Block

4

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BLOCK 4 TECHNIQUES OF CORPORATE RESTRUCTURING

This is the fourth block for Strategic Finance and Corporate Restructuring text book. This block introduces the restructuring activities such as Divestitures, spin offs, equity carve outs, split ups, split offs, joint ventures, going private, leveraged buyouts, ESOPs, MLPs, buy-back of shares, exchange offers, etc. This block also discusses takeover defenses. This block consists of six units.

Unit 14 discusses Sell offs and divestitures which are the commonly used strategies to exit businesses. This chapter deals with the effects of several forms of corporate restructuring and with strategies that allow the firm to maximize shareholders' value. The unit talks about the commonly used strategies to exit businesses such as divestitures, spin offs, equity carve outs, split ups and split offs, etc.

Unit 15 deals with joint ventures. It is 'strategic partnership' wherein two or more firms develop a relationship that combines their resources, capabilities and core competencies for certain business purposes. This unit explores the potential of various means to maximize shareholder's value, like strategic alliances, joint ventures, etc.

Unit 16 outlines the topics going private and leveraged buyouts. Over the past few years, transactions involving public companies turning private have grown dramatically world over. Going private requires a great deal of more financial planning than going public. Most going-private deals are structured as Leveraged Buyouts (LBOs) involving a company's management, an equity player and a lender.

Unit 17 deals with other very important restructuring activities that are Employee Stock Option Plan (ESOP) and Master Limited Partnerships (MLPs). ESOPs have become the new buzzword in the corporate sector. These plans may receive stock or cash to buy employer's stock. Master limited partnership units are traded publicly like stock and thus significantly provide the investor more liquidity than ordinary limited partnerships.

Unit 18 features Buy-back of Shares and Exchange Offers. The buy-backs and exchange offers enables a change in the capital structure with a change in the investment. Theories behind share repurchase and the rationale behind popularity of buy-backs is discussed in this unit.

Unit 19 deals with takeover defenses. Mergers, acquisitions and takeovers have been a part of the business world for centuries. Takeovers may be friendly or hostile. This unit discusses the most commonly used takeover tactics to acquire a company in a hostile takeover attempt and also to evaluated the effectiveness of the commonly employed various takeover defenses.

Unit 14

Sell Offs and Divestitures

Structure

14.1 Introduction

14.2 Objectives

14.3 Factors Involved in Divestment Decisions

14.4 Explanation and Rationale for Gains to Sell-offs

14.5 Divestitures

14.6 Divestiture and the Spin-off Process

14.7 Summary

14.8 Glossary

14.9 Suggested Readings/Reference Material

14.10 Suggested Answers

14.11 Terminal questions

"How do you make money? Spinoffs, split-ups, liquidations, mergers and acquisitions".

\- Mario Gabelli

14.1 Introduction

Let's study the modus operandi of Sell Offs and Divestitures and their types. Many corporations, mostly large and highly diversified organizations, are persistently evaluating various ways in which the shareholders' position could be enhanced. These activities are referred to as restructuring activities. The restructuring activity may take the form of either expanding the business or exiting from the business.

This unit deals with the shareholders' wealth and effects of several forms of corporate restructuring and with strategies that allow the firm to maximize shareholders' value by redeploying assets through contraction and downsizing of the parent corporation.

Divestitures, spin offs, equity carve outs, split ups and split offs are the commonly used strategies to exit businesses and to deploy corporate assets by returning cash or non cash assets through a special dividend to shareholders.

14.2 Objectives

After going through the unit, you should be able to:

- Explain factors Involved in Divestment Decisions
- Discuss Explanation and Rationale for Gains to Sell Offs
- Illustrate Different Types of Sell Offs
- Describe Motives for Divestitures, Divestiture and the Spin-Off Process

14.3 Factors Involved in Divestment Decisions

A number of factors play a role in making divestment decisions and are grouped under three general categories:

i. Opportunistic

ii. Planned

iii. Forced

Opportunistic considerations are totally optional and are to be implemented in a reactive manner. Taking the example of profit motivation, consider a successfully operating division that receives an unsolicited cash bid from a suitor, which would translate into an extraordinary profit. While there may be no immediate use for the cash, the profits to be obtained from selling off this division are such that management cannot be in a good conscience to turn down the offer. The profit motivation under opportunistic consideration is slightly different from profit motivation under planned considerations in column 2. Under the scenario of planned consideration, a company may have a profitable, well run division, but may go in for divestment to raise the necessary capital to invest in something new, or out of concern about the division's long-term future. While profit motivation is the same in both the instances, different circumstances lead to the divestiture decision.

Some amount of overlap does take place between the three basic scenarios that trigger or motivate a divestiture. Likewise, there is interchangeability among the individual factors.

These factors are divided into five categories:

i. Economic

ii. Psychological

iii. Operational

iv. Strategic

v. Governmental or legislative

Many of the subjects under these categories overlap.

Table 14.1: Divestment Decisions

Categories	Opportunistic (1)	Planned (2)	Forced (3)
Economic	Tax considerations Better alternative use of capital Profit motivation	Never be a factor at any investment level Tax considerations Shrinking margins Better alternative use of capital Profit motivation Marginally profitable Recover some capital Unprofitable division Liquidity problems	Continual failure to meet goals Tax considerations Recover some capital Unprofitable division Liquidity problems
Psychological		Eliminate psychological effect of a loser Bad apple theory	
Operational		Lack of intercompany synergy Labor considerations Competitive reasons Management deficiencies Concentration of management efforts Eliminate inefficiencies	Labor considerations Competitive reasons Concentration of management efforts
Strategic	Poor business fit Takeover defense	Change in corporate goals Change in corporate image Technological reasons Poor business fit Market saturation Takeover defense	Technological reasons Poor business fit Takeover defense
Governmental		Government-directed divestitures	Government-directed divestitures
Note: Some considerations may fall under more than one category. For example, shrinking margins and better alternative use of capital may also be strategic considerations.			

Source: Icfai Research Center

14.3.1 Economic

Never Be a Factor at any Investment Level

Many times, the market in which the company is dealing is too narrow. It becomes impossible for the management to realize an adequate return regardless of the dollars and corporate muscle put into the particular division. This kind of situation arises where the company is faced with impossible goals of achieving market share in the face of competition that is either too well-entrenched, tough, or numerous to make any investment worthwhile. The RCA Corporation faced this situation when it abandoned its mainframe computer business after attempting to compete directly with IBM.

Continual Failure to Meet Goals

The continual failure by a division to meet quarterly or yearly projections serves as an excellent rationale for divesting. Continual losses or continual shortfall arising due to overestimating the potential of the company can prove expensive to any company.

Tax Considerations

Tax considerations may serve as a justification for divestment. A company can often take advantage of changes in the tax laws by selling a division or a product line at an opportune time, and derive benefits from losses incurred or other benefits allowed by the existing tax laws. Since, tax laws are continually changing, divestment can be considered as an opportunity that can quickly be lost by a change in law. For example, when Net Operating Losses (NOLs) could be easily sold and utilized by the acquirer, many companies taking advantage of this temporary tax benefit sold off their loss-plagued divisions.

Shrinking Margins

Often, the primary reason for a divestiture is reduced profit margin. Examples of companies that have run large divestiture programs because of shrinking margins are G D Searle and American Can. Even though the divestment programs for both these companies were part of their strategic plans, the short-term reason for initiating the divestment was the continual reduction in profit margins of the divisions that were sold.

Better Alternate use of Capital

This factor serves as a combined economic and strategic reason for considering divestment. A large number of companies in corporate America have begun divestment programs in order to make better use of their capital. Companies that have reinvested proceeds into other areas of existing businesses or into new acquisitions through divestment programs have been extremely satisfied.

Profits

Lack of profits is the most noted and visible reason for corporations to initiate divestment programs. Marginally profitable divisions or those divisions whose financial performance is not in line with financial performance of other divisions in the company are sure targets for divestment. Unless serving some strategic purpose, such as a research and development unit, divisions that continue to be unprofitable and incur losses year after year should certainly be divested. A corporation's existence is dependent on its stockholders' satisfaction and the best way to satisfy stockholders is to perform well and produce generous profits. The prime candidates for divestiture should be the divisions and product lines that erode profit and, which cannot be restructured and reshaped so as to give a substantial and acceptable return on investment in alliance with the corporation's goals.

14.3.2 Psychological

Eliminate Psychological Effect of a Loser

No one likes to be associated with a loser. It is psychologically very depressing to be working for or to be associated with a loss-making company, which has very little future ahead. Management should try to avoid having a loss making company over a long-term since the effects of a loser can be as contagious as the effects of a winner. It is best to sell off a losing company if it cannot be fixed.

Bad Apple Theory

Just as one rotten apple spoils the entire basket, losers, have a way of creating other losers. The faster a company gets rid of a loss-making division, the better it would be for all its other divisions. Losers should be quickly eliminated before they can effect the morale of the management teams at the other profitable divisions of the company.

14.3.3 Operational

Lack of Intercompany Synergy

Product lines or divisions acquired or set up to add synergy to the company's other divisions, but failed to do so, are prime targets for sell-offs. If management is unable to consolidate operations to increase profitability, then liquidation or divestment is an alternative.

Labor Consideration

Often companies are divested because of unusual labor situations, which might consist of labor unrest in a particular plant, lack of adequately skilled labor pool, or outside economic and political factors causing shortage of labor at competitive prices. Divestiture can be considered as an alternative, if moving or consolidating the operation cannot remedy the situation.

Competitive Reasons

Competition forms the basis of a capitalistic system. However, when competition is intense, and is of so large and effective nature, that it becomes impossible to compete with, withdrawing from a market can be accomplished by divesting an ongoing division. The management of International Harvester, for example, due to its involvement in several markets where the competition was too intense, larger and abler to compete in terms of productivity, research and development, and new facilities, the management of preferred to sell off one of its fundamental old businesses to a larger, more financially capable company instead of remaining in these market segment as an ineffective also ran.

Management Deficiencies

A company's inability to put together the right management team to run a division reflects the management's lack of ability to recruit, hire, and even provide internally proper management to run its companies, and if the situation exists and cannot be corrected, divestitures should be considered.

Concentration of Management Efforts

It is necessary to focus the management's efforts where they will be most productive for the company. When one or several divisions of a company are losing money and the management has to concentrate its efforts on trying to turn around the losers, it is better that the problem divisions are divested quickly so that the management has ample time to return to its normal and important functions of promoting the solid and strategically important units of the company.

Eliminate Inefficiencies

Many companies operate marginal divisions indefinitely till these units encounter significant losses. However, marginally profitable units tend to get caught in the trap wherein the management starves them for growth capital. In course of time, these units become more inefficient and less competitive and ultimately begin to lose important money. It is essential to spot these trends early and to try to sell these units before they become big losers and begin gathering significant downward momentum.

If divestiture can be accomplished within a reasonable time frame, not only are future losses eliminated, but the sale of the unit helps inject more capital into the corporate treasury than would have been obtained if the sell-off was delayed too long. These situations occur commonly in vertically integrated firms, where various operations can no longer be conducted efficiently.

14.3.4 Strategic

Change in Corporate Goals

This is the most common reason for companies to begin divestment programs. A company's motivation to divest itself of bad divisions, or any division, is often masked by the statement that the corporation is changing its strategic goals and wishes to divest one or several of its divisions. For example, several years ago Gould Inc. in its efforts to get out of the electrical equipment and equipment-support business and upgrade technologically into the electronics business, divested all of its technologically mundane divisions over several years and used the funds obtained to acquire companies in the electronics business, thereby moving several steps up the technological ladder. In initiating a divestment program as a result of a change in corporate strategy, the key to the divestments is not only getting out of unwanted businesses, but estimating and projecting capital that would be raised by selling off these divisions and how much this capital would assist in either acquiring or starting up new ventures that are more in line with the newly stated corporate strategic goals.

Change in Corporate Image

Some companies feel that in order to effect a "new" image, in addition to the change in corporate goals, certain divisions must be divested. The divestments rather than pertaining to segments that are failing, or even segments that have limited long-term potential, might involve businesses in areas that are not to the liking of management

Technological Reasons

Many companies undertake divestment programs to technologically upgrade operations. For example, Litton Industries undertakes a continual year-to-year upgrading of its companies, regardless of profitability, to maximize the potential of growth in higher technological areas. On the other hand, companies downgrade technologically when they are unable to adapt to the fast-moving nature of technologically oriented business. Many companies have used divestment strategies to withdraw from the high tech areas and retreat to their core business.

Poor Business Fit

Often divisions make no sense at all strategically and fail to fit with other divisions of the company. As a result, many a times the new management of the acquiring companies that inherit these businesses, take the course of divesting quickly.

Market Saturation

A division or a product line in which the investment required to maintain market share exceeds the cash it generates is a perfect candidate for divestiture. This situation is simply a case of a cash cow turning into a dog.

Takeover Defense

Divestment serves as a classic takeover defense mechanism and has been used successfully to thwart many of the takeover bids. A typical maneuver of this kind involves the sale of a "Crown Jewel" to deter an aggressive takeover player from going ahead with its plans. For example, this tactic was successfully used by Brunswick Corporation in its sale of its medical division, the best operating division of the company, to American Home Products in order to thwart an unsolicited takeover attempt by Whitaker Corporation. Shortly after this event, Whitaker Corporation withdrew its takeover bid for the company.

14.3.5 Governmental

Government Directed Divestitures

Government-directed divestitures often occur as a result of major mergers or acquisitions where the merger of two like companies gives rise to anti-trust problems. In order to avoid antitrust litigation by the government, companies either voluntarily divest certain divisions or are directed to do so. The rush of oil combinations taking place over the last few years has resulted in major oil companies selling off large parts of their merged companies.

Companies are hence forced to evaluate operations that go against government-enacted environmental laws and practices. And in many cases, companies either decide to sell a plant, switch to an alternate method of operation, or shut down the offending operation in order to meet government regulations.

While a fairly comprehensive listing of the factors to be considered while making divestment plans has been given above, there are other factors as well that can have a direct bearing on divestment strategy. These factors may include outside pressure from stockholders, the economic conditions at any given time, and political considerations. These additional macro considerations in addition to any combination of the factors described above should be reviewed before the divestment decision is made.

Example: Divestment of Air India

In the last decade (2010-2020) alone, the Government of India infused over ₹ 1 lakh crore in Air India in the form of cash and credit guarantee support. But the airline continued to make losses, at around ₹ 20 crore a day. The accumulated losses of Air India stood at over ₹ 70,000 crore as of March 2020. During the FY 2020-21, the total losses amounted to ₹ 7,046 crore. The auditors repeatedly raised concerns over the sustainability of the airlines, leaving the government with two choices either to sell or shut it down. Finally, in January 2022, Air India was officially handed over to the Tata Group, which bought the debt-ridden airline in October 2021 for nearly ₹ 18000 crore.

Sources: (i) https://www.thehindubusinessline.com/blexplainer/bl-explainer-all-about-air-india-disinvestment/article64940230.ece, dated 26.01.2022. (Accessed on June 1, 2022) (ii) https://www.thequint.com/news/business/air-india-sold-to-tatas-all-about-the-₹-18000-crore-deal-for-national-carrier#read-more, dated 9th October, 2021. (Accessed on June 1, 2022)

14.4 Explanation and Rationale for Gains to Sell Offs

Some of the main reasons why firms are forced to divest are: efficiency gains and refocus, information effects, wealth transfers and tax reasons.

Efficiency Gains And Refocus

While Mergers and Acquisitions lead to synergy, divestures can result in reverse synergy. A particular business may be more valuable to someone for generating cash flows and that someone will be paying a higher price for the business than its present value. Divestiture is also taken to enable a company to make certain strategic changes.

The competitive advantage that a company has may change over time due to changing market conditions, and as a result, a company may have to divest a particular business. In some cases, the past diversification programs of a company may have lost value, making it necessary for the company to refocus its core competencies. A divestiture helps a company to refocus on its core competencies.

Example: COVID-19 Pandemic and the Divestment Drive

According to the EY India Survey conducted in 2021 about 74% of the companies were focusing on divesting non-core assets in 24 months. Companies acknowledge the importance of divestments which allows them to focus on long term value opportunities in the core business. Around 80% of the companies were using the divestment proceeds to invest in technology to support their core operations. 53 per cent CFOs agreed that divesting assets allowed them to streamline their operations and pay attention to higher growth opportunities across the core business.

Source: https://www.business-standard.com/article/economy-policy/74-companies-plan-to-divest-non-core-assets-in-24-months-ey-india-survey-121070600915_1.html, dated 7th July, 2021. (Accessed on June 2, 2022)

Information Effects

The information that a divestiture conveys to investors is another reason for divestiture. If the information given by management is not known to investors, the announcement of divestiture can be seen as a change in investment strategy or in operating efficiency. This may be taken in a positive sense and boost share price. However, if the divestiture announcement is perceived as the firms' attempt to dispose off a marketable subsidiary to deal with adversities in other businesses. it will send a wrong signal to investors. Whether the divestiture is seen as a good or a bad signal depends on the circumstances.

Wealth Transfers

Divestiture results in the transfer of wealth from debt holders to stockholders. This transfer takes place when a company divests a particular division and distributes the resulting proceeds of the sale among, stockholders. As a result of this transaction there is less likelihood of repayment and it will have lesser value. If the total value of the firm remains unchanged, its equity value is expected to rise.

Tax Reasons

As in the case of mergers, divestitures also provide a considerable tax advantage. When a company is losing money and is unable to use a tax-loss carry forward, it is better to divest wholly or in part to realize a tax benefit. When there is increased leverage due to restructuring, a firm can have a tax shield advantage due to interest payments being tax deductible.

Activity 14.1

a. Explain bad apple theory.

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b. What are the motives for divestures?

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14.5 Divestitures

A divestiture is the sale of portion of the firm to an outside party generally resulting in cash infusion to the parent. They are generally the least complex of the exit restructuring activities to understand. Most of the sell offs are simply divestitures. The most common form of divestiture involves sale of a division of the parent company to another firm. The process is a form of contraction for the selling company and a means of expansion for the purchasing corporation.

14.5.1 Spin Offs

It is a transaction in which a company distributes to its own shareholders on a pro rata basis all of the shares it owns in a subsidiary. Hence a spin-off results in the creation of a new public company with the same proportional equity ownership as the parent company.

Spin off has emerged as a popular form of corporate downsizing in the nineties. A new legal entity is created to take over the operations of a particular division or unit of the company. The shares of the new unit are distributed on a pro rata basis among the existing shareholders. In other words, the shareholding in the new company at the time of spin-off will reflect the shareholding pattern of the parent company. The shares of the new company are listed and traded separately on the stock exchanges, thus providing an exit route for the investors. Spin-off does not result in cash inflow to the parent company.

Spin-offs are often tax-free to the parent company and to the shareholders receiving stock in the spin-off. In addition, a spin-off can be an effective method for minimizing the execution risk of a divestiture, whether due to third-party negotiations or to market conditions. Spin-offs also have smaller underwriting discounts and fees than transactions such as carve-outs. Moreover, the shareholders of the parent company receive a direct benefit by obtaining the stock of the spun-off subsidiary, as opposed to the less direct benefits of the parent company receiving the proceeds of a negotiated sale.

Tax Consideration

Spin offs consist of multiple spin offs not taxable to shareholders. To avoid ordinary income taxes the parent and the subsidiary must have been engaged in business for 5 years prior to the spin-off. The subsidiary should be at least 80% owned by the parent. And parent has to distribute the shares in the subsidiary without a prearranged plan for these securities to be resold.

Treatment of Warrants and Convertibles Securities

When the parent company has issued the warrants and the securities the conversion ratio may have to be adjusted. The spin-off may cause the common stock in the parent company to be less valuable if the deal is structured for the gain through the distribution of the proceeds in the form of special dividend. Warrant and security holders may not participate in this gain. The stock price of the parent company may fall because it will be less likely that the price will rise high to enable the securities to be converted. If this is the case, the conversion prices may not need to be adjusted as part of the terms of the deal.

Employee Stock Option Plans

Employee’s shares are held under an employee stock option plan. The number of the shares obtained also need to be adjusted after the spin-off. The adjustment is designed to leave the market value of the shares that could be obtained after the spin-off at the same level. The main goal is to maintain the market value of the shares that may be obtained through the conversion of the employee stock options.

It has grown its popularity since 1992. Its growth was partly fueled by investors’ preferences to release the internal values in the company’s stock prices.

Disadvantages of Spin-offs

- There will be considerable selling pressure from institutions and index funds immediately after the spin-off. This will have a downward pressure on the stock price in the short-term.
- As shares are distributed primarily to existing shareholders, spin-off lack liquidity.
- From the disposition proceeds the parent does not get anything.
- The parent company does not gain monetarily through the spin off.
- A spin off is often perceived as a method for getting rid of a sub-par asset by the parent.
- The new company formed by the spin off has to incur expenses for issuing new shares.

- Servicing the shareholders will lead to duplication of the activities in parent and the spun off company.

14.5.2 Equity Carve-Outs

An Equity Carve-out (ECO) is a partial public offering of a wholly owned subsidiary. Unlike spin-offs, ECOs generate a capital infusion because the parent offers shares in the subsidiary to the public through an IPO, although it usually retains a controlling interest in the subsidiary. Like spin-offs, ECOs have become increasingly popular in the last several years.

An equity carve-out involves conversion of an existing division or unit into a wholly owned subsidiary. A part of the stake in this subsidiary is sold to outsiders. The parent company may or may not retain controlling stake in the new entity. The shares of the subsidiary are listed and traded separately on the stock exchange. Equity carve-outs result in a positive cash flow to the parent company. An equity carve-out is different from a spin-off because of the induction of outsiders as new shareholders in the firm. Secondly equity carve-outs require higher levels of disclosure and are more expensive to implement.

The potential benefits of equity carve-out include:

“Pure play” Investment Opportunity: Pure plays have been in much demand by investors in recent years. An ECO, especially for a subsidiary that is not involved in the parent’s primary business or industry, increases the subsidiary’s visibility as well as analyst and investor awareness. This enhances its overall value. Investors also like ECO pure plays because separating the parent and subsidiary minimizes cross-subsidies and other potentially inefficient uses of capital.

Management Scorecard and Rewards: Management is evaluated on a daily basis through the company’s stock price. This immediate, visible scorecard can boost performance by spurring managers to make timely strategic decisions and concentrate on the factors that contribute to better shareholder value. Correspondingly, managers are also more likely to be rewarded for improved results.

Capital Market Access: An ECO typically improves access to capital markets for both the parent and the subsidiary.

Example: The Equity Carve Out of VMware by Dell

In 2020, Dell announced plans to carve out its 81 per cent stake in VMware to current shareholders, creating an independent software company with a stock

Contd. .....

market value of nearly $64 billion. Dell wanted to get the burden of huge debt through this carveout. The deal was completed by Nov 1, 2021, through a special dividend of 30,678,605 shares of VMware Class A Common Stock and 307,221,836 shares of VMware Class B Common Stock distributed to Dell's stockholders. The terms included an $11.5 billion special cash dividend helping Dell lighten a remaining net debt load.

Sources: (i) https://arstechnica.com/information-technology/2021/11/dell-spins-off-64-billion-vmware-as-it-battles-debt-hangover/?comments=1 (Accessed on June 4, 2022)
(ii) https://www.dell.com/en-us/dt/corporate/newsroom/announcements/detailpage.press-releases~usa~2021~11~20211101-dell-technologies-announces-completion-of-vmware-spin-off.htm#/filter-on/Country:en-us (Accessed on June 4, 2022)
(iii) https://news.vmware.com/releases/vmware-announces-completion-of-spin-off-from-dell-technologies, dated 1st November, 2021. (Accessed on June 4, 2022)

Process of Equity Carve-out

A typical carve-out scenario in the US begins with the parent publicly announcing its intention to offer securities in a subsidiary or division through an ECO. Since an ECO is a type of IPO, companies must file an S-1 registration statement with the SEC. Registration requires three years of audited income statements, two years of audited balance sheets, and five years of selected historic financial data. The ensuing process – including the preparation of financial and registration statements, SEC review, responses, and amendments, and offering marketing — normally takes up to six months. Once the SEC reviews and declares it effective, the parent can sell the offering, either listing the spin-off on an exchange or providing for trading over the counter.

Either the parent or the carve-out (or both) can receive the IPO proceeds. If the subsidiary sells the shares, the IPO represents a primary offering. Over 70 percent of the companies in the researchers' sample reported handling the ECO in this manner. If the parent sells the shares (known as secondary shares), it must recognize the difference between the IPO proceeds and its basis as a gain or loss for tax purposes. If the subsidiary sells the shares in the IPO, neither the parent nor the carve-out incurs a tax liability. When the ECO sells the shares, it often uses some of the proceeds to repay loans to the parent or pay a special dividend. A relatively small number of ECOs are handled as joint offerings of the parent and subsidiary.

After the IPO, all transactions between the parent and the subsidiary must be conducted on an arm's-length basis and disclosed in the registration statement. The parent typically continues to perform certain corporate services, such as investor relations, legal and tax services, human resources, data processing, and banking services, on a contractual basis.

Characteristics of ECO Candidate

Strong potential ECO candidates have some or all of the following characteristics:

Strong Growth Prospects: If the subsidiary is in an industry with better growth prospects than the parent, it will likely sell at a higher price/earnings multiple once it has been partially carved out of the parent.

Independent Borrowing Capacity: A subsidiary that has achieved the size, asset base, earnings and growth potential, and identity of an independent company will be able to generate additional financing sources and borrowing capacity after the carve-out.

Unique Corporate Culture: Subsidiaries whose corporate culture differs from that of the parent may be good ECO candidates because the carve-out can offer management the freedom to run the company as an independent entity. Companies that require entrepreneurial cultures for success can especially benefit from this transaction.

Special Industry Characteristics: Subsidiaries with unusual characteristics are often better suited to decentralized management decision-making, which may allow management to respond more quickly to changes in technology, competition, and regulation.

Management Performance, Retention, and Rewards: Subsidiaries that compete in industries where management retention is an issue and targeted reward systems are required can benefit from an ECO.

After the Equity Carve-Out

While analyzing a sample of ECOs, researchers found important increases in sales, operating income before depreciation, total assets, and capital expenditures. However, they believe these improvements owe less to newly gained efficiencies than to the carve-out's growth after going public. This is because the relative growth rates were not positive or statistically significant.

Note that ECOs, like spin-offs, are subject to a great deal of takeover activity. In the sample, 50% of the ECOs were acquired within three years. An analysis of returns for these companies suggests that ECOs that are taken over perform better than average, while those that are not perform worse than average. Nonetheless, even the latter outperform, on average, in other types of firms. Overall, it is clear that ECOs earn significantly positive abnormal stock returns for up to three years after the carve-out. Parents, on the other hand, earn negative stock returns.

As with spin-offs, these higher-than-normal stock returns are associated with better operating performance and corporate restructuring activity. As a restructuring device, ECOs clearly seem to lead to better operating performance (on average) and greater increases in shareholder value.

Disadvantages of Equity Carve-Outs

The biggest disadvantage of carve-outs is the scope for conflict between the two companies as operation level conflict occurs because of the creation of a new group of financial stakeholders by the mangers of the carved-out company. The requirements of these stakeholders differ from those of the original stakeholders. This conflict can hinder the performance of both firms. The stock performance of a company that has carved out 70 to 100 percent is better than that of a company that has carved-out less than 70 percent. This indicates that lack of separation between the two entities prevents the carved-out entity from reaching its potential.

14.5.3 Split-Off

In a split-off, a new company is created to take over the operations of an existing division or unit. A portion of the shares of the parent company are exchanged for the shares of the new company. In other words, a section of the shareholders will be allotted shares in the new company by redeeming their existing shares. The logic of split-off is that the equity base of the parent company should be reduced reflecting the downsizing of the firm. Hence the shareholding of the new entity does not reflect the shareholding of the parent firm. Just as in spin-off, a split-off does not result in any cash inflow to the parent company.

14.5.4 Split-Up

Split-up results in the complete break up of a company into two or more new companies. All the division or units are converted into separate companies and the parent firm ceases to exist. The shares of the new companies are distributed among the existing shareholders of the firm.

The term “split-up” is defined as the division of a company into two or more publicly traded comparatively substantial entities through one or more transactions.

14.6 Divestiture and The Spin-Off Process

Financial Issues of Divestitures

Many corporations review the business portfolio to determine operations that fit their core strategies. The firm’s desire to achieve more focused business portfolio can result in operations becoming strategically redundant. The decision to sell or retain the business depends on the comparison of the after tax value of the business with the after tax proceeds from the sale of the business.

The following steps have to be considered to decide whether to sell or retain the business:

i. **Calculating after Tax Cash Flows:** To decide if the business is worth selling or not, the parent must first estimate after tax cash flows of the business. To do so, the company needs the inter-company sales and the cost of services.

   Intercompany sales represent operating unit revenue generated by selling products or services to another unit. The parent may value these operations using the transfer prices, which may be some market prices. If the transfer prices do not reflect the current market prices then the intercompany revenue may depend on the transfer prices being higher or lower than actual market prices.

The cost of services reflects the legal, treasury, and audit services provided by the parent company. To reflect these factors, the cash flows of the business may be adjusted for services provided by the parent at more or less of what the business has to pay for them. Operating profits may be reduced by the amount of subsidies and increased by what the business would have to pay if it purchased comparable services offered outside the parent firm.

ii. **Estimating the Discount Rate:** Once the after tax standalone cash flow over a discount rate is determined, it reflects the risk characteristics of the industry in which the business competes.

iii. **Estimating the After Tax Market Value of the Business:** The discount rate is used to determine the market value of the projected after the tax cash flows of the business. The valuation is based on the cash flows that have been adjusted for inter company revenues and services provided to the operating unit by the parent firm.

iv. **Estimating the Value of the Business to the Parent:** The after tax Equity Value (EV) of the business as part of the parent is estimated by subtracting the market value of the business liabilities from its market value (MV) as a standalone operation.

$$EV = MV – L.$$

Deciding to sell

The decision to sell or retain the business is made by comparing the EV with after tax Sale Value (SV) of the business. The decision can be summarized as follows:

If SV > EV divest

If SV < EV retain

Timing: Timing often has a great influence on the decisions to sell a business. It should also reflect the financial environment. Selling when the business is high and the stock prices are rising and interest rates are low will fetch a high price for the unit.

Formulation of a Restructuring Plan

A restructuring or reorganization plan must be formulated and agreement between the parent and the subsidiary may be negotiated. Planning is necessary in case of a spin-off which provides a relationship between the parent and the subsidiary. The plan covers the details like disposition of the assets of the subsidiary. If the subsidiary is to keep the assets while the others are to be transferred to the parent company the plan may provide a detailed breakdown of the asset disposition. Other issues like the retention of employees and the funding of the pension and health care liabilities should also be addressed.

Approval of the Plan by Shareholders

The approval of the plan depends on the significance of the division of the transaction and the state laws. For a spinoff of a major division of the parent company, stockholders' approval may be required. The plan is submitted to the stockholders at their meeting which may be a normally scheduled shareholders meeting called to consider only this issue. A proxy statement requesting approval of the spin-off is also sent to the stockholders. And the other issues related to the meeting will be addressed in the materials submitted to them.

Example: Jindal Steel and Power Seek the Approval of Shareholder to Divest Power Business

In 2021, Jindal Steel and Power Ltd (JSPL) did not receive even a single Expression of Interest (EOI), to its advertisement and therefore, the revised offer from Worldone (which is owned by Jindal promoter group) was ipso facto selected as the winning bid by JSPL's Board. In August, it sought shareholders' approval for the revised binding offer, to divest its 96.42 per cent stake in Jindal Power Ltd, from Worldone Private Limited. Earlier, considering the concerns of various investors, JSPL obtained valuation reports from two independent valuers and appointed Y H Malegam, Chartered Accountant (ex-President of ICAI and ex-member of the Board of RBI) to review the valuation reports and provide fairness review. Finally on September 3, 2021, at the company's extraordinary general meeting (EGM) held electronically, 97.12 per cent of Jindal Steel shareholders via special resolution approved divestment of the company's power business.

Sources: (i) https://www.financialexpress.com/market/jindal-steel-and-power-jspl-shareholder-nod-divest-power-biz-should-you-vote-yes-check-what-advisors-say/2320515/, dated 30th August, 2021. (Accessed on June 23, 2022)
(ii)https://www.business-standard.com/article/companies/jspl-accepts-revised-offer-from-worldone-to-divest-96-42-in-jindal-power-121080800661_1.html, dated 8th August 2021. (Accessed on June 23, 2022)
(iii) https://www.business-standard.com/article/companies/jspl-shareholders-okay-96-42-stake-sale-in-jindal-power-for-rs-7-401-cr-121090301212_1.html, dated 3rd September, 2021. (Accessed on June 23, 2022)

Registration of the Shares

Shares issued in a spin-off must be registered with the Securities and the Exchange Commission as part of the normal registration. A prospectus, which is part of the registration statement, must be produced. It must be distributed to the shareholders who receive stock in the spun off entity.

Completion of the Deal

After the completion of these preliminary steps, the deal may be consummated. Consideration is exchanged and the division is separated from the parent company according to the prearranged timetable.

Assembling the Divestiture Team

Divestment of a business requires a team of functional experts under the direction of an experienced project manager. The first and foremost action that is to be taken after reaching the decision to divest pertains to the selection of the project manager. Along with general management skills, the project manager must also be knowledgeable in the tasks and techniques necessary to bring about a successful divestiture. People possessing these types of skills usually reside in the corporate development function. Corporations devoid of a formal corporate development activity may find qualified divestiture managers within the financial, legal or corporate planning departments. The appointment of an internal project manager and core team is absolutely critical even in those instances where an investment banker or some other intermediary is engaged by the corporation to assist in the divestiture.

After having assembled the core team, the project manager should formulate a definitive project plan and obtain approval of the intended approach from the corporate management. The project plan should include:

i. Identification of the core team and supplementary internal resources those are required.

ii. Specific tasks and responsibilities of each project participant.

iii. Identification of outside resources required, such as investment bankers, their specific tasks, and anticipated costs for their services.

iv. Timetable for each major phase of the project.

v. An overall budget of the project.

The decision regarding the use of outside resources is a critical element in assembling the project team and preparation of the project plan. Some corporations may not possess the resources and talent internally to effect a successful divestiture and, therefore, turn to investment bankers, outside law firms, or other intermediaries for professional assistance. This decision of the corporation is perfectly appropriate because selling a business is a highly specialized activity, and investment bankers, in addition to providing the necessary professional expertise that may be lacking in a selling corporation, can be particularly helpful in a number of other areas important to a successful divestiture. These are:

i. Identification of potential purchases.

ii. Approaching potential buyers on an anonymous basis.

iii. Assisting in the structuring of the deal.

iv. Assisting in the negotiating process.

The process of engaging outside resources requires careful planning and execution. Both investment bankers as well as outside law firms receive substantial compensation for their services.

Preparing the Divestiture

No two divestitures are exactly alike and one of the foremost tasks of the project team is to determine precisely what is to be sold. While some divestitures involve the sale of assets, others involve sale of legal corporate entities. When determining specifically what is to be sold, tax, legal as well as business implications are required to be considered from both the buyer's and seller's perspective.

A number of other issues, in addition to the form of the transaction, are to be considered in preparing the divestiture. Divestitures involving stand alone businesses that have no ongoing relationship with the selling corporation after the sale are the cleanest divestitures. Divestitures, however, often involve some sort of continuing business relationship. The selling corporation may be the supplier of products and/or services to the business being sold, which are critical to the future success of the business. The purchaser will, therefore, expect to negotiate some sort of a service agreement as part of the transaction. In other words, there may exist marketing or distribution dependencies between the selling corporation and the business being divested. Further, the purchaser would prefer to develop operationally viable and economically feasible agency agreements as a part of the transaction. It is, therefore, essential to carefully analyze these types of interdependencies at the very outset of the divestiture project. Major problems can often arise in the successful completion of the divestiture due to failure to understand these interdependencies and to prepare for their resolution as part of the overall transaction. The least that can happen is that discovery of critical interdependencies late in the negotiating process can seriously impact the selling price or deal structure, and may cause the buyer to relinquish the deal.

The resolution of management and human resources issues is another important matter to be considered in preparing the divestiture, and may affect the nature, timing, and valuation of the business. If key members of the management or if staff expertise are valuable assets critical to the future success of the business, these people should be retained and motivated to assure a successful sale. It is necessary to understand and address the needs and desires of these people early in the divestiture process. Special compensation and employment contracts are useful tools to be considered in some instances in order to assure management and staff cooperation in the divestiture process. The manner in which employees are handled has a role to play in deciding the price a buyer is willing to pay for the business and the net value of the deal to the seller.

