Acquisition of Company/ Business

Lesson 2

KEY CONCEPTS

■ Target Company ■ Persons Acting in Concert ■ Acquirer ■ Shares ■ Acquisition ■ Voluntary Offer ■ Delisting offer ■ Tendering Period ■ Conditional Offer ■ Competing Offer

Learning Objectives

To understand:

- The legal framework provided for law governing acquisition and takeovers.
- The important definitions and concepts contained within Takeovers Regulations.
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
- To familiarize the students with the legal frame work pertaining to direct and indirect acquisition of shares or voting rights in, or control over target company.

Lesson Outline

- Introduction
- Substantial Acquisition of Shares or Voting Rights
- Delisting Offer
- Voluntary Offer
- Offer Size
- Offer Price
- Conditional Offer
- Competing Offer
- Other Obligations
- Disclosures of Shareholding and Control
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Companies Act, 2013
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

INTRODUCTION

Takeover concept in India emerged only around the twentieth century. In fact, Lord Swaraj Paul was one of the first to attempt a hostile takeover when he tried to obtain control over DCM Ltd. and Escorts Ltd. Further, the liberalization and globalisation policy of 1991 in the country, further necessitated the requirement of having legal framework to address takeovers in view of heightened competition amongst business entities and resultant corporate restructuring and M&As.

Where an acquirer takes over the control of the 'target company', it is termed as takeover. When an acquirer acquires 'substantial quantity of shares or voting rights' of the target company, it results into substantial acquisition of shares.

Takeovers and acquisitions are common occurrences in the business world as entities aim for inorganic growth and diversification. In some cases, the terms takeover and acquisition are used interchangeably, but each has a slightly different connotation. A takeover is a special form of acquisition that generally occurs when a company takes control of another company without the acquired company's agreement. Takeovers that occur without consent are commonly called hostile takeovers. Acquisitions, also referred to as friendly takeovers, occur when the acquiring company has the permission of the target company's Board of directors / shareholders to purchase and takeover the company. Acquisition refers to the process of acquiring a company at a price called the acquisition price or acquisition premium. The price is paid in terms of cash or acquiring company's shares or both.

The transaction relating to the acquisition of shares of a target company (listed company in India), undertaken by an existing shareholder of the company or any other independent acquirer company, is governed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Regulations"). The Regulations' goal is to govern the direct or indirect purchase of shares, voting rights, or the "control" of the target firm and to make sure that such purchases are made in a just and open way. Its objective is to also make the transactions relating to acquisition fairer and more transparent.

Takeover of companies whose securities are listed on one or more recognized stock exchanges in India is regulated by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Therefore, before planning a takeover of a listed company, any acquirer should understand the compliance requirements under the Regulations and also the requirements under the SEBI (LODR) Regulations, 2015 and the Companies Act, 2013. There could also be some compliance requirements under the Foreign Exchange Management Act, 1999 if the acquirer was a person resident outside India.

The Takeover Regulations were notified based on recommendations made by the Takeover Regulations Advisory Committee (TRAC). The TRAC report had inter alia recommended the following relating to completion of transaction that triggered the open offer - "The agreement that attracts an open offer obligation may be acted upon during the pendency of the open offer provided 100 % of the consideration payable under the open offer is placed in escrow." The provisions relating to completion of acquisition during the open offer period were accordingly provided in Regulation 22(1) and (2) of Takeover Regulations in 2011.

In the case of *M/s Nirvana Holdings Private Limited (Appellant) Versus Securities and Exchange Board of India (Respondent), decision dated 8.9.2011,* Securities Appellate Tribunal inter alia observed that the primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation. In the case before us no reasons have been recorded for deviating from the normal rule and we find no ground for deviation.

What do we mean by a takeover?

The term 'Takeover' has not been defined under the said Regulations; the term basically envisages the concept of an acquirer acquiring shares with an intention of taking over the control or management of the target company. When an acquirer, acquires substantial quantity of shares or voting rights of the target company, it results in the substantial acquisition of shares. Substantial is again not defined in the Regulations and what is substantial for one company may not be substantial for another company. It can therefore not be quantified in terms of number of shares.

Takeover of companies whose securities are listed on one or more recognized stock exchanges in India is regulated by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

An acquisition involves purchase of one entity by another (usually, a smaller firm by a larger one). A new company does not emerge from an acquisition; rather, the acquired company, or target firm, is often consumed and ceases to exist, and its assets become part of the acquiring company.

Acquiring an existing business enables a company to speed up its expansion process because they do not have to start from the very scratch. The target company is already established and has all the processes in place. The acquiring company simply has to focus on merging the business with its own and move ahead with its growth strategies.

As the motive is to takeover of other business, the acquiring company offers to buy the shares at a very high premium, that is, the gaining difference between the offer price and the market price of the share. This entices the shareholders and they sell their stake to earn quick money. This way the acquiring company gets the majority stake and takes over the ownership control of the target company.

OBJECTS OF TAKEOVER

The objects of a takeover may *inter alia* include:

- To effect savings in overheads and other working expenses on the strength of combined resources;
- To achieve product development through acquiring firms with compatible products and technological/ manufacturing competence, which can be sold to the acquirer's existing marketing areas, dealers and end users;
- To diversify through acquiring companies with new product lines as well as new market areas, as one of the entry strategies to reduce some of the risks inherent in stepping out of the acquirer's historical core competence;

- To improve productivity and profitability by joint efforts of technical and other personnel of both companies as a consequence of unified control;
- To create shareholder value and wealth by optimum utilisation of the resources of both companies;
- To achieve economies of scale by mass production at economical costs;
- To secure substantial facilities as available to a large company compared to smaller companies for raising additional capital, increasing market potential, expanding consumer base, buying raw materials at economical rates and for having own combined and improved research and development activities for continuous improvement of the products, so as to ensure a permanent market share in the industry;
- To achieve market development by acquiring one or more companies in new geographical territories or segments, in which the activities of acquirer are absent or do not have a strong presence.

KINDS OF TAKEOVER

Takeovers may be broadly classified into three kinds:

1. **Friendly Takeover:** Friendly takeover is with the consent of target company. In friendly takeover, there is an agreement between the management of two companies through negotiations and the takeover bid may be with the consent of majority or all shareholders of the target company. This kind of takeover is done through negotiations between two groups. Therefore, it is also called negotiated takeover.
2. **Hostile Takeover:** When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues efforts to gain control against the wishes of existing management.
3. **Bailout Takeover:** Takeover of a financially sick company by a profit earning company to bail out the former is known as bailout takeover. There are several advantages for a profit making company to takeover a sick company. The price would be very attractive as creditors, mostly banks and financial institutions having a charge on the industrial assets, would like to recover to the extent possible.

Legal aspects of Takeover

The legislations/regulations that mainly govern takeover are as under:

1. Companies Act, 2013
2. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (The Regulations)
3. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

As far as Companies Act, 2013 is concerned, the provisions of Section 186 apply to the acquisition of shares through a company. Section 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Section 230 (11) also deals with provision that compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

Further as per provisions of Section 230(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

TAKEOVER OF UNLISTED COMPANIES

Unlisted Entities are governed by the framework stipulated under Companies Act, 2013. Section 236 of the Companies Act contains a compulsory acquisition mode for the transferee company to acquire the shares of minority shareholders of Transferor Company.

