting (delisting of equity shares of the company pursuant to an application filed by the company) as well as compulsory delisting (delisting mandated by the stock exchange where the shares of the company are listed). The Delisting Guidelines also provided for a price discovery mechanism, the â€œreverse book-building processâ€​, which empowered the public shareholders (excluding shareholders holding shares in physical form) of the company to determine a fair exit price for the securities proposed to be delisted.

The recent economic slump has witnessed quite a few companies trying to delist, the low price of shares being a lucrative opportunity to increase control over the company. The Delisting Guidelines provided that the promoters of the company could opt for voluntary delisting once the shareholders of the company have approved the delisting by way of a special resolution in a general meeting of shareholders. The delisting offer would be successful if the public shareholding post the offer was less than the minimum required levelâ€”75% or 10%â€”as the case may be, as per the listing agreement entered into by the company concerned. This seemed to be a fair processâ€”the shareholders giving their consent for delisting of securities and the exit price at which the highest number of shares is tendered, being the price paid to all shareholders.

After the first delisting offer which came in January 2004, it was increasingly observed that the book-building process, which was to aid in the determination of a fair exit value for the shareholders, was not fully achieving the said objective and the perceived investor friendliness of the price discovery mechanism was not necessarily translating into genuine discovery of price. Comments were received from various quarters and opinions were raised on crucial provisions.

In an endeavour to provide a level playing field to the participants in the securities market while not compromising on the protection of investor interests, in the year 2006 SEBI came up with a concept paper proposing the SEBI (Delisting of Securities) Regulations, 2006 revealing that changes in the Delisting Guidelines were imminent, owing to the representations and views received from market participants, stock exchanges, industry representatives and shareholders.

The New Delisting Regulations â€“ An analysis Finally, on 10-6-2009, SEBI introduced the first regulations on delisting, the SEBI (Delisting of Equity Shares) Regulations, 2009 (the New Delisting Regulations) setting out procedural rules to govern delisting offers of equity shares in the Indian securities market. In order to provide a statutory backing for the delisting framework, the Government has also notified delisting rules under Rule 21 of Securities Contract (Regulation) Rules, 1957 (the SCR Rules) dealing primarily with substantive aspect on delisting. The New Delisting Regulations deal with the delisting of equity shares exclusively, as against the erstwhile Delisting Guidelines which dealt with securities generally. However, it is to be noted that the Delisting Regulations are not applicable to any delisting pursuant to a scheme sanctioned by BIFR or the National Company Law Tribunal (as and when comes into effect), prescribing the procedure and exit option to the public shareholders.

In this article I have compared the New Delisting Regulations with the erstwhile Delisting Guidelines to highlight certain significant changes and their impact on the ability of promoters to delist a company and the right of public shareholders of the company to influence such process so as to obtain the highest value for their investment. I have not elaborated on the various procedural requirements unless these are material to my analysis.

Distinct grounds for delisting Under Rule 21 of the SCR Rules read with the New Delisting Regulations, stock exchanges (under the compulsory delisting mechanism) may delist shares of a company if:

- (i) the company has incurred losses during the preceding three consecutive years and it has negative worth;
- (ii) trading in the securities of the company has remained suspended for a period of more than six months;
- (iii) the securities of the company had been traded infrequently during the preceding three years;
- (iv) the company, its promoters or any of its directors has been convicted for the failure to comply with any of the provisions of the Securities Contract (Regulation) Act, 1956; the SEBI Act, 1992 or the Depositories Act, 1996 or Rules, Regulations, agreements made thereunder, and has been awarded a penalty of not less than rupees one crore or imprisonment of not less than three years;
- (v) the addresses of the company, any of its promoter or any of its directors, are not known or false addresses have been furnished or the company has changed its registered office in contravention of the provisions of the Companies Act, 1956;
- (vi) public shareholding of the company has fallen below 25% or 10% as the case may be, as per the listing agreement and the company has failed to raise the public holding to the required level within the time specified by the recognised stock exchange. Once a company is compulsorily delisted by a stock exchange it shall be delisted from all the other stock exchanges, where shares of the company are listed.
A voluntary delisting by a company is possible by making a request to the stock exchange by the company to delist any equity shares provided:

- (i) the company’s securities have been listed for at least three years on the stock exchange;
- (ii) the delisting has been approved with a special resolution by two-thirds of the public shareholders through postal ballot, provided the votes cast in favour of the resolution by the public shareholders are at least two times the votes cast against it by public shareholders; and
- (iii) the company, promoter and/or the director of the company purchase the outstanding securities from those holders who wish to sell them at a price determined in accordance with book-building process under the New Delisting Regulations (such will not be required if the securities remained listed either on NSE or BSE). Voluntary delisting is not permissible pursuant to corporate actions of a buy-back or preferential allotment. Under the New Delisting Regulations it is possible to delist only a class of equity shares and continue trading of other classes of equity shares. A precondition for delisting is that there should be no convertible instruments outstanding which are convertible to the class of equity shares that are sought to be delisted. As a result, a company with outstanding depository receipts cannot delist without getting all the depository receipt holders to convert their receipts into shares. In such a case the depository receipt holders may participate in the delisting offer after getting their depository receipts converted into equity shares.