Most of the effort in preparing the divestiture goes into gathering data and information necessary to present the business to prospective purchasers. Several purposes are served by this data-gathering exercise, such as:

- It enables the selling corporation to make some policy-type decisions.
- It forms the basis on which the initial selling document or offering memorandum is developed.
- It serves as the foundation for business reviews to be held with serious prospective buyers later in the selling process.

Thus, as a result of preparing a business for sale, the project team, often, ends up knowing more about the business being sold than either the management of the business or the selling corporation. In other words, successful divestitures depend upon careful preparation and intimate knowledge of the business being sold.

In preparing a divestiture, it may be helpful to review the requirements of types of data and information in the context of a typical offering memorandum. Although the preparation of a formal offering memorandum is not required for all divestitures, the data and information necessary to initiate the selling process tend to be the same. The type of selling process decides whether or not to prepare a formal offering memorandum. A formal offering memorandum is essential if the business being sold is to be offered, to a number of potential buyers, either sequentially or on a competitive bidding basis. The formality of an offering memorandum may not be necessary if the selling corporation is highly confident of knowing the buyer and that the deal will be done with that one party; however, the prospective buyer has to be provided with the same level of information.

The offering memorandum must provide sufficient details to the prospective buyers to ascertain their genuine interest in acquiring the business. It should be accurate in every respect. Errors or misstatements about the business can cause serious difficulties in consummating the transaction and may cause discussions to be terminated completely. The offering memorandum should emphasize the strengths of the business and, where possible, position these in alliance with the strategies or potential strategies of prospective buyers.

Contents of the Offering Memorandum

i. **Executive Summary:** It constitutes one of the most important parts of the document and is the key selling chapter of the document. It should emphasize the strengths and advantages of the business in addition to summarizing the business' key points, specifically including what is for sale and the reasons for sale of the business.

ii. **Buyer Procedure:** The rules as specified by the selling corporation are given, which indicate whether competitive bidding or some other process is being used. Dates for indications of serious interest and for initial bid submission are specified. Apart from stipulating when and where detailed business reviews will be held, it also sets the date for submission of final bids. In addition to describing the method of payment that the seller would accept, and outlining both acceptable and unacceptable deal structures, it also specifically indicates the persons in the selling corporations whom the prospective purchases are authorized to contact.

iii. **Background:** The business is introduced by means of historical perspective and highlights key evolutionary events till date.

The key elements of this section include history of the business; date of founding or acquisition; past and present strategic objectives; background as to why the business is being sold; background of key officers and employees, etc.

iv. **The Market:** A comprehensive picture of the industry in which the business is participating is provided in this chapter. It also provides information that emphasizes the strengths of the business being sold. The following types of data and information are used for this purpose:

- Market size, major products/services, historic growth rates.
- Industry's current position in its lifecycle.
- Product/service life cycle position.
- Projected growth rate of market and major segments.
- Customer concentration.
- Market share of business being sold and market saturation.
- Major competitors and their market shares.
- Market strengths and weaknesses.
- Domestic and international factors, etc.

v. **Products/Services:** Prospective buyers find the following types of information helpful in describing the products/services of the business being sold:

- Quality objectives.
- Pricing policies and schedules.
- Technical specifications of the product/service.
- Operating and/or production processes, etc.

vi. **Facilities and Fixed Assets:** There should be separate exhibits made to show the specific facilities and fixed assets that are to be included as part of the sale. The facilities and fixed assets should be categorized in terms of owned or leased, by location, and by key activities. This part includes an analysis of adequacy of both facilities and equipment for future growth, and contractual obligations are also indicated.

vii. **Systems and Operations:** A detailed description of the business systems and operations are included. A distinction of those systems and operations capabilities included as part of the sale and those not included in the sale is made. The section also addresses adequacy of the systems and operations, included as part of the sale, for both current and future production and delivery of products/services.

viii. **Organization, Management and Personnel:** Apart from describing the key human resource elements of the transaction process, this section also states who among the management and/or personnel are believed to be critical to the business, lists the numbers and employee categories to be made available, and describes all employee benefits.

ix. **Key Financial Information:** Sufficient financial information will be expected to be received by prospective purchasers to enable them to make a preliminary judgement regarding their interest in acquiring the business. Generally, financial history of the business pertaining to the last 5 years is provided and is shown in pro forma terms so as to reflect accurately the specific nature of the business being sold. Items such as intercompany charges for services that the selling corporation no longer intends to provide, overhead allocations from the selling corporation, and federal and state taxes, are often omitted from the profit-and-loss statement. Prospective purchasers are advised of these adjustments and instructed to insert their own estimates regarding these expenses while valuing the business. The balance sheet, also, is similarly adjusted to reflect specifically what is being sold.

The types of data and information that might be included are balance sheet and income statement for the past five years; revenues analysis (by product/service, seasonality factors, and sales policies); expense analysis (by business segment, by product/service, fixed vs variable cost, etc); and, other specific financial items (loans, receivables analysis, prepaid expenses and deferred charges, and purchase contracts).

x. **Valuing the Business:** There are several valuation techniques available, one or more of which, can be utilized by the prospective purchasers in determining their offering price for the business. A similar analysis should be conducted by the divestiture team which will serve a number of purposes such as:

- Provide the selling corporation an estimate of the market value of the business.
- Assist in identification of prospective buyers.

- Assist in comparing values of different offers in cases where more than one offer is received.
- Provide foundation for price negotiation later in the selling process.

A few of the basic valuation techniques that might be used are book value, comparables, discounted cash flow (net present value), payback, and replacement cost method.

The valuation methodologies must be modified to reflect the special circumstances of each prospective purchaser such as considerations of market forces, competition, effect of the acquisition on the buyer's base business, etc.

The outcome of activities pertaining to the valuation and pricing of a business are thus influenced by business, market, financial, and other assumptions. The seller's knowledge and understanding of these with regard to specific purchasers decides the success of a divestiture.

The Selling Process

The four key elements that constitute the selling process are: (i) identification of prospective buyers, (ii) selection of the type of selling process to be utilized, (iii) business reviews, and (iv) negotiation of the transaction and closing the deal.

Identifying Potential Buyers

Identification of potential buyers by the project team initiates the selling process. All activities prior to this step such as the divestment decision, organization of the project team, and preliminary work in preparing the divestiture, have been internal to the selling corporation. The external process begins with the identification of the potential buyers.

The decision to engage or not to engage an investment banker or some other intermediary to identify prospective buyers is considered or reconsidered at this stage in the divestiture process. The decision to use an intermediary depends on the selling corporation's experience with divestitures, confidence it has in its divestiture team, and the in-house knowledge it has regarding potentially interested buyers. Investment bankers, similarly, can help in the identification of prospective buyers by knowing the types of businesses their clients and their competitors are seeking to acquire, and by having the capability to identify potential acquirers who have not been active in the market, but for whom a particular business may be a good strategic fit. Investment bankers can also qualify potential leads anonymously since usually the selling corporations do not like the prospect of having the business they are divesting characterized as having been widely "shopped".

Potential buyers, in general, can be categorized into direct competitors, companies in similar types of businesses, buyers who want to broaden their product lines, buyers looking for operational economies of scale, suppliers and customers, and others such as companies seeking diversification, holding companies, investment groups, and venture capitalists.

Selecting the Selling Process

There are, basically, four different methods of selling a business, each having its own advantages and disadvantages. The selection of the selling process depends on the nature of the business being sold and the objectives of the selling corporation. The four methods are given as under:

i. **Competitive Bidding:** This process helps produce the highest bidder and the best deal structure for the selling corporation, if correctly managed. The process of competitive bidding is most effective when 5 to 10 potential buyers have been identified and when the potential buyer list contains diverse strategic objectives.

   Disadvantages of utilizing competitive bidding include the unlikely possibility of an unsuccessful sale that can adversely affect the value and near term viability of the business. Customers as well as the employees view it as a lack of commitment to the business on the part of the selling corporation. Competitors stand to gain significant advantage in such a circumstance. If a competitor has been a potential buyer, it gains significant knowledge about the business, which it can use against the business in the marketplace. Divestitures usually fail due to poor initial planning of the divestiture or due to a badly managed selling process.

ii. **Sequential Selling:** This method involves establishing a priority list of potential buyers after the identification of prospective purchasers. The selling corporation offers the business to what it believes to be the most likely potential buyer and, if unsuccessful, moves down the pre-established priority list. If successful with the very first potential buyer, this process is obviously a much easier process to manage than competitive bidding. However, there is no market frame of reference available for the price and deal structure that is negotiated and the seller can never know if a better deal could have been struck with someone else. This is an acceptable selling method, if the primary objective is to get out of business with secondary importance being attached to the price and deal structure. However, if the pre-established priority list itself is faulty, it requires the business to be offered to a number of prospective buyers, in sequence, giving the business an image of having been widely "shopped" and rejected. This seriously impairs the potential value of the business.

iii. **One Buyer:** If, in the process of identifying potential buyers, only one prospective purchaser can be identified, the seller is left with little negotiating leverage. The resulting transaction is hence not likely to meet all of the seller's objectives. In cases where there is a known anxious buyer, the seller should ascertain the value that this buyer sees in the business, and should try and identify other buyers who might see the same value as well. If successful in doing so, a one-buyer divestiture might be transformed into a competitive bidding transaction thereby resulting in significantly better price and terms than could have been possible in a one-buyer transaction.

iv. **Going Public:** Divestiture of a business through an initial public offering is completely different from selling it through a private transaction. In order to go public, the entity to be sold must have an established history of profits and growth or a proprietary product or service on which a public market price can be based. Also, there should be existing favorable market conditions in terms of appetite for initial public offerings. When considering the divestiture of a business through an initial public offering, even the most sophisticated selling corporations require the assistance of investment bankers.

Business Reviews

In the competitive bidding type of selling process, business reviews are held only for serious prospective buyers after receipt of initial bids and clarifying discussions. In a sequential sale, the business review is held only for the prospective buyer enjoying top most priority and only when discussions are terminated with that buyer, the process is started all over again with the buyer who figures next on the priority list. Similar is the case with one-buyer transaction, however, if the discussions terminate, the selling corporation has only two options – either to keep the business or to turn the transaction into a competitive bidding deal by identifying other buyers who can be shown the same value in the business as was seen by the initial one buyer.

Business reviews generally last for one or two days during which prospective buyers are given detailed presentations on all aspects of the business, and are also, often, given the opportunity to visit the company's facilities.

The primary objective of business reviews is to provide sufficient information to prospective purchasers, which is necessary for the preparation of firm offers for the business. In case of competitive bidding, business reviews enable prospective purchasers to refine their initial bid after the review. In case of sequential selling, business reviews either reinforce the interest of the priority purchaser, thus increasing the probability of consummating the transaction, or lessen the interest, causing the selling corporation to move on to the next potential purchaser on the priority list. In a one-buyer type of selling process, business reviews tend to blend with the negotiating process since both the parties are aware of the fact that there is only one potential buyer. Information exchange, therefore, invariably includes discussions about the deal structure and the purchase price.

Negotiating and Closing the Transaction

A diverse set of skills and very thorough preparation is required for negotiating and closing a divestiture transaction. Facts and information alone are not sufficient for the purpose. A good negotiator knows when to be tough and when to be flexible on a specific point. The objective of good negotiators is to maximize price and optimize the deal structure.

a. **Preparing for Negotiations:** Prior to initiating negotiations, the negotiating team should identify all the major points that are to be discussed and should evaluate these in the context of the overall objective of the divestiture. The team should prepare the opening position, preferred position, fallback position and the deal breakers for each point in the negotiation.

   Before beginning the negotiations, a role-play of the forthcoming negotiations will facilitate identifying the weaknesses in the positions established for each point and enable the members of the negotiating team to polish their roles.

b. **Conducting the Negotiations:** There are several steps involved in actual negotiations. The first step deals with reaching an agreement in principle. This process may result in a term sheet, which is used as a basis for negotiation and preparation of the definitive purchase agreement or may simply result in the parties agreeing to sign a formal agreement in principle once all major points pertaining to the negotiation are believed to be resolved.

c. **Due Diligence Examinations:** After having reached a consensus and documenting an agreement on the major points of the transaction, the purchaser expects to conduct a due diligence examination of appropriate books, records, and facilities of the business to verify the financial statement and other information. Any kind of misrepresentation, if discovered by the purchaser, can void the agreement or cause renegotiations of the price and deal structure.

d. **The Purchase Agreement:** The next step involves the preparation of the definitive purchase agreement and any supplementary agreements that may be required. The process involves numerous drafts and revisions prior to the closing. Preparation of agreements and the closing documents is greatly facilitated if the divestiture is planned well by the selling corporation and both the parties in good faith negotiate the business issues.

e. **Closing the Transaction:** Usually, closing of a transaction involves signing of agreements, exchanging of the proceeds of the transaction, and may be a glass of champagne to celebrate the success of the deal. It is however essential to observe caution. To quote Yogi Berra, “It ain’t over ‘til it’s over.” Simply speaking, a seller can never relax until the documents are signed and proceeds change hands. A high level of confidence after reaching an agreement in principle is a sure signal for disaster. A feeling of comfort about the last draft of the purchase agreement can result in great disappointment, and if there is insufficient attention to detail while preparing the closing documents, it can lead to deferred closing of the deal, or worse, no closing at all.

Activity 14.2

a. What is Spin off?

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……………………………………………………………………………

b. What are the four key elements that constitute the selling process?

……………………………………………………………………………

……………………………………………………………………………

Check Your Progress -1

1. Business firms in their pursuit of growth, engage in a broad range of restructuring activities. Divestiture is one among them. The term 'divesture' involves which of the following activities?

   I. Distribution of shares to the existing shareholders of the parent company.

   II. Sale of a portion of the firm through an equity offering to outsiders.

   III. Sale of a portion of the firm to an outside third party in consideration of cash or equivalent.

   (a) Only (I) above

   (b) Only (II) above

   (c) Only (III) above

   (d) Both (I) and (III) above

   (e) All (I), (II) and (III) above.

2. APSEB has transferred its two businesses; Power generation and Transmission & distribution to two separate companies called APGENCO and APTRANSCO. APSEB cease to exist as a result of the

   (a) Split-Offs

   (b) Split-Ups

(c) Divestiture

(d) Spin-Offs

(e) Assets sale.

3. Which of the following statements is **not true** with respect to spin-offs?

   (a) There will be a possibility for considerable selling pressure from institutions and index funds immediately after the spin-off

   (b) The new company formed by the spin off need not incur expenses for issuing new shares

   (c) Servicing the shareholders leads to duplication of the activities in parent and the spin-off company

   (d) A spin off is often perceived as a method for getting rid of a sub-par asset by the parent

   (e) As shares are distributed primarily to existing shareholders, spin-off lack liquidity.

4. Business firms in their pursuit of growth, engage in a broad range of restructuring activities. The term 'split-up' involves which of the following activity?

   (a) Distribution of shares to the existing shareholders of the parent company

   (b) Sale of a portion of the firm through an equity offering

   (c) Sale of a portion of the firm to an outside third party in consideration of cash or equivalent

   (d) Breaking up the entire firm in series of spin-offs

   (e) An agreement of providing certain resources to achieve the business goal.

5. Which of the following factors of divestiture suggests that losers should be quickly eliminated before they can affect the morale of the management teams at the other profitable divisions of the company?

   (a) Market Saturation

   (b) Shrinking Margins

   (c) Poor Business Fit

   (d) Bad Apple Theory

   (e) Management Deficiencies.

14.7 Summary

- Sell-offs and divestitures are an integral part of corporate restructuring. Large companies with diversified business interests may divest some of their businesses to focus on a few core businesses. Firms can sell assets of an entire company or of some business unit, such as a subsidiary, a smaller business unit or a product line.
- Divestitures are undertaken for two reasons: the assets are worth more as part of the buyer's organization than as part of the seller's; and or the assets are actively interfering with other profitable operations of the seller. The other reasons for the divestitures are efficiency gains and refocus, information effects, wealth transfers and tax reasons.
- A divestiture is a sale of portion of the firm to an outside party. The sale finalized is usually in cash, marketable securities, or combination of both.
- An equity carve out is the variation of the divestiture that involves the sale of the equity interest in a subsidiary to outsiders. In this, a new entity is created with stockholders that may be different from that of the parent selling company.
- Spin-off involves a creation of a new legal entity. New shares are issued but they are distributed to the existing stockholders on pro rata basis.
- In split offs, some of the stockholders in the parent company are given shares in a subsidiary. In split ups the entire firm is broken up into a series of spin offs. As a result the parent company no longer exits.

14.8 Glossary

Equity Carve Out: It is a type of divestiture and is different to spin off. It resembles the IPO of some portion of equity stock of a wholly owned subsidiary by the parent company. Some of the subsidiary's shares are offered for sale to general public for increasing cash inflow without losing control. This is also called split off IPO.

Sell Off: General term for divestiture of part or all of a firm by any one of a number of means, e.g., sale, liquidation, spin-off and so-on.

Spin Off: It is a kind of a demerger where an existing parent company distributes on a pro rata basis all the shares it owns in a controlled subsidiary to its own shareholders by which it gains effect to make two of the one company or corporation. There is no money transaction, subsidiary's assets are not valued, transaction is not treated as stock dividend and tax free exchange. Both the companies exist and carry on business. It does not alter ownership proportion in any company.

Split Off: This occurs when equity shares of a subsidiary company are distributed to some of the parent company's shareholders in exchange for their holdings in parent company.

Split Up: It is a diversion of a company into two or more parts through transfer of stock and parent company ceases to exist.

14.9 Suggested Readings / Reference Material

1. Richard Brealey and Stewart Myers and Franklin Allen and Alex Edmans (2023). Principles of Corporate Finance. 14th Edition, McGraw Hill India
2. Stephen A. Ross, Randolph Westerfield (Author), & Jordon (2018). Fundamentals of Corporate Finance. 12th edition, McGraw Hill College
3. Prasanna Chandra (2020). Strategic Financial Management: Managing for value creation. 2nd edition, McGraw Hill
4. Hubbard & Obrien (2022). Money, Banking and Financial System. 4th edition, Pearson Education
5. Kalyani Karna (2019). Strategic Financial Management. 1st edition. Corporate Plus Publications Private Limited
6. Edward I Altman (2019). Corporate Financial Distress, Restructuring and Bankruptcy. 4th edition, Wiley
7. Rick Mann & David Tarrant (2020). Strategic Finance for Strategic Leaders: The First Five Tools. Clarion strategy publishing
8. Sheeba Kapil (2021). Financial Valuation and Modelling. Wiley

14.10 Answers to Check Your Progress Questions

1. **(e) All (I), (II) and (III) above.**

   Divestiture' involves distribution of shares to the existing shareholders of the parent company, sale of a portion of the firm through an equity offering to outsiders and sale of a portion of the firm to an outside third party in consideration of cash or equivalent.

2. **(b) Split-Ups**

   APSEB ceases to exist as a result of the Split-Ups.

3. **(b) The new company formed by the spin off need not incur expenses for issuing new shares**

4. **(d) Breaking up the entire firm in series of spin-offs**

   'Split-up' involves breaking up the entire firm in series of spin-offs.

5. **(d) Bad Apple Theory**

   Bad Apple Theory suggests that losers should be quickly eliminated before they can affect the morale of the management teams at the other profitable divisions of the company.

Unit 15

Joint-Ventures

Structure

15.1 Introduction

15.2 Objectives

15.3 Strategic Alliances

15.4 Joint Ventures

15.5 Managing International Joint Ventures

15.6 Reasons for Failure of Joint ventures

15.7 Summary

15.8 Glossary

15.9 Suggested readings/reference material

15.10 Suggested Answers

15.11 Terminal questions

You can get into any business by leveraging joint ventures.

- Ehab Atalla

15.1 Introduction

Let's learn more on what joint ventures are and how they can be a great strategic advantage to businesses. In today's fast changing competitive world many firms particularly large and diversified organizations are constantly reviewing various ways to increase the shareholder value by changing the composition of their assets, equity, liabilities and operations. Business alliances or strategic partnerships represent an attractive alternative to mergers and acquisitions. Business alliances take the form of a variety of different legal structures.

The alternative to M&A is 'strategic partnership' wherein two or more firms develop a relationship that combines their resources, capabilities and core competencies for certain business purposes. This chapter explores the potential of various means to maximize shareholder's value without resorting to mergers and acquisitions. There are four major types of strategic partnerships: (i) Strategic alliances, (ii) Long-term contracts, (iii) Equity partnerships, and (iv) Joint ventures.

15.2 Objectives

After going through the unit, you should be able to:

- List alternatives to Mergers and Acquisitions
- Discuss Strategic Alliances and Joint Ventures

- Explain rationale behind Joint Ventures and issues to be considered in a Joint Venture Agreement
- Illustrate managing International Joint Ventures
- Examine reasons for Failure of Joint Ventures

15.3 Strategic Alliances

In this form of strategic partnership, two or more companies jointly share resources, capabilities, or distinctive competencies to achieve some business goals. These alliances may be aimed at world market dominance within a product category. While the partners cooperate within the boundaries of the alliance relationship, they often severely compete in other parts of their business operations. Each firm remains a distinct entity, separate from its strategic alliance partner.

Different Types of Strategic Alliances

Some of the more common types of alliances include: (i) Partnering with Supplier, (ii) Pooled Purchasing, (iii) Partnering with Distributors, and (iv) Franchising and Licensing Contracts.

i. **Partnering with Suppliers:** Alliances are formed between a firm and its suppliers to boost quality, reduce cost and increase speed by establishing long-term relationships. This partnering enables a supplier to develop the desired parts or services at a specified level of quality or cost.

ii. **Pooled Purchasing:** It is the alliances between firms for purchasing identical products by combining separate purchasing volumes to increase their leverage on suppliers.

iii. **Partnering with Distributors:** These are alliances between a company and one or more distributors to provide access to new markets (domestic/foreign), or strengthen a position in existing markets.

iv. **Franchising and Licensing Contracts:** Alliances are formed to provide long-term business assistance or to offer access to a new technology or product:

    - R&D partnerships and research consortia with other private companies.
    - Even includes alliances between the company and government agencies or universities.

Why do Companies form Strategic Alliances?

The following are the several reasons that compel/encourage companies to form strategic alliances:

i. **Globalization of Demand and Supply**

    - Major markets have come up in Europe, Japan, and in newly industrialized countries in Asia and Latin America.

- Uniform demand for same products because of increasing equivalency of literacy rates, higher mobility of people, and mass media communications.
- Trends in achieving economies of scale by focusing on production of components or end products in the same location.
- Trends in shifting production facilities from one place to another to exploit differentials in resource costs and wages.

ii. **Rapid Change in Technology**

- Growing technological equality among countries.
- The level of technology needed to compete in the industry often exceeds the financial or technical capabilities of the individual companies.

Example: KPMG and Forcepoint Strategic Alliance

In October 2021, KPMG in India and Forcepoint announced a strategic alliance to offer information protection services to businesses in India. The alliance will bring together KPMG in India's industry leading cyber security services along with Forcepoint's world class data-first cybersecurity innovations which enable enterprises and government agencies to protect their critical data anywhere it is accessed. Forcepoint was credited for its unique vision of data-first SASE (Secure Access Service Edge) and KPMG in India had rich experience in offering cyber security services to the corporates. Their alliance helped corporates in protecting and securing their information systems in today's digital first environment.

Source: https://home.kpmg/in/en/home/media/press-releases/2021/10/kpmg-india-forcepoint-strategic-alliance-protection-service.html dated October 18, 2021, Accessed on 1.7.2022

iii. **Pressures on Individual Companies**

- Pressure to increase/protect market share of the firm by expanding into new domestic/foreign markets.
- Pressure to manufacture products beyond the existing technological capabilities of the firm.
- Pressure to accelerate product development and bring technology to the market quickly.
- Pressure to decrease the cost of products and boost product quality and usefulness to the consumers.

iv. **Other Reasons**

- To focus on the firm's core competencies and outsource other functions. A core competency is a key competitive advantage of the firm.
- To gain access to complementary human, physical and financial resources.

- To gain access to technical expertise, cheap manpower, manufacturing capabilities, raw materials and finances.
- To gain access to new domestic and foreign markets.
- To access established distribution channels to preclude market entry barriers.
- To direct limited capital investment funds to the areas that the firm does best.

Long-Term Contracts

In this form of strategic partnership, two or more firms enter a legal contract for a specific business purpose. Long-term contracts are common between a buyer and a supplier. Many strategists consider long-term contracts more flexible and less inhibiting than vertical integration. It is usually easier to walk out from an unsatisfactory long-term contract than a joint venture.

15.4 Joint Ventures

In a joint venture, two or more firms join their hands to form a separate, independent organization for strategic purposes. Such partnerships are typically focused on a specific market objective. As part of the joint venture agreement, ownership, operational responsibilities, and financial rewards and risks are allocated to each participant. Each partner in the joint venture retains its own corporate identity and independence. Joint ventures may run from a few months to a few years, and often involve a cross-border relationship called as "cross-border joint ventures".

- The joint venture entity is manned by a separate management team.
- The joint venture may own its assets independently from its parent firms.
- Partner firms play an active role in the joint venture's strategic decisions.
- The joint venture is the vehicle of choice for international market entry in countries which do not permit wholly owned subsidiaries.

Characteristics of Joint Ventures as per Contract Law

As per the contract law, joint ventures are often described as possessing the following characteristics:

- Contribution by partners of money, property, knowledge, efforts, skill or other asset(s) to the common project.
- Joint property interest in the subject matter of the venture.
- Right of mutual control or management of the enterprise.
- Expectation of profit or presence of adventure.
- Right to share the profit.
- Usual limitation of the objective to single undertaking or ad hoc enterprises.

How Strategic Alliance Differs from Joint Venture

A strategic alliance is simply a business-to-business collaboration where two or more corporates share resources, capabilities or distinctive competencies to achieve some business purpose. These alliances are formed for joint marketing, joint sales or distribution, joint production, design collaboration, technology licensing and research and development. A strategic alliance is a more flexible concept than a joint venture and refers to numerous arrangements between firms whereby they work jointly for varying periods of time to accomplish a specific business goal. The central idea behind this type of alliance is to minimize risk while maximizing the leverage.

On the other hand, in a joint venture, two or more organizations set-up a separate, independent organization for strategic purposes. Such partnerships are normally focused on a specific market objective. They may continue for few months/years and often involve a cross-border relationship. One firm may buy a percentage of the stock in the other partner but not a controlling share. An organizational entity usually is not created with a strategic alliance, whereas it often is in a joint venture.

15.4.1 Rationale behind Joint ventures

Joint ventures are generally not formed as a result of one firm making a passive investment in another. Fund alone does not form the basis of a successful joint venture. The basis of this union can include several other factors such as:

Pooling of Complementary Resources

With the formation of joint ventures, firms can share each other's resources such as technology, production facilities, inventories, distribution channels, etc. It enables companies involved to keep the pace with the fast changing business environment. With resources of all the partners being pooled, they can have access to sufficient resources that will help them to innovate in all spheres such as technology, product quality, etc.

Example: Plastic Legno and Reliance Brands Ltd JV

Plastic Legno SPA was owned by the Sunino group which was making toys in Europe for more than 25 years. It started its India business in 2009 in order to develop a production hub that would cater to global markets, but more importantly to the fast evolving and growing Indian market. Reliance Brands Ltd (RBL) had a strong play in the toy industry with its portfolio of Hamleys, the British toy retailer and homegrown toy brand – Rowan, making RBL one of the leading toy distributors. Both these companies signed a joint venture arrangement in June 2022 wherein RBL will have a 40% stake in Plastic Legno

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SPA's toy manufacturing business in India. Plastic Legno's experience in toys manufacturing and RBL's commercial outreach will complement each other and the joint venture company will achieve greater heights and success.

Source: https://www.business-standard.com/article/companies/reliance-brands-signs-jv-to-acquire-40-stake-in-toy-maker-plastic-legno-122060101155_1.html dated June 2, 2022, Accessed on July 1, 2022

Access to Raw Materials

Joint ventures help companies to gain access to the raw materials available in the new place, i.e., the place where the other partner carries its business/production functions. It enables companies to mitigate the risks like scarcity of raw material, irregularity in raw material supply, etc.

Access to New Markets

Accessing new markets is often a costly affair involving huge outlays in terms of upfront marketing costs such as advertising, promotion, warehousing, and distribution expenses. With the formation of joint ventures, companies can use the other partners' marketing/distribution channels and hence can reduce the marketing costs to a significant extent. This also helps companies to gain access to new markets (partners' markets) that in turn boosts the overall sales performance.

Diversification of Risks

Cost of rolling out new products can be very high in terms of development and manufacturing costs. By sharing these costs with other partners, the capital sum that any single partner has at risk is reduced. Further, risk may be minimized by reducing the chance or probability of taking poor business decisions by allying with those who have access to better information or proprietary knowledge. Risk of missing lucrative business opportunities can also be minimized by having access to ample resources required to exploit apparent opportunities at the right time.

Economies of Scale

A joint venture can produce economies of scale, take advantage of complementary assets or specialized skills and acquire new technological or managerial capabilities. Sometimes separate operations may be economically wasteful.

Cost Reduction

'Cost reduction' is also one of the basic rationale behind joint ventures. Cost reduction through joint ventures may come about in many ways such as purchaser-supplier relationships and combining/sharing facilities in joint manufacturing operations.

i. **Purchaser-Supplier Relationships:** Companies across the globe, starting from retailers to computer hardware manufacturers are increasingly building relationships with providers of 'logistic' services. These alliances usually cover both transportation and warehousing services and utilize a single provider for these services. This helps the companies to reduce their transportation and warehousing costs to a significant extent.

ii. **Joint Manufacturing:** Firms may also opt to combine their manufacturing operations in a single facility with the potential to meet the production needs of all parties involved in the venture. By setting up a large facility, firms can mutually benefit from lower production costs resulting from spreading fixed cost over larger volume of production units. Companies can obtain identical benefits by closing their production facilities and meeting their production needs by purchasing at favorable prices from other parties with substantial unutilized capacity.

Tax Shelter

Though tax considerations should never push up the transaction of a joint venture, failure to recognize their different implications can have adverse financial consequences for all the partners involved. The key tax concerns of the joint venture partners will be to avoid the recognition of taxable gains on the formation of the joint venture and to lessen taxes imposed on the distribution of their incomes.

Equity Partnerships

This partnership involves a company's purchase of stocks (mostly 5-10%) in another company or a two-way exchange of stock by the two companies. The minority investor may also have an option to buy a larger stake. Sometimes, it is often referred to as a partnership because of the exchange of equity ownerships. But, in the legal sense, it is considered as a partnership. These partnerships are usually formed in market alliances, purchaser-supplier relationships, technology advancements and in circumstances where a larger company makes an investment in a smaller company to ensure its continued financial viability. Companies form these partnerships when there is a necessity to have a close strategic relationship (long-term), to prevent a competitor from making an alliance or acquisition, or as a 'lead-up' to an expected merger or acquisition.

15.4.2 Key Issues in the Joint Venture

Key issues to be considered in the joint venture agreement are given below:

i. **Management Issues**

- The agreement should be clear in terms of arrangements for managing the joint venture company.
- Clear assignment of responsibilities to all the full-time directors.
- Board of Directors should have a higher representation of the majority shareholder; chairman should be nominated by the majority shareholder.

ii. **Financing Issues**

- Provision for funds on a regular basis.
- Meeting day-to-day funds (working capital needs).
- Losses incurred by the joint venture.
- Expansion and development cost.
- Proportion of contribution of the partners vis-à-vis the original investment.
- Issues related to the inability of the minority partner to subscribe to future expansion costs.

iii. **Issues Regarding Transfer of Shares**

- Degree to which the participation of the partners is transferable in terms of shareholding.
- Issues related to pre-emptive rights in case of transfer of shares to a third-party.
- Transfer of shares if the joint venture winds up in case one of the parties intends to sell the whole shares.
- Intra-group transfer issues.
- Price of shares in case of transfer.
- Issues related to naming the joint venture in case of change in shareholding pattern.
- Issues relating to transfer of shares in case one of the parties turns out to be insolvent.
- Transfer of shares if one of the partners becomes liable for breach of the joint venture agreement.

iv. **Issues Related to Termination**

- Recognizing situations in which the joint venture is automatically terminated or cases where one of the partners is entitled to terminate the joint venture.
- Preparation/arrangements for termination.

v. **Contingency Issues**

- Alternation in government regulations and policies.
- Changes in competition scenario and market forces.
- Requirement of more funds.

vi. **Commercial Issues**

- Limitation and scope of activity/geographical location and spread, offices under consideration, operation of office activities, profit centers, etc.
- Rights of exports and imports.

15.4.3 Partner Selection for the Joint Venture

Some of the important factors that should be kept in mind while selecting a partner are:

- The firm in search for a partner must meet a number of potential companies and discuss the plans with them.
- The firm should prepare a list of criteria for evaluation of these partners – this could include both tangible and intangible factors. In addition, weightage must be given to each parameter.
- Local consultants can be contacted; their inputs or suggestions may help to select the right partner.
- Proper identification of both short-term and medium-term goals of the company vis-à-vis that of the future/potential partner.
- Both the participants in the joint venture should bring near-equal strengths; and both should gain from the deal.

With regards the partner contribution towards the joint venture, some of the important factors that have a say on the operation of the joint venture are given in the following table:

Table 15.1: Success and Failure Factors in Joint Ventures

Success	Failure
• Understanding • Transparency • Shared objectives • Faith or trust • Foresightedness • Professional thinking	• Contradictory views or perceptions of the domestic office and foreign office (cross-border joint ventures) • More than two partners • Change of top-level management/owners on the either side • Lack of proper communication

Source: ICFAI Research Center

15.4.4 Advantages and Disadvantages of Joint Ventures

The advantages from entering a joint venture include:

- Achieving economies of scale in some aspects of marketing or the procuring of production inputs;
- Flexibility in obtaining capital for expansion and other purposes;
- Guaranteed market for the output;
- Guaranteed source of supply for raw material;
- Achieving a greater degree of quality and quantity control;
- Maintaining a steady buyer;
- Achieving stronger bargaining power;
- Spreading market risk between the cooperative and the corporation; and
- Sharing in growth and profits of a branded product.

The disadvantages from entering into a joint venture are:

i. Loss of effective management control, and

ii. May lead to exchange of competitive-sensitive information.

15.5 Managing International Joint Ventures

Though international joint ventures are riskier, they are also potentially most rewarding. International joint ventures, unmistakably, not only help the participants to boost their earnings but also increase organizational learning and help gain access to new markets. In addition, they become the basis for new partnerships and collaborations in the future.

With the waves of globalization on the rise and with the convergence of new technologies and regulatory and institutional changes during the past thirty years, markets the world over have created new opportunities for international collaboration between companies. The growth of international joint ventures has intensely affected international business. It is now vital to the quest of competitive advantage. But, international joint ventures remain difficult to handle, in part because of the difficulty of matching goals and objectives of firms situated/headquartered in two or more nations.

What is an International Joint Venture?

A joint venture is known as international if at least one of the partners is headquartered outside the country of operation, or if the venture has active presence in more than one country. Thus, put simply, an international joint venture can be defined as, "inter-company alliance over an international economic space and time for the achievement of mutually agreed business goals."

According to the above definition, a number of integrative relationships between companies such as M&As, subcontracting agreements, licensing and franchising, etc. are not considered as international joint ventures. On the other hand, strategic networks, strategic alliances and other strategic unions that satisfy the conditions of the definition qualify for international joint ventures.

Why do Companies Form International/Cross-border Joint Ventures?

MNCs routinely formed joint ventures and strategic alliances to enter the markets of countries with restrictions on foreign investments. However, over the recent years, strategic alliances have been driven by rapidly changing market conditions. During the past two to three decades, the number of international joint ventures, both horizontal and vertical, has increased significantly. Increased global competition, rapid change in technology, high cost R&D, change in government policies in different nations, etc. are some of the factors that have stimulated/compelled companies to form cross-border joint ventures. According to a recent survey conducted on Danish companies, the motives for international joint venture are as follows:

- Market penetration/expansion.
- Retaining market share/position in the existing market.
- Achieving economies of scale.
- Sharing/exchanging existing technology.
- Internationalization or expansion internationally.
- Sharing Research and Development (R&D) costs.
- Develop new technology.
- Alliance to adhere to government policy.
- Alliance with competitor(s) to avoid competition.
- Forming alliance with suppliers/marketing channels.
- Product diversification.
- Diversification of risk associated with investments.
- Payback on investment.