Where the scheme has been approved by the holders of not less than nine tenth (90%) in value of the shares of the transferor company whose transfer is involved, the transferee company, may, give notice to any dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Tribunal orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

Accordingly, the transferee company shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

The advantage of going through the route contained in Section 235 of the Companies Act is the facility for acquisition of minority stake. The transferee company shall give notice to the minority dissenting shareholders and express its desire to acquire their shares within a period of 4 months after making an offer as envisaged under Section 235 of the Act.

When a Company intends to takeover another Company through acquisition of 90% or more in value of the shares of that Company, the procedure laid down under Section 235 of the Act could be beneficially utilized. When one Company has been able to acquire more than 90% control in another Company, the shareholders holding the remaining control in the other Company are reduced to a minority. They do not even command a 10% stake so as to make any meaningful utilization of the power. Such minority cannot even call an extra-ordinary general meeting under Section 100 of the Act nor can they constitute a valid strength on the grounds of their proportion of issued capital for making an application to the Tribunal under Section 241 of the Act alleging acts of oppression and/or mismanagement. Hence, the statute itself provides them a meaningful exit route.

The advantage of going through the route is the facility for acquisition of minority stake. But even without going through this process, if an acquirer is confident of acquiring the entire control, there is no need to go through Section 235 of the Act. It is purely an option recognized by the statute.

The merit of this scheme is that without resort to tedious court procedures, the acquisition by takeover is affected. Only in cases where any dissentient shareholder or shareholders exist, the procedures prescribed by this section will have to be followed. It provides machinery for adequately safeguarding the rights of the dissentient shareholders also.

Section 235 lays down two safeguard in respect of expropriation of private property (by compulsory acquisition of majority shares). First the scheme requires approval of a large majority of shareholders. Second the Tribunal's discretion to prevent compulsory acquisition.

The following are the important ingredients of the Section 235 route:

- The Company, which intends to acquire control over another Company by acquiring share, held by shareholders of that another Company is known under Section 235 of the Act as the "Transferee Company".
- The Company whose shares are proposed to be acquired is called the "Transferor Company".
- The "Transferee Company" and "Transferor Company" deliberate and discuss together at the Board level and come out with a scheme or contract.
- Every offer or every circular containing the terms of the scheme shall be duly approved by the Board of Directors of the companies and every recommendation to the members of the transferor Company by its directors to accept such offer. It shall be accompanied by such information as provided under the said Act. The circular shall be sent to the dissenting shareholders in Form No: CAA 14 to the last known address of the dissenting shareholder.
- Rule 26 A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with purchase of minority shareholding held in DEMAT form. According to Rule 26A:

(1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

(2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.

(3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.

(4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that:

   (a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act;

   (b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action a copy of the notice served to such shareholders and published in the newspapers to be attached;

   (c) the minority shareholders shall be paid by the company immediately after completion of corporate action;

   (d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.

(5) For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.

(6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

(7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899.

(8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.

   Explanation: The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.

(9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996, the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

Explanation: For the purposes of this rule, if “cut-off date” falls on a holiday, the next working day shall be deemed to be the “cut-off date”.

- Every offer shall contain a statement by or on behalf of the Transferee Company, disclosing the steps it has taken to ensure that necessary cash will be available. This condition shall apply if the terms of acquisition as per the scheme or the contract provide for payment of cash in lieu of the shares of the Transferor Company which are proposed to be acquired.
- Any person issuing a circular containing any false statement or giving any false impression or containing any omission shall be punishable with fine.
- After the scheme or contract and the recommendation of the Board of Directors of the transferor Company, if any, shall be circulated and approval of not less than 9/10th in value of "Transferor Company" should be obtained within 4 months from the date of circulation. It is necessary that the Memorandum of Association of the transferee company should contain as one of the objects of the company, a provision to take over the controlling shares in another company. If the memorandum does not have such a provision, the company must alter the objects clause in its memorandum, by convening an extraordinary general meeting. The approval is not required to be necessarily obtained in a general meeting of the shareholders of the Transferor Company.
- Once approval is available, the 'Transferee Company' becomes eligible for the right of compulsory acquisition of minority interest.
- The Transferee Company has to send notice to the shareholders who have not accepted the offer (i.e. dissenting shareholders) intimating them the need to surrender their shares.
- Once the acquisition of shares in value, not less than 90% has been registered in the books of the transferor Company, the transferor Company shall within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee Company.
- The transferee Company having acquired shares in value not less than 90% is under an obligation to acquire the minority stake as stated aforesaid and hence it is required to transfer the amount or other consideration equal to the amount or other consideration required for acquiring the minority stake to the transferor Company. The amount or consideration required to be so transferred by the transferee Company to the transferor Company, shall not in any way, less than the terms of acquisition offered under the scheme or contract.
- Any amount or other consideration received by the Transferor Company in the manner aforesaid shall be paid into a separate bank account. Any such sums and any other consideration so received shall be held by the transferor Company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

The takeover achieved in the above process through Section 235 of the Act will not fall within the meaning of amalgamation under the Income Tax Act, 1961 and as such benefits of amalgamation provided under the said Act will not be available to the acquisition under consideration. The takeover in the above process will not enable carrying forward of unabsorbed depreciation and accumulated losses of the transferor Company in the transferee Company for the reason that the takeover does not result in the transferor Company losing its identity.

Check-list

Transferor Company (Documents etc. involved in this process):

1. MOA and AOA
2. Offer of a scheme or contract from the transferee company
3. Minutes of Board meeting containing consideration of the offer and its acceptance or rejection
4. Notice calling general meeting with explanatory statement
5. Form CAA 14 circulated to the members (dissenting)

6. Minutes of general meeting of the company containing approval of the offer by statutory majority in value and in numbers also, if required
7. Court order, if any
8. Register of Members
9. Notice sent by the transferee company to dissenting shareholders for acquiring their shares
10. Duly filled in and executed instrument(s) of transfer of shares held by the dissenting shareholders
11. Bank Passbook or Statement of Account in respect of the amount deposited in the special bank account to be kept in trust for the dissenting shareholders
12. Annual Report.

Transferee Company (Documents etc. involved in this process):

1. MOA and AOA
2. Minutes of Board meeting containing consideration and approval of the offer sent to the transferor company
3. Offer of a scheme or contract sent to the transferor company
4. Notice to dissenting shareholders if any, of the transferor company
5. Notice to the remaining shareholders of the transferor company, who have not assented to the proposed acquisition, if any
6. Form No: CAA14 received from the transferor company, which has been circulated to its members by that company
7. Minutes of general meeting of the company containing approval of the shareholders to the offer of scheme or contract sent to the transferor company
8. Court order, if any
9. Register of Investments
10. Duly filled in and executed instrument(s) of transfer for shares held by the dissenting shareholders
11. Balance Sheets showing investments in the shares of the transferor company.