Kicking-off voluntary delisting Stringent threshold for shareholders’ approval The requirement of shareholders’ approval for voluntary delisting of the company by way of a special resolution has been further qualified with new requirements that such special resolution should be passed through postal ballot and shall be deemed to be passed only if the votes cast by the public shareholders in favour of the proposal amount to at least two times the votes cast against it. With these new parameters to initiate the delisting of equity shares it may prove to be extremely cumbersome for the companies/promoters to get the shares delisted without general consensus.

It is important to note that now under the New Delisting Regulations the definition of promoter has been trimmed down. Under the Delisting Guidelines promoters comprised as defined under the Takeover Code and any person desirous of getting the securities of the company delisted. Whereas, under the New Delisting Regulations the word promoter has been defined as only a under the Takeover Code and nobody else, thereby thwarting any shareholder having substantial stake from attempting to delist the shares of the company against the wishes of the promoters.

Exit opportunity Partial delisting It is possible for a company to voluntarily delist its equity shares from one or more recognised stock exchanges. If after the proposed delisting from any one or more of the recognised stock exchanges, the equity shares of the company would still remain listed on any recognised stock exchange having nationwide terminals, no exit opportunity needs to be given to the public shareholders. Now even the requirement of passing a special resolution for the delisting without exit opportunity is removed and only a board resolution with public notice and the disclosure in the first annual report after delisting would suffice. Under the Delisting Guidelines no time-limit was prescribed for the exchanges for disposal of such delisting application filed by the companies but now a time-frame of 30 days has been provided to the exchange to dispose of such delisting application.

Dual clearance window for delisting process The New Delisting Regulations have introduced a two-stage approval process from the stock exchanges concerned. Prior to commencing the delisting process, after passing the special resolution approving the delisting an application, in the form specified by the stock exchange concerned, for an in-principal approval of the stock exchange where the shares are listed, is required to be made by the company. Such application shall be accompanied with an audit report, as required under Regulation 55A of the SEBI (Depositories and Participant) Regulations, 1996 in respect of the equity shares sought to be delisted, covering a period of six months prior to the date of the application. The regulator has provided several checkpoints which the stock exchange has to consider while approving the application for delisting, these include status of pending investor grievances, compliance with listing agreement(s) having material bearing on the interest of the shareholders and pending litigation pertaining to the company’s activities in securities market or any matter having material bearing on the interest of its equity shareholders. However, no guidelines have been provided to decide on the conditions that could have material bearing on the interest of shareholders, giving unrestrained power to the stock exchanges. If an application to delist is refused, the aggrieved parties could apply to SEBI for a favourable order and then use the appeal machinery under the SEBI Act. A final application of delisting has to be submitted to the stock exchange for delisting of securities after completion of the book-building process, within one year of passing of the special resolution approving delisting.

Rationalisation of exit offer process Recognition of the Takeover Code principles The New Delisting Regulations provide for a more detailed mechanism for voluntary delisting by bringing it in line with the tried and tested mechanism and formulae of the SEBI Takeover Code. While under the Delisting Guidelines, the floor price for the exit offer to be made in a voluntary delisting was based on the average of 26 weeks’ traded price, under the New Delisting Regulations it is required to be the higher of the 26 week average weekly high and low of closing price of the shares sought to be delisted. For infrequently traded equity shares the floor price shall be calculated on the basis of the highest of the acquisition price paid by the promoters for shares during 26 weeks prior to the date on which the stock exchange
was intimated about the board meeting considering the delisting proposal and up to the date of public announcement for delisting and other parameters like return on net worth, EPS, book value per share, etc. A specific obligation to issue a letter of offer pursuant to public announcement; providing for concept of specified date for determining the public shareholders of the company, opening of special account and inclusion of shares held in physical form in exit offer process are the other changes that have been introduced. Another important change is that now the floor price shall not be calculated from the date of public offer but from the date on which the company informed the stock exchange about the date of the board meeting in which the delisting proposal was considered. The promoters are not bound to accept the offer price determined under the book-building process.

Fresh success criteria The New Delisting Regulations now clearly state the percentage at which the offer for delisting is deemed successful. This is a welcome clarification of the cryptic requirement of the public shareholders falling below the minimum limit specified by the listing agreement of the erstwhile Delisting Guidelines, where minimum limit varied from time to time with the amendments to listing conditions. The stock exchanges had on several occasions insisted that at least 90% shareholding be achieved by the promoter seeking to delist. Where companies, whose promoters already owned 90% of the shares, sought to delist, they were obliged to obtain separate clarifications from the stock exchanges about the number of shares to be acquired. The New Delisting Regulations clarify this aspect and require that the pre- and post-offer aggregate shareholding of the promoters seeking to delist will be the higher of:

- (a) 90% of the total issues shares of that class held by the public (excluding the shares held by a custodian and against which depository receipts have been issued overseas); or
- (b) the aggregate of the promoters’ pre-offer shareholding and 50% of the offer size. For instance, where the pre-offer promoter shareholding is 75%, the promoter will have to achieve a post-offer shareholding that is the higher of 90% or, 75% plus half of 25%, i.e. 87.5%. Thus, where the pre-offer shareholding of promoters is 85%, the promoter must acquire 92.5% to be able to delist that particular class of shares of the company. Simple norms for delisting of small companies Under the earlier Delisting Guidelines small companies were not being treated separately for the purpose of delisting of their shares. However, under the New Delisting Regulations special provisions have been provided for small companies whereby the book-building process may be avoided if 90% of the public shareholders agree to the proposal to delist. A small company has been defined as a company having 300 or fewer public shareholders and the paid-up value of shares held by such public shareholders in such a company is not more than Rs 10 million, or where the company has paid-up capital of up to 10 million and its equity shares were not traded in any recognised stock exchange in the one year immediately preceding the date of decision for delisting. The promoters shall have to follow an abridged process, as prescribed, for the delisting of small companies.

Reinstatement of delisted equity shares Unlike 2 years as provided under the Delisting Guidelines, now, post delisting a company may again list its equity shares only after the expiry of 5 years from the date of its voluntary delisting and 10 years from the date of its compulsory delisting, as the case may be. However, such re-listing may be done even before 5/10 years if a recommendation has been made by the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985.

Broadening timelines The minimum bidding period will now be 3 to 5 days and should start within 55 days of the public announcement, and the final announcement for acceptance or rejection of the final price can be made within 8 working days of the closure of the offer (earlier it was within 2 days under the Delisting Guidelines), on which shares shall be acquired.

Under the New Delisting Regulations the remaining shareholders post a voluntary delisting offer may now tender their equity shares and exit within 1 year from the date of public announcement (as against 6 months under the erstwhile Delisting Guidelines).

The New Delisting Regulations: An effort towards more transparent and responsive process The approach taken by the New Delisting Regulations is justified since it is more investor-centric than the erstwhile Delisting Guidelines. A listed company has benefited from publicly raised capital. Any move to deprive the public of a market for such a company’s securities must be based on sound principles and stringent safeguards. The stridency of the New Delisting Regulations has a sound commercial basis to ensure that the controlling hands of a company do not slap the unsuspecting face of a public shareholder. With the requirement of a higher qualitative threshold for shareholders’ approval for authenticating a delisting proposal, it is certain that now delisting of companies will truly reflect the shareholders’ interest in such companies whereby the book-building process may be avoided if 90% of the public shareholders agree to the proposal to delist. However, under the New Delisting Regulations special provisions have been provided for small companies whereby the book-building process may be avoided if 90% of the public shareholders agree to the proposal to delist. A small company has been defined as a company having 300 or fewer public shareholders and the paid-up value of shares held by such public shareholders in such a company is not more than Rs 10 million, or where the company has paid-up capital of up to 10 million and its equity shares were not traded in any recognised stock exchange in the one year immediately preceding the date of decision for delisting. The promoters shall have to follow an abridged process, as prescribed, for the delisting of small companies.

Process for compulsory delisting has been reinforced by introduction of the statutory delisting grounds by Rule 21 of the SCR Rules and detailed criteria which a stock exchange needs to follow while taking a decision on compulsory delisting of a company. Moreover, in a delisting pursuant to the rights issue, now the price for the delisting offer must comply with the same pricing mechanism as provided under the New Delisting Regulations and not at the price of such rights issue.
The process of delisting envisaged under the New Delisting Regulations comes out as a more transparent as well as time sensitive process. The new definition of ‘promoters’ coupled with the qualitative threshold will surely cater to the greater good of companies and its shareholders against hostile intentions of any acquirer having substantial shareholding in the company. Moving towards the Takeover Code principles for determining the floor price as well as the offer process is likely to achieve greater transparency for the benefit of the shareholders. The ‘higher of’ criteria for floor price takes care of bids for delisting at the time when markets are down.

Since the New Delisting Regulations apply only to ‘equity shares’ and do not specifically supersede the Old Delisting Guidelines it appears that the delisting of securities other than equity shares will still be governed by the Old Delisting Guidelines. The New Delisting Regulations specifically prohibit delisting of convertible securities. This seems to be a grey area as going forward it may create confusion for the companies having different kinds of securities listed in the stock exchanges.

However, one issue of concern is that the stringency of the entire process may dissuade companies from trying to delist. In cases where a majority of the shareholders agree to delist, the offer may still fail if the company fails to acquire more than ninety per cent of the total issued shares (save the exceptions). A small minority may thus thwart the attempts of the majority and continue to keep the company listed. The question remains whether this is undesirable. Should a company with a small percentage of public shareholding remain listed? Are there any adverse consequence? When compared to the drawbacks of a lenient approach to delisting and the potential harm to minority public shareholders, the answer should be in the negative. Now only time will tell how the new regulatory measures will change the process in practice and usher in the benefits to both shareholders and the market.