Example: New Logistic Brand Movin – A JV of UPS and Interglobe Enterprises

United Parcel Service (UPS) is an Atlanta, US based logistics giant company. Interglobe Enterprises is a travel and hospitality conglomerate operating in India. Both these entities joined hands and formed a joint venture and announced it in May 2022 at New Delhi. The joint venture will offer a new logistics service to the corporates in India under a new brand called ‘Movin’. This service will offer various specific solutions like particular day specific delivery, express specific time definite delivery and similar logistic solutions to corporates. Such specific logistic solutions will help the corporates to

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synchronise themselves with global value chain in terms of logistics. Backbone of these services and the uniqueness of the brand Movin will be the technology based platforms which the joint venture claims will offer speed and reliability to the corporates. The logistic solutions will encompass land, air and water based movement support so that the flow of logistics remains unhindered and seamless. The joint venture claims that their solutions will enhance its customers' business and uplift the economy in general through better employment opportunities.

Source: https://economictimes.indiatimes.com/small-biz/trade/exports/insights/interglobe-enterprises-and-ups-launch-logistics-brand-movin-for-indian-market/articleshow/91812955.cms dated May 27, 2022, Accessed on July 1, 2022

Dimensions Critical to the Success of International Joint Ventures

The difficulty in managing international joint ventures lies in their "comparatively low success rate". International joint ventures demand strategists to concentrate on four important decision-making dimensions such as:

a. Choosing the right partner.

b. Governance and control.

c. Performance.

All the four factors are important and play their own role in the success of the venture. Each of the four factors influences the other factors in the development of an international joint venture. The following paragraphs explore some of the key management decisions involved in each of the four dimensions.

Choosing the Right Partner

A company can profit from a cross-border joint venture if the partner it joins its hands with has the relevant skills to help it achieve its strategic goals. Selecting a right partner is important for it makes the deal smoother, improves strategy-environment configuration for both companies and reduces uncertainty or risk. In a broader sense, partner selection is based on two criteria:

i. Task-related criteria.

ii. Partner-related criteria.

Task-related Criteria

These are strategic competencies the company gets access to through the prospective partner. These criteria include knowledge about product, market, regulation, distribution channel, etc. Following are the task-related criteria that a company considers before it joins its hands with a cross-border partner.

- Access to local market knowledge.
- Access to links with key suppliers/borrowers.
- Accesses to marketing/distribution channels.

- Access to product-specific knowledge.
- Access to local regulatory knowledge.
- Access to technology.
- Access to finances/capital.
- Access to production techniques.
- Access to raw material and other important production inputs.

Partner-related Criteria

Partner selection criteria are the organizational features that decide the desirability of the venture. These criteria include collaborative know-how, how intimately the partner’s business relates to the company’s business, and the size of the partner company. Following are the partner-related criteria a company considers before it forms a joint venture with another company.

Partner-related Criteria:

- Trust between top management teams,
- Relatedness of partner business,
- Partner’s goodwill and reputation,
- Partner’s financial condition,
- Partner’s company size,
- Past favorable experience with partner,
- Distribution capabilities,
- Partner’s international exposure and experience,
- Past experience in technology application and adoption,
- Potential for new technology development,
- Partner’s technological sophistication, and
- Partner’s ability to negotiate with local government.

Partner selection plays a key role behind international joint venture formation. The success of international joint ventures depend on the criteria “how best is the partner the company chooses”. A company’s motives for constituting international joint venture will determine the type of partner it joins with, according to both task-related and partner related criteria. The criteria listed above also show the importance of the sociological dimension of international joint venture formation. Some of the most important criteria are connected with factors such as access to knowledge, status, reputation and trust.

Governance and Control

Once a partner has been chosen and a contractual agreement negotiated, focus gets shifted to the integration and governance of the joint venture. Since the contractual agreement specifies the type of relationship entered into, the choice of partner and the initial motivation have a profound effect on the governance and control of an international joint venture. As per the transaction cost perspective, intermediate asset specificity and low uncertainty may lead to a preference for hybrid forms of governance over both arm's-length transactions and internalization. Hence, international joint ventures can be regarded as an intermediate organizational form between market and hierarchy.

There too exists a relationship between levels of integration and degrees of control. Usually, the deeper the integration – as, for example, with a merger – the greater the level of control. With joint ventures, the distinction between a non-equity joint venture and an equity joint venture illustrates this relationship. A non-equity joint venture is an agreement between partners to co-operate in some way without creating a new, joint entity. On the other hand, an equity joint venture includes the setup of a newly incorporated entity in which each of the partners has an equity position. Partners in an equity joint venture usually expect representation on the board of directors and a proportional share of dividends as compensation.

The type of joint venture entered into vis-à-vis its level of integration and control, is determined by the overall objective and the partner's characteristics. To cite an example, if a firm wishes to enter a developing market such as India, China, etc. and needs access to local regulatory and cultural knowledge, then an equity joint venture might be most appropriate. It could then retain control and ensure that local knowledge is a feature of the joint venture. On the other hand, if a firm intends to sell a patented product in a developed market, then a licensing agreement might be more beneficial. The selection of governance structure along with the other two dimensions, determines the overall performance of the international joint venture.

Performance

It is quite difficult to estimate the performance of an international joint venture. It has been linked to objective financial parameters such as profitability, growth and cost status, survival, duration, instability of ownership and re-negotiation of the alliances. But, international joint ventures may not be mainly motivated by such factors. As an alternative, companies may form international joint ventures because of the above cited reasons including enhancing learning, improving strategic positions and gaining legitimacy within a larger social context. The degree to which an international joint venture achieves its aims may not always be fully reflected in objective financial measures. In reality, by measuring the performance of an international joint venture on a firmly financial basis, managers run the risk of abandoning it before it realizes its potential.

15.6 Reasons for Failure of Joint ventures

Like all the long-term contracts, joint ventures are also subject to difficulties. As time passes the circumstances surrounding the contract change and the inflexibility in the contract may not authorize the required adjustments to be made. Sometimes the participants in the contract do not spent enough time in laying out a proper program for implementing the joint venture. Some of the most common reasons for the failure of joint ventures are:

- The expected technology never developed.
- Inadequate preplanning.
- Agreements could not be reached on alternative approaches to solve the basic objectives of the joint venture.
- Managers with experience in one company refuse to share knowledge with their counterparts in the joint venture.
- Management difficulties may be compounded because of inability of parent companies to control or compromise on difficult issues.
- Cultural differences.
- Profitability of foreign operations.
- Taxability characteristics of joint venture products
- Importance of financial and other conflicts.

Example: Failure of Mahindra and Ford JV

Mahindra is an Indian auto giant and Ford is an International brand in auto industry. Collaboration between Mahindra and Ford regarding the transfer of technology or any specific product in which the respective entities have incremental advantage is always mutually beneficial. In October 2019 both these companies entered into a joint venture with an objective to manufacture vehicles in India. Due to various global events impacting the economies across the globe the joint venture was called off in January 2021. Reason cited for the joint venture to be called off was the altered economic situation and consequently the changes in the business priorities. Although both entities confirmed that they will like to go solo and pursue their individual interest in every market.

Source: https://www.financialexpress.com/auto/industry/mahindra-ford-joint-venture-called-off-due-to-these-reasons-endeavour-coronavirus-xuv500-electric/2162177/ dated Jan 1, 2021, Accessed on July 1, 2022

Activity 15.1

a. What are the major types of strategic partnerships?

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b. Write a short note on joint ventures.

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Check Your Progress -1

1. Which of the following is not a characteristic of a joint venture?
   (a) Both the partners lose their own corporate identity and autonomy
   (b) Financial risk and rewards are allocated to each member
   (c) It is an independent legal entity in the form of a corporation or partnership
   (d) Management of the enterprise is controlled by anyone of the partners
   (e) Joint property interest lies in the subject matter of the venture.
2. Which of the following statements is not true with regard to strategic alliances and joint ventures?
   (a) A strategic alliance is simply a business-to-business collaboration
   (b) A strategic alliance is a more flexible concept than a joint venture
   (c) In a joint venture, two or more organizations set up a separate, independent organization
   (d) Joint ventures are normally focused on a specific market objective
   (e) An organizational entity usually is not created in a joint venture, whereas it often is with a strategic alliance.
3. Which of the following is not a type of strategic partnership?
   (a) Strategic alliances
   (b) Mergers
   (c) Equity partnerships
   (d) Joint ventures
   (e) Long term contracts

15.7 Summary

- Joint Ventures represent a form of relationship between two or more business entities to achieve common strategic objectives and are being used widely by business firms. They are typically formed for special purposes for a limited duration.
- The participants of the joint venture continue to exist as separate firms with a joint venture representing a newly created business enterprise.
- A joint venture may be structured as a partnership, a corporation or any other form of organization.
- As joint ventures represent a new thrust by each participant, it is also called a strategic alliance. The main motive for joint ventures is to reduce the investment outlay required and share risks. A small firm may have a new product idea that involves high risks and requires relatively large amounts of investment capital. Another larger firm may be able to carry the financial risk and may be interested in becoming involved in a business entity that promises growth and profitability. By investing in a large number of such ventures, the larger firm has limited risk in any one while enjoying the possibility of very high financial pay offs.
- There are several other general motives for joint ventures which can be summarized as achievement of economies of scale, supply of raw materials, sharing of technology, etc.
- Like all contracts joint ventures contracts are also subjected to difficulties. Each participant hopes to gain as much as possible from the interaction, but would like to limit the gains to the other participants.
- Some of the reasons for failure of joint ventures may be inadequate preplanning, refusal to share knowledge or inability of parent companies to share control or compromise on difficult issues.
- Thus, joint ventures present many attractive opportunities but they also pose difficult challenges.

15.8 Glossary

Collateral Restraints: Agreements between the parties to a joint venture to limit competition between themselves in certain areas.

Joint Venture: This is an agreement between two or more companies where there will be an agreed contribution and participation of the respective companies.

Strategy: The long range planning process for an organization. A succession of plans with procedures for implementation for the future of the firm.

Sell Off: General term for divestiture of part or all of a firm by any one of a number of means, e.g., sale, liquidation, spin-off and so-on.

Operating Synergy: A phenomenon where combining of two or more firms results in gains in revenues or cost reductions because of complemen-tarities or economies of scale and scope.

Financial Synergy: A theory which suggests a financial motive for mergers, especially between firms with high internal cash flows and poor investment opportunities and firms with low internal cash flows and high investment opportunities which in the absence of a merger require expensive external financing.

Synergy: The phenomenon where the combination of two entities is greater than the sum of their individual outputs.

15.9 Suggested Readings / Reference Material

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15.10 Answers to Check Your Progress Questions

1. (a) **Both the partners lose their own corporate identity and autonomy.**

   In a Joint Venture, each partner in the joint venture retains its own corporate identity and independence.

2. (e) **An organizational entity usually is not created in a joint venture, whereas it often is with a strategic alliance.**

   The above statement is not true as in case of a joint venture, a new entity is created.

3. (e) **Long term contracts**

   Long term contracts is not a type of strategic partnership.

Unit 16

Going Private and Leveraged Buyouts

Structure

16.1 Introduction
16.2 Objectives
16.3 'Going Private' Transactions
16.4 Leveraged Buyout
16.5 Management Buyouts
16.6 Management Buy-ins
16.7 Leveraged Cash Out
16.8 LBO and Corporate Governance
16.9 Leveraged Buyouts in India
16.10 Summary
16.11 Glossary
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"When you combine ignorance and leverage, you get some pretty interesting results".

— Warren Buffett

16.1 Introduction

The business and legal climate have changed dramatically in the recent years. Public companies as a whole recorded a loss in their market capitalization. The collapse in market valuations has affected the finances of being public. In particular, while a public company should still generally be able to raise capital more easily than a private company, the advantage is diminished if the company cannot easily tap the capital markets at an acceptable price.

The recent developments have affected the costs and risks of staying public. The increased costs and risks include the following:

Cost of reporting: A publicly owned company must file quarterly reports with the SEC and/or various state officials. These reports can be costly especially for very small firms.

Disclosure: Management may not like the idea of reporting operating data, because such data will then be available to competitors.

Self-dealings: The owners/managers of closely-held companies have many opportunities for self-transactions, which they may not want to disclose to the public, although legal.

Inactive market, low price: If a firm is very small, and its shares are not traded frequently, then its stock will not really be very liquid and the market price may not be truly representative of the stock's true value.

Control: Owning less than 50% of the control could lead to a loss of control for the owners/management. Against this background, two financial developments have led to the increase in the number of going private transactions. First, large pools of capital are currently available for going private transactions. Second, relatively low interest rates may permit privatizations to be financed on attractive terms with borrowed funds.

This has led to increasing number of companies 'going private' in recent times.

16.2 Objectives

After going through the unit, you should be able to:

- Explain 'Going Private' Transactions and Leveraged Buyout
- Discuss sources of LBO Financing
- Outline the characterisitcs of an Ideal Leveraged Buyout Candidate
- Illustrate sources of Gains in LBOs
- Describe Management Buyouts, Management Buy-Ins and Leveraged Cash Outs
- Examine LBO and Corporate Governance, and Leveraged Buyouts in India

16.3 'Going Private' Transactions

The transformation of a public company into a privately held firm is called a going private transaction. In other words it can be termed as the repurchasing of some or all of a company's outstanding stock by a private investor or sometimes by the employees. Over the past few years, transactions involving public companies turning private have grown dramatically world over. One of the significant elements in a going private transaction is justice to minority or outside shareholders thus, avoiding allegations of security fraud against the controlling shareholders. But the most important aspect of going private is from where the money would come from.

Going private requires a great deal of more financial planning than going public. Most going-private deals are structured as Leveraged Buyouts (LBOs) involving a company's management, an equity player and a lender. Let us look at leveraged buyout transactions in more detail.

Methods for 'Going Private'

A company can go private in a variety of ways, including a merger, a tender offer and a reverse stock split. A privatization typically commences when a prospective buyer approaches a public company, which may form a special committee to consider the proposal. The special committee retains legal and financial advisors and negotiates with the prospective acquirer.

i. In a going-private merger, the parties execute a merger agreement, and the company sends its stockholders a proxy statement soliciting votes on the merger. If all conditions to the merger are satisfied, the parties file certificates of merger with the relevant states and the public company merges with an entity formed by the buyer. As a result of the merger and by operation of law, the shares of the public company's stock (other than shares owned by the buyer) are converted into the right to assert appraisal rights or receive the merger consideration. The merger consideration is the cash or stock paid to the stockholders. A merger typically leaves the surviving corporation with one stockholder, a subsidiary of the buyer.

ii In a tender offer, the acquirer purchases shares directly from the public company's stockholders. The acquirer sends the stockholders a written offering document, the "offer to purchase", and a letter of transmittal, which stockholders use to tender shares. Tender offers are commonly conditioned on the buyer's holding at least 90% of each class of the company's stock following the offer. Ownership of at least 90% of the stock permits the buyer to complete a short-form merger, without a vote of stockholders or soliciting proxies. In the short-form merger, the shares that were not tendered are typically converted into the right to assert appraisal rights or receive the same consideration that was paid to the tendering stockholders. At the conclusion of the short-form merger, the company typically has one stockholder, a subsidiary of the buyer.

iii. Companies can, but rarely 'go private' through a reverse stock split. In a reverse stock split, each outstanding share is converted into a fraction of a new share, and stockholders receive certificates representing whole shares and cash in lieu of fractional shares. For example, in a 1-for-10,000 split, each stockholder who owned less than 10,000 shares would receive cash only, each stockholder who owned 10,000 shares would receive 1 new share, and each stockholder who owned more than 10,000 shares would receive 1 new share for each 10,000 shares owned and cash for the remainder of his shares. A reverse stock split is generally affected by amending the company's certificate of incorporation; this requires the company to distribute a proxy statement and permit stockholders to vote on the amendment. A 1-for-10,000 split effectively cashes out holders of less than 10,000 shares and reduces the number of stockholders.

16.4 Leveraged Buyout

The ideal mechanism to finance an acquisition or a going private transaction might be to use the cash held by the target in excess of normal working capital requirements. However, having such huge amount of liquid cash is difficult. Use of stock may be an appropriate way to minimize the initial cash outlay, but such an option is hardly ever available in a buyout by privately held firms. Venture capital funding may become very expensive financing since the firm might have to give up as much as 70% of the ownership in the acquired firm. The use of a public issue of long-term debt to finance the transaction may minimize the initial cash outlay, but it is subject to restrictions placed on how the business may be operated by the investors buying the issue. For such reasons asset based financing or a leveraged buyout has emerged as an attractive alternative to the use of cash, stock, or public debt issues, if the target had sufficient tangible assets to serve as security.

A leveraged buyout is a financing technique where debt is used to purchase the stock of a corporation and it frequently involves taking a public company private. It is used by a variety of entities, including the management of a corporation, or outside groups, such as other corporations, partnerships, individuals or investment groups. The leveraged buyouts are usually cash transactions in which the cash is borrowed by the acquiring firm. The target company's assets are often used as security for the loans acquired to finance the purchase. This type of lending is often called the asset based lending. Thus capital intensive firms with asset having high collateral value can easily obtain such loans. Non-capital intensive firms (like the service industries) having high enough cash flows to service the interest payments on the debt can also obtain such loans.

16.4.1 Elements of Typical LBO Operation

A leveraged buyout transaction takes place as follows:

- The first stage, in an LBO operation consists of raising the cash required for the buyout and devising the management incentive system. Usually around 10 percent of the cash is put up by the firm's top managers and/or the buyout specialists. Managers also receive incentive compensation in the form of stock option or warrants. Hence, the percentage of equity share on the management will be around 30%. Other outside investors provide the remaining equity.
- Approximately 50 to 60% of the required cash is raised by borrowing against the company's assets through secured bank loans. The bank loan usually is taken from different commercial banks. This portion of the debt is sometimes also taken from insurance companies, pension funds or from limited partnerships specializing in venture capital investments and leveraged buyouts. The remainder of the cash is obtained by issuing senior and junior subordinated debt in a private placement or in a public offering as high yield notes or bonds like the junk bonds.
- The second stage, of the transaction involves making the firm private. The company can be made private either in a stock purchase format where all the shares of the company are bought or in an asset purchase format where all the assets of the company are purchased. In an asset purchase format the buying group forms a new privately held corporation. Some of the parts of the business are sold off by the new management to reduce the debt.
- In the third stage, the management tries to increase the profits and cash flows by cutting operating costs and changing marketing strategies. It may strengthen and restructure the production facilities, change product quality, product mix, customer service, pricing, improve inventory control and accounts receivable management. It may even lay off employees and reduce the expenditure on research and development as long as these are necessary to meet the payment on the huge borrowings.
- In the fourth stage, the investor group may again take the company public if it has become stronger and the goals of the group are achieved. This process is called a reverse LBO and is achieved through a public equity offering which is referred to as a Secondary Initial Public Offering (SIPO). The purpose is to provide liquidity to the existing shareholders.

16.4.2 Financing for LBOs

Two general categories of debt are used in LBOs – secured and unsecured debt and they are often used together.

Secured LBO Financing or Asset Based Lending

Under the asset based lending, the borrower pledges certain assets as collateral. Asset based lenders look at the borrower's assets as their primary protection against the borrower's failure to repay. Such loans are often short-term, i.e., around 1-5 years in maturity and secured by assets that can be easily liquidated such as accounts receivable and inventory. Secured debt also called the asset based lending contains two sub-categories: senior debt and intermediate-term debt. In some small buyouts these two categories are considered one. In larger deals there may be several layers of secured debt, which vary according to the term of the debt and the types of assets used as security.

Senior Debt

Senior debt consists of loans secured by liens on particular assets of the company. The collateral which provides the risk protection required by lenders includes physical assets such as land, plant and equipment, accounts receivable and inventories. The level of the accounts receivable that the firm averages during the period of the loan is assessed, based on which the amount of loan to be lent is determined. Lenders usually will give 85% of the value of the accounts receivable and 50% of the value of the target inventories (excluding the work-in-progress).

The process of determining the collateral value of the LBO candidate's assets is sometimes called qualifying the assets. Assets that do not have collateral value such as accounts receivable that are unlikely to be collected are called the unqualified assets.

Intermediate-term Debt

The intermediate-term debt is usually subordinate to senior debt. The loan is often backed by the fixed assets such as land and plant and equipment. The collateral value of these assets is usually based on their liquidation value. A debt backed up by equipment usually has a term of six months to one year and a debt backed by real estate will have a one to two-year term. Usually, the loan amount will be equal to 80% of the appraised value of equipment and 50% of the value of real estate. However, these percentages may vary depending on the area of the country and conditions of the market. The collateral value depends not on the book value of the asset but on its auction value. If the auction value i.e., the liquidation value is greater than the book value of assets, the firm's borrowing capacity is greater than what is reflected in the balance sheet.

Costs of Secured Debt

The costs of senior debt vary depending on the market conditions. Senior debt rates are often quoted in relation to other interest rates such as the prime lending rate. The prime rate is the rate which the bank charges for their best customers. It often ranges between 2 and 5 points higher than the prime rate for a quality borrower with quality assets.

Unsecured LBO Financing

Leveraged buyouts are typically financed by a combination of secured and unsecured debt. The unsecured debt also referred to as subordinated and junior subordinated debt has a secondary claim on the assets of the LBO target. Unsecured financing often consists of several layers of debt each secondary (subordinate) in liquidation to the next most senior issue. Those with the lowest level of security normally get the highest yields to compensate for their higher level of risk.

It is also often called mezzanine financing, because it has both equity and debt characteristics. It has more characteristics of a debt but, it is also like equity, because lenders receive warrants that may be converted into equity in the target. The warrant allows the holder to buy stock in the firm at a pre-determined price within a defined time period. When the warrant is exercised the share of ownership of the previous equity holders is diluted. Hence, this form of LBO financing is often used when there is no collateral. The main advantage of the mezzanine layer financing is the profit potential that is provided by either the direct equity interest or warrants or warrants convertible into equity. The added return potential offsets the lack of security that the secured debt has.

Unsecured LBOs are sometimes called cash flow LBOs because stable cash flows can also act as an important source of protection. The more regular the cash flows, the more assurance the lender has that the loan payments will be made. These deals have a more long-term focus with a maturity of around 10-15 years. On the contrary, secured LBOs might have a financing maturity of only around 1-5 years. The cash flow LBOs allows firms that are not in capital intensive industries like the service industries to be LBO candidates. Usually, lenders of an unsecured financing require a higher interest rate as well as an equity interest. The equity interest may be as low as 10% or as high as 80% of the company’s shares. If the risk is higher this percentage will be even more.

Unsecured lenders are entitled to receive the proceeds of the sale of the secured assets after the full payment has been made to the secured lenders.

Private Equity

Private Equity means an equity investment in an asset in which the equity is not freely tradable on public stock markets. Now-a-days, most of LBOs are financed by private equity. It also helps deals like venture capital, growth capital etc. Private equity firms maintain private funds. In India, ICICI bank is one of the equity investors. At present 800 funds are maintained by private equity firms. Private equity funds are organized as limited partnerships which are controlled by the private equity firms that act as General partners. Private Equity fund is contributed by long-term funds, like pension fund. The life of a fund often extends up to ten years, the fund will typically make between 15 and 25 separate investments with usually no single investment exceeding 10% of the total commitments. General partners are generally compensated with a management fee and interest.

16.4.3 Structuring Leveraged Buyouts

The structure of the leveraged buyout is aimed at optimizing the relationship between a company's capital structure and the equity values realizable by both its current shareholders and prospective future shareholders. The current shareholders receive an acquisition value that reflects the financial capabilities of the company and its ability to assume a significant debt burden. New investors bear the risk of the ownership of the leveraged company with the expectation of receiving an outstanding return on their investment as compensation for the financial risk being assumed.

Leveraged buyouts can be divided into three categories depending on the probable mechanism for debt repayment and the realization of value to equity. They are:

Bust up LBOs

LBOs of this kind depend on the sale of assets of the acquired company to generate returns for the equity investors. This type of LBO is usually seen in acquisitions of diversified public companies where the equity markets may not fully value the various sub-entities of the company. In such cases the acquirer seeks a relatively short-term return based upon a rapid sale of the individual parts of the firm to exploit the markets' failure to recognize the full value of a diversified business.

The finances of the bust-up transaction depend upon the values of the assets of the various individual units. The greater the value of these assets, the less equity is required to accomplish the transaction as the acquirer can subsequently sell off the various sub-entities to generate cash required to retire the debt. These forms of leveraged buyout transaction are very rare.

Cash Flow LBOs

Cash Flow LBOs is a second category of leveraged buyout which is most common in management led transactions that requires repayment of acquisition financing through the operating cash flows. Equity investors receive the returns through the replacement of debt capital with equity and also through any increase in the total market value of the company. This type of LBO is similar to the purchase of a real estate property with mortgage financing and equity. Returns are obtained when the value of the property increases with an increase in rent (operating income) and when the debt is replaced by equity as debt is retired from the income from property.

Selective Bust-up/Cash Flow LBOs (Hybrid)

The third type of leveraged transaction is a hybrid of a bust-up and cash flow techniques. It involves the purchase of a fairly diversified company and the subsequent divestiture of selected units to retire a portion of the acquisition debt. The acquirer gets the control of a smaller group of assets which are best suited for longer term leverage and have captured a premium on the assets which have been sold. The remaining assets form the operations of a cash flow leveraged buyout.

Sources of LBO Financing

The primary sources of LBO financing are the different categories of institutional investors such as Life Insurance Companies, Pension Funds, etc. Institutional investors either fund LBOs by direct investment or fund LBOs indirectly through an LBO fund. Pools of funds are created by contributions made by various institutional investors, to invest in various LBOs. By investing in LBOs, institutional investors anticipate realization of higher returns than those available from other sources or forms of lending. Also, by pooling the funds, they could achieve broader diversification and hence can reduce the risk. Diversification is designed to limit the exposure of default to any one borrower.

16.4.4 Characteristics of an Ideal Leveraged Buyout Candidate

Lenders often look for certain features in a business to identify whether the business makes a good leveraged buyout candidate. Not all of the following characteristics are necessary for the completion of a leveraged buyout. However, the greater the number of these characteristics in a target company and the stronger any individual characteristic is, the more likely it is for the LBO to be successful.

Experienced Management Team

A strong management team consisting of a highly qualified chief executive officer and chief financial officer are key components to an LBO. In a leveraged situation, the company has little room for trial and error. Because of this, lenders and investors will insist on having a management team that has a long track record in the industry and knows how to meet projections with few surprises. Lenders also like to see a management team that has either been in a leveraged situation or who has had to meet projections on a consistent basis.

Example: Blackstone Showing Faith in Experienced Management Team of Mphasis

In September 2021, private equity giant Blackstone Group completed a US$ 817.9 m loan backing its buyout of IT outsourcing services provider Mphasis. The deal was India’s largest syndicated leveraged financing and redrew the boundaries for leveraged finance in the country. Thirty-four lenders

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participated in the loan, belying the gargantuan challenges involved as the LBO navigated changing market conditions, including another wave of the coronavirus pandemic in India during the second quarter.

Mphasis was a Bengaluru based company which was the providers of IT services specialising in cloud and digital solutions. It had deep domain expertise in the banking, financial services and insurance sectors (BFSI) and serves 35 of the top 50 US BFSI firms. Mphasis delivered its highest-ever quarterly total contract value (TCV) wins in each of the last three quarters ending on 31st December, 2020. It had a strong team of managers which helped them to highest TCV. In April 2021, one of the private equity giants, Blackstone, made an open offer to acquire 26% additional stake in Mphasis at ₹ 1677.16 per share totalling in excess of ₹ 8000 crore. As per the co-head of Asia Acquisitions and Head of India operations of Blackstone, this investment in Mphasis enabled Blackstone to continue creating value for the long term with continuity in the management team and the Board.

Sources: (i) https://www.business-standard.com/article/companies/blackstone-to-acquire-controlling-stake-in-mphasis-for-up-to-2-8-bn-121042600320_1.html April 27, 2021, Accessed on 08.06.2022
(ii) https://www.ifre.com/story/3200416/asia-pacific-loan-mphasis-us8179m-lbo-loan-k0jcjhpq5m` Feb 18th 2021; Accessed on Sept 19, 2022

Strong and Secure Cash Flow

Cash flow must be sufficient enough to fund both the company's ongoing operations and to service the debt. Future cash flows based on strong and stable historical performance are most saleable to lenders. Projections that need little explanation and that replicate past performance can withstand the greatest scrutiny and will therefore produce the highest borrowing capacity. To the extent these projections are based on changes in the business, detailed assumptions with specific explanations should accompany the first set of numbers presented to lenders. Prior explanation allows the lender to follow the flow from start to finish with little guess work. This type of presentation maximizes the lender's belief that the cash flows are strong and secure and leaves a strong first impression. In addition to supportable cash flow, cash flow with a significant depreciation component is also desirable, because it can be used to pay down acquisition debt and not to pay taxes.

Strong Asset Base

Because assets are used as collateral for financing, assets should have significant value relative to the purchase price of the company. Machinery and equipment that has multiple uses or that can be easily converted for alternative uses will derive a higher borrowing percentage than equipment that is highly customized. Customized equipment is difficult to sell in a downside situation and therefore has a lower borrowing value. In addition, accounts receivable and inventory that can be collected quickly or has a high liquidation value are attractive to lenders.

Finished inventory and raw materials generally have higher advance rates than work-in-progress. Generally, the more commodity-like the asset is, the higher the advance rates will be.

Low Operating Risk

Because the financial risk of the business is very high under an LBO, the business cannot afford to have a bad year. Therefore, those companies that have less operating risk are better LBO candidates. Companies with strong market positions can usually weather downturns in the economy and thus have less operating risk. Companies with a diversified product, customer base, or geographic market have less operating risk because the company's cash flow is less dependent on any single source of revenue. These companies are better able to withstand the obsolescence of a product, loss of a customer, or change in a region's economy. Companies that have long-term contracts with their customers or who have customers that would incur high changeover costs if they switched suppliers also have less operating risk.

Limited Debt on the Firm's Balance Sheet

The lower the amount of debt on the firm's balance sheet relative to the collateral value of the firm's assets, the greater the borrowing capacity of the firm. If the firm's balance sheet is already burdened by significant financial leverage, it may be more difficult to finance the LBO. The already existent debt limits the borrowing capacity of the company.

Equity Interests of Owners

The equity investment of managers or outside parties who are buying the company acts as a cushion to protect lenders. The greater the cushion, the more likely it is that secured lenders will not have to liquidate their assets since the management would try its best to save the company in tough times due to their equity investment.

Separable, Non-core Businesses

If the LBO candidate owns non-core businesses that can be sold off quickly to pay back a significant portion of the firm's post-LBO debt, the deal may be easier to finance. Deals that are dependent on the sale of most of the businesses of the firm are referred to as breakup LBOs.

Other Factors

Lenders look for many other factors depending on the business of the LBO candidate. The existence of unique or intangible factors may provide the impetus for a lender to provide financing when the lenders are indecisive of the performance of the LBO candidate. A dynamic, growing and innovative firm may provide lenders with sufficient incentives to ignore some shortcomings.

Timing

Timing is often the most important element to take advantage of an LBO opportunity. Below are some examples of situations where timing makes a business a good buyout candidate.

Companies that Lack Strategic Fit with Parent

Often larger corporations that have multiple subsidiaries have businesses that no longer fit with their strategic objectives. A common example is when a company decides to focus on the marketing end of a business and decides not to manufacture a product but rather to outsource it. This is a great opportunity for an LBO, because the buyer can usually negotiate a long-term supply agreement with the seller. This allows the buyer to purchase the business based only on the cash flows from the supply agreement, thus minimizing the purchase price. In addition, it creates the base of business necessary for the new company to grow and be competitive in the marketplace.

There are many more reasons a parent corporation might decide to exit a business, all of which might be valid for that owner. However, just because the owner wants to exit the business based on its standards, it does not mean it is a bad business to be in. Instead, it means that there may be an excellent opportunity for someone to attempt a leveraged buyout.

Retiring Owner Situations

One of the most common reasons for the sale of a business is that the owner wants to retire and there are no family members who want to takeover the business. Confronted with the decision to sell to a competitor, the owner often turns to the management team to see if they have an interest in purchasing the business. Selling to the management team can provide a smooth transition for the owner and minimize the interruptions to the business.

Companies that must be sold because of Regulators

With the continued consolidation going on in many industries, the Trade Commission is faced with the task of maintaining a competitive environment for the consumers. In many cases, the trade commission has ordered companies to divest assets in particular markets where the divesting company has too much market share. Generally, the trade commission will require the sale to be made to a qualified buyer who will continue to run a competitive business and therefore promote competition in the marketplace. This type of situation is a very good time to attempt an LBO, because there is a seller who must sell the business and who also wants to sell to the least competitive buyer as possible. Selling to another big player in the industry is usually not the seller's first choice.

Subsidiaries that lack the attention of the Parent Company

Often smaller divisions or units of larger corporations lack the attention necessary to maximize their potential. Therefore, these divisions or units appear to be much less valuable than they really are. This is an ideal time for an LBO to be structured. With parent company management at headquarters believing that they are selling a business with little potential, the buyer can negotiate a bargain purchase, raise the necessary capital to move the business in the right direction and generate the cash flows necessary to pay off the transaction debt. Although the parent company is usually the initiator of the transaction, management should not hesitate to ask the parent company if it is willing to sell. Management teams are the natural buyers in these situations and can usually find an equity sponsor to back their ideas.

Good LBO candidates have experienced management teams, strong and secure cash flows, a healthy asset base and low operating risk. In addition, a business is a good LBO candidate when the owner believes it is no longer fits its strategic objectives; when the owner is considering retiring or estate planning; when regulators are requiring the sale of the business; or when the business lacks the attention of its parent. Combining the characteristics of a good buyout candidate with proper timing will maximize the probability of a successful transaction.

16.4.5 Sources of Gains in LBOs

The gains associated with a leveraged buyout transaction are mainly: (i) taxes, (ii) management incentives, (iii) wealth transfer effects, (iv) asymmetric information and underpricing, and (v) efficiency considerations.

Taxes

The new company formed can operate without payment of any tax for as long as five to six years. The high amount of leverage provides the benefits of interest savings. Moreover, the asset setups can provide higher asset values for depreciation expenses.

Management Incentives and Agency Cost Effects

Management ownership is enhanced by the leveraged buyout or the management buyout. Hence, there are more and stronger incentives for an improved performance. Some investment proposals may require disproportionate effort of managers. In such cases the managers are given disproportionate share of the proposal's income. The going private buyouts facilitate compensation arrangements that induce managers to undertake these proposals.

A going private transaction may eliminate certain costs incurred by managers to defend their position to potential proxy contestants and to the outside shareholders. In many buyouts the promoters retain a large stake and their desire to protect their reputation as efficient promoters give them the incentive to closely monitor post buyout management. This will decrease the information asymmetry between the managers and the shareholders. The ownership resulting from the LBO represents reunification of ownership and control, which reduce agency costs.

Finally, presence of internal cash accruals will encourage managers to use more of these cash flows for self-expenditure rather than pay them to the shareholders as dividends. However, an increase in debt through a leveraged buyout commits the cash flows to debt payments. Hence, the agency costs of the free cash flows will be decreased in the leveraged buyouts. In case of risk averse managers increased debt will put pressure on managers and gives them an incentive to perform to prevent bankruptcy since bankruptcy will cause a decline in their compensation and value of human capital. Hence, an LBO is a debt bonding activity which bonds the managers to meet newly set targets.

Wealth Transfer Effects

Payment of premiums in the leveraged buyout transactions represent wealth transfers to shareholders from other stakeholders like the bond holders, preferred stock holders, employees and the government. Hence, there is an increase in the value of the equity. The existing bondholders are protected by the covenants in the event of change in control, new debt issues, etc., to some extent but not completely. The new debt issue might not be subordinated to the outstanding debt and the maturity of these debts may be of shorter duration. Hence there might not be an absolute security for the outstanding debt.

Asymmetric Information and Underpricing

Large premium paid in the LBO transactions indicate that the buyers or the managers have more information on the value of the firm than the public shareholders. The buyout proposal signals to the market that the future operating income will be greater than what was expected and the firm is less risky than what was perceived by the public.

Efficiency Considerations

Under a private ownership the decision process is more efficient. Actions can be taken more promptly. Getting a new investment program started is critical for the success of a firm and it is easily achievable under a private ownership. A public firm has to disclose information that is vital and competitively sensitive to rival firms which a private firm need not.