Development of Takeover Regulations

The SEBI Act, 1992 empowered SEBI to make substantial acquisition of shares and takeovers a regulated activity for the first time. SEBI notified the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 in November 1994.

Being statutory in nature, violation of any of the provisions attracted several penalties. SEBI could initiate criminal prosecution under Section 24 of the SEBI Act, 1992, issue directions under the SEBI Act and could direct any person not to dispose off any securities acquired in violation of the regulations or direct him to sell shares acquired in violation of the Regulations or take action against the intermediary registered with SEBI. The SEBI Act, 1992 also empowered SEBI to initiate adjudications and to impose fines as penalties for certain violations of the Regulations.

SEBI acquired necessary learnings, expertise and insight into the complexities of a Takeover after implementing the same for 2 years and thereafter formed a Committee under the Chairmanship of Justice Bhagwati. The terms of reference of the Committee were:

- to examine the areas of deficiencies in the existing regulations; and
- to suggest amendments in the Regulations with a view to strengthen the Regulations and make them more fair, transparent and unambiguous and also protect the interest of investors and all parties concerned in the acquisition process.

The Committee submitted its report in January 1997 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were notified on February 20, 1997. These Regulations primarily dealt with the issues such as consolidation of holdings, conditional offers, change in control, formation of a Takeover Panel, competitive offers and defined substantial quantity for the purpose of making a disclosure and for the purpose of making an open offer. Takeovers were for the first time regulated in India in full swing. However, the various provisions were again subject to different interpretations and some of the provisions could not give the intended results.

With a view to address all the concerns raised by all concerned, the same committee was reconstituted to review the working of the regulations and to consider suitable suggestions for further refinement of the Regulations in the light of the experience gained so far. The reconstituted Committee submitted its recommendations in 2002 and the Regulations went in for a major amendment in the year 2002.

In 2009, SEBI constituted a Takeover Regulation Advisory Committee ("TRAC Committee") under the Chairmanship of Late Mr. C Achutan to review the Takeover Regulations of 1997. The committee submitted its report in 2010 and the Regulations, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 were notified on September 23, 2011 and became effective from October 22, 2011. The major amendments/changes were:

1. Increase in trigger limit for open offer from 15% to 25%
2. Increase in statutory open offer size from 20% of share capital to 26% of total share capital of the company
3. Overhaul of exemptions from open offer:

   Exemptions have been further categorized into the following broad heads:

   (a) Transactions, which trigger a statutory open offer due to substantial acquisition of shares/ voting rights, or due to change in control

   (b) Transactions, which trigger a statutory open offer due to acquisition of shares/ voting rights exceeding prescribed thresholds, provided that there is no change in control.
4. Offer pricing: The new regulations brought in the concept of Volume Weighted Average Market Price.
5. Creeping acquisition: The New Regulations provided that an acquirer could make a creeping acquisition of 5% annually (between April 1 to March 31 of next year) to reach 75% stake such that the minimum public shareholding of 25% is maintained. The manner of computation of the 5% creeping acquisition limit has also been clarified.
6. Non-Compete Fee : The provision of payment of non compete was done away with.
7. Recommendation of independent directors on the open offer to be published in the newspapers in which the detailed public statement was given.

The Regulations, further sought to include the various Securities Appellate Tribunal ("SAT") judgements, informal guidance given and the experience gained from implementing the Takeover Regulations from the year 1994. They further sought to align itself with the Takeover Regulations as they exist in the rest of the world.

TAKEOVER OF LISTED COMPANIES

Takeover of companies whose securities are listed on one or more recognized stock exchanges in India is regulated by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Therefore, before planning a takeover of a listed company, any acquirer should understand the compliance requirements under the Regulations and also the requirements under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR") and the Companies Act, 2013. There could also be some compliance requirements under the Foreign Exchange Management Act, 1999 if the acquirer is a person resident outside India.

As per Regulation 38 of SEBI LODR, the listed entity shall comply with the minimum public shareholding requirements ("MPS") as specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957 in the manner as specified by the Board from time to time. In other words, the listed entity shall ensure that the public shareholding shall be maintained at 25% of the total paid up share capital of the listed company failing which the listed company shall take steps to increase the public shareholding to 25% of the total paid up share capital by the methods as specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957.

This provision shall not apply to entities listed on Innovators Growth Platform without making a public issue.

Substantial Acquisition of Shares or Voting Rights

Regulation 3(1) provides for Substantial acquisition of shares or voting rights. It states that no acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by Persons Acting in Concert (PACs) with him in such target company, entitle them to exercise twenty-five percent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

It may be noted that-

"Target Company" means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange. [Regulation 2(1)(z)]

"Persons Acting in Concert" means persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company. [Regulation 2(1)(q)]

"Acquirer" means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company. [Regulation 2(1)(a)]

"*Shares*" means shares in the equity share capital of a target company carrying voting rights, and includes any security which entitles the holder thereof to exercise voting rights

Explanation— For the purpose of this clause shares will include all depository receipts carrying an entitlement to exercise voting rights in the target company; [Regulation 2(1)(v)]

Regulation 3(2) provides that no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company.

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to the sub-regulation (2) of regulation 3.

Explanation.— For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition .

It may be noted that-

"Acquisition" means, directly or indirectly, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company. [Regulation 2(1)(b)]

"Maximum permissible non-public shareholding" means such percentage shareholding in the target company excluding the minimum public shareholding required under the Securities Contracts (Regulation) Rules, 1957. [Regulation 2(1)(o)]

How is the maximum permissible non-public shareholding in a listed company defined?

Maximum permissible non-public shareholding is derived based on the minimum public shareholding requirement under the Securities Contracts (Regulations) Rules 1957 ("SCRR"). Rule 19A of SCRR requires all listed companies (other than public sector companies) to maintain public shareholding of at least 25% of share capital of the company. Thus by deduction, the maximum number of shares which can be held by promoters i.e. Maximum permissible non-public shareholding) in a listed companies (other than public sector companies) is 75% of the share capital.

"Promoter" has the same meaning as in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, and includes a member of the promoter group.

What is the basis of computation of the creeping acquisitions limit under Regulation 3(2) of Takeover Regulations 2011?

For computing acquisitions limits for creeping acquisition specified under regulation 3(2), gross acquisitions/ purchases shall be taken in to account thereby ignoring any intermittent fall in shareholding or voting rights whether owing to disposal of shares or dilution of voting rights on account of fresh issue of shares by the target company.

Whether for the purpose of the creeping acquisition in terms of the Takeover Regulations, 2011, the Creeping Acquisition made during the period 01.04.201 to 22.10.2011 will be considered?

The Takeover Regulations, 2011 have clearly defined the financial year as the period of 12 months commencing on the first day of the month of April. Thus, for the purpose of the creeping acquisitions under Regulation 3(2) of Takeovers Regulations 2011, shares acquired during 1/4/2011 to 22/10/2011 will be taken in to account.

Regulation 3(3) provides that for the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.

Regulation 3(4) provides nothing contained in this regulation shall apply to acquisition of shares or voting rights of a company by the promoters or shareholders in control, in terms of the provisions of Chapter VI-A of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Regulation 3(5) provides for the purpose of this regulation, any reference to “twenty-five per cent” in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as “forty-nine per cent”.

