

## Capital Markets Hotline

July 22, 2009

### NO MORE SUPERIOR RIGHTS IN LISTED COMPANIES

On July 21, 2009, the Securities and Exchange Board of India ("SEBI") issued a letter addressed to the stock exchanges, directing them to amend provisions of the Equity Listing Agreement ("Listing Agreement"). The amendment is to include a clause that provides that the issuer (company) shall not issue shares in any manner which may confer on any person, superior rights as to voting or dividend vis-a-vis the rights on equity shares that are already listed.

#### Background

The issue of equity shares with differential rights (including differential rights as to voting, dividend or otherwise) ("Differential Shares") is governed by the provisions of Section 86 (a)(ii) of the Companies Act, 1956, together with the Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001 ("Rules"). Under the aforesaid provisions, a company limited by shares could issue Differential Shares not exceeding 25% of the total issued share capital. Differential rights would mean, in the context of voting, any equity share that is entitled to less than one vote per share (excluding the right to vote on alteration of rights attached to such shares), or more than one vote per share. A listed company may issue Differential Shares only if it has obtained the approval of its shareholders through a postal ballot.

The perception by market regulators that the issue of Differential Shares to a person would be detrimental to the interests of the minority shareholders, resulted in the proposal to completely abolish the right of both public and private companies to issue Differential Shares in the Companies Bill, 2008. The objective of enacting this provision appears to have been to bring about equality insofar as equity shares were concerned.

#### Amendment

The Companies Bill, 2008 is yet to be passed. However, SEBI has issued directions to the stock exchanges to amend the Listing Agreement to make the prohibition effective against listed companies. The direction provides for the addition of a new clause 28A, which states as follows:

*"28A. The company agrees that it shall not issue shares in any manner which may confer on any person, superior rights as to voting or dividend vis-à-vis the rights on equity shares that are already listed."*

#### Implications

The amendment speaks of 'shares', without specifying whether the intention is to cover equity shares only. Therefore, the amendment would, on a literal interpretation, include preference shares as well, which, under the Companies Act, 1956, already have superior rights vis-a-vis dividend and liquidation than equity shares. Therefore, this amendment could have the effect of preventing listed companies from issuing preference shares as well.

The direction from SEBI does not clarify what is meant by 'superior' rights. The amendment seems to imply that a listed company cannot issue rights superior to those statutorily conferred to a holder of equity shares in accordance with the Companies Act, 1956. Therefore, a listed company may still be able to issue shares with 'inferior' rights with respect to voting, dividend or otherwise, if this is commercially acceptable to the investor. Further, the meaning of 'superior' rights could also be construed to mean and include affirmative voting rights that are often granted to investors holding such equity shares.

The amendment could have a direct impact on private investment in public equity (PIPE investments) in India. Private investors may be reluctant to invest in a company in the absence of protective provisions, such as affirmative voting rights and covenants that bind the target company.

The direction from SEBI also does not suggest what happens to the Differential Shares already issued by some listed companies (notably Tata Motors and Pantaloon Retail). One view is that Differential Shares issued prior to this

## Research Papers

### M&A In The Indian Technology Sector

February 19, 2025

### Unlocking Capital

February 11, 2025

### Fintech

January 28, 2025

## Research Articles

### Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

### INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

### Key changes to Model Concession Agreements in the Road Sector

January 03, 2025

## Audio

### Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

### Renewable Roadmap: Budget 2024 and Beyond - Part I

August 26, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

Click here to view Hotline archives.

## Video

### Arbitration Amendment Bill 2024: A Few Suggestions | Legally Speaking With Tarun Nangia | NewsX

February 12, 2025

amendment will have to be rationalized, since listed companies are required to be in compliance with the Listing Agreement at all times. If this is the case, the amendment neither addresses the time nor the manner in which this rationalization should be achieved. Conversely, another view is that since the Listing Agreement governs the listed equity shares, the amendment is intended to cover only prospective issuances of Differential Shares, and will not affect issuances made before the date of the amendment.

Conclusion

The amendment lacks clarity on the issues pointed out above, and could lead to confusing interpretations. The need of the hour is for SEBI to clarify these issues at the earliest. Considering the grim state of investments generally, it would augur well for the capital markets regulator to stimulate investment activity, rather than stifle it.

Further, considering the object of the abolition, the amendment is a weak move towards protection of minority shareholders in a company. Since the Companies Act provides for adequate grievance redressal mechanisms in the form of remedies against mismanagement and oppression, these may be a more appropriate way of ensuring the protection of minority interests. Equality of voting rights may not achieve the desired minority protection objective, based on several factors most significant of which is public shareholder apathy. We will continue to update you as this issue plays out, but for the nonce it certainly appears that shares with “superior rights” are passing into the annals of history.

- Rohini Agarwal & Kartik Ganapathy

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.