16.4.6 Types of LBO Risk

The risk of a leveraged buyout transaction may be a business risk and/or an interest rate risk.

Business Risk

It refers to the risk that the firm going private will not generate sufficient earnings to meet the interest payments and other current obligations of the firm. Cyclical downturn in the economy and competitive factors within the same industry such as greater price and non-price competition are some of the factors which affect the risk of the firm. Firms that have cyclical sales or firms that are in very competitive industries are not considered as good LBO candidates.

Interest Rate Risk

Risk that the interest rates will rise, increasing the firm's current obligations of interest payments is the interest rate risk. This is more important for firm that has more variable rate debt. Increase in interest rate could force a firm into bankruptcy even when it experiences greater than anticipated demand and holds non-financial costs within reasonable limits. The level of interest rates at the time of the LBO may be a guide to the probability that rates will rise in the future.

Reverse LBO

A reverse LBO occurs when a company goes private in an LBO only to be taken public again at a later date. This may be done if the buyers who take the company believe that it is undervalued, perhaps because of poor management. They may buy the firm and introduce various changes, such as replacing senior management and other forms of restructuring. If the new management converts the company into a more profitable private enterprise, it may be able to go through the initial public process again.

Leveraged Buyouts as White Knights

Managers in target firms have used LBOs as part of an anti-takeover strategy, providing stockholders an offer that they may accept instead of the hostile bid. This phenomenon became very common in the fourth merger wave and declined with the overall slowdown in the LBO activity in the 1990s.

16.5 Management Buyouts

A management buyout is a special type of a leveraged buyout where the management decides that it wants to take its publicly traded company or a division of the company, private. Since, large sums are necessary for such transactions, the management has to usually rely on borrowing to accomplish such objectives. There should be a premium to be given above the current market price to convince the shareholders to sell their shares.

Example: Positive Impact of GE T&D India's Decision to Sell Off its Division

GE T&D India had a division called Global Engineering Operations (GEO) Division. In January 2021 the company decided that it will sell off its GEO division on an as is where is basis. It also decided to sell off on a slump sale basis which means the GEO division's assets, liabilities and personnel employed in the division will all move in together to the new entity. Accordingly the GEO division was sold to GE India Industrial another independent entity for a total sale consideration in excess of ₹ 87 crore.

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Impact of the decision was witnessed when the stock market responded favourably for GE T&D India as its share prices rose. On an average the investors of the company could witness an increase of close to 3% in the value of their portfolio.

Source: https://www.business-standard.com/article/news-cm/ge-t-d-india-gains-on-sale-of-global-engineering-operations-division-121011800215_1.html dated January 18, 2021, Accessed on 01.07.2022

Management buyouts have been a very important aspect of a business. However, the following points should be considered by managers before going ahead with the management buyout:

- Management buyouts are very risky and can result in the managers losing their personal wealth as well as their jobs.
- When the new company becomes independent there are possibilities of problems being encountered. For example, there are chances of losing the customers if they consider the existing firm to be too risky.

On the other hand a management buyout can also be advantageous as follows:

- Though the risks are high the potential rewards are also high. The returns to the shareholders can be very high once the loans have been repaid.
- Management buyouts are less risky than starting a new firm altogether.
- Firms that have been subject to management buyouts tend to operate at a higher level of efficiency. The separation of ownership and control is effectively ended and managers and the shareholding employees have greater incentive to improve the efficiency of the firm.

16.6 Management buy-ins

A management buy-in occurs when a group of outside managers buys a controlling stake in a business. Management buy-in is particularly effective when the existing management is weak and need to be replaced and when more efficient managers are able to quickly gain new responsibilities. However, employee resistance can be experienced when the new management tries to impose new ways of running the business. Another disadvantage is that the new management might concentrate on the short-term profitability at the expense of securing the company's long-term prosperity.

Example: Actis Management Buy in Omega Energia

Renewable energy is a field where the focus is increasing globally. With focus, investments are also increasing in this sector. In Brazil in the field of renewable energy one of the major player is Omega. This entity is engaged in acquiring, operating and building energy projects across Brazil. The projects include solar, wind and hydro energy projects. In July 2022, a global investor in this

Contd. .....

field Actis acquired stakes in Omega with a tacit understanding with the founders of Omega to have an amalgamation in order to have controlling interest in the entity. Actis first invested through purchase of shares from public equity holders. Having been in the Board of Omega as a controlling entity Actis would subsequently acquire shares in tranches.

Source: https://www.act.is/2022/07/06/actis-acquires-a-significant-stake-and-joins-the-controlling-block-in-omega-energia-the-largest-publicly-listed-pure-play-renewable-energy-generation-company-in-latin-america/ July 6, 2022, Accessed on 7th July, 2022.

Illustration of a Leveraged Buyout

Jupiter Ltd. is a successful publicly traded manufacturer of consumer durables. It acquired a smaller company Venus Ltd., manufacturing glassware. However, Venus did not fit into its mould and suffered for a number of years. In the year 2021, a small group of disappointed executives of Venus began to consider a leveraged buyout. Jupiter was ready to consider the divestiture as it was never comfortable with Venus's product line. Venus had always had stable production costs and good contribution margins which consistently resulted in a strong and steady cash flow. Though, the production equipment was old it was in a good condition and its replacement cost exceeded its book value. Till the acquisition by Jupiter, Venus was always managed well and had very little debt.

The following financial information for the 2021 is available for Venus:

Revenues – ₹ 80 lakh

EBIT – ₹ 12 lakh

Net Income – ₹ 7.2 lakh

After negotiations the purchase price was settled for ₹ 30 lakh. Because of the high replacement cost of its assets, its strong cash flow, and its relatively unencumbered balance sheet Venus was able to take on large amount of debt. Banks supplied nearly ₹ 20 lakh of the senior debt at an interest rate of 13%. This was secured by finished goods inventory, plant and equipment and was amortized over a five year period. An insurance company also provided a loan of ₹ 6 lakh in the form of subordinated debt. Finally the management of the company took an equity position of ₹ 4 lakh.

Estimate the value of the firm after the Leveraged buyout.

Solution

Amortization table of Bank Loan

Year	Interest	Principal	Balance
1	2,60,000	3,08,666	16,91,334
2	2,19,873	3,48,793	13,42,541
3	1,74,530	3,94,136	9,48,405
4	1,23,293	4,45,373	5,03,032
5	65,394	5,03,032	–

*₹ 20 lakh at 13%, annual payment X

20,00,000 = X $PVIFA_{(13\%,\ 5\ yrs)}$

X = 20,00,000/3.517 = ₹ 5,68,666

Amortization table of Insurance Company Loan

Year	Interest	Principal	Balance
1	78,000	92,600	5,07,400
2	65,962	1,04,638	4,02,762
3	52,359	1,18,241	2,84,521
4	36,988	1,33,613	1,50,908
5	19,618	1,50,908	–

* ₹ 6 lakh at 13%, annual payment X

6, 00,000= X $PVIFA_{(13\%,\ 5yrs)}$

X = 6,00,000/3.517 = ₹ 1,70,600

The following proforma cash flow calculations are made on the basis of a number of conservative assumptions. It is assumed that there is no growth. The tax rate is assumed to be 36%. Depreciation is calculated on a straight line basis over a period of 15 years.

Cash Flows Statement

Particulars	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5
EBIT	12,00,000	12,00,000	12,00,000	12,00,000	12,00,000	12,00,000
– Interest		3,38,000	2,85,835	2,26,889	1,60,280	85,012
EBT		8,62,000	9,14,165	9,73,111	10,39,720	11,14,988

Contd. ....

– Taxes @ 36%		3,10,320	3,29,100	3,50,320	3,74,300	4,01,396
NI		5,51,680	5,85,065	6,22,791	6,65,420	7,13,592
+ Dep		2,00,000	2,00,000	2,00,000	2,00,000	2,00,000
CFBDR		7,51,680	7,85,065	8,22,791	8,65,420	9,13,592
– Principal repaid		4,01,266	4,53,431	5,12,377	5,78,986	6,53,940
Cash Flow Cushion		3,50,414	3,31,634	3,10,414	2,86,434	2, 59,652
Equity	4,00,000	9,51,680	15,36,745	21,59,536	28,24,956	35,38,548
Debt	26,00,000	21,98,734	17,45,303	12,32,926	6,53,940	–
Total Assets	30,00,000	31,50,414	32,82,048	33,92,462	34,78,896	35,38,548
% Debt	87%	70%	53%	36%	19%	0%

CFBDR – Cash Flow Before Debt Repayment.

16.7 Leveraged Cash Out

It is also known as leveraged recapitalization. It is a defensive reorganization of the capital structure in which outside shareholders receive a large onetime cash dividend and inside shareholders, i.e., the management receives new shares of stock instead. The cash dividend is largely financed with newly borrowed funds, leaving the firm highly leveraged and with greater proportional ownership share in the hands of management.

Example: Open Financial Technology Getting Fee for Rendering Services in a Leveraged Joint Venture (JV)

In May 2022, IIFL Finance Ltd (IIFL) and Open Financial Technologies (OFT) entered into a joint venture in India. IIFL is a NBFC based in India and OFT is a leading entity engaged in offering Neo Banking platform especially catering to SMEs in Asia. The joint venture will launch first neobanking services to the MSME in India to take care of their banking needs. IIFL will hold 51% of the controlling interest in the joint venture entity while the rest will be with OFT. As per the terms of the agreement OFT will get per customer fees for its technology platform and the joint venture will not need to invest any capital for such technical set up.

Source: https://www.business-standard.com/article/companies/iifl-open-financial-technologies-enter-jv-launch-neobank-for-msmes-122050300963_1.html May 3, 2022. Accessed on 10.06.2022

Leveraged Joint Venture

We have learnt that the leveraged buyouts have become increasingly popular forms of acquisitions for management groups who intended to buy private companies, divisions of public companies, or public companies in going private transactions. It is hardly ever used as an M&A device by the publicly held corporation. However, in situations where there are volatile market conditions or where the transaction size is so huge that the acquisition is apparently expensive and unaffordable, the LBO technique can be used by public companies to make acquisitions that are otherwise not possible. The use of leveraged joint venture as an M&A technique makes this possible.

A leveraged joint venture LBO attempts, to overcome a major disadvantage of a public company using an LBO to acquire a target company. The public company, along with a passive financial partner can acquire the target business through an LBO but does not have to show the related debt on its balance sheet. It is still free to operate in the business, turn it around and ultimately purchase and consolidate the entire operation when the debt declines to a manageable level. A typical joint venture LBO is where one partner is a publicly owned corporation owning up to 50 percent of the acquired company's voting stock and sometimes owns a large block of preferred stock as well. The other passive partner is a leverage financing buyout firm, or a investment bank, owning to the remainder of voting stock. Sometimes the management of the acquired firm may also own some of the common stock.

The acquired firm is usually managed and operated by the corporate partner. A fee for the management services is paid to the corporate partner.

Leveraged Sell Out

A leveraged sell out is a transaction which enables a company to raise cash from the sale of one of its business unit. The main difference between the leveraged sell out and a leveraged buyout transactions is that the former transaction enables the seller to retain an interest in the equity of the divested business.

When a company intends to sell 50 percent or more of its holding in its subsidiary, it can enter into an agreement with a financial partner (a LBO fund or an investment bank) to restructure the subsidiary and obtain the necessary buyout financing. After the sale, both the corporate and the financial partners own 50 percent, interest in the entity.

16.8 LBO and Corporate Governance

In India, while attempting to put forward principles of best practice in British Corporate Governance, the Cadbury Committee studied LBOs, venture capital firms and relational investing (Warren Buffet) as different possible models for best practices. Since LBOs are mainly seen as mere financial transactions, their effect on governance is often ignored. But, the fact is finance and governance are closely related. Equity (corporate governance) is a matter of constant negotiation. Debt and equity are not only two different types of financial claims but represent alternative approaches to check corporate performance and direct management governance. Equity and debt are opposite ends of a range of potential governance management. Debt is inflexible but leads to a simple and low cost administration while equity is flexible and adoptive but complex and costly. The ideal form of governance depends on the nature of the assets to be managed, the transaction stream which these assets support and the growth opportunities. A leveraged buyout (LBO) is one form of governance that is suitable for a wide cross section of business. It represents a young and still growing organizational form in a market-determined economy.

Example: Reliance Strategic Business Ventures respecting the Operational Expertise of Sanmina

Sanmina is recognised as a leading integrated manufacturing solution provider globally. It has its Indian subsidiary called Sanmina SCI India (SIPL). The Indian entity is focussed on providing integrated solutions to manufacturers especially in the field of communications, defence, medical and automobiles segment. In March 2022 a subsidiary of Reliance Industries Ltd (RIL) entered into a joint venture with Sanmina where in RIL will invest in SIPL and have a controlling interest in the company. RIL through its subsidiary will only provide the strategic inputs and overall management but the regular operations will continue as is being conducted by SIPL AT PRESENT. Such understanding will have seamless integration of employees and benefit the customers.

Source: https://www.business-standard.com/article/news-cm/ril-sanmina-corp-ink-pact-to-create-manufacturing-jv-122030300281_1.html dated March 2, 2022, Accessed on 10.06.2022

16.9 Leveraged Buyouts in India

Traditionally, public sector banks have stayed away from M&A financing because there are no clear guidelines for this. However, Leveraged buyout financing is likely to emerge in India against the backdrop of the government's divestment program. Till a couple of years ago, banks were reluctant to sponsor any Leveraged Buyout (LBO). But, as the divestments accelerated, most banks have come forward to fund the acquisitions. Now banks have realized that funding an acquisition of a running company is safer than funding a new company. Unlike the foreign practice of funding based on the acquiree balance sheet, in India, banks fund acquisitions relying on the acquirer's balance sheet and the cash flows that the company can receive after the acquisition. The recent exemptions on the utilization of the foreign reserves raised in the form of External Commercial Borrowings (ECBs), American Depository Receipts (ADRs) and Global Depository Receipts (GDRs) have created a new channel of funds for the companies going for acquisition. One instance of a leveraged buyout by an Indian company with international funds is Tata Tea's £ 271mn acquisition of Tetley.

Due to the determined drive to big-ticket divestments from Arun Shourie, most banks are now open to the funding acquisitions, at least funding for the PSUs being disinvested. Although so far the interest is only in PSU disinvestment bankers say that the experience gained here could pave the way for creating a formal system of financing takeovers even in the private sector. The move by the RBI that loans for acquisitions of divested PSUs will not come under the 5% cap on exposure to loans against shares has encouraged banks to provide loans for acquisitions. Among the domestic players, ICICI has been the first to do such deals and has funded Sterlite and Piramal in their acquisitions.

Example: Lenders showing Confidence in the Tata Group

In December 2021, TATA Group acquired the national air carrier Air India at a final bid of ₹ 18000 crore. Soon after, Tata Group expressed its requirement for funding as a one year unrated and unsecured loan for ₹ 23000 crore. The total requirement included the funds to honour the bid and ₹ 5000 crore for initial operating costs. The group received a total offer for funding ₹ 35000 crore from lenders such as State Bank of India, Bank of Baroda, Punjab National Bank, Union Bank of India and HDFC Bank. Individual lenders approved a line of credit in the range of ₹ 3000 crore to ₹12000 crore. The rate of interest asked by these entities was 4.25% per annum which was much lower than individual lenders' prime lending rates. Finally, Tata Group chose State Bank of India, Bank of Baroda and HDFC Bank as their preferred banks. This presents an example of lenders funding one of the top disinvestments going by the balance sheet of the acquirer.

Source: https://m.economictimes.com/industry/transportation/airlines-/-aviation/tatas-pick-sbi-two-other-banks-to-finance-air-indias-old-debt/articleshow/89191620.cms January 29, 2022, Accessed on 11.06.2022

Lenders have to evaluate whether the cash flows that accrue to the acquirer after the purchases are enough to repay the debt raised for the takeover. The cash flows could arise out of forward integration of the acquired company or by way of dividend. All this requires heavy financial structuring. For this reason the target company's cash flows, debt profile, shareholding pattern, etc., are to be understood properly. Hence, LBOs can be selectively be used in PSUs, which have low leverages in their capital structure.

Activity 16.1

a. Write a short note on leveraged buyout.

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b. What is Selective Bust-up leveraged transaction?

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Check Your Progress-1

1. The structure of the leveraged buyout (LBO) is aimed at optimizing the relationship between a company's capital structure and equity values realizable by both its current shareholders and prospective future shareholders. Leveraged buyouts can be divided into following three categories depending on the probable mechanism for debt repayment and the realization of value to equity:

   I. Bust-up LBOs.

   II. Cash Flow LBOs.

   III. Selective Bust-up/Cash Flow LBOs.

   Which of the aforementioned kind of LBOs depend only on the sale of assets of the acquired company to generate returns?

   (a) Only (I) above

   (b) Only (II) above

   (c) Only (III) above

   (d) Both (I) and (II) above

   (e) Both (I) and (III) above.

2. Which of the following is/are true for bust-up LBOs?

   I. It depends upon the sale of assets of the acquired company to generate returns for the equity investors.

   II. Equity investors receive the return through the replacement of debt capital with equity and also through any increase in the total market value of company.

   III. These are usually seen in acquisition of diversified public companies where the equity markets may not fully value the various sub entities of the company.

   (a) Only (II) above

   (b) Only (III) above

   (c) Both (I) and (III) above

   (d) Both (II) and (III) above

   (e) All (I), (II) and (III) above.

3. Which of the following statements is/are not true with respect to Management Buy Outs (MBOs) and Management Buy Ins (MBIs)?

   I. Firms that have been subject to MBO tend to operate at a higher level of efficiency.

   II. In case of MBI, there is no problem of employee resistance.

   III. In MBI, it is ensured that the new management always focuses on company's long term prosperity.

   (a) Only (I) above

   (b) Only (III) above

   (c) Both (I) and (II) above

   (d) Both (II) and (III) above

   (e) All (I), (II) and (III) above.

4. In the third stage of a typical LBO, management tries to increase the profits and cash flows of the firm by undertaking which of the following activities except

   (a) Restructuring the production facilities

   (b) Reducing the expenditure on research and development

   (c) Laying off the employees

   (d) Making the additional borrowings to meet the payments outstanding

   (e) Changing the product quality.

16.10 Summary

- Going private refers to the act of a public corporation transforming itself into a privately held firm. The term is used in various ways. In some cases, it may refer to the controlling shareholders squeezing out the minority shareholders. Going private can take place through leverage buyout (LBO), a frequent form of corporate restructuring.
- An LBO is an acquisition that is financed largely by borrowing of all the stocks or assets of a public limited company by a small group of investors. Specialists or investment bankers who arrange the deal generally sponsor the buying group. Debt financing represents 50 percent or more of the purchase price and is secured by the assets of the acquired firm.
- An LBO operation is generally carried out in four stages. The first stage, involves raising the required cash for the buyouts and devising a

management incentive system. In the second stage, the organizing sponsor group buys all the outstanding shares of the company and takes it private. The group may even purchase all the assets of the company and form a new privately held corporation. The third stage, involves the new corporation cutting down of operating costs and changing the marketing strategies to increase the profits and cash flows. The fourth stage, is the stage when the investor group has to decide if the company is to be taken public if the company emerges strong and the goals have been achieved. Such a procedure is referred to as a reverse LBO. It is affected through public equity offering, better known as Secondary Initial Public Offering (SIPO). Such a conversion creates liquidity for the existing stockholders.

- A variant of going private is the unit Management Buy-Out (MBO). In a unit MBO, a purchasing group led by an executive from the parent company acquires a division or a subsidiary of a public corporation.
- An LBO or an MBO can be used as an anti-takeover method against an unwanted takeover. And sometimes they stimulate competing bids once announced.

16.11 Glossary

Bust-Up Takeover: An acquisition followed by divestiture of some or all of the operating units of the acquired firm which are presumably worth more in pieces than as a going concern.

Leveraged Buy-Out: The purchase of the company by a small group of investors, financed largely by debt. Usually involves going private.

Leveraged Cash Out (Lco)/ Leveraged Recapitalization: A defensive reorganization of the firm's capital structure in which outside shareholders receive a large onetime cash dividend and inside shareholders receive new shares of stock instead. The cash dividend is largely financed with newly borrowed funds, leaving the firm highly leveraged and with a greater proportional ownership share in the hands of management.

Management Buy-Out (MBO): A going private transaction led by the incumbent managers of the formerly public firm.

16.12 Suggested Readings / Reference Material

1. Richard Brealey and Stewart Myers and Franklin Allen and Alex Edmans (2023). Principles of Corporate Finance. 14th Edition, McGraw Hill India
2. Stephen A. Ross, Randolph Westerfield (Author), & Jordon (2018). Fundamentals of Corporate Finance. 12th edition, McGraw Hill College
3. Prasanna Chandra (2020). Strategic Financial Management: Managing for value creation. 2nd edition, McGraw Hill

4. Hubbard & Obrien (2022). Mony, Banking and Financial System. 4th edition, Pearson Education
5. Kalyani Karna (2019). Strategic Financial Management. 1st edition. Corporate Plus Publications Private Limited
6. Edward I Altman (2019). Corporate Financial Distress, Restructuring and Bankruptcy. 4th edition, Wiley
7. Rick Mann & David Tarrant (2020). Strategic Finance for Strategic Leaders: The First Five Tools. Clarion strategy publishing
8. Sheeba Kapil (2021). Financial Valuation and Modelling. Wiley

16.13 Answers to Check Your Progress Questions

1. (a) Only (I) above

Bust-up LBOs depend only on the sale of assets of the acquired company to generate returns.

2. (b) Only (III) above

These are usually seen in acquisition of diversified public companies where the equity markets may not fully value the various sub entities of the company.

3. (e) All (I), (II) and (III) above.

All the statements given about Management Buyin and Management Buyout are incorrect.

4. (d) Making the additional borrowings to meet the payments outstanding

In the third stage, the management tries to increase the profits and cash flows by cutting operating costs, changing marketing strategies, strengthen and restructure the production facilities, lay off employees and reduce the expenditure on research and development.

Unit 17

ESOPs and MLPs

Structure

17.1 Introduction

17.2 Objectives

17.3 Types of Pension Plans

17.4 ESOPs: The Underlying Philosophy

17.5 History of ESOPs in the US

17.6 Types of ESOPs

17.7 Employee Risk and ESOP

17.8 ESOPs and Corporate Performance

17.9 Role of ESOPs in Mergers and Acquisitions

17.10 ESOPs Practices in India – An Overview

17.11 Master Limited Partnerships

17.12 Summary

17.13 Glossary

17.14 Suggested readings/reference material

17.15 Answers to Check Your Progress Questions

We're all connected by the system, and we all have to be a part, I think, of changing it.

- Eric Schlosser

17.1 Introduction

The Employee Stock Options Plan (ESOP) has become the new buzzword in the corporate sector. From cash-poor start-ups in the Silicon Valley to old-line manufacturing and service firms, an increasing number of companies are offering stock options not only to their senior executives but to other employees as well, all in the hope of enticing and retaining the intellectual capital within the organization by creating a feel of ownership.

ESOPs are nothing but "contribution employee benefit pension plans". These plans may receive stock or cash to buy employer's stock. ESOPs may also provide for the employee contribution besides the employers'. To better appreciate the relevance and potency of ESOPs as a tool of HRD, we first need to recall what we understand by pension plans.

17.2 Objectives

After going through the unit, you should be able to:

- Understand types of Pension Plans
- Discuss history of ESOPs and types of ESOPs
- Explain mechanics of ESOPs, ESOPs and Corporate Performance
- Discuss role of ESOPs in Mergers and Acquisitions and ESOP Practices in India
- Describe Master Limited Partnerships

17.3 Types of Pension Plans

There are two major types of pension plans such as (i) defined benefit plans, and (ii) defined contribution plans.

i. **Defined Benefit Plans:** Government workers in the US quite often avail this facility. Under this plan, an employer agrees to pay employees specific benefits upon their retirement. It may be a fixed sum per month or a specific percentage of previous year's salary/several years' salary, according to a predetermined formula.

ii. **Defined Contribution Plans:** In a defined contribution plans, employers make a substantial and recurring contribution rather than a specific benefit. The employees' benefits depend on the investment performance of the benefit fund that is managed by a group that oversees the investment of the funds. Since the employees' benefits under these plans depend on the performance of the funds, these plans are riskier for the employees. The factor of risk gets compounded with the absence employer's guarantee for the performance of funds. Money Purchased Pension Plans, Profit Sharing Plans etc., are some of the examples of defined contribution plans available in the US market.

In the context of Mergers and Acquisitions employee stock ownership plans have evolved as tools for facilitating the transactions in two main ways: (i) as a financing vehicle for the acquisition of companies, including through LBOs, and (ii) as an anti-takeover defense.

Example: Defined Contribution Plans

Public Provident fund (PPF) in India is a very popular defined contribution plan in India. Its salient features are as follows.

- Its rate of return is fixed and is announced by the Government every year and the interest carries sovereign guarantee.
- One can contribute ₹ 1.5 lac per annum.
- The initial lock in period is for 15 years and it can be renewed for multiple blocks of 5 years thereafter.

Contd. ....

- Investments and maturity amounts are tax exempted.
- Partial withdrawal after first 5 years of investment is possible.

Source: https://www.canarahsbclife.com/blog/retirement-plan/difference-between-defined-benefit-and-defined-contribution-plan.html , dated 20th July, 2022. Accessed on 30.08.2022

17.4 ESOPs: The Underlying Philosophy

In markets like the USA, ESOPs are seen as an important HRD (Human Resources Development) tool. In India, the idea is just beginning to catch up. An ESOP is another incentive or compensation tool for a company.

The rationale is that stock options generate a sense of ownership among employees. Stock options tend to develop an entrepreneurial spirit among top executives since they own stock and an appreciation in stock prices, if the company does well will add to their wealth. ESOPs help in aligning individual goals with corporate goals. ESOPs also help companies to retain staff, attract talent, motivate employees by enabling them to share the long-term growth of the company.

The basic purpose of the employee stock option plan is to ensure employee retention. In an industry where switching loyalties is as common as changing one's outfit, this option would give an incentive to employees to hold on at least until their stocks mature. If stock-holding employees decide to leave the organization before the maturity period, they would stand to lose their benefits under the plan.

ESOPs are a very good method of giving part-ownership to employees. Stock options are also a mechanism by which the firm can synergize the personal goals of the employees with those of the organization. This is because an employee with a stock option has a personal interest in seeing the price of the stock increase and, therefore, has an incentive to be more productive to improve the firm's bottom line.

The Employees Stock Option Plan (ESOP) is widely recognized as an effective means of improving corporate performance, by enabling employees to participate in the creation and sharing of the wealth they help create in an organization. The ESOP confers on an employee the right to buy shares at a predetermined price to be exercised at a predetermined time. During this intervening time, i.e., from the date of vesting of the right to buy shares till the actual exercise of option to buy the shares, an employee just by working would add value to the organization.

An employee also stands to gain. Stock options have advantages over other forms of compensation like profit sharing. There is an implied justice in a stock option that is apparent to the employee. This is so because the owner or promoters of the company are also rewarded in exactly the same way.

Also, should the board decide to increase the employees' salary by, say, 40%, it will directly burden the profits of the company. By issuing ESOPs, the company is able to retain its employees as well as build long-term wealth.

Industry Segments and Predominance of ESOPs

Companies in the software or pharmaceutical industries are likely to go in for ESOPs. Basically, options work in industries where intellectual capital is precious and attrition levels are high. In knowledge industries like software and financial services, for instance, the benefits of ESOPs have converted companies like Infosys Technologies, Satyam Computers, NIIT and Aptech into front rank players in the global markets several years ago. But now, dozens of companies in other sectors – from services to engineering, from automobiles to consumer goods are embracing ESOPs too.

In software industries, ESOPs can be a very strong motivation to retain high quality professionals. A few software companies in India have introduced this scheme and have seen the benefits.

Example: ESOPs – Tool to Enhance Employee Commitment

Persistent Systems is a services and solutions company operating in 18 countries and employing more than fourteen thousand employees. In October 2021 it floated an ESOP scheme under which almost 80% of its employees were eligible to participate. The CEO of Persistent Systems said that the company is acknowledging the contribution of each of its employees. These employees were the backbone of the success that the company has been able to achieve according to the CEO. As such he wished that under the ESOP scheme the employees will get the opportunity to become the co-owners of the successful results achieved by the company. This will further motivate them to aim higher he wished.

Source: https://www.persistent.com/media/press-releases/persistent-launches-one-of-the-most-inclusive-employee-stock-option-plans-in-the-global-it-services-industry/ dated October 8, 2021, Accessed on 13.06.2022

17.5 History of ESOPs in the US

ESOPs have their roots in the USA. During the 1920s when the stock market was rising and Americans owned stock the employee stock option plan was very popular in the United States. The stock market crash of 1929 followed by the economic slowdown caused the stockholdings of employees to decline dramatically. With the decline in the value of the firm's stock, employees were not willing to take shares in the company as compensation, due to the added risk that this form of compensation brought.

The past, present and future play a crucial role in the evolution of the ESOP. Its humble beginning is no indication of its current or future state. It is, and always will be, simple in principle but inherently complex in application.

The earliest sign of anything remotely similar to an ESOP was in 1926. The stock bonus plan was authorized in the same Internal Revenue Code that authorized the profit sharing plan. Some of the more famous stock bonus plans include the Sears Plan, which was adopted in the late 1920s, the J C Penney Plan and the Proctor and Gamble Plan. In fact, stock bonus plans were not very popular until the 1950s and the 1960s and were used primarily by public companies that already had a readymade public market for their stock.

The ESOPs gained significance first in 1956. At this time, a revenue ruling was made that authorized stock bonus plans to borrow money to purchase company stock. Previously, the critical difference between a stock bonus plan and an ESOP had been that an ESOP had the power to leverage; that is, to borrow money to purchase company stock. A stock bonus plan, on the other hand, did not have the authority or the power to borrow money; it could only purchase stock on an annual basis. In 1956, for the first time, an Internal Revenue Service Ruling allowed stock bonus plans to borrow funds to purchase company stock. With this ruling the first ESOP was adopted and operated in the form known today.

In 1974, the Employee Retirement Income Security Act (ERISA) was being considered by Congress. The Act originated as an attempt to regulate the Central States Teamsters' Pension Plan that had been subject to abuse. However, in its final form, the Act regulated everything from savings plans to profit sharing and pension plans.

In the same year, significant actions regarding ESOPs came up in the Senate. The Senate, at that time, had two bills: the Senate Labor Committee Bill and the Finance Committee Bill. Both bills were based upon the provisions in the 1969 Charitable Foundation Act and the 1969 Tax Reform Act. That is, there was a series of prohibited transactions and a series of exemptions from prohibited transactions. Accordingly, there was an exemption for loans to purchase company stock. There was also a prohibition against purchasing or borrowing stock from a party-in-interest. However, an exemption existed in the private foundation provisions and in ERISA for borrowing money from a party-in-interest. No one in the Senate realized that this inadvertently protected ESOPs.

After considering both bills, they were assigned to a Conference Committee comprising members of the Senate Finance Committee and the Senate Labor Committee. Since only one or two senators were even aware of ESOPs, the Conference Committee saw no need for the exemption and deleted the exemption that protected ESOPs. The Senate passed the Bill and sent it to the House Ways and Means Committee. As a result, the bill was passed by the House, making ESOPs prohibited transactions.

During 1974, there was high inflation; high interest rates and banks were rationing credit. As a result, the Dow Jones Industrial Average was in the 500s, there was no venture capital and there were no mergers or acquisitions. Small businesses could not even borrow money from their banks. The Penn Central was in bankruptcy and was asking the Congress for a $15 billion subsidy. Added to this, the British economy was in a depression, and the entire work force in Britain was on a three-day work week due to the presence of various union strikes. Because of these circumstances, Senator Long immediately endorsed the ESOP for the following reasons:

- ESOPs reduce the tax burden for smaller companies.
- ESOPs reduce inflation by encouraging employees to take less pay in return for more equity.
- ESOPs are an incentive for employees to become more productive.
- ESOPs generate capital.
- ESOPs reduce unionization and the frequency of strikes.

Accordingly, he sponsored the legislation that became law on September 2, 1974 the Employee Retirement Income Security Act (ERISA). He also sponsored ESOP legislation in the Railroad Reorganization Act. This legislation proves that, to the maximum extent possible, should Congress give federal subsidy to private industry, i.e., Penn Central Railroad, this financing should be provided through an ESOP, to the maximum extent possible. By doing so, a broader ownership of capital would be created, the employees would be less likely to engage in striking and featherbedding, and the probability of having the money repaid would be enhanced.

In 1976, 1978 and 1982, there was additional ESOP legislation. These bills made technical corrections that improved and enhanced the abilities and the advantages of ESOPs. The Retirement Equity Act of 1984, signed into law by President Reagan on August 24, 1984, contains the most dramatic tax benefits for ESOPs ever enacted. It is evident by this Act that Congress intended to encourage and promote the ESOP concept by providing special tax incentives for companies that adopt them. The most dramatic provision of the 1984 law is the tax free rollover provision contained in Section 1042 of the IRS Code. Under this provision, a taxpayer may defer paying the capital gains tax on certain securities sold to an ESOP if he reinvests the proceeds in qualified securities within 12 months of the date of sale. Further enhancements included interest exclusion, a dividend deduction and an estate tax assumption. Together, these strengthened and encouraged the implementation of ESOPs.

However, in the Tax Reform Act of 1986, Congress unexpectedly questioned the practicality of all ESOPs. Their future existence was at stake. After much debate, but little action, ESOPs remained basically unchanged. Since then, the popularity of ESOPs has grown, and it is unlikely that Congress will drastically change or eliminate ESOPs in the future.

The enactment of tax laws in 1974 set a stage for the eventual development of the leveraged ESOPs. The law allowed a qualified retirement plan to borrow for the purpose of purchasing stock. However, till the 1980s the tax benefits and other advantages of ESOPs were not explored and so the ESOP activity was not very significant.

ESOPs became very attractive by the end of 1980s. The improved tax incentives that were enacted in the Tax Reform Act of 1984 and the use of ESOPs as an anti-takeover defense led to this popularity of the ESOPs.

Usually, employees in the USA are known to acquire interest in their employer company's stock in three common ways:

i. **Company Stock Under 401(k):** Often, public companies will allow employees to purchase stock within their 401(k), sometimes at a discounted rate. This stock is usually portable, and can be transferred in-kind to a Rollover IRA or redeemed into a taxable Brokerage Account.

ii. **Stock Purchased through Employer Company:** Public companies sometimes allow employees to purchase company stock directly from the company. One type of plan is an Employee Stock Purchase Plan, which gives an employee the right to purchase company stock, sometimes at a predetermined discount from the fair market price. This stock can usually be transferred in kind to a Brokerage Account.

iii. **Employee Stock Options:** As incentives, many public companies give certain employees the right to purchase stock at a predetermined price, even if the fair market value of the stock has increased from that option's grant price. Often, companies will require the allotted employee the options to hold for a period of time before being exercised. This is called the vesting period. When the allotted employee leaves a company, the company's plan may give him/her a limited amount of time to exercise vested unexercised options (usually 90 days). Shares acquired previously through exercise of options can, of course, be retained by the employee and can be transferred in kind into a Brokerage Account.

An ESOP ("Employee Stock, Option Plan") is a qualified plan designed to invest primarily in the employer's securities and thus gives the participants in the ESOP an ownership interest in their employer. An ESOP may also be leveraged and deal with related parties to acquire the employer's securities. This would be prohibited under other types of qualified plans. As a result, an ESOP may serve as a financing vehicle for the employer. The Tax Reform Act of 1984, of the USA which forms a part of Deficit Reduction Act of 1984 ("DEFRA"), and the Tax Reform Act of 1986, present the most important legislative breakthroughs in the history of ESOPs. These Acts not only provide substantial incentives for institutions making loans to ESOPs and employers maintaining ESOPs, but also includes significant federal income and estate tax planning opportunities.

Employee Stock Options are the right to purchase a given number of shares of company stock at the non-tradable "strike" price. An employee can exercise a vested in-the-money option but cannot sell the option to an investor. An implication of this is that both the employee's valuation of the option and the timing of the exercise decision are affected by the employee's risk tolerance. An employee with a significant amount of wealth tied up in company stock options has a strong interest in diversifying the risk from movements in the value of the company stock. With traded stock options, the employee could simply sell some options in the market to another investor, an action that transfers but does not diminish the options' underlying value. With employee stock options, the employee would have to exercise the options in order to diversify his risk. This creates an incentive for the early exercise of the options, which reduces their overall value because the employee forgoes the remaining option value.