Acquisition of Control

Regulation 4 states that irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

What are the typical steps and corresponding timelines, in an open offer process?

- ***Under most scenarios (except in certain types of indirect acquisitions) on the day of the triggering event, the acquirer is required to make a Public Announcement to the stock exchanges where shares of Target Company are listed and to SEBI. Within 5 working days thereafter, the acquirer is required to publish a Detailed Public Statement (DPS) in newspapers and also submit a copy to SEBI, after creation of an escrow account.***
- ***Within 5 working days of publication DPS, the acquirer through the manager to the offer is required to file a draft letter of offer with SEBI for its observations. The letter of offer is dispatched to the shareholders of the target company, as on the identified date, after duly incorporating the changes indicated by SEBI, if there are any.***
- ***The offer shall open not later than 12 working days from the date of receipt of SEBI’s observations. The acquirer is required to issue an advertisement announcing the final schedule of the open offer, one working day before opening of the offer. The offer shall remain open for 10 working days from the date of opening of the offer. Within 10 working days after the closure of the offer, the acquirer shall make payments to the shareholders whose shares have been accepted. A post offer advertisement, giving details of the acquisitions, is required to be published by the acquirer within 5 workings days of the completion of payments under the open offer.***

Indirect Acquisition of Shares or Control

Regulation 5 states that for the purposes of regulation 3 and regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company.

In the case of an indirect acquisition attracting the provisions of sub-regulation (1) where,—

1. the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
2. the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
3. the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

Explanation.— For the purposes of computing the percentage referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

How are the thresholds for the requirement of making an open offer in case of an indirect acquisition computed?

The thresholds for the requirement of making an open offer in case of an indirect acquisition are computed on the basis of the voting rights and/or control acquired in the target company. Further, the quantum of acquisition of the target company in case of an indirect acquisition cannot be computed on a pro rata basis. This is illustrated as below:

- ***If X acquires 40% shares of Y along with majority control of Y which, in turn, holds 70% shares of Z, a listed company along with majority control of Z, then X, in effect, acquires control on 70% shares of Z held by Y. Therefore, X will be required to make an open offer for the shareholders of Z.***
- ***Now; If X, which already holds 40% shares of Y and majority control of Y, further acquires additional 10% shares of Y, then X, in effect, does not acquire control on any shares additional to 70% shares of Z held by Y. Therefore, X will not be required to make an open offer for the shareholders of Z. It may be noted that the computation of quantum of additional shares acquired by X in Z as 10% of 70%, i.e., 7% on pro rata basis is not correct. Here, X does not acquire any additional shares of Z either directly or indirectly by acquiring additional 10% shares of Y.***
- ***Now; if A and B are in joint control of X which holds majority control of Y which, in turn, holds 70% shares of Z along with its majority control and A acquires sole control of X pursuant to cessation of control of X by B, then A, in effect, acquires sole control of Z indirectly through X and Y. Therefore, X will be required to make an open offer for the shareholders of Z.***

Are there special provisions for determining the offer price in case of open offer arising out of indirect acquisition of a target company?

Yes. Since indirect acquisitions involve acquiring the target company as a part of a larger business, SAST Regulations, 2011 have prescribed additional parameters to be taken into account for determination of the offer price. If the size of the target company exceeds certain thresholds as compared to the size of the entity or business being acquired then the acquirer is required to compute and disclose in the letter of offer, the per share value of the target company taken into account for the acquisition, along with the methodology. (Kindly refer to Regulation 5). Further, in indirect acquisitions which are not in the nature of deemed direct acquisition, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of 10% per annum for the period between the date on which primary acquisition was contracted and the date of Detailed Public Statement.

Delisting Offer

Regulation 5A states that notwithstanding anything contained in these regulations and the Delisting Regulations, in the event the acquirer makes a public announcement of an open offer for acquiring shares or voting rights or control of a target company in terms of sub- regulation (1) of regulation 3, regulation 4 or regulation 5, the acquirer may seek the delisting of the target company by making a delisting offer in accordance with this regulation:

Provided that the acquirer shall have declared his intention to so delist the target company at the time of making such public announcement of an open offer as well as at the time of making the detailed public statement. A subsequent declaration of delisting for the purpose of the delisting offer proposed to be made under sub-regulation (1) shall not suffice:

Provided further that if the open offer is for an indirect acquisition that is not a deemed direct acquisition under sub-regulation (2) of regulation 5, the declaration of the intent to so delist shall be made initially only in the detailed public statement.

Explanation 1: The acquirer shall not, in such target company during the preceding two years from the date of the public announcement made under this regulation, be:

i. a promoter / promoter group / person(s) in control, or

ii. directly / indirectly associated with the promoter or any person(s) in control, or

iii. a person(s) holding more than twenty-five percent shares or voting rights.

Explanation 2: The acquirer shall not acquire joint control along with an existing promoter / person in control of the company.

The delisting offer obligations shall be fulfilled by the acquirer in the following manner:

A. the public announcement, the detailed public statement and the letter of offer shall mention the open offer price determined in accordance with regulation 8 of these regulations and the indicative price for delisting:

Provided that if the open offer is for an indirect acquisition that is not a deemed direct acquisition under sub-regulation (2) of regulation 5, the open offer price and indicative price shall be notified by the acquirer at the time of making the detailed public statement and in the letter of offer:

Provided further that the indicative price shall include a suitable premium reflecting the price that the acquirer is willing to pay for the delisting offer with full disclosures of the rationale and justification for the indicative price so determined that can also be revised upwards by the acquirer before the start of the tendering period which shall be duly disclosed to the shareholders.

Explanation: Indicative price shall be in accordance with clause (o) of sub- regulation (1) of regulation 2 of the Delisting Regulations and shall not be less than the book value of the company as computed in accordance with the Explanation to sub-regulation (5) of regulation 22 of the Delisting Regulations.

B. In case the response to the offer leads to the delisting threshold as provided under regulation 21 of the Delisting Regulations :

i. being met, all shareholders who tender their shares shall be paid the indicative price;

ii. not being met, all shareholders who tender their shares shall be paid the open offer price.

It may be noted that –

"*Tendering period*" means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares made under these regulations.[Regulation 2(1)(za)]

Delisting offer made under sub-regulation (1) is said to be not successful when:

a) on account of the non–receipt of the prior approval of shareholders in terms of regulation 11 of the Delisting Regulations; or

b) on account of non-receipt of the prior in-principle approval of the relevant stock exchange in terms of regulation 12 of the Delisting Regulations; or

c) the threshold as specified under Regulation 21 of the Delisting Regulations is not achieved;

the acquirer shall, within two working days in respect of such failure, make an announcement in all the newspapers in which the detailed public statement was made and comply with all the applicable provisions of these regulations in relation to completing of the open offer.

Regulation 5(4) states that where a competing offer is made in terms of sub-regulation (1) of regulation 20 of these regulations:

a) the acquirer shall not be entitled to delist the target company;

b) the acquirer shall not be liable to pay interest to the shareholders on account of delay due to the competing offer; and

c) the acquirer shall comply with all the applicable provisions of these regulations and make an announcement in this regard, within two working days from the date of public announcement made in terms of sub-regulation (1) of regulation 20, in all the newspapers where the detailed public statement was made.

