M&A Hotline

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MINIMUM PUBLIC UNITHOLDING: SEBI LAYS DOWN THE ROAD FOR INVITS

MINIMUM PUBLIC UNITHOLDING REQUIREMENT

The SEBI (Infrastructure Investment Trusts) Regulations, 2014 ("**InvIT Regulations**") regulates the establishment, operation and management, issuance of units, and governance of an Infrastructure Investment Trust ("**InvIT**"), among other things. InvIT Regulations allow for raising of funds either through private placement or by way of public offer subject to fulfillment of certain eligibility criteria and conditions. SEBI has now issued a circular on 'Manner of achieving minimum public unitholding - InvITs'[1] ("**InvIT Circular**") providing alternatives to InvITs to increase their public shareholding as required.

By way of background, Regulation 14(1A) of the InvIT Regulations deals with the offer and allotment of units to the public by way of issuance of a placement memorandum and provides for the below minimum thresholds of units to be offered and allotted to the public[2] for the offer to be valid, based on the size of the InvIT:

1. if the post-issue capital of InvIT is less than INR 16 billion (Indian Rupees Sixteen Billion only), then at least 25% (twenty five percent) of the total outstanding units of the InvIT are to be held by the public;
2. if the post-issue capital of InvIT is equal to or more than INR 16 billion (Indian Rupees Sixteen Billion only) but less than INR 40 billion (Indian Rupees Forty Billion only) then units worth at least INR 4 billion (Indian Rupees Four Billion only) are to be held by the public; or
3. if the post-issue capital of InvIT is equal to or more than INR 40 billion (Indian Rupees Forty Billion only), then at least 10% (ten percent) of the total outstanding units of the InvIT are to be held by the public.

The InvIT Regulations were cognizant of the fact that InvITs being comparatively newer infrastructure vehicles, may not be able to raise at least 25% (twenty five percent) of the units from the public ("**Public Unit Threshold**") in case of InvITs with larger post-issue capital, at the time of making such offer. Hence, the thresholds are different in such cases, as can be seen from (ii) and (iii) above. However, providing these exemptions on an absolute basis would have raised concerns about the differential treatment of InvITs. Accordingly, as a middle ground the InvIT Regulations provide that InvITs falling under the criteria (ii) and (iii) that do not meet the Public Unit Threshold, shall be required to increase its public unitholding to reach such levels, within a period of 3 (three) years from the date of listing pursuant to the initial offer.[3]

MECHANISMS FOR INCREASING THE PUBLIC UNITHOLDING IN INVIT

In view of the aforesaid requirement under the InvIT Regulations, SEBI has issued InvIT Circular providing mandated methods to InvITs to increase their public shareholding. The mechanism provided under the InvIT Circular can be classified in broadly two categories: (i) Mechanism without any additional conditions; and (ii) Mechanism with additional conditions.

1. ***Mechanisms without any additional conditions***: InvITs can utilize the below mechanisms to increase their public unitholding to meet Public Unit Threshold, without any additional conditions:
   - Fresh issuance of units can be made to the public through an offer document;
   - Sponsor(s), investment manager, project manager of the InvIT and/or their associated/related parties ("**InvIT Parties**") can sell the units held by them either by way of an offer for sale to the public through an offer document or through the stock exchange mechanism;
   - Allotment of units under Institutional placement.
2. ***Mechanisms with additional conditions***: In addition to the aforesaid mechanisms, the InvIT Circular provides for the below-mentioned routes as well for increasing the public unitholding. However, certain conditions are required to be fulfilled in such cases.
   - Fresh issue of units to the existing public unitholders by way of rights issue or bonus issue. In such cases, the InvIT Parties will be required to mandatorily renounce their entitlement to the aforesaid units.
   - Sale of units held by the InvIT Parties in the open market by choosing either of the below-mentioned methods:
     - up to 2% (two percent) of the total paid-up unit capital of the InvIT during each financial year till the due date for meeting the Public Unit Threshold expires. The sale of units is subject to a limit of five times' average monthly trading volume of the units of the InvIT; or

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- upto a maximum of 5% (five percent) of the paid-up unit capital of the InvIT during a financial year subject to the condition that the public unitholding in the InvIT shall become 25% (twenty five percent) after completion of such sale. The sale can be a single tranche or in multiple tranches during a period of 12 (twelve) months and the amount of units to be sold shall not exceed the trading volume of the units of the InvIT during the preceding 12 (twelve) months from the date of the announcement.

  Further, the investment manager is required to provide details to the stock exchanges including the purpose of the sale, details of selling unitholders and units to be sold, and timelines for completion of the entire process. This should be accompanied by an undertaking from the InvIT Parties, that none of these parties will buy out any units being offered in the open market.

- Transfer of units held by the InvIT Parties to an Exchange Traded Fund (ETF) managed by a SEBI-registered mutual fund. This transfer of units in case is capped at 5% (five percent) of the paid-up unit capital of the InvIT. Additionally, the investment manager is required to provide a similar set of information and the undertakings from the InvIT Parties to the stock exchanges as mentioned in paragraph (ii)(b) above.
- Residuary Method: SEBI has permitted the InvITs to come up with any other method to achieve the Public Unit Threshold. However, SEBI will have the discretion to approve or reject such a proposal by InvIT and also to seek further information if required. Though the InvIT Circular provides a timeline of 30 (thirty) days for SEBI to respond to the proposal, the same is not mandatory.

CONCLUSION

While the InvIT circular provides clarity, and ostensibly a variety of methods, for achieving the minimum public unit holding, the timing of the circular and the conditions introduced may create difficulties for some industry participants. Prior to the InvIT Circular, there were no restrictions on how the minimum unit holding was to be achieved. Given the conditions introduced, existing InvITs may find themselves pressed for time or constrained for options, in planning the mandated broad basing of their unit holding.

– Akash Kumar, Ratnadeep Roychowdhury & Nishchal Joshipura

You can direct your queries or comments to the authors.

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[1]SEBI Circular, Manner of achieving minimum public unitholding – InvITs, SEBI/HO/DDHS/PoD2/P/CIR/2023/107, dated June 27, 2023.

[2]For the purpose of calculation of the units offered to public, any units offered to sponsor or the investment manager or the project manager or their related parties or their associates shall not be counted towards units offered to the public. See, Proviso to Regulation 14(1A), InvIT Regulations.

[3]Second proviso to the Regulation 14(1A), InvIT Regulations.

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