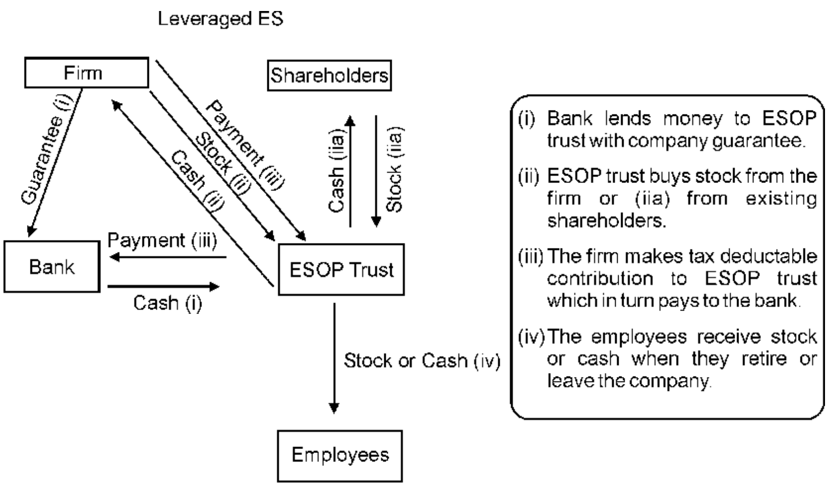
17.6 Types of ESOPs

Employee stock ownership plans can be divided into two categories – leveraged stock ownership plans and unleveraged stock ownership plans.

i. **Leveraged:** In a leveraged ESOP, companies borrow to purchase their own shares and then make a contribution to the ESOP that is used to pay the principal and interest on the loan. Leveraged ESOPs are of more interest as a vehicle for Leveraged Buy-outs (LBOs).

In a leveraged ESOP, the ESOP or its corporate sponsor borrows money from a bank or other qualified lender. The company usually gives the lender a guarantee that it will make contributions to the trust and this enables to amortize the loan on schedule; or, if the lender prefers, the company may borrow directly and make a loan back to the ESOP. If the leveraging is meant to provide new capital for expansion or capital improvements, the company will use the cash to buy new shares of stock in the company. If the leveraging is being used to buy out the stock of a retiring owner, the ESOP will acquire those existing shares. If the leveraging is being used to divest a division the ESOP will buy the shares of a newly created shell company, which will in turn purchase the division and its assets. ESOP financing can also be used to make acquisitions, buy back publicly – traded stock, or for any other corporate purpose.

Figure 17.1: Leveraged ESOP



Example: Allocating ESOP options for buy back on a future date

Zerodha is a Bangaluru based stock broking company with its stock broking App being used by more than 6 million users as on October 2021. The company is co-founded by Nikhil and Nitin Kamath. The company is completely boot strapped and has no plans to change it at least in near future. In October 2021 the company allocated 7 lac options in addition to its existing ESOP pool to be

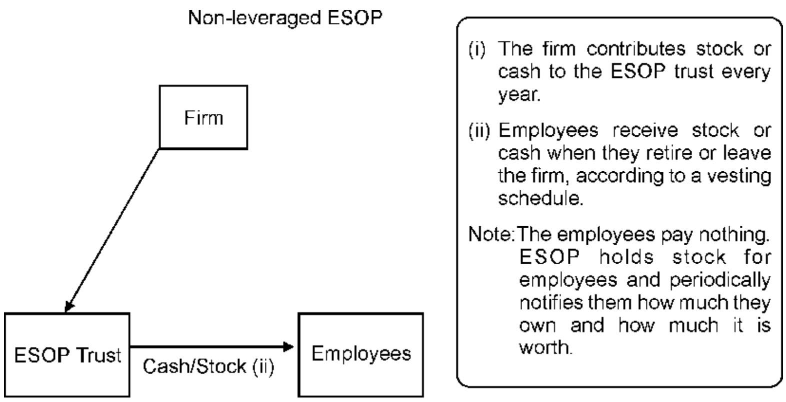
Contd. ....

used as ESOP for its employees under the ESOP plan 2021. A year ago the company had bought back its ESOP options at ₹ 700 per unit. The buyback was worth close to ₹ 65 crore. Under the current plan the company wishes to buy back at ₹1400 per unit and the total buy back value would be ₹100 crore. Since the company is neither listed nor does it plans so and it does not want any outside investors to come in the buyback itself will be an option for the company.

Source: https://entrackr.com/2021/10/exclusive-zerodha-creates-new-esop-plan-worth-rs-100-cr/, Accessed on 30.08.2022

ii. **Unleveraged ESOPs:** On the other hand, unleveraged ESOPs do not borrow.

Figure 17.2: Unleveraged ESOP



iii. **Leverage able ESOPs:** It is an authorized ESOP which does not require borrowing the funds; and the plan for the documents for non-leveraged ESOPs do not provide for borrowing.

iv. **Tax Credit ESOPs:** In addition to the regular investment credit in existence an additional investment credit of 1% is also earned by a contribution of that amount to an ESOP. These plans were called as Tax Reduction Act ESOPs or TRASOPs. Further, 0.5% credit was added in 1976 to companies which contributed same amounts as their employees to the TRASOPs.
Such plans are called as pay roll based ESOPs or PAYSOPs.

17.7 Employee Risk and ESOP

By accepting part of their compensation in the form of stock in the employer corporation, workers take on an increased risk. If the company fails, employees will lose not only their regular source of income but perhaps the value of their pension as well. This occurred in the USA when the South Bend Lathe company was forced to file for bankruptcy.

Corporations may offset the risk by contributing convertible preferred shares instead of shares of common stock. Shares are convertible in common stock to be eligible for the plan. Preferred shares have a higher priority than common stock in bankruptcy. If the value of the firm is increasing the employees will be able to participate in this growth by converting to shares of common stock.

It is important to bear in mind that many successful proponents of ESOPs disagree with this assessment of the risks of ESOPs when this is combined with the fact that most ESOPs have higher contribution rates than other defined contribution plans.

ESOPS: Modus Operandi

Most ESOPs act out of a Trust or through a Board of Directors; this is a direct transfer of shares in the employee's name from the company. In the case of a Trust, the company commits itself to transfer a certain amount of shares. It is like a kitty where a one-time preferential issue of warrants is stored.

In place of actual stock options, companies can also offer phantom stock options, which grant stock appreciation rights. The recipients in such schemes receive a cash payment equivalent to the rise in the values of their respective notional stocks without actual transfer of shares in their names.

Example: Issue of shares under ESOP at a discount

iD Fresh Food is a Bangaluru based ready to cook product start up which is also backed by Wipro promoter Mr. Azim Premji.. The company in July 2022 rolled out an extension of its ESOP plan to cover 27 more of its employees. The company has an approximate staff strength of 2000 employees and it plans to make 100 of its employees as 'crorepatis'. 54% of the employees who have been offered ESOP till now are junior staffs including drivers and helpers. The company is offering its high value shares only at s 10 to its employees in order that they can create the desired wealth for them.

Source: https://www.business-standard.com/article/companies/food-firm-id-fresh-grants-esop-says-it-aims-to-create-100-crorepatis-122070700758_1.html, dated 8th July, 2022. Accessed on 30.08.2022

Pricing

In India, stock options must be priced according to the same rules that govern the issue of preference shares. That is, the option price must be at the current market price (the average of the weekly high and low during the six months preceding the date of approval of the scheme by shareholders). Issuing the shares at a discount to market price is not permissible.

The price at which one should grant shares under ESOP has invited much debate. At one level, the price should be determined by the employer's objectives. If it is past performance that one is rewarding, then employees should be able to buy their shares at a sizeable discount to the market price so that their gains are immediate. That, of course, will hit the bottom line of an employer.

On the other hand, the more profit – friendly alternative is best applied when one is using ESOP to spur future performance. Then, the grant price could well be the same as that of scrip's current market price, with the incentives being available only if the recipients can take the company to greater heights on the bourses.

Payment Mechanics

Since the mechanics of ESOPs involves offering employees the opportunity to buy their company's shares, these shares have to be made available in the first place. The source: either a fresh issue of equity, or buying back one's shares from the stock market with the intention of issuing them to employees. Both have a cost.

The second option will mean using the firm's reserves to bankroll the repurchase. And the first will carry a two-fold cost: lower earnings, thanks to a higher equity-base.

And the cost involved in offering the shares at a discount. As a leading analyst in the Industry points out: "A discounted issue implies an opportunity-loss since the same shares could have been issued at the marketprice or even higher."

Let us now turn to how the cost will show up on employer's books. The SEBI guidelines specify that the difference between the price at which your employees can exercise their options and the market-price-on-the-date on which the option is granted-must be taken as an expenditure on employer's Profit & Loss Account although there is no actual cash-outflow. The only saving grace is – this can be spread out over the entire period during which the scheme is in play instead of taking the blow in one year.

Identification of the Recipients

If a company wants to make all its employees richer a general disbursal can be opted, with a short lock-in period so that the payback period is tangible. For instance, at the Bangalore-based Aditi Technologies, all 300 employees are stock-option holders, with ESOPs being an intrinsic part of the compensation-package. In fact, the straightforward stock-purchase scheme could be the ideal solution since it creates instantaneous ownership. The focus is on rewarding a track record, but not on promising incentives for future performance.

If, like a growing number of the peers, a company wants to use ESOPs as a tool for rewarding the best, stringent qualification standards need to be set. This may create a rift between the haves and the have-nots. But then, the company only wants to reward and motivate the best people. A simple solution is to make either length of service or seniority – or both, the criteria for granting ESOPs which will automatically narrow the number of recipients.

For many companies, ESOPs are, actually, an obvious carrot for employees to do better in future. At one level, since the market is the ultimate arbitrator of performance, the price it puts on the company's scrip will help determine the value of every employee's stockholding. But is the offer an identical number of shares to each or does it vary according to their past and potential contribution? That is where picking the right parameter of performance comes in. Judging from the precedents set by the US corporations, the primary choice is between absolute and relative indicators: improvement in sales, profits, or share-prices, either in absolute terms or relative to those of rivals. In addition, specific targets could be set for different individuals.

One has to take into account the criticality and the market value of both the position and the individual when picking whom to reward with ESOPs. Smart strategists classify their people in two ways: those who, both as individuals and by virtue of the roles they play, are critical to a company's competitive advantage, and those who are substitutable head-and-body players. The differentiation is needed because it is best to use ESOPs only for the first category.

17.8 ESOPs and Corporate Performance

Some proponents of ESOPs challenge that they are beneficial to a corporation because they help finance capital expenditure and facilitate improvements in labor productivity. Employee Stock Ownership Plan may take a greater interest in their performance. With sufficient incentives, workers may be less resistant to productivity enhancement changes such as mechanization or more efficient work procedures.

Douglas Kruse and Joseph Blasi of Rutgers University analyzed all the ESOPs. They then matched these companies to comparable non-ESOP companies and looked at the sales and employment data for the paired companies for three years prior to a company setting up an ESOP to the period three years after. They found that when they indexed out for the performance of the competitor companies, the ESOP companies grew 2.3% to 2.4% faster after setting up their plan than would have been expected otherwise. That seemed to give strong evidence that ESOPs do make a significant and positive contribution to corporate performance.

Impressive as these findings are, they do not indicate what it was about employee ownership that causes the improved performance or whether the improved performance is accounted for by just a subset of ESOP companies with particular characteristics.

Example: Coverage of Employees under ESOP

There was a time when the corporates used to concentrate on key senior employees while contemplating to float ESOP scheme. It was believed that if

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the company could retain its key resources the rest would follow. The paradigm shift witnessed now is due to several reasons one being the pandemic despite which some of the companies witnessed good success during this period. One such start up was Bengaluru based meat and sea food company Licious which, in January 2021, floated its first ESOP scheme covering around 800 employees including processing centre staff, corporate executives and delivery boys. The co-founder of Licious was of the opinion that the meat technicians, meat processors and the delivery boys were the real heartbeat of the company and deserved to benefit from its growth. The co-founder further observed that the grant of ESOP to the blue collar staff was a progressive and positive step by the company.

Source: https://economictimes.indiatimes.com/tech/startups/esops-for-startups-no-more-a-fable-esops-reach-rank-and-file-of-startups-in-india/articleshow/80679023.cms?from=mdr dated February 4, 2021, Accessed on 15.06.2022

The answer to whether employee ownership motivates employees seems to answer whether ownership improves corporate performance. Not so. In most companies, labor costs are under 30-40% of total costs. Motivation on its own, presumably, makes employees work harder. When managers are asked about how much more work they think they could hope to get from more motivated employees, based on an eight-hour day. "Fifteen minutes" is the typical response.

While a 1% improvement can be a lot of money, it is not what distinguishes the really successful companies from the mediocre ones. The star performers are those that react to their environment in creative, innovative ways, providing better value to their customers than competitors. How is that achieved? Through processing information and acting on it intelligently. In most companies, information gathering is limited to a group of managers. The generation of ideas is similarly limited. So is decision-making. The assumption is that only these people have the talent, and perhaps motivation, to carry-out these tasks.

In fact, no one has more daily contact with customers than employees at the front end office, at least in most companies. No one is closer to the day-to-day process of making the product or providing the service than the employees. And, employees often do have useful ideas they could share with the management.

Thus, for a company to use employee ownership effectively, it needs to do more than motivate people to work harder at what, after all, may not be the most efficient or effective thing to do. Instead, it must enlist employee ideas and information to find the best ways to do the most important things. To do that, companies need to get employees involved. Managers should seek their opinions. Employee task forces, *ad hoc* and permanent, should be established to solve problems. Quality circles and employee involvement teams can be set-up. Individual jobs can be enhanced with limited supervision suggestion systems can be implemented. This may all seem like common sense, and it is. Though, it is not very common practice in most companies, however, Data indicate that this practice is becoming common in employee ownership companies.

Other approaches include employee advisory committees to management, eliminating levels of supervision while giving non-management employees more authority, meetings between management and randomly selected groups of employees, suggestion boxes, and anything else companies can imagine to get people involved in.

This “high-involvement” management style has, of course, become conventional wisdom, if still considered an unconventional practice, at many companies.

Is ownership really essential to make it work? There are no conclusive data on this, but there is good reason to believe that ownership, if not essential, is at least highly desirable. First, ownership is a cumulative benefit. Each additional year, an employee has more and more at stake in how well the company performs. It is not unusual in mature plans for the appreciation in share value and employer contributions to add up to 30% to 50% or more of pay in a year. In profit sharing or gainsharing, both of which are paid periodically and almost always amount to a small portion of total compensation, the benefit always remains relatively minor. Second, ownership has a stronger emotive appeal. People may be very proud to say they are owners; a few would brag to friends to be profit-sharers. Finally, only ownership encourages people to think about all aspects of a business, not just short-term profits or some efficiency measure. This is especially important in companies moving towards open-book management systems.

17.9 Role of ESOPs in Mergers and Acquisitions

Till now we have seen how ESOPs are used as a HR tool to generate a sense of ownership among employees, as an effective means of improving corporate performance, and as an incentive to improve the productivity of the firm. Now we will look at how ESOPs are increasingly being used in raising capital in leveraged buy-outs and divestitures and also as an anti-takeover defense.

ESOPs as a Financing Tool

Equity financing can be obtained from within the company if the firm is willing to share some ownership control with the employees of the company. An ESOP plan enables employees to purchase shares of stock in the company by paying cash or by agreeing to deductions from salary or benefits. The employees become part owners of the business and the firm in turn has additional funds for other business purposes. In addition, the company also can contribute to the ESOP by either making an annual cash contribution to the plan for the purchase of company securities or by directly contributing stock to the plan. In both ways, the company’s contribution results in the cash price of the stock being returned to the company. The company gets a tax deduction for the ESOP contribution while effectively retaining the cash.

Allocating equity for the ESOP pool

OLA, a cab aggregator platform has been reasonably successful in its operations and in the year 2020 expanded its ESOP plan further by allocating additionally over 153000 equity shares in its pool of ESOP. Value of the additional allocation of the equity would be around ₹ 326 crore. The value is arrived at by considering the price at which the shares of OLA were allotted to Hyundai and Kia. The expanded ESOP pool will be utilised in extending and covering additional employees of OLA to get the benefit of the scheme.

Source https://entrackr.com/2020/02/ola-adds-esops-worth-rs-326-cr/, Accessed on 30.08.2022

ESOPs can also be used as leverage for borrowing additional funds for the business. An ESOP can borrow funds from lenders in order to purchase additional securities in the employer's business. Alternatively, the employer can borrow from a lender and re-lend the funds to the ESOP. The ESOP would then purchase company stock with the cash. In both the situations, the employer ends up with the cash price of the stock. ESOPs can be used in this manner for large stock purchases when funding is necessary to finance mergers, acquisitions or buy-outs.

However, the use of ESOPs as a financing tool has its own disadvantages. ESOP as a financing tool may not be prudent for many startup and existing small businesses because implementing an ESOP is very expensive and time-consuming.

In addition, participants in the ESOP plan who terminate employment may demand distribution of stock itself, rather than simply the stock's cash value. A closely held business may not want former employees to own stock in the company or to be able to vote as shareholders. Besides, if the trustees of the ESOP are also the business' owners, they may occasionally face a conflict of interest between their duties to act in the best interests of the ESOP and their duties as directors and/or officers of the company. For example, if a takeover offer was tendered, the ESOP might profit from the takeover, but company management might oppose the possible change.

We will now see the use of ESOP financing over other forms of financing like equity and debt in the form of a numerical example.

A firm is trying to expand its business and requires a capital of ₹ 2,50,000. The shareholder's capital is ₹ 1,50,000 and it seeks to raise the additional capital required i.e., ₹ 1,00,000. It can do this through three options.

Option I – Conventional Equity Financing

By selling 10,000 shares at ₹ 10 per share. Assume that during first year the operating income of the firm is₹ 20,000 and is expected to grow at 20% every year for 4 years. The tax rate applicable to the firm is 36%.

	0 (₹)	1 (₹)	2 (₹)	3 (₹)	4 (₹)
Operating Income		20,000	24,000	28,800	34,560
Less: Interest		-	-	-	
Income before Tax		20,000	24,000	28,800	34,560
Income Tax @ 36%		7,200	8,640	10,368	12,441.6
Net Income		12,800	15,360	18,432	22,118.4
Cumulative Net Income			28,160	46,592	68,710.4
Shareholders Capital	1,50,000				
	1,00,000				
	2,50,000	2,62,800	2,90,960	3,37,552	4,06,262.4
Cumulative Taxes Paid		7,200	15,840	26,208	38,649.60

Here, the original number of shares was 15,000. The new total is 25,000. Hence, the percent ownership of the original shareholders will be 15,000/25,000 = 60%. Hence, the ownership in the income is 4,06,262 x 60% = ₹2,43,756 approximately.

Option II – Long-term debt

By raising long-term debt of ₹ 1,00,000. The debt is to be paid off in four years by paying ₹ 17,500; ₹ 22,500, ₹ 32,500 and ₹ 37,500 respectively at the end of each year in the first four years. The interest is assumed to be 10% on the balance at the beginning of the year.

	0 (₹)	1 (₹)	2 (₹)	3 (₹)	4 (₹)
Operating Income		20,000	24,000	28,800	34,560
Less: Interest		1,000	825	600	325
Income before tax		19,000	23,175	28,200	34,235
Income tax @ 36%		6,840	8,343	10,152	12,324.6
Net Income		12,160	14,832	18,048	21,910
Cumulative net income		12,160	26,992	45,040	66,950
Repayment principal on debt Capitalization		17,500	22,500	27,500	32,500
					Contd. ..

Long-term debt	1,00,000	82,500	60,000	32,500	
Shareholder's equity	1,50,000	1,62,160	1,76,992	1,95,040	2,16,950
Total capital	1,50,000	2,44,660	2,36,992	2,27,540	2,16,950

Here, there is no dilution of equity ownership. However, because of the repayment of the debt and the interest on debt, the total capital is about 1,80,000 less than under the conventional equity financing. But the taxes are reduced and the ownership is higher.

Option III – ESOP Financing

Establish an ESOP trust which will borrow ₹ 1,00,000 and use the money to buy 10,000 shares in the sponsorer firm. The resulting financial patterns can be shown as:

	0 (₹)	1 (₹)	2 (₹)	3 (₹)	4 (₹)
Operating Income		20,000	24,000	28,800	34,560
ESOP contribution interest		1000	825	600	325
ESOP contribution Principal		17,500	22,500	27,500	32,500
Income before taxes		1,500	675	700	1,735
Income tax @ 36%		540	243	252	624.6
Net income (Books)		960	432	448	1,110
Net income (Actual)		18,460	22,932	27,948	33,610
Cumulative net income		18,460	41,392	69,342	1,02,952
Capitilization					
Long-term debt	1,00,000	82,500	60,000	32,500	
Shareholders equity	1,50,000	1,68,460	2,09,852	2,79,194	3,82,146
ESOP obligation	1,00,000	82,500	60,000	32,500	
Net equity = book value	50,000	85,960	1,49,852	2,46,694	3,82,146
Total Capital	1,50,000	168,460	2,09,852	2,79,194	3,82,146
Outstanding Shares	15,000	16,750	19,000	21,750	25,000
Share Additions		1,750	2,250	2,750	3,250
Percent Ownership	100%	89%	79%	69%	60%
ESOP Capital Cumulative Shares		1,750	4,000	6,750	10,000
ESOP % of shareholders equity owned		11%	21%	31%	40%
ESOP equity at book value (Shareholders equity x ESOP %)		18,530	44,069	86,550	15,2858
Cumulative Taxes paid		540	783	1,035	1,660

Here, we started with the operating income as in the previous two options. However, in addition to interest being a deductible expense as it was in the case of borrowing through debt, the ESOP contribution applied to principal is also a tax deductible expense. The taxable income before taxes and the income tax is the lowest among all the three options. The cumulative net income is the highest because of tax savings.

As compared to the conventional debt financing, shareholders' equity is much larger. The number of shares outstanding at the end of the year 0 is 15,000 and in each subsequent year we transfer shares on the basis of the amount that the ESOP has repaid on the principal. By the end of the fourth year an exactly same 60% original ownership remains as in the conventional equity financing. But the advantage of leveraged ESOP financing over the conventional equity financing is that if the funds raised are productive so that the value of the shares increases, a smaller number of shares will have to be transferred. Consequently, the percentage that the original shareholders own at the end of the fourth year period would be greater than 60%.

(**Note:** In all the above three options it is assumed that the shares were sold at a market price equal to the book value of ₹ 10 per share.)

From the above discussion, we can say that as compared to the conventional equity financing, leveraged ESOPs financing has the benefit of transferring the shares on the basis of the future market prices which are expectantly higher. As compared with the conventional debt financing, repayment of principal is a tax deduction, and hence taxes can be saved.

ESOPs and Divestitures

If a subsidiary of a large corporation cannot be sold at a reasonable price or if liquidating the subsidiary would be disruptive to customers, the parent company may initiate a sale directly through an ESOP. Many corporations are now increasingly considering using Employee Stock Ownership Plans (ESOPs), as a unique cost-effective tool for facilitating divestiture.

The employers of the subsidiary can purchase the controlling interest of the subsidiary through an ESOP since they will have a huge stake in the subsidiary. Divestiture of a subsidiary through an ESOP can be done by establishing a shell corporation. The shell company will establish an ESOP and the debt capacity of the shell company and the ESOP will be used to finance the purchase of a subsidiary from the parent. The shell corporation will be responsible for the operations of the subsidiary and the ESOP holds the stock of the subsidiary. If the subsidiary is successful, income is generated. And this income is allowed for tax deductions. This will enable the subsidiary to service its debt. Here, the subsidiary's capability as an independent entity and its ability to generate sufficient income to cover its financing is very important. If the subsidiary is in a dying industry and requires a large amount of transformation, then it is better to liquidate the assets of the subsidiary.

ESOPs and Leveraged Buyouts

ESOPs are also commonly used by employees in leveraged buyouts or management buyouts to purchase the shares of the owners of privately held firms. The use of ESOPs to finance leveraged buyouts is seen mostly where the owners have most of their net worth tied up in their firms. The mechanism is similar to a sale initiated by the owner to the employees.

ESOPs as an Anti-Takeover Defense

Usually, firms which are potential takeover candidates create ESOPs. The ESOP trust borrows with the help of the sponsoring firm's guarantee and uses the loan proceeds to buy stock issued by the sponsoring firm. While the loan is outstanding, the ESOPs trustees retain the voting rights on the stock. Once the loan is paid off, it is generally assumed that the employees will tend to vote against bidders who they perceive as putting their jobs at risk.

Much of the rising popularity of ESOPs is related to the use of the compensation vehicle as an anti-takeover defense rather than because of its tax advantages. For a large percentage of the American corporation in Deleware where an anti-takeover law became effective, this law provided that if a bidder purchases more than 15% of a firm's stock he may not complete the takeover for three years unless:

- the bidder purchases as much as 85% of the targets shares;
- two thirds of the shareholders approve the acquisition; and
- the Board of Directors and the shareholders decide to exempt themselves from the provisions of the law.

17.10 ESOPs Practices in India – An Overview

The survey report, which is described in the following section, addresses to the finer aspects of ESOP Design practices in India. It would however be useful to take a macro view of the overall trends that seem to be emerging in this relatively new phenomenon in India.

Example: Key Understandings in the Strategic Implementation of ESOP Tool

KPMG, one of the big four audit and consulting firms, conducted a survey in 2021 on the issue of ESOP – its current and proposed trends in India. The key findings of the survey are as follows:

- 68% of the respondents have either implemented or are going to implement an ESOP plan. IT companies are majorly in it.
- Employee retention is the major objective behind implementing an ESOP plan.
- Equity share is the major choice of instrument under the plan.

Contd. ....

- Single plan for all the employees is preferred than a multiple plan for different set of employees.
- Sourcing of securities for the plan is through fresh issue.
- Companies prefer to dilute not more than 5% of its holding for the plan.
- Key senior executives continue to be the major beneficiaries under the plan.
- Companies review the stock ownership plan on an annual basis to assess impact vis-à-vis objective.
- Companies prefer to grant stock at fair market value.
- Additional administrative compliances and tax issues have probably rendered Trust route as less attractive.
- Vesting and exercise period is preferred at three to five years.
- Most companies use ESOP plan as a part of their hiring strategy.

Source: https://home.kpmg/in/en/home/insights/2021/05/esop-survey-report-2021.html Accessed on 17.06.2022

Here, we have made an attempt to identify and analyze the macro trends. An attempt is made to interpret the findings with reference to sectors (IT vs Non-IT) and also within the sectors, in terms of whether companies are looking at structures unique to their requirements or is everyone following each other. We have also tried to analyze the impact of the SEBI guidelines on ESOP and benchmarked the findings versus global trends, particularly in the USA.

Coverage of Employees

There is a noticeable difference in terms of coverage, if one compares the IT and Non-IT companies. While around 43% of the IT companies have given ESOPs to more than 90% of the employees, only 17% of the Non-IT companies have done so. A related finding is that more than 75% of the Non-IT companies offer ESOPs only to the senior and middle management employees.

This is a predictable trend. We believe that apart from the willingness of the management to offer ESOPs, it is also the preference of the employees, which influences the decision about coverage. While a worker employee in a manufacturing company would prefer a cash incentive to a stock option, a fresh software developer would go for a stock option. It has to be seen how the employees in the IT sector react to the slump in the stock prices.

It is however interesting that within the IT companies, while only 23% of the large companies offer ESOPs to more than 90% of the employees, the number is as high as 60% in case of smaller companies. A significant 54% of the large IT companies offer ESOPs to less than 25% of their employees. This clearly brings out that smaller companies offer options to the junior employees also to ensure retention and attract them from larger companies. For IT sector the Government has expanded the scope of the “Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism)” to cover employees of subsidiary companies of parent company, under the facility for issue of ADR/GDR linked stock options. Accordingly Indian companies engaged in the IT Software and IT Services, would be entitled to issue ADR/GDR linked Stock Options to the permanent employees (including Indian and overseas working directors) of its subsidiary companies incorporated in India or out of India and engaged in Information Technology Software and Information Technology Services subject to the eligibility criteria and other parameters announced earlier. The Government has been considering expansion in the coverage of employees who would be entitled to the ESOPs in line with the SEBI guidelines on ESOPs which covers employees of a subsidiary company for the purposes of ESOPs.

Legal Structure

It is interesting to find that there is no uniform legal structure followed by the companies. While around 58% of the companies have preferred a direct route (Without an ESOP Trust) a significant number (42%) of companies have preferred a Trust route.

Term of Options

There appears to be no difference in the practices followed by IT and Non-IT companies with respect to the term of the options. More than 78% of the IT companies have a term of less than 4 years and the percentage is identical for the Non-IT companies.

It was expected that the tenure in the Non-IT companies would be longer since their attrition rates are much less than the IT sector.

If the Non-IT companies look at longer terms, they could optimize by diluting less equity without affecting the attractiveness of ESOPs.

Interestingly no remarkable difference is noticed between large and small IT companies. It was expected that small IT companies would have shorter term of options than the larger companies, to attract and retain talent. However, it does not appear to be so.

Frequency of Grants

Here, again there is similarity in the practices followed by the IT and Non-IT companies. Around 57% of the IT companies grant on a yearly basis whereas around 50% of the Non-IT companies do so.

It is expected that as a response to volatility in stock prices, more and more companies would now go for frequent grants. This would facilitate pricing the options at close to the market price.

Entitlement

Large number of companies (77%) noticeably give more weightage to individual performance when it comes to deciding the number of options granted. Less importance is given relatively to salary grade, position/title.

Here again the trends are similar in the IT and Non-IT companies.

Conditional Vesting

A significant portion (25%) of the companies provide for vesting linked to individual performance. A comparable figure in the US is around 5%. An apparent trend in the US is more towards only time based vesting because performance based vesting requires compliance with variable plan accounting.

As more and more Indian companies start following US GAAP, they are also likely to follow time-based vesting. Other US features such as performance accelerated vesting (which avoids variable plan accounting) are also likely to feature in the Indian plans.

Another interesting trend is that while in around 90% of the IT companies the vesting is time based, the figure is only 67% in the Non-IT sector. Significantly large number (33%) of Non-IT companies links the vesting to individual performance.

Vesting Schedule

Almost all the companies (98%) prefer uniform vesting schedule for all the options. It seems that companies are not looking at differentiating between say options given to senior management and junior team. We believe that options could be made more effective if the vesting schedule (both the term as well as graded schedule) is fine-tuned based on the target employee segment.

Exercise Price

This is an important factor in the design of an option. Only around 42% of the companies offer options at the fair market value. The global figure is almost 100%.

The trend is no different between the IT and Non-IT companies, except that a fair portion (17%) of the Non-IT companies offer options at a fixed price.

As ESOP practices mature in India, there shall be more and more companies offering options at the market price. Further, usage of differential exercise prices to optimize on the extent of dilution, presumably to avoid the accounting impact in all likelihood, would continue as a norm in the future too.

Provision for Facilitating Exercise

Significantly large number of companies (60%) leave it to the employees to make arrangements for financing the exercise of options. As many as 20% provide for broker-assisted cash less exercise. An equal portion (20%) provides loans to fund the exercise.

The global picture is that almost every company offers broker assisted cashless exercise of options, as a facility to employees.

It is expected that with the new (draft) insider trading guidelines more and more companies would provide for broker assisted exercise (through a designated broker). With more and more banks offering loans against shares, financing of options is also likely to surge.

Change in Control, Rights, Bonus

An alarmingly large number of companies have not addressed situations such as impact of change in control (more than 55%), Rights issue (50%) and Bonus issue (27%). It appears that these companies would leave it to the compensation committees to decide on the impact as and when such situations arise. But such changes (through takeovers, mergers and de mergers) would no longer remain as stray incidences. They shall happen every now and then. So also the occasions when companies issue Right and Bonus shares. These events have significant impact on the underlying value of the options and as such should be addressed upfront in the scheme document. It is noticeable that even larger companies (IT as well as Non-IT) have been equally ignorant about this (especially change in control) in their schemes.

Globally companies provide for accelerated vesting in case of change in control and suitably change the number of options and the exercise price in case of Bonus issues.

Even though more than 73% companies have addressed the issue of treatment to be given on issue of bonus shares, there is no uniformity in the nature of treatment. More than 37% of the companies offer bonus options for vested as well as unvested options.

In order to be fair to the shareholders, option holders should be entitled to bonus options only on the unvested options. For the vested options, employees should exercise them to be eligible for bonus. A significant portion (22%) of the companies do not give bonus options on the unvested options. Considering that the issue of bonus shares directly influences the price of the shares and hence the value of the options, it is only fair that the option holders are offered bonus on the unvested options.

A significant proportion of companies (32%) which grant bonus options, have kept the exercise price of the bonus options as nil. This could lead to a situation where an option holder would be able to exercise the bonus options (without exercising the original options) without paying any exercise price.

It should also be noted that SEBI Guidelines require that situations such as change in control, right issues and bonus issues are addressed by the compensation committee in a fair and reasonable manner.

Response to the Slump in Stock Prices

It is no secret that after the stock market crash most of the options are under-water and no longer attractive. Interestingly, the companies have not found it necessary yet to respond to this situation. More than 92% of the companies have left their schemes untouched.

We believe that this is the first time IT companies are experiencing the phenomenon of crashing prices and under-water options. It will take some time for them to react. We are likely to witness much more on re-pricing, new schemes to swap the earlier grants, etc.

Taxation

Giving employees a stock option is a new phenomenon in India, which has been imported from the USA. It is limited to knowledge driven industries like software, where the major input going into the success of a company are the "intellectual inputs" provided by the skilled labor. It has come into vogue because of shortage of skilled personnel and consequently the rapid turnover of staff.

The attractiveness of ESOP has increased due to the rapid rise of shares of IT companies in the bourses. In such a situation an employee who has shares of the company he works for can make a killing by selling them off. But in such cases the employee has to pay a lot of capital gains tax.

In the USA, shares are normally not offered to employees at par value. Employees are normally eligible to buy company shares at a discount from the promoter's quota. In many cases the shares are not physically transferred to employees. Intel, Sun and Microsoft are amongst companies in the USA, which have employee stock options.

Rule under Indian Income Tax Act, 1961

Section 17(2) (iii)(c) of the Act

The value of any benefit or amenity granted or provided free of cost or concessional rate by any employer to its employees by way of allotment of shares, debentures or warrants directly or indirectly under ESOP or scheme of the company shall not be treated as perquisite only when these are offered to employees in accordance with the guidelines issued in this behalf by the Central Government from the assement year 2000-2001.

Tax Treatment

An ESOP is not taxed when employee get the shares. Employees are taxed, however, when they sell them. This means they will be taxed on the profit they make when they sell the shares.

They also have the option of gifting the shares or transferring them to another person under an irrevocable deed. This is a legal document that says they have handed them over to someone else and they are now the rightful owners, not the employee.

If they choose this option, they don't have to pay tax. But the person to whom the shares have been gifted/transferred will be taxed when she/he sells it and make a profit.

Employee/Shareholder's Benefits

Employee participants in an ESOP are not taxed on the benefits they receive until they actually receive distributions from the ESOP. In a merger or an acquisition if the target is not a public company the target shareholders who tender their shares to acquiring firms leverages ESOP may elect to defer the gain from the sale of the stock.

Employer Corporation Benefits Dividend Deduction

An additional tax benefit of ESOPs is that dividend paid to the ESOP generally is tax deductible. This helps avoid the double taxation of corporate income and gives this component of equity some of the tax benefits that are enjoyed by debt financing.

Ability to Use Loss Carry Forward

The changes in the tax law that took place in 1986 were limited to the ability of corporation to carry forward losses after control changes. This limitation does not apply if an ESOP purchases at least 50% of the equity in the target.

17.11 Master Limited Partnerships

As the term indicates, Master Limited Partnerships (MLPs) are structured as conduits through which the operating results of the business are passed on to the unit holders. Limited partnerships are designed to distribute 85%-90% of their earnings and are not subject to corporate taxation. The immediate advantage of the partnership structure is the elimination of double taxation found within the traditional corporate framework. As a result, operating earnings flow directly to the unit holders in the form of cash distributions. Distributions made to each partner are taxed at each unit holder's individual income tax rate. Income taxes paid at the individual tax rate are generally less than the taxes paid if the partnership were classified as a corporation. Although the characteristics of an MLP closely resemble a traditional limited partnership, a major difference is that MLPs may trade on a public exchange or in the over-the-counter market. The ability to trade on a public exchange or in the over-the-counter market provides a certain amount of liquidity not found in many limited partnership investments.