The shareholders who have tendered shares in acceptance of the offer made under sub-regulation (1), shall be entitled to withdraw such shares tendered, within five working days from the date of the announcement under sub-regulation (3).

Regulation 5(6) Where the target company fails to get delisted pursuant to a delisting offer under sub-regulation (1), but which results in the shareholding of the acquirer exceeding the maximum permissible non-public shareholding threshold:

a) the acquirer may undertake a further attempt to delist the target company in accordance with the Delisting Regulations during the period of twelve months from the date of completion of the open offer, subject to the acquirer continuing to exceed the maximum permissible non-public shareholding in the target company.

b) such further delisting attempt shall be successful subject to the following conditions:

  i. the delisting threshold as provided under regulation 21 of the Delisting Regulations is met; and

  ii. fifty percent of the residual public shareholding is acquired.

c) upon failure of the further delisting attempt, the acquirer shall ensure compliance of the minimum public shareholding requirement of the target company under the Securities Contract (Regulation) Rules, 1957 within a period of twelve months from the end of the period referred to at clause (a).

d) the floor price for a further delisting attempt as referred to at clause (a) shall be higher of the following:

  i. the indicative price offered under the first delisting attempt;

  ii. the floor price determined under the Delisting Regulations as on the relevant date of the subsequent attempt; and

  iii. the book value of the company as computed based on the method stated in explanation to clause (a) under sub-regulation 2.

While undertaking delisting for the first or subsequent attempt, all the provisions of the Delisting Regulations shall mutatis-mutandis be applicable, save as otherwise provided in this regulation.

Voluntary Offer

Regulation 6 states that an acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise twenty-five per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations, subject to their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding:

Provided that where an acquirer or any person acting in concert with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation:

Provided further that during the offer period such acquirer shall not be entitled to acquire any shares otherwise than under the open offer.

It may be noted that –

"*Offer Period*" means the period between the date of entering into an agreement, formal or informal, to acquire shares, voting rights in, or control over a target company requiring a public announcement, or the date of the public announcement, as the case may be, and the date on which the payment of consideration to shareholders who have accepted the open offer is made, or the date on which open offer is withdrawn, as the case may be. [Regulation 2(1)(p)]

Can a person holding less than 25% of the voting rights/ shares in a target company, make an offer?

Yes, any person holding less than 25% of shares/ voting rights in a target company can make an open offer provided the open offer is for a minimum of 26% of the share capital of the company.

An acquirer and persons acting in concert with him, who have made a public announcement under this regulation to acquire shares of a target company shall not be entitled to acquire any shares of the target company for a period of six months after completion of the open offer except pursuant to another voluntary open offer:

Provided that such restriction shall not prohibit the acquirer from making a competing offer upon any other person making an open offer for acquiring shares of the target company.

Shares acquired through bonus issue or stock splits shall not be considered for purposes of the dis-entitlement set out in this regulation. For the purpose of this regulation, any reference to "twenty-five per cent" in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as "forty-nine per cent".

Regulation 6A states that notwithstanding anything contained in these regulations, no person who is a wilful defaulter shall make a public announcement of an open offer for acquiring shares or enter into any transaction that would attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations:

It may be noted that –

"*Wilful Defaulter*" means any person who is categorized as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the Reserve Bank of India and includes any person whose director, promoter or partner is categorized as such. [Regulation 2(1)(ze)]

Provided that this regulation shall not prohibit the wilful defaulter from making a competing offer in accordance with regulation 20 of these regulations upon any other person making an open offer for acquiring shares of the target company.

Regulation 6B states that notwithstanding anything contained in these regulations, no person who is a fugitive economic offender shall make a public announcement of an open offer or make a competing offer for acquiring shares or enter into any transaction, either directly or indirectly, for acquiring any shares or voting rights or control of a target company.

What are the restrictions on acquirers making a voluntary open offer?

A voluntary offer cannot be made if the acquirer or PACs with him has acquired any shares of the target company in the 52 weeks prior to the voluntary offer. The acquirer is prohibited from acquiring any shares during the offer period other than those acquired in the open offer. The acquirer is also not entitled to acquire any shares for a period of 6 months, after completion of open offer except pursuant to another voluntary open offer.

How is the voluntary offer made by a person holding less than 25% of shares/ voting rights in a target company different from the voluntary offer made by a person holding more than 25% of shares/ voting rights of the target company?

Voluntary offer by a person holding less than 25%	Voluntary offer by a person holding more than 25%
Minimum offer size of 26%.	Minimum offer size of 10%.
Maximum can be for entire share capital of the target company.	The maximum offer size is linked to maximum permissible non-public shareholding permitted under Securities Contracts (Regulations) Rules 1957.
No such conditions	• Acquirer should not have acquired any shares during 52 weeks period prior to Public Announcement. • Acquirer is not entitled to acquire any shares of the target company for a period of 6months after the completion of the open offer except for a voluntary open offer.

Offer Size

Regulation 7(1) states that the open offer for acquiring shares to be made by the acquirer and persons acting in concert with him under regulation 3 and regulation 4 shall be for at least twenty six per cent of total shares of the target company, as of tenth working day from the closure of the tendering period:

Provided that the total shares of the target company as of tenth working day from the closure of the tendering period shall take into account all potential increases in the number of outstanding shares during the offer period contemplated as of the date of the public announcement:

Provided further that the offer size shall be proportionately increased in case of an increase in total number of shares, after the public announcement, which is not contemplated on the date of the public announcement.

Regulation 7(2) states that the open offer made under regulation 6 shall be for acquisition of at least such number of shares as would entitle the holder thereof to exercise an additional ten per cent of the voting rights in the target company, and shall not exceed such number of shares as would result in the post-acquisition holding of the acquirer and persons acting in concert with him exceeding the maximum permissible non- public shareholding applicable to such target company:

Provided that in the event of a competing offer being made, the acquirer who has voluntarily made a public announcement of an open offer under regulation 6 shall be entitled to increase the number of shares for which the open offer has been made to such number of shares as he deems fit:

Provided further that such increase in offer size shall have to be made within a period of fifteen working days from the public announcement of a competing offer, failing which the acquirer shall not be entitled to increase the offer size.

Regulation 7(3) states that upon an acquirer opting to increase the offer size under sub-regulation (2), such open offer shall be deemed to have been made under sub-regulation (2) of regulation 3 and the provisions of these regulations shall apply accordingly.

Regulation 7(4) states that in the event the shares accepted in the open offer were such that the shareholding of the acquirer taken together with persons acting in concert with him pursuant to completion of the open offer results in their shareholding exceeding the maximum permissible non-public shareholding, the acquirer shall be required to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957.

