

Companies Act Fundamentals

Buy Back of Securities



2020 MHA Legal

Applicable Law

- Chapter IV- Share Capital and Debentures - Section 43-72 of the Companies Act 2013
 - The Companies (Share Capital and Debentures) Rules, 2014.
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- Act means – Companies Act 2013
 - Rules means - The Companies (Share Capital and Debentures) Rules, 2014.

Buy back of Securities

Buyback of Securities

- Section 68(1) of Act permit a company whether public or private, to purchase its own shares or other specified securities (hereinafter referred to as "buy-back") out of:
 - (i) its free reserves; or
 - (ii) the securities premium account; or
 - (iii) the proceeds of any shares or other specified securities.

- However, no buy-back of any kind of shares or other specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

- Hence it is mandatory that the company must have sufficient balance in its accounts or reserves to accommodate buy-back.

Buyback of Securities

- For the purpose of buy back provisions "Specified securities" means and includes employees' stock option or other securities as may be notified by the Central Government from time to time.
- "Free reserves" includes securities premium account.
- Section 62 (2) provides that no company shall purchase its own shares or other specified securities under sub-section (1), unless—
 - (a) the buy-back is authorised by its articles;
 - (b) a special resolution has been passed at a general meeting of the company authorising the buy-back. However, special resolution is not required in cases where :
 - (i) the buy-back is, ten per cent or less of the total paid-up equity capital and free reserves of the company; and
 - (ii) such buy-back has been authorised by the Board by means of a resolution passed at its meeting;

Buyback of Securities

- (c) the buy-back is twenty-five per cent or less of the aggregate of paid-up capital and free reserves of the company. It is clarified that in respect of the buy-back of equity shares in any financial year, the reference to twenty-five per cent in this clause shall be construed with respect to its total paid-up equity capital in that financial year;

- (d) the ratio of the aggregate of secured and unsecured debts owed by the company after buy-back is not more than twice the paid-up capital and its free reserves. However, Central Government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies;

- (e) all the shares or other specified securities for buy-back are fully paid-up;

Buyback of Securities

- (f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by the Securities and Exchange Board in this behalf; and

 - (g) the buy-back in respect of shares or other specified securities other than those specified in clause (f) is in accordance with such rules as may be prescribed:
- It is to be noted that no offer of buy-back under Section 68 can be made within a period of one year reckoned from the date of the closure of the preceding offer of buy-back, if any.

Other Conditions

- Every buy-back needs to be completed within a period of one year from the date of passing of the special resolution, or as the case may be, the resolution passed by the Board.

- The buy-back under sub-section (1) may be—
 - (a) from the existing shareholders or security holders on a proportionate basis;
 - (b) from the open market;
 - (c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

- The company buying back its own shares or other specified securities, needs to extinguish and physically destroy the shares or securities so bought back within seven days of the last date of completion of buy-back.

Other Conditions

- When the company completes a buy-back of its shares or other specified securities, it shall not make a further issue of the same kind of shares or other securities including allotment of new shares under clause (a) of sub-section (1) of section 62 or other specified securities within a period of six months except by way of a bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.
- Where a company buys back its shares or other specified securities, it needs to maintain a register of the shares or securities so bought, the consideration paid for the shares or securities bought back, the date of cancellation of shares or securities, the date of extinguishing and physically destroying the shares or securities and such other particulars as may be prescribed.

Declaration of Solvency

- Where a company proposes to buy-back its own shares or other specified securities in pursuance of a special resolution, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board, a declaration of solvency signed by at least two directors of the company, one of whom shall be the managing director, in form _____ and verified by an affidavit to the effect that the Board of Directors of the company has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year from the date of declaration adopted by the Board.

- No declaration of solvency needs to be filed with the Securities and Exchange Board by an unlisted company.

Special Resolution

- The notice of the meeting at which the special resolution is proposed to be passed under clause (b) of sub-section (2) shall be accompanied by an explanatory statement stating—
 - (a) a full and complete disclosure of all material facts;
 - (b) the necessity for the buy-back;
 - (c) the class of shares or securities intended to be purchased under the buy-back;
 - (d) The amount to be invested under the buy-back; and
 - (e) the time-limit for completion of buy-back.

Explanatory statement

The explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 needs to contain the following disclosure:-

- the date of the board meeting at which the proposal for buy-back was approved by the board of directors of the company;
- the objective of the buy-back;
- the class of shares or other securities intended to be purchased under the buy-back;
- the number of securities that the company proposes to buy-back;
- the method to be adopted for the buy-back;
- the price at which the buy-back of shares or other securities shall be made;
- the basis of arriving at the buy-back price;
- the maximum amount to be paid for the buy-back and the sources of funds from which the buy-back would be financed;
- the time-limit for the completion of buy-back;
- (j) (i) the aggregate shareholding of the promoters and of the directors of the promoter, where the promoter is a company and of the directors and key managerial personnel as on the date of the notice convening the

Explanatory statement

- (ii) the aggregate number of equity shares purchased or sold by persons during a period of twelve months preceding the date of the board meeting at which the buy-back was approved and from that date till the date of notice convening the general meeting;
 - (iii) the maximum and minimum price at which purchases and sales were made along with the relevant date;
- if the persons mentioned in the offer intend to tender their shares for buy-back –
 - (i) the quantum of shares proposed to be tendered;
 - (iii) the details of their transactions and their holdings for the last twelve months prior to the date of the board meeting at which the buy-back was approved including information of number of shares acquired, the price and the date of acquisition;
- a confirmation that there are no defaults subsisting in repayment of deposits, interest payment thereon, redemption of debentures or payment of interest thereon or redemption of preference shares or payment of dividend due to any shareholder, or repayment of any term loans or interest payable thereon to any financial institution or banking company;