MLPs are limited partnerships in which the shares are traded publicly. The partnership is formed of a general partner and one or more limited partners. The general partner runs the business and shoulders unlimited liability. The limited partnership provides an investor with a direct interest in a group of assets, usually, oil and gas properties. Master limited partnership units are traded publicly like stock and thus significantly provide the investor more liquidity than ordinary limited partnerships.

Example: Master Limited Partnership in Operation

Icahn Enterprises L.P. (IEP) is a diversified entity with unique official structure. T is based at Delaware, US and the structure of the entity is master limited partnership with its depository units being traded at the NASDAQ and as on 31st March 2022 commanded a price of $ 51.93 per unit. The entity is highly diversified with interests ranging from investments, food packaging, pharma and many more.

Source: https://www.ielp.com/static-files/b68a9ffb-6659-4221-9d4b-6525434cc1e9 May 2022, Accessed on 18.06.2022

The interests of the limited partnership are divided into units that are traded as shares of common stock. This tradability of the stock provides for continuity of life. A master limited partnership has all the features of a corporation. However, it is superior to a corporation in that it eliminates the double taxation in earnings. For tax purposes the master limited partnership is not treated as a separate entity. It is treated as a partnership for which the income is treated on a *pro rata* basis to the partners. To avoid being taxed as a corporation an MLP has only two features of a corporation. (i) centralized management, and (ii) transferability. The life of the MLP is limited to generally 100 years and the general partner has unlimited liability.

Master Limited partnerships have been popular in the petroleum industry. Oil companies have distributed oil and gas assets into MLPs allowing the returns to flow directly to stockholders without double taxation.

Master Limited Partnerships are generally held by individuals as opposed to corporations, which are predominantly owned by institutional investors.

Based on their method of formation, the MLPs are classified into five different categories.

i. **Roll-up MLP:** It is formed by a combination of two or more partnerships into one publicly traded partnership.

ii. **Liquidation MLP:** It is formed by a complete liquidation of a corporation into an MLP.

iii. **Acquisition MLP:** It is formed by an offering of MLP interests to the public with the proceeds used to purchase the assets.

iv. **Roll Out MLP:** It is formed by a corporation's contribution of operating assets in exchange for general and limited partnership interests in the MLP.

v. **Start Up MLP:** It is an MLP formed by a partnership that is initially privately held but later offers its interests to the public in order to finance internal growth.

All of the MLPs in the USA, universally provide tax advantages to unitholders through partially tax-deferred cash distributions. The amount of the distribution that is tax-deferred is treated as a return of capital, and reduces the investor's tax basis in the investment. The amount of the distribution that is not tax-deferred is taxed at the taxpayer's ordinary income tax rate, and when the unitholder sells the MLP, the gain will be taxed at the ordinary income tax rate. The tax-deferral feature makes MLP an attractive investment alternative to investors seeking an estate-planning vehicle. These securities are also an excellent diversification alternative to bonds, utilities, real estate investment trusts, and other high-yielding investments.

For investors looking for more than just yield, several MLPs continue to accelerate earnings and distributable cash flow growth through acquisitions and capacity expansions. Improvements of distributable cash flow have subsequently led to increasing cash distributions payable to unitholders. The result of increasing cash distributions is usually an improved yield valuation, since cash distributions drive unit prices. As cash distributions continue to increase, the unit price of an MLP should also increase, offering investors the opportunity for attractive total returns.

Generally, all of the taxable net income received by a tax-exempt investment vehicle such as an IRA, Keogh, or 401(k) plan from an MLP may be considered Unrelated Business Taxable Income (UBTI). Section 512 of the US Tax Code states that the UBTI tax liability applies if the total amount of UBTI from all partnership interests exceeds $1,000 in any taxable year. Therefore, a unitholder may be subject to income taxes in an otherwise tax-exempt retirement account. We recommend that investors consult with their tax advisor regarding any potential retirement account investing.

Since most partnerships are not alike and generally have been formed for a myriad of different reasons, investors should not focus exclusively on a partnership's yield. Common reasons for the formation of an MLP typically involve a corporation attempting to increase shareholder value or using the partnership structure as a corporate financing tool. A corporation that believes the value of its assets is not being correctly recognized by the market may decide to monetize a portion of its asset base under the MLP structure. This strategy is based on the expectation that a more favorable valuation would be rewarded by the market once the assets are separated from the corporation. As a corporate financing tool, a corporation could obtain cash on its assets in an amount equal to its fair value, without surrendering control of the assets.

Investors should attempt to determine the partnership's ability to cover its current distribution obligations and the potential for any future cash distribution increases. Trends among many MLPs have shown a greater emphasis on improving cash flow and increasing distributions payable to unitholders. Growth initiatives such as developing new markets, capacity expansions and strategic acquisitions have played key roles for MLPs seeking ways to grow distributable cash flow. Higher cash flows and distribution increases are ultimately the driving force behind higher unit valuations. Partnerships seeking to grow should provide attractive total returns.

Advantages of an MLP

One of the most important advantages of an MLP is its elimination of the corporate layer of taxation. In case of a corporation, the stockholders are taxed twice on their investments – once at the corporate level and once at the individual level on the distribution of dividends. However, in case of an MLP the returns to the owners flow through just as they do in other partnership firms. They are not taxed as separate business entity. Many corporations use MLPs to redistribute assets so that their returns are not subjected to double taxation. Limited partners in MLP do not have control, which is an attribute that institutions are starting to value more. Moreover, corporate shareholders are normally taxed on their MLP income as opposed to the exclusion they would qualify for if they were receiving dividends from another corporation. In addition, even institutions that are normally tax-exempt may have their income taxed. For these reasons, MLPs are not very attractive to institutions.

In the USA, in the 1980s, many corporations converted themselves to MLPs to get over the problem of double taxation. However, with the Tax Reform Act, 1987, eliminating a limited partner's right to deduct passive losses, most MLPs converted themselves back to corporate form of organizations. Today, one can find only a few businesses operating as MLPs in the US market.

Tax Treatment of MLPs

IRS focused on four characteristics to distinguish between corporations and MLPs.

- Unlimited life
- Limited liability
- Centralized management
- Transferability
- MLPs may have only two of four corporate characteristics to avoid being taxed as corporation – usually centralized management and transferability.
- MLPs typically specify limited life of 100 years.

- MLPs have limited liability for limited partners but unlimited liability for general partner or manager.

General Partner of MLPs

a. General Manager (partner) of MLPs has unlimited liability.

b. Virtually autocratic power.

c. Difficult to change general partner in the absence of provable fraud.

d. Alignment of interests between general partner and public unitholders.

e. Management incentive fees.

f. Ownership of significant number of limited partnership units.

Characteristics of Various Types of MLPs

i. **Roll-up MLPs:** Roll-up MLPs are the first type of MLPs organized. They began in oil industry by Apache Petroleum Company in 1981.

   - Combine existing limited partnerships into one publicly traded partnership.
   - Provide liquidity for non-traded limited partnerships.

   Nature of Roll-up:

   Before roll-up, there are a number of limited partnerships in existence.

   a. General partners enter into agreement to combine a number of previously sponsored limited partnerships; in return for their old shares, units in new MLP are issued.

   b. After MLP has been formed, there is a general partner and units which are owned by limited partners; units may trade on stock exchange or over-the-counter.

ii. **Roll-out (spin-off) MLPs:** The first roll-out MLP created by Transco Corp in 1983.

   - Formed by a corporation's contribution of operating assets in exchange for general and limited partnership interests in MLP.
   - Sold on a yield comparison basis.

   Nature of Roll-out:

   a. Corporation holds a number of business segments.

   b. Corporation places assets of one or more of its business segments into MLP.

   c. Avoid double taxation of corporate dividends.

   d. Establish a new value on undervalued assets.

e. MLP transfers MLP units to corporation which in turn distributes them to its shareholders.

f. Stockholders hold stock in corporation and own units in MLP.

g. Corporation could sell portion or all of units to outside public.

iii. Start-up (new issue, or acquisition) MLPs:

- Formed by a partnership that is initially privately held but offers its interests to the public in order to finance internal growth.

Nature of start-up:

a. Existing entity transfers assets to MLP.

b. Management Company may be involved that provides services to MLP and probably will be its general partner.

c. In return, management company receives certain percentage of cash flows of MLP.

d. General partner does not have to hold units in order to receive income.

Activity 17.1

a. Write a short note on defined contribution plan.

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b. What is master limited partnership?

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Check Your Progress-1

1. 3i InfoTech offered Employee Stock Option (ESOP) to its permanent employees and it was priced at ₹ 145 per share of face value ₹ 10 each. Which of the following statements is **not true** with respect to ESOP's?

(a) It reduces the tax burden for smaller companies

(b) It is involved in mergers and LBOs as a financing vehicle for the acquisition of companies

(c) It is an incentive for employees to become more productive

(d) It acts as an anti-take over defense

(e) It reduces the amount of capital to the company.

2. Which of the following Master Limited Partnerships (MLPs) are sold on a yield comparison basis?

   (a) Roll up MLPs

   (b) Start up MLPs

   (c) Roll out MLPs

   (d) Acquisition MLPs

   (e) New issue MLPs.

3. In which of the following activities, can ESOPs be used?

   I. Leveraged Buy Out.

   II. Divestiture.

   III. Anti-takeover defense.

   (a) Only (III) above

   (b) Both (I) and (II) above

   (c) Both (I) and (III) above

   (d) Both (II) and (III) above

   (e) All (I), (II) and (III) above.

4. Which of the following statements is true with respect to Master Limited Partnerships (MLPs)?

   (a) MLPs are generally held by institutional investors

   (b) In start up MLPs, general partner has to hold units in order to receive income

   (c) Roll up MLPs cannot provide liquidity for non traded limited partnerships

   (d) Roll out MLPs establish a new value on undervalued assets

   (e) In start up MLPs, management company does not receive any cash flows of MLP.

5. Which of the following statements is not true with regard to ESOP?

   (a) ESOPs can be used as leverage for borrowing additional funds for the business

   (b) The use of ESOPs acts as an anti-take over defense

(c) Company can contribute to the ESOP by making annual cash contribution to the plan for the purchase of the company securities

(d) ESOP as a financing tool is prudent for many startup and existing small businesses as implementing an ESOP is cheap

(e) Employee groups interested in acquiring of their company maynot use ESOPs.

17.12 Summary

- ESOPs were developed to provide benefits to the employees. They may also be highly innovative. The cash flow benefits may be enhanced when the company combines the tax benefits with a reduction in outstanding contributions to other benefit programs.
- Hostile bidders as well as employee groups interested in acquiring ownership of their company may use ESOPs.
- In addition to providing benefits to the employees and defending the corporations in hostile contests, ESOPs also seem to generate positive wealth effects for shareholders. Thus, implying that there must be significant benefits that more than offset the lower probability of a takeover, when this defense is instituted.
- MLP being a new organizational form, offers investors the structure and the tax attributes of more traditional partnerships. But it differs in one key aspect where it offers investors liquidity in an organized secondary market for the trading of partnership interests.
- Thus, even the liquidity advantages of MLPs assume greater importance leading to the distinctly different investment and marketing thesis. They appeal to investors to view the units simply as another component of their equity securities portfolio rather than as a long-term method of sheltering income from taxes.

17.13 Glossary

Acquisition MLP: A Master Limited Partnership which is formed by an offering of MLP interests to the public with the proceeds used to purchase the assets.

Employee Stock Ownership Plan (Esop): Defined contribution pension plan (stock bonus and/or money purchase) designed to invest primarily in the stock of the employer.

Master Limited Partnership (Mlp): An organizational form in which limited partnership interests are publicly traded (like shares of corporate stock), while retaining the tax attributes of a partnership.

Non-Leveraged Esop: Same as stock bonus plan. An employee stock ownership plan recognized under the ERISA which does not provide for borrowing by the ESOP.

Roll-Out Mlp: A Master Limited Partnership which is formed by a combination of two or more partnerships into one publicly traded partnership. Also called spin off MLP.

Roll-Up Mlp: A Master Limited Partnership which is formed by a combination of two or more partnerships into one publicly traded partnership.

Start-Up Mlp: Also called acquisition MLP the assets of an existing entity are transferred to a Master Limited Partnership and the business is henceforth conducted as an MLP.

17.14 Suggested Readings / Reference Material

1. Richard Brealey and Stewart Myers and Franklin Allen and Alex Edmans (2023). Principles of Corporate Finance. 14th Edition, McGraw Hill India
2. Stephen A. Ross, Randolph Westerfield (Author), & Jordon (2018). Fundamentals of Corporate Finance. 12th edition, McGraw Hill College
3. Prasanna Chandra (2020). Strategic Financial Management: Managing for value creation. 2nd edition, McGraw Hill
4. Hubbard & Obrien (2022). Mony, Banking and Financial System. 4th edition, Pearson Education
5. Kalyani Karna (2019). Strategic Financial Management. 1st edition. Corporate Plus Publications Private Limited
6. Edward I Altman (2019). Corporate Financial Distress, Restructuring and Bankruptcy. 4th edition, Wiley
7. Rick Mann & David Tarrant (2020). Strategic Finance for Strategic Leaders: The First Five Tools. Clarion strategy publishing
8. Sheeba Kapil (2021). Financial Valuation and Modelling. Wiley

17.15 Answers to Check Your Progress Questions

1. (e) It reduces the amount of capital to the company.

All other statements about ESOP are correct. Issue of ESOP will increase the capital base of the company.

2. (c) Roll out MLPs

Roll out MLPs are sold on a yield comparison basis.

3. **(e) All (I), (II) and (III) above**.

ESOPs can be used in Leveraged Buy Out, Divestiture and Anti-takeover defense.

4. (e) **In start up MLPs, management company does not receive any cash flows of MLP.**

A Startup MLP is formed by a partnership that is initially privately held but later offers its interests to the public in order to finance internal growth. Hence, management company does not receive any cash flows of MLP.

5. (e) **Employee groups interested in acquiring of their company maynot use ESOPs**.

This is an incorrect statement, as employee groups can use ESOPs to acquire controlling interest in a company.

Unit 18

Buy-back of Shares and Exchange Offers

Structure

18.1 Introduction

18.2 Objectives

18.3 The Nature of Cash Share Repurchases

18.4 Dividend like Effects of Share Repurchases

18.5 Basic Stock Repurchase Model

18.6 The Theories behind Share Repurchase

18.7 Share Repurchases as a Potentially Unique Signaling Mechanism

18.8 Criticism of the Potential Unique Signaling Benefit of Repurchases

18.9 The Rationale behind the Popularity of Buy-Backs

18.10 Implications of Buy-Backs for Investors

18.11 The Indian Scenario

18.12 Concept of Exchange Offers

18.13 Summary

18.14 Glossary

18.15 Suggested readings/reference material

18.16 Suggested Answers

"The share buyback is not always a good indicator; look deeper."

— Naved Abdali

18.1 Introduction

Managers wishing to distribute profits to their shareholders have two choices: (i) Issue dividend or (ii) Repurchase shares. Unlike in the past when paying out dividends was the most popular way of distributing profits, share repurchases are preferred today as a way to compensate shareholders with a company's excess cash. Share repurchases enhance shareholder value in many ways.

One of the reasons that companies opt for share repurchases over dividends is that shareholders often prefer capital gains over the current income that comes in the form of dividends. Moreover, in some countries dividends are double taxed since all the profits which a company earns are taxed at the corporate level besides being taxed in the hands of the receiver. (In the Indian context, dividends are exempted from tax in the hands of the receiver.). If a company wishes to pay-out some of its profits in the form of a dividend, the shareholders also have an income tax liability. This is the reason why in recent times dividend yields of stocks are being at all-time lows and at the same time share repurchase activity is becoming extremely active.

Another reason which justifies the operations of open market repurchases is related to free cash flow. Free cash flow gives rise to conflicts between shareholders and managers when the latter have incentives to invest in projects other than those which give positive net present value. By distributing the free cash flow to shareholders, repurchases lessen these conflicts. Repurchases are an extremely reliable means of distributing free cash flow because funds are distributed immediately. Other methods of distributing free cash, such as dividends, involve an obligation to make distributions in the future. Also open market repurchases are often a more flexible and efficient means of distributing free cash flow than major leverage increasing transactions such as debt-for-equity swaps and leveraged recapitalizations.

The free cash flow hypothesis implies that firms with high levels of excess cash flow and firms with low marginal financing costs will repurchase more stock. Firms with high levels of excess cash flow are at a greater risk of over investing, and hence, derive greater benefits from distributing cash to shareholders. Firms with relatively low marginal financing costs can distribute more cash to shareholders, knowing that if they must raise external funds in the future if cash flow is lower than expected, or profitable investment opportunities are greater than expected, the funds will be relatively inexpensive.

18.2 Objectives

After going through the unit, you should be able to:

- Explain the Nature of Cash Share Repurchases
- Discuss dividend like effects of Share Repurchases
- Explain basic Stock Repurchase Model and the Theories behind Share Repurchase
- Describe the Rationale behind the Popularity of Buy-backs and the Indian Scenario
- Illustrate concept of Exchange Offers

18.3 The Nature of Cash Share Repurchases

A company can repurchase its own outstanding shares in three ways: (i) in the open market, (ii) by a tender offer or (iii) by a private negotiation.

Open Market Repurchases

Open Market Repurchases (OMR) refer to a company's buying back of its own shares in the open market at the prevailing market price just as any other investor might buy the company's shares, as opposed to a tender offer for share repurchase or a negotiated repurchase. Open market share repurchases take place more often than tender offers to repurchase, but they are a smaller fraction of total shares outstanding than tender shares.

The firm wishing to repurchase its shares need not announce the OMR either in advance or while it is taking place and may start, suspend, resume, and terminate the OMR whenever it desires. Generally, firms announcing an OMR will typically indicate the number of shares they intend to repurchase, but at the same time makes clear that the number of shares that it will actually repurchase will depend on the market conditions. As a result, the firm is not compelled to repurchase any shares. Because of the lack of filing and other requirements an OMR's transaction costs are lower than those of a Repurchase Tender Offer (RTO).

Negotiated Repurchase

Negotiated repurchase involves repurchase of shares from a smaller number of shareholders who own a significant block of the company's common stock. In recent years negotiated repurchases are being used to defend against groups of shareholders who try to make large initial purchases with an intention of taking over the company by a tender offer. The management of the target arrange for a negotiated repurchase which is termed as a 'greenmail'. It may sometimes include a standstill agreement under which the investors in the company agree to sell their shares and not make any additional purchases for a specified period of time.

Repurchase Tender Offers

In a tender offer the company usually decides the number of shares it is offering to purchase, the price at which the company would repurchase the shares and the period for which the offer would be open. The offer price is generally higher than the market price prevailing at the time of the tender offer. The number of shares offered for tender represents the total number of shares which the company intended to repurchase. If the shares tendered exceed the limit, then the company might buy all or a portion of the shares tendered in excess of the number announced. Shares are repurchased on a pro rata basis (same fraction from every tendering shareholder) if the number of shares repurchased is less than the number of shares tendered. The company also has the right to extend the time period of the offer. Usually, when fewer shares are tendered than what is targeted by the company, the length of the offer period is extended. All the shares tendered during the initial offer period are repurchased and the shares tendered during the extension period are purchased either on a pro rata basis or on the basis of the order in which the shares are offered. The tender offer generally does not permit officers and the directors of the company to tender their shares.

Types of Repurchase Tender Offers

In the US two types of Repurchase Tender Offers (RTO) are often used fixed price and Dutch auction. In a fixed price RTO, the repurchasing corporation specifies in advance the price that it will pay for its shares. The offer price of fixed price RTOs is on an average of 15-20 percent higher than the pre-offer market price, and the fraction of outstanding shares sought is on an average of 15-20 percent.

In a Dutch auction RTO, the corporation does not specify in advance the price at which it will buy-back its shares. It only indicates a range of prices over which it is willing to repurchase the shares. The minimum price of the range is usually slightly above the pre-announcement market price; the maximum represents a premium similar to those offered in fixed price RTOs. Each tendering shareholder indicates the minimum price(s) for which he or she would sell the shares. The corporation constructs a supply curve based on the shareholders' tenders and repurchases the shares offered by paying the lowest price. All of the shares tendered at or below the repurchase price are repurchased at that price. An average of approximately 15 percent of outstanding shares are sought in Dutch auction RTOs and an average of approximately 15 percent of shares are tendered at or below the final repurchase price. The advantage of a Dutch auction RTO is that it repurchases shares at the lowest possible price – the price demanded by the marginal tendering shareholder.

Of all the three ways through which share repurchases is done, tender offer repurchases are usually of the largest magnitude because its impact on the market is more clearly defined and measurable. This is because the date of the repurchase, the actual dates of the repurchase activity and the repurchase price is known in advance.

Example: TCS Buyback Offer 2022

In 2022, Tata Consultancy Services (TCS) – India's largest software exporter - came up with a share buyback. TCS offered buyback of four crore shares for an amount not exceeding ₹18,000 crore. The ratio for buyback was 1:7 (i.e., for every 7 shares 1 share is eligible for buyback) for reserved category (i.e., small shareholders - means investors holding less than 2 lakh worth TCS shares as on the record date), and for (i.e., general category) it was 1:108 (i.e., for every 108 shares, 1 share is eligible for buyback). The record date fixed was 23rd February, 2022. The buyback offer was ₹ 4500 per share and the offer period was March 9, 2022 to March 23, 2022. This example illustrates about buyback tender offer model.

Sources: (i) https://www.indmoney.com/articles/tcs-buyback-2022-on-march-9th-offer-price-and-news, dated March 8, 2022. Accessed on 17.06.22.
(ii) https://economictimes.indiatimes.com/markets/stocks/news/tcs-rs-18000-crore-buyback-offer-subscribed-7-5-times/articleshow/90408605.cms, dated March 24, 2022. Accessed on 17.06.22..

Section 77 of the Companies Act governs the rule for share repurchases. According to which, private, public and listed companies can all buy-back shares. However, listed companies will have to wait for the Securities and Exchange Board of India (SEBI) Regulations. Power in articles and a special resolution are pre-requisites. Buy-back can be taken in the form of tender offers acquiring shares from shareholders on proportionate basis, purchases in open market, and purchase of odd lots. Negotiated buy-backs are not permitted in India. Without adequate safeguards and transparency, negotiated buy-backs have a serious potential for harm to shareholders' interests. At the same time, it should find a place with due protection as it is a convenient method to buy-back certain groups of shareholders. Buy-back can be out of securities premium, free reserves and prior issue.

18.4 Dividend like effects of Share Repurchases

A share repurchase transaction can be visualized as a two-part transaction in which a firm issues a dividend and causes shareholders to trade with another. In particular, a repurchase can be thought of as a transaction in which the corporation (i) compels non-selling shareholders to purchase the stock of selling shareholders at the repurchase price and (ii) then issues a dividend equal to the amount of the repurchase.

A simple example can be used to illustrate the equivalence between a share repurchase and this two-part transaction.

Suppose that ABC Corp. has N shareholders, each of whom owns one share.

Consider a single-step stock repurchase in which ABC repurchases X shares for a price ₹ P per share. The effect of the repurchase is that (i) X shareholders have sold all of their shares for a total of ₹ XP in cash; (ii) ABC has distributed ₹ PX in cash; and (iii) the (N – X) non-selling shareholders own 100 percent of ABC.

Now consider the following two-step transaction: First, ABC causes the selling shareholders to sell their X shares to non-selling shareholders (pro rata) at the price ₹ P per share. Call this the "involuntary trading component". Second, ABC distributes a dividend of ₹ PX to the remaining (non-selling) shareholders. Call this the "dividend component".

The results of this two-step transaction are identical to those of the single-step transaction: (i) the selling shareholders end up with ₹ PX and no shares in ABC; (ii) ABC has distributed ₹ PX in cash; and (iii) the non-selling shareholders own 100 percent of ABC.

Because of this equivalence a share repurchase can be considered to be having two types of economic effects: the economic effects that flow from the dividend component of the transaction and the economic effects that flow from the involuntary trading component of the transaction. Reconceptualizing the effect of share repurchase in this way makes it clear that only differences between a dividend and a share repurchase are those that arise from the involuntary trading component of the repurchase.

Before we consider these differences, however, it will be useful to first examine the potential efficiency consequences of a dividend – and therefore, the potential efficiency consequences arising from the dividend component of a repurchase. It is to this subject that we now turn.

Dividends and share repurchases can influence the social value in two ways:

i. By reducing the cash available for corporate projects and increasing the cash available for projects outside the corporations, and

ii. By increasing leverage and thereby changing managerial incentives.

The net effect on social value can be either positive or negative. This can be explained as follows:

Reallocation of Capital

The first mechanism by which dividends and repurchases can effect social value is through their effect on the allocation of capital. Dividends and repurchases move funds from corporate projects to projects outside the corporation. The efficiency consequences will depend on the returns of the different projects. When a firm's projects have higher expected returns than the alternative investments available to its own shareholders, distributing cash will be wasting value. The funds could be better used in the firm.

On the other hand, when the firm's projects have lower expected returns than projects outside the firm, distributing cash is value increasing. Funds that could be better used outside of the firm are called 'excess' or 'free' cash.

Altering Managerial Incentives by Increasing Leverage

The second means by which a dividend and repurchase can affect social value is by changing managerial incentives. Managers' incentives are not fully associated with value maximization.

They are altered due to three reasons. First, managers do not capture the full benefit of their efforts because they own only a fraction of the equity, and thus have an incentive to work less than would be socially optimal, that is, to 'evade'. Second, to the extent managers are risk averse, they may give up the positive expected value projects with a high likelihood of failure. Finally, managers of highly leveraged firms who own a large amount of equity may have an incentive to choose high risk negative expected value projects rather than low risk positive expected value projects in order to benefit shareholders at the expense of creditors.

The reduction in total wealth that results from each of these distortions is called an 'agency cost."

Dividends and repurchases can affect managerial incentives by increasing leverage – the debt/equity ratio of the firm – and therefore the likelihood of failure. The manner in which dividends and repurchases increase the risk of failure depends on whether the distribution is funded by new debt. If the dividend is funded with new debt, the firm is obliged to make additional interest payments, which increases the likelihood that the firm will not be able to make these payments in bad times. If the dividend is not funded with new debt, the managers will have fewer assets with which to make payments on any old debt. In either case the likelihood of failure increases. As explained below, by increasing leverage and the risk of failure, dividends and share repurchases can ease or worsen each of the three distortions described above.

Shirking or Evading

Managers have an incentive to work less and take less care than is optimal, because they enjoy 100 percent of the benefit of their "shirking", but pay (through the reduction in the value of their shares) only a small fraction of the cost of their shirking to the firm.

A cash distribution, whether in the form of a dividend or share repurchase, reduces this problem by raising the cost to the managers for evading their responsibilities. The distribution raises the cost of evading by making it more likely to lead to a crisis that could threaten managers' jobs. This should give managers an incentive to focus harder on generating revenues and cutting costs, making the corporation more efficient.

Risk Aversion

Managers tend to place a high value on keeping their jobs (and in particular the salary, power and prestige that comes with them). When the firm does poorly, managers face an increased likelihood of losing their jobs. To the extent managers value their jobs they will be reluctant to engage in projects that have a relatively high probability of failure, even if those projects are value maximizing. Because a dividend or repurchase increases the likelihood of failure, either form of cash distribution could exacerbate the problem of risk aversion by making managers even less likely to undertake value-increasing projects that happen to be risky.

Asset Substitution

Once firms have borrowed funds, they may have an incentive to choose projects that benefit shareholders at the expense of creditors even though the projects are value-wasting. The severity of this distortion increases as leverage increases. Thus, to the extent a dividend or repurchase distribution boosts leverage it may increase managers' incentives to engage in high risk value-wasting projects.

18.5 Basic Stock Repurchase Model

Analysts have designed the basic stock repurchase model to understand better the implications of stock repurchases and exchange offers. Some of the assumptions which are made under the model are:

i. The market is efficient, i.e., at any given time the market prices reflect all publicly available information that influences the prices of securities.

ii. There is pure competition in the markets. This means that the information is costless and is the same and received at the same time by all individuals.

> **Example: Zydus Lifesciences Buyback Offer**
>
> Zydus Lifesciences Limited (formerly known as Cadila Healthcare Limited), an Indian multinational pharmaceutical company, approved ₹ 750 crore share buyback for purchase of over 1.15 crore shares. It represented around 1.13% of the total paid-up equity share capital of the company. The last date for closure of the buyback process was fixed at 15th July, 2022. The same was filed at stock exchange(s) as part of its regulatory filings.
>
> When any document was filed at the stock exchange(s) then it automatically becomes a public document (i.e., open to public and whoever wants to refer can do so). So, this showcases a pure competition in the market for tendering the buyback offer.

Source: https://economictimes.indiatimes.com/markets/stocks/news/zydus-lifesciences-rs-750-cr-share-buyback-to-open-on-june-23/articleshow/92185788.cms, dated June 13, 2022. Accessed on 17.06.22.

iii. The individual investors are price takers and they cannot influence the outcome of a stock repurchase, i.e., there is perfect competition in the markets.

iv. The expectations of all investors regarding the various aspects of the share repurchase like the change in value caused by the repurchase, portion of shares tendered and the portion of shares purchased by the company are homogenous.

v. Investors seek to maximize their wealth only after taking into consideration the taxes and the transaction costs.

vi. The price changes are evaluated with respect to the repurchases only after adjusting for the market wide price changes.

vii. Offers are maximum limit offers. This means that when the offer is undersubscribed the firm will buy all the shares and when the offer is oversubscribed the firm will either by all or some portion of these shares on a pro rata basis.

According to the basic repurchase model,

$$P_E N_E = P_0 N_0 - P_T (N_0 - N_E) + W$$

Where, P_0 = Pre-announcement share price.

P_T = The tender price.

P_E = The post-expiration share price.

N_0 = The pre-announcement number of shares outstanding.

N_E = The number of shares outstanding after repurchase.

W = The shareholder wealth effect caused by the share repurchase.

The equation states that, the value of the shares outstanding after expiration of the repurchase offer equals the value of the shares existing before the announcement of the repurchase offer less the value of the shares repurchased plus the change in the shareholder wealth associated with the repurchase offer.

Illustration 1

ABC Ltd., a listed company in the Bombay Stock Exchange which has 50,000 outstanding shares has made an offer to repurchase 18 percent of its shares through an open market operation. The shares are being quoted at ₹ 84. ABC Ltd., offered ₹ 92 for each share sold by the shareholders. 25 percent of the outstanding shares were offered by the shareholders for the buy-back.

Estimate the value of the remaining shares after the repurchase.

Solution

According to the basic stock repurchase model.

$$P_E N_E = P_0 N_0 - P_T (N_0 - N_E) + W$$

Where, P_0 = Pre-announcement share price.

P_T = The tender price.

P_E = The post-expiration share price.

N_0 = The pre-announcement number of shares outstanding.

N_E = The number of shares outstanding after repurchase.

W = The shareholder wealth effect caused by the share repurchase.

$$= 84 \times 50{,}000 - 92\ (50{,}000 - 37{,}500) + 0.18 \times 12{,}500$$

$$= 42{,}00{,}000 - 11{,}50{,}000 + 2{,}250$$

$$= ₹\ 30{,}52{,}250.$$

Therefore, value of the shares outstanding after expiration of the repurchase offer = ₹ 30,52,250.

Value per share = 30,52,250/37,500 = ₹ 81.40 per share approximately.

18.6 The Theories behind Share Repurchase

As studied earlier there is an increase in the market price of the firm's common stock as a consequence of the share repurchase. This is because of the following reasons:

Dividend or Personal Taxation

The dividends received on the equity shares are taxed at the ordinary income tax rates whereas capital gains are taxed at lower rates. The cash received by the shareholders in a stock repurchases in excess of the acquisition price of the shareholders is taxable at the capital gains tax rate. Hence, a share repurchase enables the stockholder to substitute a lower capital gains tax for a higher ordinary personal income tax rate on the cash received.

Leverage

Repurchase of stock increases the debt/equity ratio. If the repurchase is financed with cash and other marketable securities the extent to which the debt/equity ratio increases depends on the method used to calculate the leverage ratio. If the share repurchase is financed clearly by an issue of debt, then the increase in the debt/equity ratio is regardless of the method of calculation used. Also the amount of tax deductible interest payments increases with the use of debt in the share repurchases exercise.

Information and Signaling

The most popular explanation for stock repurchases is that they are a means by which management can convey, or signal, its view that the firm's stock is undervalued. The announcement by a company that it is going to employ a share repurchase exercise sends an information signal to the investors. An announcement of the management to buy its own shares conveys information, that it has no other profitable investments in which the funds can be utilized. It can also convey another message. When the management tries to buy its own shares at the premium above the market price, it may convey an inside information that the company is undervalued by the market.

Analysts have found that the wealth of the shareholder increases due to the above signaling effects.

Bond Holder Expropriation

Share repurchases also result in an increase in the bond prices. Significant positive rates of return were observed for the convertible securities, which may be regarded as delayed issues of common stock. Hence, bond holder expropriation is one of the reasons for share repurchases.

Wealth Transfer among Shareholders

Transfer of wealth takes place between shareholders who have tendered the shares and those who have not tendered their shares. The largest portion of the wealth effect goes to the shareholders who do not tender their shares, since they experience significant gains as the price of expiration still remains higher than the price of the stock before the announcement of the repurchase tender offer. Moreover, since no insiders (management) are allowed to participate in the offer it gives signaling information that the stock price in future will be even more favorable than at the expiration period.

Defense against Outside Shareholders

When the management of a firm feels that the firm is undervalued, it may be worried that it may be subject to a takeover bid at a relatively small premium. A large premium in the share repurchase order may convey information to the outside shareholders that the value of the share should be as high as the premium and may be perhaps even higher in the future. This could put the market on notice that if a takeover bid is to succeed, it may have to be even higher than the repurchase tender offer premium.

Activity 18.1

a. Write a short note on Open Market Repurchases.

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b. Dividends and share repurchases can influence the social value in two ways. Explain.

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18.7 Share Repurchases As a Potentially Unique Signaling Mechanism

According to the "signaling theory", managers who have confidential information indicating that the stock is underpriced and intend to signal that the stock is underpriced can use a share repurchase (but not a dividend) to do so. In particular, managers can convincingly signal that the stock is worth more than the repurchase price by conducting either an RTO or an OMR and committing not to tender or sell their own shares. In this section we will explain why, according to the signaling theory, managers may need to signal in such a manner and how share repurchases can uniquely enable them to do so.

Need to Signal

Managers often have inside information about the value of the stock which is not reflected in the stock price. This information may sometimes indicate that the stock is underpriced. And the managers may wish to communicate this positive information to shareholders. The managers may consider disclosing the basis of their belief. However, disclosure of all the data may be impossible because of concerns of confidentiality or difficulty of describing the facts on which the managers' conclusions are based. The managers may consider to simply announce that the stock is underpriced. According to signaling theorists, however, there is no cost to the manager who falsely announces that the stock is underpriced. Thus, an announcement that the stock is underpriced will not convince the market. To convincingly signal underpricing, managers must act in a way that compels managers to incur substantial costs if the stock is not actually underpriced. And, these costs must be high enough so that a would-be false signaler would find the signal too costly to send.

Share Repurchases as a Signal of Underpricing

By offering to repurchase shares and committing not to sell their shares, managers, can signal that the stock is worth more than the repurchase price. This is because, as was explained, a share repurchase in effect causes non-selling shareholders to buy the shares of selling shareholders. Thus, managers buy those shares at the repurchase price. In particular, managers purchase a fraction of all the share repurchases equal to their post-repurchase proportional interest in the firm. To the extent the actual value of the shares is below the repurchase price, this transaction makes managers worse off because they overpay for those shares. Thus, the signaling theory suggests that by committing not to sell their shares managers send a credible signal that the actual value of the stock is above the repurchase price. The cost to managers of false signaling increases with the size of the repurchase and the percentage of insider ownership. Thus, the larger the repurchase amount, and the higher the percentage of insider ownership, the more credible is the signal.

For the share repurchase to be a credible signal that the stock is underpriced, managers must undertake that they will not sell any shares until the good news signaled by the repurchase is supposed to materialize. Otherwise, managers would have an incentive to conduct a share repurchase when the stock's actual value is below the repurchase price, indicating that they will not sell during the repurchase and thereby, falsely signaling good news, and then sell their shares at a high price after the signal has caused the market price to rise.