Provided that if the open offer has been made by an acquirer under sub- regulation (1) of regulation 3, regulation 4 or regulation 5 and the acquirer has stated upfront his intention to retain the listing of the target company in the public announcement and the detailed public statement issued pursuant to an open offer in accordance with these regulations, the acquirer may alternatively undertake a proportionate reduction of the shares or voting rights to be acquired pursuant to the underlying agreement for acquisition/ subscription of shares or voting rights and the purchase of shares so tendered, upon the completion of the open offer process such that the resulting shareholding of the acquirer in the target company does not exceed the maximum permissible non-public shareholding prescribed under the Securities Contract (Regulation) Rules, 1957:

Provided further that in case of a preferential allotment pursuant to a Share Subscription Agreement which may trigger an open offer as envisaged in the above proviso, the Board Resolution and shareholder resolution shall be appropriately worded, so as to include the effective date of allocation/allotment and the quantum thereof.

Notwithstanding anything contained in regulation 170 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, in case of undertaking a scale down of subscription of shares or voting rights from the agreement, the period of fifteen days for allotment of shares shall be counted from the date of the closure of the tendering period for the open offer.

Explanation 1: The acquirer who is undertaking a scale down shall not, in such target company during the preceding two years from the date of the public announcement, be:

i. a promoter / promoter group / person(s) in control, or

ii. directly / indirectly associated with the promoter or any person(s) in control, or

iii. a person(s) holding more than twenty-five percent shares or voting rights.

Explanation 2: The acquirer who is undertaking a scale down shall not acquire joint control along with an existing promoter / person in control of the company.

Regulation 7(5) states that subject to regulation 5A, the acquirer whose shareholding exceeds the maximum permissible non-public shareholding, pursuant to an open offer under these regulations, shall not be eligible to make a voluntary delisting offer under the Delisting Regulations, unless a period of twelve months has elapsed from the date of the completion of the offer period.

Regulation 7(6) states that any open offer made under these regulations shall be made to all shareholders of the target company, other than the acquirer, persons acting in concert with him and the parties to any underlying agreement including persons deemed to be acting in concert with such parties, for the sale of shares of the target company.

What is the stipulated size of an open offer?

An open offer, other than a voluntary open offer under Regulation 6, must be made for a minimum of 26% of the target company's share capital. The size of voluntary open offer under Regulation 6 must be for at least 10% of the target company's share capital. Further the offer size percentage is calculated on the fully diluted share capital of the target company taking in to account potential increase in the number of outstanding shares as on 10th working day from the closure of the open offer.

Offer Price

Regulation 8(1) states that the open offer for acquiring shares under regulation 3, regulation 4, regulation 5 or regulation 6 shall be made at a price not lower than the price determined in accordance with sub-regulation (2) or sub-regulation (3), as the case may be.

Regulation 8(2) states that in the case of direct acquisition of shares or voting rights in, or control over the target company, and indirect acquisition of shares or voting rights in, or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met, the offer price shall be the highest of,—

a) the highest negotiated price per share of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;

b) the volume-weighted average price paid or payable for acquisitions, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the date of the public announcement;

c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty- six weeks immediately preceding the date of the public announcement;

d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

Provided that the price determined as per clause (d) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking.

It may be noted that –

"*Disinvestment*" means the direct or indirect sale by the Central Government or any State Government or by a government company, as the case may be, of shares or voting rights in, or control over, a target company, which is a public sector undertaking. [Regulation 2(1)(g)]

"Public Sector Undertaking" means a target company in which, directly or indirectly, majority of shares or voting rights or control is held by the Central Government or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments [Regulation 2(1)(u)]

"Frequently Traded Shares" means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company:

Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares [Regulation 2(1)(j)]

e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies; and

f) the per share value computed under sub-regulation (5), if applicable.

Regulation 8(3) states that, in the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of,—

a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;

b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement of the open offer for shares of the target company made under these regulations;

e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

Provided that the price determined as per clause (e) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking; and

f) the per share value computed under sub-regulation (5).

Regulation 8(4) states that, in the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

Regulation 8(5) states that, in the case of an indirect acquisition and open offers under sub-regulation (2) of regulation 5 where,—

a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;

b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or

c) the proportionate market capitalization of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of fifteen per cent, on the basis of the most recent audited annual financial statements, the acquirer shall, notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), be required to compute and disclose, in the letter of offer, the per share value of the target company taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

Explanation.— For the purposes of computing the percentages referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

How is the offer price calculated in case shares are frequently traded on the stock exchange?

If the target company's shares are frequently traded then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

- ***Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;***
- ***Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");***
- ***Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;***
- ***Volume weighted average market price for sixty trading days preceding the PA.***

Regulation 8(6) states that for the purposes of sub-regulation (2) and sub-regulation (3), where the acquirer or any person acting in concert with him has any outstanding convertible instruments convertible into shares of the target company at a specific price, the price at which such instruments are to be converted into shares, shall also be considered as a parameter under sub-regulation (2) and sub-regulation (3).

Regulation 8(7) states that for the purposes of sub-regulation (2) and sub-regulation (3), the price paid for shares of the target company shall include any price paid or agreed to be paid for the shares or voting rights in, or control over the target company, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise.

Regulation 8(8) states that where the acquirer has acquired or agreed to acquire whether by himself or through or with persons acting in concert with him any shares or voting rights in the target company during the offer period, whether by subscription or purchase, at a price higher than the offer price, the offer price shall stand revised to the highest price paid or payable for any such acquisition:

Provided that no such acquisition shall be made after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

Regulation 8(9) states that the price parameters under sub-regulation (2) and sub-regulation (3) may be adjusted by the acquirer in consultation with the manager to the offer, for corporate actions such as issuances pursuant to rights issue, bonus issue, stock consolidations, stock splits, payment of dividend, de-mergers and reduction of capital, where the record date for effecting such corporate actions falls prior to three working days before the commencement of the tendering period:

Provided that no adjustment shall be made for dividend declared with a record date falling during such period except where the dividend per share is more than fifty per cent higher than the average of the dividend per share paid during the three financial years preceding the date of the public announcement.

Regulation 8(10) states that where the acquirer or persons acting in concert with him acquires shares of the target company during the period of twenty-six weeks after the tendering period at a price higher than the offer price under these regulations, the acquirer and persons acting in concert shall pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the open offer, within sixty days from the date of such acquisition:

Provided that this provision shall not be applicable to acquisitions under another open offer under these regulations or pursuant to the Delisting Regulations, or open market purchases made in the ordinary course on the stock exchanges, not being negotiated acquisition of shares of the target company whether by way of bulk deals, block deals or in any other form.

Regulation 8(11) states that, where the open offer is subject to a minimum level of acceptances, the acquirer may, subject to the other provisions of this regulation, indicate a lower price, which will not be less than the price determined under this regulation, for acquiring all the acceptances despite the acceptance falling short of the indicated minimum level of acceptance, in the event the open offer does not receive the minimum acceptance.

Regulation 8(12) states that, in the case of any indirect acquisition, other than the indirect acquisition referred in sub-regulation (2) of regulation 5, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the detailed public statement, provided such period is more than five working days.

Regulation 8(13) states that, the offer price for partly paid up shares shall be computed as the difference between the offer price and the amount due towards calls-in-arrears including calls remaining unpaid with interest, if any, thereon.