Explanatory statement

- a confirmation that the Board of directors have made a full enquiry into the affairs and prospects of the company and that they have formed the opinion-
 - (i) that immediately following the date on which the general meeting is convened there shall be no grounds on which the company could be found unable to pay its debts;
 - (ii) as regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company shall be able to meet its liabilities as and when they fall due and shall not be rendered insolvent within a period of one year from that date; and
 - (iii) the directors have taken into account the liabilities(including prospective and contingent liabilities), as if the company were being wound up under the provisions of the Companies Act, 2013

Explanatory statement

- A report addressed to the Board of directors by the company's auditors stating that-
 - (i) they have inquired into the company's state of affairs;
 - (ii) the amount of the permissible capital payment for the securities in question is in their view properly determined;
 - (iii) that the audited accounts on the basis of which calculation with reference to buy back is done is not more than six months old from the date of offer document; and
 - (iv) the Board of directors have formed the opinion on reasonable grounds and that the company, having regard to its state of affairs, shall not be rendered insolvent within a period of one year from that date.

Procedure

- The company which has been authorized by a special resolution shall, before the buy-back of shares, file with the Registrar of Companies a letter of offer in Form No. SH.8, along with the fee.
- The letter of offer needs to be dated and signed on behalf of the Board of directors of the company by not less than two directors of the company, one of whom shall be the managing director, where there is one.
- The company shall file with the Registrar, along with the letter of offer, and in case of a listed company with the Registrar and the Securities and Exchange Board, a declaration of solvency in Form No. SH.9 along with the fee and signed by at least two directors of the company, one of whom shall be the managing director, if any, and verified by an affidavit as specified in the said Form.
- The letter of offer shall be dispatched to the shareholders or security holders immediately after filing the same with the Registrar of Companies but not later than twenty days from its filing with the Registrar of Companies.

Procedure

- The offer for buy-back shall remain open for a period of not less than fifteen days and not exceeding thirty days from the date of dispatch of the letter of offer.
- In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on proportionate basis out of the total shares offered for being bought back.
- The company shall complete the verifications of the offers received within fifteen days from the date of closure of the offer and the shares or other securities lodged shall be deemed to be accepted unless a communication of rejection is made within twenty one days from the date of closure of the offer.
- The company shall immediately after the date of closure of the offer, open a separate bank account and deposit therein, such sum, as would make up the entire sum due and payable as consideration for the shares tendered for buy-back in terms of these rules.

Procedure

- The company shall within seven days of the time specified in sub-rule (7)-
 - a) make payment of consideration in cash to those shareholders or security holders whose securities have been accepted; or
 - b) return the share certificates to the shareholders or security holders whose securities have not been accepted at all or the balance of securities in case of part acceptance .
- The company shall ensure that—
 - a) the letter of offer shall contain true, factual and material information and shall not contain any misleading information and must state that the directors of the company accept the responsibility for the information contained in such document;
 - b) the company shall not issue any new shares including by way of bonus shares from the date of passing of special resolution authorizing the buy-back till the date of the closure of the offer under these rules, except those arising out of any outstanding convertible instruments;
 - c) the company shall confirm in its offer the opening of a separate bank account adequately funded for

Procedure

- d) this purpose and to pay the consideration only by way of cash;
 - e) the company shall not withdraw the offer once it has announced the offer to the shareholders;
 - f) the company shall not utilize any money borrowed from banks or financial institutions for the purpose of buying back its shares; and
 - g) the company shall not utilize the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities for the buy-back.
- The company, shall maintain a register of shares or other securities which have been bought-back in Form No. SH.10.
 - The register of shares or securities bought-back shall be maintained at the registered office of the company and shall be kept in the custody of the secretary of the company or any other person authorized by the board in this behalf.
 - The entries in the register shall be authenticated by the secretary of the company or by any other person authorized by the Board for the purpose.

Procedure

- The company, after the completion of the buy-back under these rules, shall file with the Registrar, and in case of a listed company with the Registrar and the Securities and Exchange Board of India, a return in the Form No. SH.11 along with the fee .
- There shall be annexed to the return filed with the Registrar in Form No. SH.11, a certificate in Form No. SH.15 signed by two directors of the company including the managing director, if any, certifying that the buy-back of securities has been made in compliance with the provisions of the Act and the rules made thereunder.

Aspects to keep in mind

- Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company. In respect of any financial year, the shareholders can approve by special resolution upto 25% of total equity capital in that year.
- The ratio of the aggregate of secured and unsecured debts owed by the company after buy-back is not more than twice the paid-up capital and its free reserves i.e the ratio shall not exceed 2:1.
- All the shares or other specified securities for buy-back are to be fully paid-up.
- No offer of buy-back can be made within a period of one year reckoned from the date of the closure of the preceding offer of buy-back, if any.
- The buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the Securities and Exchange Board in this behalf; and
- The buy-back in respect of shares or other specified securities other than listed securities is in accordance with such rules made under Chapter IV of the Act.

Thank you



Mind, Heart, Aspiration =
Passion, Integrity, Excellence

Thank You

Please feel free to contact, if you need any further information or clarification:

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