In theory, both RTOs and OMRs can be used for signaling underpricing. An RTO in which managers pledge not to tender their shares or sell them into the market after the announcement has caused the stock price to rise would signal that managers believe that the stock is worth more than the offer price (or, in the case of a Dutch auction RTO, the highest price on the offer range). There is nothing inherent in OMRs that would prevent managers from using OMRs to signal in the same manner as RTOs. For example, if the stock is trading at ₹ 10 managers could announce that during a specified period the corporation will repurchase stock in the open market whenever it falls below ₹ 10, that the corporation will expend upto a certain amount on the repurchase, and that the managers will not sell their shares below ₹ 10 during that period. This would signal the managers' belief that the stock is worth at least ₹ 10.

18.8 Criticism of the Potential Unique Signaling Benefit of Repurchases

We have seen that share repurchases can, in theory, be used to signal that the stock is underpriced. However, some analysts feel that managers do not have an incentive to use repurchases to signal underpricing. According to them signaling is not the primary or even secondary motive for most Repurchase Tender Offers (RTOs) and Open Market Repurchases (OMRs). They also say that if managers had an incentive to signal underpricing the potential efficiency benefit of that signaling would be low, because there are even better means of sending the same signal.

Managers' Incentive to Signal

Let us first consider the managers' incentives to signal. According to the signaling theory managers benefit from using repurchases to signal underpricing. However, in practice managers have little incentive to use repurchases to signal underpricing because they can use the same inside information indicating that the stock is underpriced to profit at the expense of public shareholders. This can be explained with the help of an example:

Suppose managers know that the stock is worth ₹ 15 when it is trading for ₹ 10.

The signaling theory would indicate that managers conduct a Repurchase Tender Offer (RTO) at ₹ 15 and pledge not to tender their shares or sell their shares within the "acceleration period" following the RTO, i.e., the time it is expected to take for the inside information indicating that the stock is worth ₹ 15 to emerge on its own. The announcement of the RTO coupled with the pledge would credibly signal that the stock is worth at least ₹ 15.

However, conducting an RTO at ₹ 15 and holding their stock until the information indicating that the stock is worth ₹ 15 emerges would provide the managers with no profits. Consider an alternative use of the same information. Managers knowing the stock is worth ₹ 15 when it is trading at ₹ 10 buy as much stock as they wish for their own accounts. The managers then conduct an OMR or an RTO at ₹ 10 in order to indirectly buy more stock at a low price. When conducting the RTO or OMR, the managers do not commit to hold their shares because this would send an unequivocal signal that the stock is worth more than ₹ 10. If such a signal were sent, public shareholders would not tender or sell their shares for ₹ 10 and the managers could not profit from the repurchase. By failing to announce their tendering or selling plans, managers leave shareholders wondering whether (a) the stock is worth more than ₹ 10 and the managers are attempting to buy low, or (b) the stock is worthless than ₹ 10 and the managers are using the repurchase option to sell their shares back to the firm at a high price. Because of this uncertainty, some public shareholders will be willing to sell or tender their shares for ₹ 10. Thus, it is not in the managers personal interest to conduct repurchases in a way that sends a credible signal of underpricing. Managers act more in a manner much more consistent with insider trading than signaling.

Share Repurchases Activity – Effect on Shareholder Value

The very nature of share repurchases answers this basic question. Share repurchases result in decrease in the number of shares outstanding. Smaller numbers of outstanding shares not only increase the relative percentage ownership of the remaining shareholders, but also increase the percentage claim on the company's profits. In other words, buying back shares increases the Earnings Per Share (EPS) assuming that net income is stable. If a company can manage to increase earnings at the same time when it is buying back shares, the growth in EPS is compounded.

Another reason why share buy-backs tend to increase shareholder value is the equilibrium between supply and demand for any given stock. If demand remains constant and the supply (number of shares outstanding) decreases, prices in a free market tend to rise. This is simple economics.

Reducing excess cash can also have a dramatic effect on some important efficiency metrics that many investors look at. Assuming that a company's net income remains constant over time, share buy-backs also tend to increase both a company's Return On Assets (ROA) and Return On Equity (ROE). This can be expressed as,

Return on Assets = Net Income/Average Assets.

Since cash is certainly a part of any company's assets, it again makes sense that reducing assets by spending money to buy-back shares would increase the ROA, all other things remaining constant. Substituting "Equity" for "Assets" in the above equation also shows why share buy-backs tend to increase ROE with steady profits.

However, share repurchases, are not always successful. One of the worst times a company can buy-back shares is when the company's core business is in trouble. When investors start selling a stock because of deterioration in the fundamental health of a company, management is often attracted by the temporary positive effects that share buy-backs may yield. But, if the company's future fortunes are actually declining, buying back shares generally wastes the valuable cash that may be needed to help the business come out of the problem. In other words, share buy-backs done poorly can worsen a bad situation.

Another disadvantage of share repurchase is when a company has a high amount of debt. In this case, buying back shares represents nothing more than an increase in a company's leverage, not really a return of excess cash.

While there are always some exceptions to the rule, share buy-backs tend to enhance shareholder value when done properly. Investors will serve themselves well if they know why repurchases work and can spot the difference between what is a true return of capital to them and what is merely a fake transaction and leveraging up.

18.9 The Rationale behind the Popularity of Buy-Backs

By purchasing its own stock, a company reduces the number of shares outstanding without disturbing its reported earnings, consequently increasing the company's earnings per share. But buy-backs do not create value by increasing earnings per share. Apparently a buy-back is an economic non-event. If increased earnings per share were the only rationale for buy-backs, it would have no impact on value.

Buy-backs can create value in two main ways. Firstly, the announcement of a share repurchase, its terms, and the way it is implemented all convey signals about the company's prospects and plans, even though few managers accept this publicly. Secondly, when the buy-back is financed by a debt issue, it can significantly change a company's capital structure, increasing its dependence on debt and decreasing its dependence on equity. Buy-backs can also be a tax efficient alternative to dividends. Buy-backs offer companies a shareholder-friendly way to distribute cash where investors are taxed highly on cash dividends than on capital appreciation.

Some analysts argue that much of the popularity behind share buy-backs is their relative advantage against dividends in effecting the value of executive stock options.

The rationale behind share repurchase can be summarized as follows:

i. To increase share price,

ii. To rationalize the company's capital structure,

iii. To substitute dividend pay-outs in cash with share repurchases,

iv. To prevent dilution of earnings, and

v. To deploy excess cash flows.

Example: Doordash Inc. Buyback Offer

On 20th May, 2022, Doordash Inc., food delivery firm, approved buyback of its shares upto $400 million shares. The aim of the buyback was to offset a

Contd. .....

portion of the earnings dilution that arouse from its employee stock compensation program. Hence, the buyback was planned to be done at different intervals and in models like open market repurchases or privately negotiated transactions.

Sources:(i) https://www.investing.com/news/stock-market-news/doordash-approves-400m-share-buyback-program-2828563?utm_source=yahoo&utm_medium=referral&utm_campaign=yahoo_finance, dated May 20, 2022. Accessed on 17.06.22.
(ii) hhttps://economictimes.indiatimes.com/tech/startups/food-delivery-firm-doordash-approves-400-million-stock-buyback/articleshow/91681288.cms., dated May 20, 2022. Accessed on 17.06.22.
(iii) https://finance.yahoo.com/news/doordash-approves-400m-share-buyback-104525493.html, dated May 20, 2022. Accessed on 17.06.22.

18.10 Implications of buy-backs for investors

To evaluate buy-backs and their implications on the investment decision investors must understand the rationale and evaluate its relative merits in each specific case. Buy-backs are evidently a more tax efficient form of distribution of free cash than dividends. Open market repurchases seem to be a good mechanism to achieve this for companies seeking to distribute excess cash. The share price need not enter into the evaluation of this tactic; rather it is primarily a question of cash management and required levels of cash reserves.

Buy-backs can be an efficient mechanism to create value through changes in capital structure, especially tender offers. The value created per share, will be the expected value of the capitalized taxes saved from the tax shield of debt. However, if the cyclicality of taxable income is ignored there is a risk of overstating the value created from tax shields. First, the question is whether the tax shield will be fully utilized. Secondly, whether the change in capital structure permanent or temporary. Attributing a capitalized value to the benefit of taxes saved implicitly assumes a permanent increase in leverage. Finally, is the change in leverage appropriate? Is the valuation predicated on a significant growth value or real options that might be forgone without sufficient financial flexibility available to the company?

As mentioned earlier buy-backs can also create value through market signaling. This is particularly true in the cases of tender offers. But, most of the companies normally underestimate how many shares they need to buy to send a credible signal to the markets. While the general share repurchases typically range between 5-10 percent, they need to be closer to 20 percent to give a reasonable signal. And the credibility of a signal is seriously weakened if the company's managers choose not to participate in the buy-back themselves. This gives an impression that "they have not put their own money where their mouths are".

Share buy-backs are becoming an increasingly popular vehicle to create value. But many companies are looking to support share prices suffering from poor fundamental operating results. And executive stock options favor buy-backs ahead of dividends. So, investors must understand the rationale behind a buy-back, and evaluate the deal and investment thesis on its own merit.

Example: Aarti Drugs Buyback Offer

On 19th March, 2021, Aarti Drugs Limited, Indian pharmaceutical company, approved the buyback offer to distribute its surplus cash (In October-December 2020 quarter alone, consolidated profit after tax was up at ₹ 68.03 crore – up by 144.88% on year-on-year basis). The buyback offer was ₹ 60 crores for buyback of 6 lakh equity shares representing 0.64% of the total number of company's allocated equity shares. The buyback price fixed was ₹ 1,000 per share at a premium of 45.04% per share. The promoter and promoter group including person in control of the company informed the company about their interest to participate in the buyback. As on 12th March, 2021, the promoter and promoter group held 60.2% stake in the company. The buyback offer opened on 27th April, 2021 and ended on 10th May, 2021. The investors before tendering for buyback should analyze whether this offer was beneficial to them from many aspects like company's future earnings, its future growth, its existing captive fund and investor's tax perspective.

Sources: (i) https://www.livemint.com/market/stock-market-news/aarti-drugs-announces-share-buyback-worth-rs-60-crore-at-rs-1-000-apiece-11616145862823.html., dated March 19, 2022. Accessed on 17.06.22
(ii) https://www.ndtv.com/business/stock-updates-aarti-drugs-set-to-open-share-buyback-offer-on-april-27-2418512
(iii) https://top10stockbroker.com/buyback/aarti-drugs-limited-buyback/, dated March 19, 2022. Accessed on 17.06.22.

Gains to Investors

To answer the perennial question regarding – 'who gains?' in a share buy-back, i.e., whether the investor who receives a premium in buy-back or the investor who gets better EPS, we make an attempt to analyze this issue in terms of impact on the market price of the shares of both the tendering and the non-tendering shareholders.

Table 18.1: Impact on Market Price of Shares

S. No.	Issuer Name	Premium Over Prevailing Market Price	Buy-back Price	Price on Opening Date	Price on Closing Date	Price Three Months after Closing Date	Tendering Shareholder		Non-Tendering Shareholder	
			(i)	(ii)	(iii)	(iv)	(i)-(ii) / (ii)	(i)-(iii) / (iii)	(iii)-(ii) / (ii)	(iv)-(ii) / (ii)
1	Finolex Cables Ltd.,	7.42%	275	256.00	261.00	257.00	7.42%	5.36%	1.95%	0.39%

Contd. .....

2	Great Eastern Shipping Co. Ltd.,	23.35%	42	34.05	24.70	28.70	23.35%	70.04%	-27.46%	-15.71%
3	Indian Rayon & Industries Limited	14.68%	85	NA	76.20	109.25	NA	11.55%	NA	NA
4	Madura Coats Ltd.,	37.61%	30	21.80	21.15	21.00	37.61%	41.84%	-2.98%	-3.67%
5	Raymond Ltd.	13.07%	160	141.50	105.15	83.00	13.07%	52.16%	-25.69%	-41.34%
6	Selan Exploration Technology Ltd.,	38.89%	20	14.40	14.20	14.55	38.89%	40.85%	-1.39%	1.04%
7	Winsome Yarn Ltd.,	43.88%	10	.06.95	6.75	4.55	43.88%	48.15%	-2.88%	-34.53%
8	Reliance Industries Ltd.,	-10.55%	303	338.75	373.90	317.30	-10.55%	-18.96%	10.38%	-6.33%

Source: ICFAI Research Center

Observations:

i. Reliance Industries is the only company that offered to buy-back its share at a discount to the prevailing market price to buy from its shareholders while all other companies offered at a premium over the prevailing market price.

ii. Except in the case of Reliance Industries, the shareholders of all the other companies who tendered their shares against the buy-back offer benefited both in the short-term and in the long-term.

iii. The shareholders who did not tender their shares against buy-back in Reliance Industries and Finolex Cables, gained marginally in the short-term, while in the long-term the gain was either insignificant or it was a loss.

18.11 The Indian Scenario

In India, share buy-back was first introduced in 1999. Since then, there has been a spate of announcements regarding stock buy-back.

Example: Buyback Activity in India

In fiscal year 2021, Indian companies' share buybacks climbed to a two-year high. In the year, around 61 companies made buyback offer worth ₹ 392.9 billion, when compared to that of 2020 and 2019 wherein almost 52 and 63 companies made similar offer worth ₹ 199.7 billion and ₹ 555.9 billion respectively. The year 2022 also showed good number of buyback offers as shown below.

Contd. .....

Buybacks Activity Over the Years		
Year	**Amount (₹) bn**	**No. of Issues**
FY 11	42.95	20
FY 12	137.65	31
FY 13	16.94	21
FY 14	113.8	32
FY 15	6.05	10
FY 16	18.34	16
FY 17	344.68	49
FY 18	533.07	59
FY 19	555.87	63
FY 20	199.72	52
FY 21	392.95	61
FY 22	106.06	16

Source: https://www.livemint.com/companies/news/five-indian-companies-that-are-buying-back-shares-big-time-11631185251362.html., Year 2021. Accessed on 17.06.22.

In the past companies such as GE Shipping, Raymond, Reliance Industries, Jayshree Tea, Finolex Industries, Bombay Dyeing, Britannia, etc. have all announced their intention to buy-back their shares through the open market.

However, buy-back has not been very popular in India. Despite the fact that many specified group companies qualify for buy-back, not many of them will be able to make use of their cash flow to buy-back their shares, at current prices as it will directly effect their cash requirements for normal operations. Cash rich companies like Bajaj Auto, HLL, TISCO, TELCO, etc., will have to disburse huge amounts to buy-back even a fraction of their equity at prevailing prices, which are apparently higher than the book value of the shares. The other problem is that most of the Indian companies have a debt-equity ratio greater than one. Buy-back would increase this ratio and reduce the capacity of leverage of the firm. This is especially true is case of companies having a high proportion of fixed assets, like TISCO & TELCO. Since the firm will not be allowed to issue new shares for at least one year, it implies that the company will not be able to go in for any expansion for the next one year or so, it would be definitely a big dampener to the whole concept of share repurchase.

Many people feel that in India share repurchases can be used principally as an anti-takeover defense. However, the utility of share repurchases as a tool of defense in India is doubtful under the existing regulations. For example, in the US companies are allowed to borrow to buy-back their shares in case of a takeover bid. However, in India a company is not allowed to assume fresh borrowings for the purpose buy-back. This means that weaker companies which are predictably takeover targets cannot resort to buy-back as a defense mechanism.

Buy-back norms in the Indian scenario have been relaxed recently. The move was initiated by SEBI and has been accepted by the Central Government, which promulgated an ordinance relaxing the norms. Currently, Section 77A(2b) of the Companies Act, 1956, requires that a special resolution should be passed in the general meeting of the company authorizing the buy-back of their own securities (Refer Appendix-A at the end of the chapter). The ordinance also provides for the reduction of time limit from 24 months to 6 months. The present Section 77A(8) stipulates that when a company has completed its buy-back of shares it shall not make further issue of the same kind of share within a period of 24 months. However, these guidelines are changed in the new norms.

The relaxation in the buy-back norms is with an intention to improve the market sentiments, which have been quiet, depressed. The recent developments in the US have also been considered before taking these decisions. The main features of the new norms include:

i. Companies would be allowed to buy-back shares every six months as against the earlier time limit of 24 months.

ii. The Board of Directors of a company can decide to buy-back 10 percent of the total paid-up capital and free reserves of the company in a year without waiting for shareholders' approval. Only if the buy-back by the company is more than 10 percent of its paid-up equity capital and free reserves a special resolution would be mandatory.

Buy-back had not been a very popular option with the Indian companies prior to these changes. Despite the fact of companies' having excess cash at their disposal and shares being traded at rock bottom prices not many companies opted to buy-back their shares. It remains to be seen if the relaxation is going to make this an attractive option in the coming years.

18.12 Concept of Exchange Offers

An exchange offer is a transaction which provides one class (or more) of securities with the right or option to exchange part or all of their holdings for a different class of the firm's securities. For example, exchange of debt for common stock. The exchange offer enables a change in the capital structure with a change in the investment. The impact of an exchange offer is the same as that of the share repurchase.

Like a tender offer repurchase, an exchange offer is usually open for a month. The terms of the exchange offered necessarily involve new securities of greater market value than the market value before the exchange offer. The management usually specifies in its offer the maximum number of shares which might be exchanged.

If the firm redeems debt at a price below the issue price then, the excess is treated as ordinary income. If the debt is redeemed at a price above the issue price, the difference is treated as ordinary loss. The treatment of tax in the firm just the opposite for an individual tendering the shares (A gain for the firm is a loss for the investor and loss for the firm is a gain for the investor).

When stock is tendered for debt, stockholders incur a capital gains tax liability, as if they had sold their stock for cash.

Debt for common stock offers has the effect of increasing leverage and vice versa. The theory of wealth effects of exchange offers is similar to that of share repurchases. The following characteristics result in positive returns to the shareholders:

i. When the offer increases leverage.

ii. When the offer implies increase in future cash flows.

iii. When the offer implies that the common stock is undervalued by the market.

Example: Exchange Offer –
An effective method to become a 'no debt company'

M/s XYZ company was a super market that sold agricultural products to the retail consumers. It regularly purchased the products from farmers on debt and repaid the amount with interest at regular intervals. Due to Covid pandemic, there was a significant decrease in company sales and thus failed to repay the amount. The debt amount piled up. The company, to settle the entire debt amount, offered 15% ownership to its farmers (i.e., creditors). On farmers' acceptance, the company exchanged its entire debt holdings for equity ownership.

Source: ICFAI Research Center

Activity 18.2

a. What is signaling theory?

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………………………………………………………………………………
………………………………………………………………………………

b. What are the rationale behind share repurchase?

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………………………………………………………………………………

Check Your Progress-1

1. In which of the following case(s), the shareholders obtain positive returns in case of exchange offers?

I. When offer decreases leverage.

II. When offer implies increase in future cash flows.

III. When offer implies that the common stock is undervalued by the market.

(a) Only (I) above

(b) Only (II) above

(c) Only (III) above

(d) Both (I) and (II) above

(e) Both (II) and (III) above.

2. Which of the following are the basic conditions for stock repurchase?

I. Investors seek to maximize their wealth only after taking into consideration the taxes and the transaction costs.

II. Individual investors can influence the outcome of stock repurchase.

III. Offers are maximum limit offers, when the offer is oversubscribed, the firm will buy either all or some portion of these shares on a pro rata basis.

IV. The expectations of all investors regarding the portion of shares tendered and the portion of shares purchased by the company are homogenous.

(a) Both (I) and (II) above

(b) Both (III) and (IV) above

(c) (I), (II) and (III) above

(d) (I), (III) and (IV) above

(e) All (I), (II), (III) and (IV) above.

3. Which of the following statements is **not true** with respect to the influence of dividends and share repurchases on social value?

(a) Dividends and repurchases may encourage the managers incentives to engage in high risk value-wasting projects

(b) Dividends and repurchases can affect social value through their effect on the allocation of capital

(c) Dividends and repurchases can affect social value by decreasing leverage and thus decreasing the probability of failure

(d) Dividends and repurchases can affect social value by changing managerial incentives

(e) Dividend or repurchases reduce the problem of shirking by raising the cost to the managers for evading their responsibilities.

18.13 Summary

- Share repurchase and exchange offers are both considered to be areas of practical significance to the corporate management. Both of them have some similarities in their motives and effects on firms and shareholders.
- Share repurchases for cash effects the firm's leverage ratio. Studies show that the abnormal returns are much higher when the exchange is financed by debt rather than by cash, though there are significant positive returns in cash transactions as well.
- In USA, gains on the repurchases enjoyed by the shareholders are taken as capital gains. However, the Tax Reform Act, 1986, reduces the benefits from this due to the increase in the tax rate. Hence, tax effects play a small role in the gains.
- Gains on the repurchases are also influenced by the information and signaling hypothesis. When the leverage increases, it is a signal to the shareholders that the cash flows will be sufficiently higher in the future and would cover higher interest payments. Also, the repurchase of shares at premiums over the current market price is a signal that the management considers the shares as undervalued by the market. Moreover, the repurchase premium is also considered as a takeover defense measure.
- The exchange offers enable the firm to change its capital structure while holding the investment policy unchanged. The basic characteristics of the exchange offer are; it increases leverage, it implies an increase in future cash flows, and it implies that the market has undervalued the common stock.

18.14 Glossary

Buy-Back: Nothing but a share repurchases where a public corporation buys back its own shares by a tender offer in the open market or in a negotiated buy back from a large block holder.

Exchange Offer: A transaction which provides one class (or more) of securities with the right or option to exchange part or all of their holdings for a different class of the firm's capital structure with no change in investment.

Maximum Limit Offer: A stock repurchases tender offer in which all tendered shares will be purchased if the offer is undersubscribed; but if the offer is oversubscribed, shares may be purchased only on a pro rata basis.

Open Market Share Repurchase: A corporation's buying back of its own shares in the open market at the going price just as any other investor might buy the corporation's shares.

Premium Buy Back: The repurchasing of shares of a large block holder at a premium over the market price.

18.15 Suggested Readings/Reference Material

1. Richard Brealey and Stewart Myers and Franklin Allen and Alex Edmans (2023). Principles of Corporate Finance. 14th Edition, McGraw Hill India
2. Stephen A. Ross, Randolph Westerfield (Author), & Jordon (2018). Fundamentals of Corporate Finance. 12th edition, McGraw Hill College
3. Prasanna Chandra (2020). Strategic Financial Management: Managing for value creation. 2nd edition, McGraw Hill
4. Hubbard & Obrien (2022). Mony, Banking and Financial System. 4th edition, Pearson Education
5. Kalyani Karna (2019). Strategic Financial Management. 1st edition. Corporate Plus Publications Private Limited
6. Edward I Altman (2019). Corporate Financial Distress, Restructuring and Bankruptcy. 4th edition, Wiley
7. Rick Mann & David Tarrant (2020). Strategic Finance for Strategic Leaders: The First Five Tools. Clarion strategy publishing
8. Sheeba Kapil (2021). Financial Valuation and Modelling. Wiley

18.16 Answers to Check Your Progress Questions

1. **(e) Both (II) and (III) above**.

   Shareholders obtain positive returns in case of exchange offers when offer implies increase in future cash flows and when offer implies that the common stock is undervalued by the market.

2. **(e) All (I), (II), (III) and (IV) above**.

   The basic conditions for stock repurchase are:

   Investors seek to maximize their wealth only after taking into consideration the taxes and the transaction costs, individual investors can influence the outcome of stock repurchase, offers are maximum limit offers, when the offer is oversubscribed, the firm will buy either all or some portion of these shares on a pro rata basis and the expectations of all investors regarding the portion of shares tendered and the portion of shares purchased by the company are homogenous.

3. **(c) Dividends and repurchases can affect social value by decreasing leverage and thus decreasing the probability of failure**

   This is an incorrect statement.

Unit 19

Takeover Defenses

Structure

19.1 Introduction

19.2 Objectives

19.3 Friendly takeover

19.4 Hostile Takeover

19.5 Takeover Defenses

19.6 Preventive Anti-takeover Measures

19.7 Corporate Charter Amendments

19.8 Active Anti-takeover Defenses

19.9 Regulation of Takeovers in India

19.10 Summary

19.11 Glossary

19.12 Suggested readings/reference material

19.13 Suggested Answers

"Revival is not just an emotional touch; it's a complete takeover!"

\- Nancy Leigh DeMoss

19.1 Introduction

Takeover is said to be done only when the revival is in a formatted legal structure. The unit discusses the same. Mergers, acquisitions and takeovers have been a part of the business world for centuries. In today's dynamic economic environment, companies often face decisions concerning acquisitions or mergers. The job of management is to maximize shareholders value. In most cases the use of mergers and acquisitions strategy can help a company develop a competitive advantage and ultimately increase shareholder value. There are several ways that two or more companies can combine their efforts. They can partner on a project, mutually agree to join forces and merge, or one company can acquire another company completely. Among these, the instruments of takeover are crucial for corporate growth. The purpose of this chapter is to discuss the most commonly used takeover tactics to acquire a company in a hostile takeover attempt and to evaluate the effectiveness of the various takeover defenses commonly employed.

Takeovers may be friendly or hostile.

19.2 Objectives

After going through the unit, you should be able to:

- Explain Friendly vs. Hostile Takeovers
- Discuss Takeover Defenses and Preventive Anti-takeover Measures
- Explain Corporate Charter Amendments and Golden Parachute
- Enumerate Active Anti-takeover Defenses and Regulation of Takeovers in India

19.3 Friendly Takeover

Negotiated settlements often involving bargaining are called friendly takeovers. Here the acquirer does not have to resort to aggressive tactics like the bear hug, proxy contest or the tender offer etc., because both the companies are in a mood to go for such a merger driven by individual interests or strategies.

Example: RRVL's Addverb Acquisition

The article dated 19th January, 2022 reported that Reliance Retail Ventures Limited (RRVL), a retail company, invested about ₹ 983 crores in Addverb Technologies Private Limited (Addverb), a Robotics firm (Start-up), and acquired around 54% stake in it. Mr. Sangeet Kumar, Adverb co-founder and CEO, said that this acquisition did not adversely affect their association with RRVL as it was based upon the trust and comfort levels with each other. Because a strategic partnership already existed between RRVL and Addverb as the former is a customer to the latter.

Source: https://www.business-standard.com/article/companies/reliance-retail-acquires-about-55-stake-in-addverb-technologies-ril-122011901070_1.html, dated 19th January, 2022. Accessed on 10.06.2022.

19.4 Hostile Takeover

A hostile takeover is an unwanted offer made by a potential acquirer, that is, strongly opposed by the target firm. These types of takeovers are usually bad news since the employee moral of the target firm can quickly turn to enmity against the acquiring firm.

In a hostile takeover, aggressive tactics like the bear hug, proxy contest or the tender offer are adopted by the firms. A bear hug involves the mailing of a letter containing an acquisition proposal to the Board of Directors of a target company without prior warning, but demanding immediate decision from the target. A proxy contest is an effort by a group of dissident shareholders to obtain representation on the Board of directors or to change a firm's by-laws. A tender offer is a takeover tactic in which the acquirer goes directly to the shareholders of the target with an offer to purchase their shares. We will see each of them in detail.

Example: L&T's Mindtree Acquisition

India's first hostile takeover in IT sector was Mumbai based Larsen and Toubro Limited (L&T) acquisition of Bangalore based Mindtree Limited. This was termed as hostile bid because it took in the midst of strong resistance from Mindtree Promoters and others. They called the offer an unsolicited offer and, raised the corporate governance issues and cultural difference between the two companies at L&T. Because L&T is a multinational conglomerate company while Mindtree is a software developer company.

On 1st May, 2019, L&T first purchased Mr.V.G.Siddhartha's stake in Mindtree (20.4%) and placed an order with the brokers to buy another 15% stake from the open market. Next, it made an open offer to Mindtree's large institutional investors to buy their shares (31% stake) to it. On 27th June, 2019, L&T declared that it successfully acquired ₹ 10,000 crore worth Mindtree shares (60% stake) and thus taken the complete control of Mindtree. On 20th June 2022, L & T made a press release that the Mind tree will be merged with its subsidiary company (Larsen & Toubro Infotech (LTI) and form a new company 'LTIMindtree'. The acquisition process will be completed by December 2022.

All this happened without taking lawful consensus of the Mindtree Limited. Thus, L&T takeover of Mindtree set an example to tender offer tactic in a hostile takeover

Source: https://www.news18.com/news/business/lt-infotech-mindtree-merger-likely-by-december-official-5404603.html, dated:20th June, 2022. Accessed on 08.08.22

Bear Hug

When a friendly approach of a takeover through a negotiated settlement is not successful then the acquirer may sometimes try to limit the options available to the management of the target by forcing them to take immediate decision before initiating a tender offer. This is done by contacting the Board of Directors and making a formal acquisition proposal with an expression of interest in acquiring the target. The letter also contains an implied intention to go directly to the stockholders with a tender offer if they do not receive a positive response. It may also be accompanied by a public announcement of the bidder's intent to make a tender offer. This strategy is called the Bear Hug. The bear hug is mainly intended to move the board to a negotiated settlement. The management of the company is motivated to do so because of its fiduciary responsibility to the shareholders. Some target shareholders may file lawsuits against directors who vote against the said acquisition proposal (mainly when the offer price is at a substantial premium to the target's share price).

Proxy Contests

Proxy contests refer to the attempts made by the dissident group of shareholders to obtain representation in the board. Proxy contests represent another aspect of the control and membership on the firm's Board of Directors. They have significant effects on the wealth of the shareholders of the target firm regardless of whether the attempt to takeover will be successful or not. They are sometimes initiated by the shareholders of the firm when the management opposes a takeover attempt. This strategy is used to replace those members of the board or management who oppose the merger with those who are more willing to vote for the merger. Proxy contests can be an effective means of gaining control without owning 51percent of the voting stock. They can also be used to get rid of certain takeover defenses, such as the poison pills before a tender offer is actually made.

The proxy fight is very expensive. Substantial fees will have to be paid to hire proxy solicitors, investment bankers, attorneys, etc. Other expenses like printing, mailing, advertising expenses are also incurred. However, a successful proxy fight is less expensive than a tender offer which requires purchasing the controlling interest in the target by paying a substantial premium.

Impact on shareholder value

Proxy fights often result in abnormal returns to the shareholders of the target company regardless of the outcome, i.e., whether the offer attempt would be successful or not. This is because of various reasons like the eventual change in the management in most of the firms involved in proxy fights, the tendency of the new management to restructure the firm and the expectations of the investors of a future change in control due to the merger and acquisition activity. However, presence of both the incumbent and the dissidents on the same board could also result in losses to the shareholders because of the disagreements between the two parties over the appropriate corporate policies.

Proxy Fight Process

The process starts when a bidder of the firm, who is also a shareholder, attempts to change control at the impending stockholder's meeting. He may have a right to call a special meeting to formally consider the replacement of the management. The rebellious stockholders may also decide to undertake a proxy fight against any major proposal by the management like a sale of a division of the firm or setting up certain anti-takeover amendments.

Before the start of the meeting, the insurgent shareholders meet other shareholders and try to convince them to vote against the management's candidates for the Board of Directors or against the major change proposed by the management. The insurgent group usually hires a proxy solicitor to undertake the process of contacting the other shareholders. On receiving the proxies, the shareholders may then forward their votes to the chosen collector such as a brokerage firm or a bank. The votes are then counted under the strict supervision to make sure that the counting is done accurately.

Tender Offers

This is a method of undertaking a takeover via a public offer to the shareholders of the target. A tender offer puts individual shareholders under pressure to tender their shares regardless of their collective interests with each other. A company usually resorts to a tender offer when a friendly negotiated transaction does not work. A tender offer is more expensive than a negotiated deal because of the various costs associated with it like the publication costs, legal filing fees etc. Once the tender offer is initiated, it is most likely that the target will ultimately be acquired, though not necessarily by the firm that initiated the tender offer.

Tender offer can be for cash or for stock. In either of the two cases the proposal is made directly to the shareholders. If the offer is extended for a specified period of time it is called an unrestricted or any-or-all offer. If there is a restriction on the time period or on the certain percentage or number of shares to be tendered, it is called a restricted tender offer. If the restricted tender offer is oversubscribed then the bidder might choose to buy all the target shares that are tendered or buy only a portion of the shares tendered on a pro rata basis. Tender offers can also be two tiered offers where the bidders offer a first tier price for the specified maximum number of shares tendered and a second tier price for the remaining shares.

Two Tiered Tender Offer

This is sometimes also referred to as the front end loaded tender offer. The first tier price is always more than the second tier price. This method is designed to put pressure on those shareholders who are worried that they might get lesser compensation in the second tier, if they do not tender the shares in the first tier. In most of the cases cash is offered in the first tier and non-cash compensation like the debentures or securities whose market value is less than the first tier price is offered in the second tier. Acquirers or bidders who do not have access to large amounts of capital choose the two tiered offer. The limited capital is used to pay cash in the first tier and securities are offered for the second tier.

Any-or-All Offer

This offer is believed to be a more effective takeover tactic. The maximum number of shares to be purchase is not specified, but the shares will not be purchased at all if the conditions of the offer are not met. Front end loading takes place even in these offers. The front end price is usually paid in cash and the back end price is given by the terms of clean up merger and typically is equal to the front end cash offer price. However, this is paid only at a later date.

Partial Offer

A partial offer specifies the maximum number of shares to be accepted, but does not specify what will be given to the remaining shares. These offers are mostly unconditional. The front end price is usually paid in cash and the back end price is simply the market value of the remaining shares.

Regulation of the two tiered tender offers

If the acquisition price in the tender offer (blended price) is less than the market value of the target when it remains independent the pressure to tender will lead to an unclear outcome. Here, the acquisition price is estimated as the weighted average of the front end price and the back end price, using the fraction of the shares purchased in the respective tiers as the weight. According to Comment and Jarrell, the acquisition price can be represented as,

$$P_B = (F \times P_T) + [(1 - F) \times P_E]$$

Where, P_B = Acquisition or the blended price.

P_T = Offer price (i.e., front end loaded).

P_E = Market price of the remaining shares after the offer

F = The fraction of shares purchased in the front-end offer.

The premium is calculated as $[(P_B/P_P) - 1] \times 100$

Where,

P_P = Pre-offer market price.

Open Market Operations

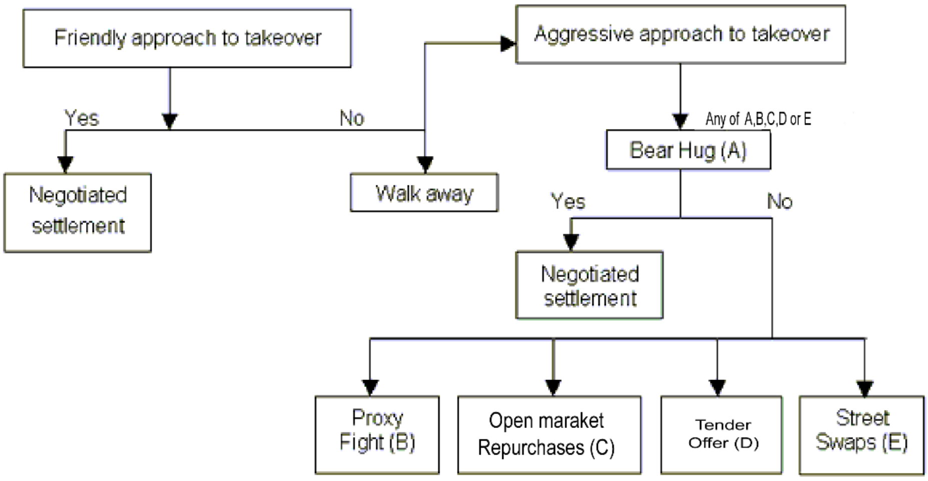
The potential bidders usually build-up stock in the target before making the actual bid by buying them in the open market at a price lower than the eventual offer price. Such early purchase of is usually kept undisclosed by the bidder to ensure that there would be no increase in the price consequently leading to an increase the average price paid for these shares. Such acquisitions are made through various shell corporations or partnerships whose names do not state the true identity of the final purchaser.

The stock is accumulated in this way mainly to get the voting rights associated with the stocks it has purchased. The voting power so acquired can be used later in a proxy fight to remove takeover defenses, or to win the shareholder approval, or for the election of the members of the target's board, etc. If the bid to takeover is not successful the stock acquired can be sold at a gain and used to recover the legal and investment banking expenses incurred.

Street Sweeps

Open market operations might not always lead to a tender offer. If the stock is too strictly held by the current stockholders who are long-term investors or if the bidder is unable to get the required number of shares, then the bidder may choose to adopt a street sweep. A street swap involves searching for owners of large blocks of target stock (like the institutional investors), and quickly buying a large amount of stock to gain control.