Regulation 8(14) states that, the offer price for equity shares carrying differential voting rights shall be determined by the acquirer and the manager to the open offer with full disclosure of justification for the price so determined, being set out in the detailed public statement and the letter of offer:

Provided that such price shall not be lower than the amount determined by applying the percentage rate of premium, if any, that the offer price for the equity shares carrying full voting rights represents to the price parameter computed under clause (d) of sub-regulation 2, or as the case may be, clause (e) of sub-regulation 3, to the volume-weighted average market price of the shares carrying differential voting rights for a period of sixty trading days computed on the same terms as specified in the aforesaid provisions, subject to shares carrying full voting rights and the shares carrying differential voting rights, both being frequently traded shares.

Regulation 8(15) states that, in the event of any of the price parameters contained in this regulation not being available or denominated in Indian rupees, the conversion of such amount into Indian rupees shall be effected at the exchange rate as prevailing on the date preceding the date of public announcement and the acquirer shall set out the source of such exchange rate in the public announcement, the detailed public statement and the letter of offer.

Regulation 8(16) states that, for purposes of clause (e) of sub-regulation (2) and sub-regulation (4), the Board may, at the expense of the acquirer, require valuation of the shares by an independent merchant banker other than the manager to the open offer or an independent chartered accountant in practice having a minimum experience of ten years.

Regulation 8 (17) provides that the effect on the price of the equity shares of the target company due to material price movement and confirmation of reported event or information may be excluded as per the framework specified under sub-regulation (11) of regulation 30 of the listing regulations for determination of the offer price under this regulation.

Mode of payment.

Regulation 9(1) provides the offer price may be paid, —

a) in cash;

b) by issue, exchange or transfer of listed shares in the equity share capital of the acquirer or of any person acting in concert;

c) by issue, exchange or transfer of listed secured debt instruments issued by the acquirer or any person acting in concert with a rating not inferior to investment grade as rated by a credit rating agency registered with the Board;

d) by issue, exchange or transfer of convertible debt securities entitling the holder thereof to acquire listed shares in the equity share capital of the acquirer or of any person acting in concert; or

e) a combination of the mode of payment of consideration stated in clause (a), clause (b), clause (c) and clause (d):

Provided that where any shares have been acquired or agreed to be acquired by the acquirer and persons acting in concert with him during the fifty-two weeks immediately preceding the date of public announcement constitute more than ten per cent of the voting rights in the target company and has been paid for in cash, the open offer shall entail an option to the shareholders to require payment of the offer price in cash, and a shareholder who has not exercised an option in his acceptance shall be deemed to have opted for receiving the offer price in cash:

Provided further that in case of revision in offer price the mode of payment of consideration may be altered subject to the condition that the component of the offer price to be paid in cash prior to such revision is not reduced.

Regulation 9(2) provides that, for the purposes of clause (b), clause (d) and clause (e) of sub-regulation (1), the shares sought to be issued or exchanged or transferred or the shares to be issued upon conversion of other securities, towards payment of the offer price, shall conform to the following requirements, —

(a) such class of shares are listed on a stock exchange and frequently traded at the time of the public announcement;

(b) such class of shares have been listed for a period of at least two years preceding the date of the public announcement;

(c) the issuer of such class of shares has redressed at least ninety five per cent. of the complaints received from investors by the end of the calendar quarter immediately preceding the calendar month in which the public announcement is made;

(d) the issuer of such class of shares has been in material compliance with the listing regulations for a period of at least two years immediately preceding the date of the public announcement:

Provided that in case where the Board is of the view that a company has not been materially compliant with the provisions of the listing regulations, the offer price shall be paid in cash only;

(e) the impact of auditors' qualifications, if any, on the audited accounts of the issuer of such shares for three immediately preceding financial years does not exceed five per cent. of the net profit or loss after tax of such issuer for the respective years; and

(f) the Board has not issued any direction against the issuer of such shares not to access the capital market or to issue fresh shares.

Regulation 9(3) provides that, where the shareholders have been provided with options to accept payment in cash or by way of securities, or a combination thereof, the pricing for the open offer may be different for each option subject to compliance with minimum offer price requirements under regulation 8:

Provided that the detailed public statement and the letter of offer shall contain justification for such differential pricing.

Regulation 9(4) provides that, in the event the offer price consists of consideration to be paid by issuance of securities, which requires compliance with any applicable law, the acquirer shall ensure that such compliance is completed not later than the commencement of the tendering period:

Provided that in case the requisite compliance is not made by such date, the acquirer shall pay the entire consideration in cash.

Regulation 9(5) provides that where listed securities are offered as consideration, the value of such securities shall be higher of:

i. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the six months preceding the relevant date;
ii. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the two weeks preceding the relevant date; and
iii. the volume-weighted average market price for a period of sixty trading days preceding the date of the public announcement, as traded on the stock exchange where the maximum volume of trading in the shares of the company whose securities are being offered as consideration, are recorded during the six-month period prior to relevant date and the ratio of exchange of shares shall be duly certified by an independent merchant banker (other than the manager to the open offer) or an independent chartered accountant having a minimum experience of ten years.

   Explanation.— For the purposes of this sub-regulation, the "relevant date" shall be the thirtieth day prior to the date on which the meeting of shareholders is held to consider the proposed issue of shares under sub-section (1A) of Section 81 of the Companies Act, 2013.

Regulation 9(6) states that the effect on the price of the listed equity shares, which are offered as consideration, due to material price movement and confirmation of reported event or information may be excluded as per the framework specified under sub-regulation (11) of regulation 30 of the listing regulations for determination of the price of such equity shares under this regulation.

General Exemptions

Under Regulation 10(1) the following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,—

a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—
   i. immediate relatives;
   ii. persons named as promoters in the shareholding pattern filed by the target company in terms of the listing regulations or as the case may be, the listing agreement or these regulations for not less than three years prior to the proposed acquisition;
   iii. a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;

      Explanation: For the purpose of this sub-clause, the company shall include a body corporate, whether Indian or foreign.
   iv. persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing regulations or as the case may be, the listing agreement;
   v. shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the 35[listing regulations or as the case may be, the listing agreement], and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:

Provided that for purposes of availing of the exemption under this clause,—

(a) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty- five percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and

(b) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

b) acquisition in the ordinary course of business by,—

i. an underwriter registered with the Board by way of allotment pursuant to an underwriting agreement in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

ii. a stock broker registered with the Board on behalf of his client in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;

iii. a merchant banker registered with the Board or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue in terms of Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

iv. any person acquiring shares pursuant to a scheme of safety net in terms of regulation 44 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

v. a merchant banker registered with the Board acting as a stabilising agent or by the promoter or pre-issue shareholder in terms of regulation 45 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

vi. by a registered market-maker of a stock exchange in respect of shares for which he is the market maker during the course of market making;

vii. a Scheduled Commercial Bank, acting as an escrow agent; and

viii. invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions as a pledgee.

c) acquisitions at subsequent stages, by an acquirer who has made a public announcement of an open offer for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement:

Provided that,—

i. both the acquirer and the seller are the same at all the stages of acquisition; and

ii. full disclosures of all the subsequent stages of acquisition, if any, have been made in the public announcement of the open offer and in the letter of offer.