Figure 19.1: Takeover Ethics



Some of the other takeover tactics available to a potential bidder are:

Dawn Raid

This is a takeover technique where a firm or an investor buys up a substantial amount of shares in a company first thing in the morning when the stock markets open. Usually a broker does the buying on behalf of the acquirer (the predator) to avoid drawing attention to the buying. It builds up a substantial stake in its target (the victim) at the current stock market price. Because this is done early in the morning the target firm usually does not get informed about this until it is too late and the acquirer has already scooped up controlling interest.

Saturday Night Special

It is a sudden attempt by one companies to takeover another by making a public tender offer. The name comes from the fact that this practice used to be done over the weekends.

Activity 19.1

a. Write a short note on Tender offers.

....
....
....

b. Write a short note on dawn raid.

....
....
....

19.5 Takeover Defenses

The increase in the corporate takeover activity was also accompanied with many innovations in the art of corporate anti-takeovers. By the end of the 1980s the art of the anti-takeover defenses became very sophisticated. The major investment banks organized various teams of defense specialists who worked with the managements of larger corporations to establish certain dreadful defenses that might counteract the raiders.

Example: ESG, an Anti-takeover Defense

Environmental, Social, and Corporate Governance (ESG) was used as an anti-takeover defense by most of the French Companies. In May 2019, French Government introduced PACTE Act (Action Plan for Growth and Transformation) thereby amending the definition of a corporate purpose.

According to the amended definition, the companies were required to consider its ESG issues and its impact on the society, and can include in its byelaws as a legal attire for its corporate social responsibility, and allows the company to include its ESG goals in its byelaws.

In strict sense, these amendments were not designed to prevent or counter hostile takeovers. But can be used as a weapon to declare that the proposed acquirer, in case he fails to adhere ESG, was incompatible for takeover.

Source: https://news.bloomberglaw.com/esg/employing-esg-to-defend-against-hostile-takeovers, dated 24th March, 2021. Accessed on 10.06.2022

Anti-takeover defenses can be divided into two categories, preventive and active measures. Measures which are designed before a takeover bid is attempted and which are aimed at reducing the possibility of a financially successful hostile takeover are termed as preventive anti-takeover defenses. Measures that are employed after the hostile bid is attempted are called active anti-takeover defenses.

Shareholder Interest Hypothesis and Management Entrenchment Hypothesis

Two theories have been proposed to explain the effect of the management's attempt to use takeover defenses. The management entrenchment hypothesis proposes that the shareholders who do not participate lose value in response to the management's actions to prevent the takeover attempts. The wealth of the shareholders is reduced as a response to a revaluation of the firm's stock by the market. The shareholder interest hypothesis also known as the convergence of interest hypothesis suggests that the wealth of the shareholders rises when the management takes actions to prevent changes in control. This resistance for the takeover by the management is considered to be in the best interests of the shareholders, if the resistance would lead to initial bidder increasing the offer price or if the competing bidder offers a higher price.

19.6 Preventive Anti-takeover Measures

The presence of certain characteristics like the strong and stable cash flows, low levels of debt in the capital structure, low stock price compared to the value of the firm's assets, etc, make a firm vulnerable to a takeover. Hence, some preventive measures are adopted to adjust to these characteristics of the firm beforehand, so that the financial motivation of a bidder to acquire the target is reduced to a large extent. Through these measures the pace of the takeover attempt can be slowed down and the acquisition becomes more expensive for the bidder.

We will now discuss some of the most popular preventive anti-takeover measures.

Poison Pill

Poison pills are shares issued by a firm to its shareholders to make the firm less valuable in the eyes of a hostile bidder. These shares have no value till the happening of a triggering event (acquisition of certain percentage of the firm's voting stock by the bidder). There are generally two triggering events first for issuing the rights and second for exercising them. There are basically two types of poison pills flip-over and flip-in.

Example: Twitter Takeover Saga 2022

On 4th April, 2022 Mr.Elon Musk made a public statement. Mr.Elon Musk, CEO of Tesla Motors and the richest man in the world, revealed that he was the largest stakeholder (with 9.2%) in Twitter, a surprise to the larger world. On 13th April, 2022, he notified Twitter Board that he was offering around $43 billion for Twitter takeover, his best and final offer, and if Twitter rejects the offer then he may be forced to reconsider his position as a stakeholder. Twitter reacted to this as Mr.Elon's hostile takeover bid (i.e., unwelcome takeover bid).

On 15th April, 2022, Twitter, to defend itself against this unwelcome bid, adopted a limited duration plan that expires on 14th April 2023. It is called a 'Limited Duration Shareholder Rights Plan' or a 'Poison Pill'. During this period, Twitter can search for a buyer who is willing to pay a higher price than Elon Musk.

It is a poison pill for Mr.Elon because if Elon, as a potential buyer, accumulates the twitter shares above a certain threshold (more than 15% stake) then Twitter can flood the capital market with the new shares. Then, except Mr.Elon, all its other stakeholders could buy them at a highly discounted price. This is negative for Elon because his stake gets diluted and becomes 'more expensive and difficult' to regain the stake.

On this and to move ahead, on 25th April, 2022 Elon Musk's consensus for a funding package (includes Musk's $21 bn self-money) transformed Twitter's

Contd. ....

reluctance to acceptance. But the takeover deal was kept on hold by Elon Musk, when Twitter first quarter filing on 2nd May, 2022 reported that it got less than 5% false or spam accounts out of its 229 million users. On this, Elon asked Twitter for clarification through supporting data and stated that till then the takeover deal will be kept on hold. So, the summary is, there is a way for takeover even after poison pill induction.

Sources: (i) https://breitbart.my.id/business-news-for-april-15-2022.html. Accessed on 10.06.2022.
(ii) https://www.npr.org/2022/04/15/1093077611/twitter-board-poison-pill-elon-musk. Accessed on 10.06.2022.
(iii) https://www.theguardian.com/technology/2022/apr/15/twitter-poison-pill-elon-musk-takeover. Accessed on 10.06.2022.
(iv) https://www.theguardian.com/technology/2022/apr/25/twitter-elon-musk-buy-takeover-deal-tesla. Accessed on 10.06.2022.
(v) https://www.abc.net.au/news/2022-05-13/elon-musk-places-twitter-bid-on-hold/101066482. Accessed on 10.06.2022.

Flip-in Plan

In a flip-in plan shareholders are given a common stock dividend in the form of rights for each share they own. Whenever the bidder acquires a certain percentage of stock the rights are activated. The flip-in poison pill plan permits the current shareholders, except the acquirer, to buy more shares of the issuing company at a discount.

Flip-over Plan

In the flip-over poison pill plan, the shareholders are given a common stock dividend in the form of rights to acquire the firm’s common or preferred stock at an exercise price above the market price. Whenever the bidder acquires a certain percentage of stock the rights are activated. The rights flip over and allow the holders to purchase the acquirer’s shares at a heavy discount.

Creation and Redemption of Poison Pills

A poison pill program is created by the Board of Directors (without shareholder approval, but often submits its adoption for shareholder’s vote) and the board has the authority to redeem it.

First generation poison pills

This involves issuing the preferred stock in the form of a dividend to shareholders, which can be converted into the common stock of the acquiring company after the takeover. When the target company is acquired and merged with the acquirer, the shareholders of the target company holding the poison pills can convert their preferred stock into the common stock of the acquiring company after the takeover. Hence, the acquirer’s ownership interest in the combined companies is diluted.

Though they may keep a hostile bidder at a bay, these first-generation poison pills had certain disadvantages such as:

- If investors fail to take part in the poison pill and buy stock at the discounted price then the outstanding shares will not be diluted enough to defend against a takeover.
- The issuer could only redeem them after an extended period of time, which might be in excess of ten years.
- Preference shares were counted towards the company's indebtness when analysts compute the leverage and hence the firm becomes more risky in the eye of investors.

Second-Generation Poison Pills-Flip-Over Rights

The second generation poison pill are in the form of right offerings that allow the holders of these shares to purchase stocks in the acquiring firm (that is, flip over) at a low price, i.e., with substantial discount. These rights may be in the form of call option issued by the company, giving the holders of the option the right to purchase a certain amount of stock for a particular price during a specified time period. The rights certificates used in modern poison pills are distributed to shareholders as dividend and become activated after a triggering event. A typical triggering event can be any one of the following:

- An acquisition of 20 percent of the outstanding stock by an individual, partnership or corporation.
- A tender offer for 30 percent or more of the target corporation's outstanding stock.

Flip-over poisons pills are only effective if the bidder acquires 100 percent of the target. They are not effective in preventing the acquisition of a controlling but less than 100 percent interest in the target. Since most acquirers want to obtain 100 percent of the target's stock so as to have unrestricted access to the target's resources, flip-over provisions may prevent many, but not all control transactions.

Third Generation Poison Pills

These are referred as flip-in, flip-over pill. The third generation flip-in poison pills were an innovation designed mainly to deal with the problem of a bidders who was not trying to purchase the entire 100 percent of the target. With the flip-over positions, a bidder can avoid the impact of the pill simply by not buying the entire outstanding stock of the target. Flip-in provisions allow holders of the rights to acquire stock in the target, as opposed to flip-over rights, which allow holders to acquire stock in the acquirer. The flip-in rights were designed to dilute the target company without even considering whether the bidder merged the target into his company. They can be effective in dealing with raiders who look to acquire a controlling influence in a target while not even acquiring majority control. Ownership can often be controlled with stock holdings of less than 51 percent. This is particularly true if the target firm is a widely held corporation in which most shareholders have a small percentage of outstanding stock. The presence of flip-in rights makes such controlling acquisitions very expensive.

A flip-over plan may also contain flip-in provisions, therefore combining the advantages of a flip-over plan, which is used against a 100 percent hostile acquisition, with a flip-in plan, which is used against a control share acquisition that is not a 100 percent share acquisition.

Back End Plans

Back End Plans were first developed in 1984 as an alternative to the poison pill. These plans are also known as note purchase rights plan. Under these plans the shareholder receive a rights dividend which gives them the capacity to exchange the right along with a share of stock for cash or senior securities that are equal in value to a specific back end price fixed by the Board of Directors of the issuer. The rights become exercisable when the acquirer purchases shares in excess of a specific percentage of the target's outstanding shares. The back end price is set above the market price, to establish a minimum price for a takeover.

These plans are used to restrict the effectiveness of two tiered tender offers. The name back end refers to the back end of the two tiered offer. The Board of Directors are placed in conflicting role because they have to establish a price for the company while taking the position that the company is not for sale.

Voting Plans

These plans were developed to prevent any outside entity from obtaining the voting control of the company. The company issues a dividend of preferred stock which entitles the holders of these stocks to super voting rights when any outsider acquires a substantial percentage of the company's stock. This stops the hostile bidder from obtaining voting control of the target.

Poison Puts

Poison puts are different from poison pills. They involve issuance of bonds that contain a put option which becomes exercisable in the event of a hostile takeover. The option allows the holder to sell a particular security to another individual or firm during a certain time period and for a specific price. The bonds demand for large cash from the merged firm and will make the prospect of the takeover more unattractive.

However, if the acquirer is able to prevail upon the debt providers/bondholders not to exercise the put option, the problem of liquidity can be avoided. Further if the debt carries a coupon which is higher than the prevailing rates, it is unlikely that the option would be exercised.

People Pill

Sometimes the entire management team threatens to resign, in the event of a takeover. This threat is especially useful if the incumbent management is a good team. Losing the team could seriously impact the company's performance and hence may discourage the raider to really attempt a takeover.

19.7 Corporate Charter amendments

These are the most common anti-takeover defenses. These amendments are also called 'shark repellants'. The Corporate Charter gives a company a legal existence. The corporate charter consists of the Memorandum and Articles of Association in India. The Memorandum of Association consists of the corporation's name, the purpose of existence, the amount of authorized shares, the number and identity of the directors etc., while the Articles contain the rules governing the internal management of the corporation.

The charter can be amended by including various provisions which obstruct the hostile takeover attempts. These are put in place to strengthen the ability of the firm's Board of Directors to retain control. The amendments to the charter generally require approval of the shareholders. The common types of charter amendments are super majority provisions, fair price provisions, staggered boards and dual capitalizations.

Staggered or Classified Boards

The directors of a firm are divided into a number of different classes. Only one class is up for reelection each year. These amendments delay the effective transfer of control in takeover. For instance, a board of directors consisting of twelve members can be divided into three groups, with only one group up for election in a particular year. Hence, the hostile bidder has to wait for two more annual general meetings to gain the control of the board in spite of holding the majority of the stock. The size of the board is also limited to prevent the insurgent stockholder from simply adding the board seats to take control of the board.

Supermajority Provisions

A supermajority provision requires approval by a larger number of votes, than the normal simple majority requirements, to approve the merger. Generally, supermajority clauses require approval by two-thirds or even 80 percent votes for approval of the merger. In extreme cases, amendments have provided for as high as 95 percent of the votes for merger approval. For example, if the management holds 25 percent stake in the firm, the corporate charter can be amended to require 80 percent approval for a merger. Generally, supermajority provisions contain escape clauses called as board-out clauses. These clauses allow the firm to waive or give up the supermajority provision. The board out clause usually provides that the supermajority provisions will not apply if the merger is approved by the Board. However, such clauses are worded carefully to provide that interested directors cannot participate in the proceedings of the Board in which they are interested. For example, if a raider has acquired 20 percent stake in a company and gets a seat on the Board, he is prohibited from exercising his/her votes on the issue of merger.

Fair Price Amendment

Fair price provisions require the acquirer to pay a 'fair' price to the minority shareholders of the firm. The fair price may be stated in the form of a minimum price or in terms of a price-earnings multiple at which a tender offer can be made. For example, a fair price amendment may require that any tender offer should be at a price of ₹ 70. It is the highest price paid by the bidder during a specified period and is sometimes required to exceed an amount decided relative to the accounting earnings or book value of the target.

Fair price provisions are most useful when the acquirer offers a two tiered bid to the target shareholders. A two tiered offer is generally designed to give the shareholders of the target company an incentive to tender early so as to be a part of the first tier. The provision of fair price in the charter can force the bidder to provide those in the second tier also with the same prices and terms in the first tier. Hence, the existence of a fair price is a disincentive for a bidder to initiate a two tiered offer.

Dual Capitalization

This is a defense mechanism used against a hostile takeover bid, according to which the Board of Directors are authorized to create a new class of securities with special voting rights. This voting power is given to a group of stockholders who are friendly to the management. A typical dual capitalization involves the issuance of another stock that has superior voting rights to all the current outstanding stockholders. The stockholders are then given the right to exchange this stock for ordinary stock. The stockholders prefer to exchange the super voting stock to the ordinary stock because the former usually lack marketability and also fetch low dividends. Management retains the special voting stock. This results in the management increasing its voting control of the corporation.

In US, managements of many firms also use corporate charter amendments like:

- Reincorporation, where the target firm chooses to change its state of incorporation to the state with more favorable anti-takeover laws. This involves creation of a new subsidiary in the new state. The parent is then merged with the subsidiary at a later date. Such a move usually requires the approval of the shareholders because the parent is merged with the subsidiary. Several factors like the state's statutes pertaining to the treatment of the various charter amendments, the state's courts ruling for lawsuits alleging breach of corporate director fiduciary responsibility in takeover situation, etc., have to be considered before selecting a state for possible reincorporation.
- Anti-greenmail amendments which restrict a firm's ability to repurchase a raider's shares at a premium. By removing the incentives for greenmail,

companies believed that they were making themselves less attractive as potential takeover targets.

Golden Parachute

Golden parachutes are distinctive compensation agreements that the company provides to the top management. The term 'golden' is used because of the attractive compensation that executives covered by these agreements receive. Although companies typically maintain that they adopt such agreements for reasons other than the prevention of takeovers, they may have some anti-takeover effects. These effects may occur when the parachutes are used in a preventive or an anti-takeover manner. They may be used in advance of a hostile bid to make the target less desirable, but they may also be used in the midst of a takeover battle.

A golden parachute agreement provides for lump-sum payments to certain senior management on either voluntary or involuntary termination of their employment. This agreement is usually effective if termination occurs within one year after the change in control. The agreements between the employee and the corporation may have a fixed term or may be an average agreement, in which the term is one year but is automatically extended for an additional year if there is no a change in control during a given year. Funds to back up golden parachutes are sometimes put aside in separate accounts referred to as rabbi trusts. Rabbi trusts offer assurance to the employee that the money will be there for the payment of the parachute.

The variation from the golden parachutes are silver parachutes which are agreements that cover far more number of employees and are also triggered in the same manner as golden parachutes. In some cases tin parachutes cover practically all the employees and consists of very modest payments in case of a takeover.

In US Golden, silver or tin parachutes can be implemented without the approval of the stockholders.

19.8 Active Anti-takeover Defenses

Defenses which are undertaken in response to a bid are called active anti-takeover defenses. Once a bidder makes an unwanted offer, a variety of additional anti-takeover defenses can be introduced. Some of them are greenmail which is used to discourage the bidder from continuing the pursuit, restructuring and recapitalization strategies which are defenses designed to make the target less attractive and Employee Stock Ownership Plans (ESOPs), white knights, and white squires which place an increasing share of the company's ownership in friendly hands.

Greenmail

Greenmail refers to the buying back of shares at a substantial premium from the stockholder holding a significant majority of shares in return for an agreement that he will not initiate a bid for control of the company. It is a form of targeted share repurchase, which is a general term that is more broadly used to include other purchases of stock from the specified group of stockholders who may not ever contemplate a raid on the company. The potential acquirer is required to sign an agreement called the standstill agreement whereby he undertakes not to begin a bid for the control of the company. It is a spin-off of the term blackmail.

Standstill Agreement

A standstill agreement takes place when the target corporation reaches a contractual agreement with a potential acquirer whereby the would be acquirer agrees not to increase its holdings in the target during a particular time period. They are often accompanied with greenmail. Such an agreement takes place when the acquiring firm has established sufficient stockholdings to be able to pose a threat to mount a takeover battle for the target. Many standstill agreements are accompanied by the target's agreement to give the acquirer the right of first refusal in the event that the acquirer decides to sell the shares it currently owns. This agreement is designed to prevent these shares from falling into the hands of another bidder who would force the target to pay them standstill compensation, or even worse, to attempt to takeover the target.

Another version of standstill agreement occurs when the acquirer agrees not to increase its holdings beyond a certain percentage. In other words, the target establishes a ceiling above which the acquirer may not increase its holdings. The acquiring firm agrees to these various restrictions for a fee. Like Greenmail, standstill agreements provide compensation for an acquirer not to threaten to take control of the target. In fact, standstill agreements often accompany greenmail.

White Knights

When a corporation is the target of an unwanted bid or the threat of a bid from a potential acquirer, it may seek the help of a white knight, that is, another company that would be a more acceptable suitor for the target. To complete such a transaction, a white knight must be willing to acquire the target company on more favorable terms than those of the original bidder. These favorable terms may be a higher price, but management may also look for a white knight that will promise not to disassemble the target or lay off management or other employees. It is sometimes difficult to find a willing bidder who will agree to such restrictive terms. The target often has to bargain for the best deal possible to stay out of the first bidder's hands.

The incumbent managers of the target maintain control by reaching an agreement with the white knight to allow them to retain their current positions. They may also do so by selling the white knight certain assets and keeping control of the remainder of the target.

A target company may find a white knight through its own industry contacts or through the assistance of an investment banker who will survey potential suitors. The potential white knight might request favorable terms or other consideration as an inducement to enter the dispute. However, if this consideration is given only to the white knight and not to hostile bidder and if it is so significant an advantage that it could cause the hostile bidder to withdraw, the deal with the white knight may be a violation of the target's duties.

White Squire

The white squire defense is similar to the white knight defense. In the white squire defense, however, the target company seeks to implement a strategy that will preserve the target company's independence. A white squire is a firm that consents to purchase a large block of the target company's stock. The stock selected is often convertible preferred stock. The convertible preferred share might be already approved through a blank cheque preferred stock amendment of the company's charter.

Example: White Squire – An undisputed anti-takeover defense

M/s XYZ Limited (Target company) received a takeover bid from M/s ABC Limited (Acquiring Company). The bid offer was rejected by XYZ Company, which was unpalatable for the acquiring company. So, it started purchasing target company shares in the open market at a premium price, i.e., above the market price, to acquire its controlling interest. This is said to be an attempt of hostile takeover.

To contradict this attempt, M/s MNO company, investor friendly to target company, started purchasing the latter shares as a preventive measure. It is preventive because it is laying a block for ABC company from further purchasing the shares thereby controlling interest in the XYZ company.

Here, the friendly investor, i.e., MNO Company, was a white squire because its attempt was to protect XYZ Company against ABC's hostile takeover attempt.

Source: https://corporatefinanceinstitute.com/resources/knowledge/deals/defense-mechanism/, dated 7th September, 2021. Accessed on 10.06.2022.

Recapitalization

Under a recapitalization plan (also called as leveraged recapitalization), shareholders are usually offered with a super dividend that is typically funded through the assumption of substantial debt. When a company is recapitalized, it substitutes most of its equity for debt while paying shareholders a large dividend. Added to the stock dividends, stockholders at times receive a stock certificate called 'stub' that represent their new shares of ownership in the company.

The concept of recapitalization as an anti-takeover defense was initiated and popularized by the Multimedia Corporation with the assistance of Goldman Sachs. Multimedia, a South Carolina-based broadcasting company, initiated this plan, after the original founding family members received unsolicited bids for the company in response to their Leveraged Buyout Offer (LBO). In addition to a cash pay-out, Multimedia stockholders saw their stub appreciate around 6.3 times over a period of two years.

There are several advantages associated with the recapitalization plan. One of the major advantages of this plan is that it allows a company to act as its own 'white knight'. Most of the companies which are victims of a takeover attempts would either look for an outside entity to serve as a white knight or go for an LBO deal. The recapitalization plan is a substitute to both. In addition to this, the increase in company's debt in a large-scale makes the firm less attractive to the bidder. A recapitalization may discourage a hostile bid for shareholders receive a value for their shares that is substantially higher than historical stock prices.

Another important advantage of a recapitalization which is more beneficial to the target company's management is that it may give them a greater controlling power (voting rights) in the target following recapitalization. It may also build-up other security options that may give the management enhanced voting power. However, other stockholders will get only a single share in the recapitalized company as well as whatever combination of cash and debt has been offered. It is highly essential for the company to make sure that all non-management stockholders get at least a reasonable/comparable monetary value for their common stock holdings.

Majority of the recapitalization plans require stockholder approval before they are implemented, of course depending on the available national laws and company's own charter. While introducing a recapitalization plan to stockholders, companies habitually seek approval for other anti-takeover actions that are proposed as part of a joint anti-takeover plan. Some of the other measures such as fair price provisions or staggered boards, etc. might be included here.

Added to the available restrictions in the national laws and company charter, corporates may be prohibited from using the recapitalization defense by restrictive agreements in earlier debt agreements. Companies form these lawful agreements when they raise funds from bankers/investors through floating corporate bonds. Such agreements impose restrictions on the company's future decisions so as to assure the debtors that their debts would be repaid.

ESOPs

Employee Stock Option Plans (ESOPs) involve offering some ownership stake in the company to all or some employees of the firm with a motive to develop ownership position among the employees and bring into line their interests with that of the company and its shareholders. ESOPs can be either in the form of stock option plans, phantom equity plans or stock purchase plans. Companies offer ESOPs to their employees for the following reasons:

- It acts as a very good motivator and can get employees more involved in their duties and focused on corporate performance.
- It is an important means to attract and retain efficient employees, developing long-term relationships with them.
- As a compensation device, ESOPs offer rewards that can exceed the expectations of employees, but are still affordable to the company as they are highly performance driven, and
- ESOPs are used for providing retirement benefits to the employees and as succession plan for owners.

An ESOP can make an unfriendly takeover more difficult. Management and directors can more effectively leverage corporate assets and place a large block of shares in the hands of employees who are likely to be sympathetic to management objectives.

Litigation

Litigation is one of the common anti-takeover defenses. Takeover litigation includes antitrust concerns, alleged violation of securities laws, inadequate disclosure by the bidder, etc. Targets often get a court injunction temporarily stopping the takeover attempt until the court decides that the claims of the target are baseless. Such an injunction prevents the acquirer from buying more stock and the firm in turns buys more time to put up more takeover defenses. The additional time also allows the target to seek a white knight. Another important benefit of litigation is to give the bidder the impression that if the offer price and the terms are improved, the target would drop the litigation.

Pac-Man Defense

This is a highly aggressive defense technique which is rarely used. Here the target company makes a counter tender offer in response to the raider's bid for the target. This defensive technique is named after the popular video game in which the characters try to eat each other before they are eaten up themselves. This defensive technique will only be successful when the target company has the financial resources to make a legitimate bid for the bidder. It may defense may end up being extremely destructive as both the firms may be left with high debt in their efforts to implement hostile tender offer over each other.

"Just Say No" Defense

This is the most basic form of takeover defense where the target refuses to be taken over by the bidder. The target refuses to take any measures, including taking more cash for its shareholders by saying that it has many other optimistic plans for the future of the company.

Crown Jewels

This strategy involves creating a mechanism which ensures that a raider, in the event of a hostile takeover, is denied access to the 'jewels' of the firm. It is based on the argument that a particular aspect of the firm is so highly valued that it attracts raiders. The aspect can be a highly profitable division, a undervalued fixed asset or an intangible asset like a brand or patent. In case, it is made known that even after takeover of the firm, the acquirer would not acquire these jewels, the firm may become less vulnerable.

Share Repurchases

This involves the firm buying back its own shares from the public. This is a sound strategy and has several advantages:

The amount of floating stock which is available for a raider is reduced. Once the target acquires certain shares, these shares will no longer be available for the bidder to purchase.

The management is able to increase its stake in the company without investing any additional funds. For example, if the paid-up capital of the company comprises of 1 crore shares and the current promoters holding is 24 lakh shares, then the promoters' stake is 24 percent. Suppose the company were to buyback 40 lakh shares from the market, (the existing management does not participate in the buyback), the management's stake in the firm increases to 40 percent in the post buy back capital.

The acquisition of the target's own shares can allow the corporation to use up its own resources and hence the target cannot use this cash to pay-off some of the debt incurred in the acquisition.

If the share repurchase is financed through debt then it implies that the target is using up its own borrowing capacity, which could have been used to finance some of the acquisition by the bidder.

Restructuring

Restructuring of a firm might involve taking a company private, the sale of attractive assets, undertaking a major acquisition or even liquidating the firm.

Going private refers to the restructuring activity where the management of the firm purchases the bulk of the firm's stock. This is a win-win situation for the shareholders of the target who receive a premium for their stock and the management also retains control.

The target company might also make its shares less attractive by selling off the assets which the bidder wants. The proceeds from the sale of such assets can be utilized in other defenses like the share repurchases or payment of special stock holder dividend.

Sometimes in order to defend itself against an acquisition bid the target in turn makes an acquisition to drain its excess cash balances and exhaust the borrowing capacity making itself less attractive. When the target is highly profitable it may acquire a less profitable business thereby reducing its financial comfort. If these acquisitions involve the assumption of greater debt, the target becomes less attractive due to the increased leverage.

Another drastic restructuring activity is liquidation and is undertaken only when the firm believes that it would receive more by liquidating than what is offered by the bidder. The firm chooses to liquidate the company, pay outstanding obligations to the creditors and distribute the remaining proceeds to the shareholders as the liquidating dividend.

19.9 Regulation of Takeovers in India

It is a common misunderstanding that regulation of takeover means prevention of hostile takeovers. Formation of such regulations which prevent takeovers would destroy the basis of a free market economy. Therefore, the purpose of takeover regulations is, not to discourage takeovers, but to ensure fairness, transparency and protection of minority interests. Some of the salient features of the Takeover Code of India are:

- The acquirer should intimate the target company and the stock exchanges where the shares are listed as soon as its holding cross 5 percent of the voting capital of the target company.
- As soon as the holding of the acquirer cross 15 percent of the voting capital, it should intimate the same to the stock exchanges. The acquirer is also required to make a public offer to the shareholders to acquire a minimum of another 20 percent of the voting capital.
- The public offer should be priced at higher of the following:
  - the highest price paid by the acquirer to acquired shares in the target company; and
  - the higher of the average price (average of the daily high and low) prevailing in the market for the last six months or the last two weeks.
- The public offer is required to be managed by a SEBI registered Merchant Banker, who is required to exercise due diligence over the process and ensure full disclosures of all material facts.

Thus, it can be observed that the takeover code brings about transparency by ensuring disclosures. It also ensures protection of minority interests by giving the small shareholders an opportunity to exit from their investments. It achieves fairness by ensuring that the minority shareholders get at least the same value as those who transferred the controlling stake.

The Takeover Code has also attracted a reasonable amount of criticism as well. Firstly, it has been criticized that the threshold limit of 15 percent is too low. It has been suggested that the limit should be raised to a "more reasonable" level of say 25 percent to 30 percent. Secondly, the criticism of the requirement to make a tender offer for 20 percent appears to be more valid. The laws in most of the other countries require that the acquirer make a tender offer for the entire balance of the voting capital. This would provide an opportunity to all the shareholders to exit from their investment, if they so desire. However, the requirement to make a tender offer for only 20 percent of the voting capital may necessitate that shareholders are not given adequate opportunities to exit.

The detailed guidelines are given in the takeover code given in the chapter regulatory control.

Activity 19.2

a. What are Poison pills?

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b. Write a short note on Golden parachutes.

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Check Your Progress-1

1. When the companies amend their bye-laws and regulations to be less attractive for the raider company, such feature is called

   (a) Scorched Earth Defense

   (b) Shark Repellent

   (c) Shark Watcher

   (d) Tender Offer

   (e) Saturday Night Special.

2. Which of the following statements is/are **true** with respect to recapitalization plan?

   I. Under this plan, shareholders are usually offered with a super dividend that is typically funded through the assumption of substantial debt.

   II. The advantage of this plan is that it allows a company to act as its own 'white knight'.

III. This plan may give the target company's management a greater controlling power in the target following recapitalization.

(a) Only (I) above

(b) Only (III) above

(c) Both (I) and (II) above

(d) Both (II) and (III) above

(e) All (I), (II) and (III) above.

3. Which of the following statements is **not true** with respect to leverage recapitalization?

   (a) Under this, shareholders are usually offered with a super dividend

   (b) It allows a company to act as its own white knight

   (c) It may give target company's management a greater controlling power in the target following recapitalization

   (d) For implementation of recapitalization plans, the approval of shareholder is not required

   (e) When a company is recapitalized, it substitutes most of its equity with debt.

4. Which of the following preventive anti-takeover measures is adopted by a firm to delay the effective transfer of control in a takeover?

   (a) Supermajority amendments

   (b) Fair price amendments

   (c) Classified board

   (d) Standstill agreement

   (e) Dual capitalization.

19.10 Summary

- Corporate growth takes place through various forms, and takeovers or acquisition form one of the major tools. Takeovers can be friendly which take place through negotiated settlement or hostile.
- There are three alternatives available for hostile bidders: bear hug, tender offer, proxy fight etc. A bear hug is an offer made directly to the directors of the target corporation. It puts pressure on the directors since it carries an implication that if the offer is not received favorably, a tender offer will follow. An attempt by the dissident group of shareholders to gain representation on the firm's Board of Directors is called a proxy fight. It brings out a change in control or seeks more modest goals. Tender offer is

an effective method of financing a takeover via a public offer to the target firm's shareholders to buy their shares.

- There exists a lack of agreement in a takeover activity. There always lies a debate on the desirability of having an auction for the target, the coerciveness of tender offers, and the bargaining role of management. People against takeovers argue that it increases costs and results in inefficiency in the operation of the market for corporate control.
- As per some of the researchers, coerciveness of tender offers should not pose any problem given that the takeover market is competitive. Whatever are the arguments, there would always be optimal incentives for takeover activity along with the existence of anti-takeover mechanisms, and rather they would become more innovative.
- Anti-takeover defenses can be grouped as pre-bid or preventive defenses and post-bid or active defenses.
- These are designed to raise the overall cost of a takeover attempt and to provide the target firm with more time to install additional takeover defenses.
- Preventive defenses generally are divided into three classes: poison pills, corporate chartered amendments or shark repellants and golden parachutes.
- Active defenses are those undertaken in response to a bid. These include greenmail, white knight, litigation, leveraged recapitalization, share repurchases, etc.

19.11 Glossary

Anti-Greenmail Amendment: Corporate charter amendment which prohibits the targeted share repurchases at a premium from an unwanted acquirer without the approval of the non participating shareholders.

Anti-Takeover Amendment: Corporate charter amendment which is intended to make it more difficult for an unwanted acquirer to takeover the firm.

Any-Or-All Offer: A type of tender offer which does not mention the maximum number of shares to be purchased. If the conditions of the offer are not met, none of the shares will be purchased.

Back End Rights Plan: A poison pill takeover defense in which the share holders of a target are issued rights dividend which becomes exercisable if an acquirer obtains a triggering amount of target stock.

Classified Board: An anti-takeover measure which divides a firm's Board of Directors into several classes, only one of which is up for election in any given year, thus delaying effective transfer of control to a new owner in a takeover.

Crown Jewels: Section 23 of SEBI Takeover Regulations indicate that the company calls its precious assets as crown jewels to depict the greed of the acquirer under the takeover bid. These precious assets attract the raider to bid for the company's control. The company sells these assets at its own initiative leaving the rest of the company intact. (Instead of selling the assets, the company may also lease them or mortgage them so that the attraction of free assets to the predator is suppressed.)

Friendly Mergers: Mergers and acquisitions through the negotiations, willingness and consent of the target company are called friendly mergers.

Golden Parachutes (Or) First Class Passengers Strategy: This envisages a termination package for senior executives and is used as a protection tool against the takeover.

Greenmail: A large block of shares is held by an unfriendly company, which forces the target company to repurchase the stock at a substantial premium to prevent the takeover. (This could prove to be an expensive deal to the raider.)

Grey Knight: A friendly party of the target company who seeks to takeover the predator.

Hostile Takeovers : An acquirer may not offer the proposal to acquire the target company's undertaking, but may silently and unilaterally pursue efforts to gain controlling interest in it against the wishes of the management. They are also called raids or takeover raids.

Pac-Man Strategy: The target company attempts to takeover the hostile raider. This happens when the target company is larger than the predator.

Poison Pill: An antitakeover defense which creates securities that provide their holders with special rights. The exercise of these rights would make it more difficult and/or costly for an acquirer to takeover the target against the will of its Board of Directors.

Poison Put: A covenant allowing the bond holder to demand repayment in the event of a hostile takeover.

Saturday Night Special: A hostile tender offer with a short time for response.

Scorched Earth Defense: Actions to make the target less attractive to the acquiring firm and which may also leave the target in weakened condition.

Staggered Board: An antitakeover measure which divides a firm's Board of Directors into several classes only one which is up for election in any given year, thus delaying the effective transfer of control to a new owner in a takeover. Also called classified board.

19.12 Suggested Readings / Reference Material

1. Richard Brealey and Stewart Myers and Franklin Allen and Alex Edmans (2023). Principles of Corporate Finance. 14th Edition, McGraw Hill India
2. Stephen A. Ross, Randolph Westerfield (Author), & Jordon (2018). Fundamentals of Corporate Finance. 12th edition, McGraw Hill College
3. Prasanna Chandra (2020). Strategic Financial Management: Managing for value creation. 2nd edition, McGraw Hill
4. Hubbard & Obrien (2022). Mony, Banking and Financial System. 4th edition, Pearson Education
5. Kalyani Karna (2019). Strategic Financial Management. 1st edition. Corporate Plus Publications Private Limited
6. Edward I Altman (2019). Corporate Financial Distress, Restructuring and Bankruptcy. 4th edition, Wiley
7. Rick Mann & David Tarrant (2020). Strategic Finance for Strategic Leaders: The First Five Tools. Clarion strategy publishing
8. Sheeba Kapil (2021). Financial Valuation and Modelling. Wiley

19.13 Answers to Check Your Progress Questions

1. (a) Scorched Earth Defense

When the companies amend their bye-laws and regulations to be less attractive for the raider company, it is called Scorched Earth Defense.

2. (b) Only (III) above

Recapitalization plan may give the target company's management a greater controlling power in the target following recapitalization. This is a true statement.

3. (d) For implementation of recapitalization plans, the approval of shareholder is not required.

This is incorrect as shareholder approval is required.

4. (c) Classified board

Classified board is adopted by a firm to delay the effective transfer of control in a takeover.

Strategic Finance and Corporate Restructuring

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