d) acquisition pursuant to a scheme,—

i. made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification or re-enactment thereto;

ii. of arrangement involving the target company as a transferor company or as a transferee company, or reconstruction of the target company, including amalgamation, merger or demerger;

iii. pursuant to an order of a court or a tribunal under any law or regulation, Indian or foreign; or

iv. of arrangement not directly involving the target company as a transferor company or as a transferee company, or reconstruction not involving the target company's undertaking, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal or under any law or regulation, Indian or foreign, subject to,—

(a) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

(b) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent of the voting rights in the combined entity are the same as the persons who held the entire voting rights before the implementation of the scheme.

da) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;

e) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ;

f) acquisition pursuant to the provisions of the Delisting Regulations;

g) acquisition by way of transmission, succession or inheritance;

h) acquisition of voting rights or preference shares carrying voting rights arising out of the operation of sub-section (2) of section 47 of the Companies Act, 2013;

i) Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with the guidelines specified by the Reserve Bank of India:

Provided that the conditions specified under sub-regulation (6) of regulation 158 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 are complied with

Explanation. – For the purpose of this clause, "lenders" shall mean all scheduled commercial banks (excluding Regional Rural Banks) and All India Financial Institutions.

j) increase in voting rights arising out of the operation of sub-section (1) of section 106 of the Companies Act, 2013 or pursuant to a forfeiture of shares by the target company, undertaken in compliance with the provisions of the Companies Act, 2013 and its articles of association.

(2A) An increase in the voting rights of any shareholder beyond the threshold limits stipulated in sub-regulations (1) and (2) of regulation 3, without the acquisition of control, pursuant to the conversion of equity shares with superior voting rights into ordinary equity shares, shall be exempted from the obligation to make an open offer under regulation 3.

(2B) Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub- regulation (1) of regulation 3 and regulation 4.

Explanation.- The above exemption from open offer shall also apply to the target company with infrequently traded shares which is compliant with the provisions of sub- regulations (2), (3), (4), (5),(6), (7) and (8) of regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. The pricing of such infrequently traded shares shall be in terms of regulation 165 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

How is the offer price calculated in case shares are infrequently traded on the stock exchange?

If the target company's shares are infrequently traded, then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

- ***Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;***
- ***Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");***
- ***Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;***
- ***The price determined by the acquirer and the manager to the open offer after taking into account valuation parameters including book value, comparable trading multiples, and such other parameters that are customary for valuation of shares of such companies.***

It may be noted that the Board may at the expense of the acquirer, require valuation of shares by an independent merchant banker other than the manager to the offer or any independent chartered accountant in practice having a minimum experience of 10 years.

Under Regulation 10(3), an increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back of shares by the target company shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in sub-regulation (1) of regulation 3 within ninety days from the date of the closure of the said buy-back offer.

Under Regulation 10(4), the following acquisitions shall be exempt from the obligation to make an open offer under sub-regulation (2) of regulation 3, —

a) acquisition of shares by any shareholder of a target company, upto his entitlement, pursuant to a rights issue;

b) acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to a rights issue, subject to fulfillment of the following conditions,—

   i. the acquirer has not renounced any of his entitlements in such rights issue; and

   ii. the price at which the rights issue is made is not higher than the ex-rights price of the shares of the target company, being the sum of,—

      A. the volume weighted average market price of the shares of the target company during a period of sixty trading days ending on the day prior to the date of determination of the rights issue price, multiplied by the number of shares outstanding prior to the rights issue, divided by the total number of shares outstanding after allotment under the rights issue:

      Provided that such volume weighted average market price shall be determined on the basis of trading on the stock exchange where the maximum volume of trading in the shares of such target company is recorded during such period; and

      B. the price at which the shares are offered in the rights issue, multiplied by the number of shares so offered in the rights issue divided by the total number of shares outstanding after allotment under the rights issue:

c) increase in voting rights in a target company of any shareholder pursuant to buy- back of shares:

Provided that,—

i. such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 68 of the Companies Act, 2013;

ii. in the case of a shareholder resolution, voting is by way of postal ballot;

iii. where a resolution of shareholders is not required for the buy- back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under section 68 of the Companies Act, 2013; and

iv. the increase in voting rights does not result in an acquisition of control by such shareholder over the target company:

Provided further that where the aforesaid conditions are not met, in the event such shareholder reduces his shareholding such that his voting rights fall below the level at which the obligation to make an open offer would be attracted under sub-regulation (2) of regulation 3, within ninety days from the date of closure of the buy-back offer by the target company, the shareholder shall be exempt from the obligation to make an open offer.

d) acquisition of shares in a target company by any person in exchange for shares of another target company tendered pursuant to an open offer for acquiring shares under these regulations;

e) acquisition of shares in a target company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter;

f) acquisition of shares in a target company from a venture capital fund or category I Alternative Investment Fund or a foreign venture capital investor registered with the Board, by promoters of the target company pursuant to an agreement between such venture capital fund or category I Alternative Investment Fund or foreign venture capital investor and such promoters.

Under Regulation 10(5), acquisitions under clause (a) of sub-regulation (1), and clauses (e) and (f) of sub-regulation (4), the acquirer shall intimate the stock exchanges where the shares of the target company are listed, the details of the proposed acquisition in such form as may be specified, at least four working days prior to the proposed acquisition, and the stock exchange shall forthwith disseminate such information to the public.

Under Regulation 10(6), any acquisition made pursuant to exemption provided for in this regulation, the acquirer shall file a report with the stock exchanges where the shares of the target company are listed, in such form as may be specified not later than four working days from the acquisition, and the stock exchange shall forthwith disseminate such information to the public.

Under Regulation 10(7), any acquisition of or increase in voting rights pursuant to exemption provided for in clause (a) of sub-regulation (1), sub-clause (iii) of clause (d) of sub- regulation (1), clause (h) of sub-regulation (1), sub-regulation (2), sub-regulation (3) and clause (c) of sub-regulation (4), clauses (a), (b) and (f) of sub-regulation (4), the acquirer shall, within twenty-one working days of the date of acquisition, submit a report in such form as may be specified along with supporting documents to the Board giving all details in respect of acquisitions, along with a non-refundable fee of rupees one lakh fifty thousand by way of direct credit in the bank account through NEFT/RTGS/IMPS or any other mode allowed by RBI or by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board.

Explanation.— For the purposes of sub-regulation (5), sub-regulation (6) and sub- regulation (7) in the case of convertible securities, the date of the acquisition shall be the date of conversion of such securities.

What are the threshold limits for acquisition of shares / voting rights, beyond which an obligation to make an open offer is triggered?

Acquisition of 25% or more shares or voting rights: An acquirer, who (along with PACs, if any) holds less than 25% shares or voting rights in a target company and agrees to acquire shares or acquires shares which along with his/ PAC's existing shareholding would entitle him to exercise 25% or more shares or voting rights in a target company, will need to make an open offer before acquiring such additional shares.

Acquisition of more than 5% shares or voting rights in a financial year: An acquirer who (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in a target company, can acquire additional shares in the target company as would entitle him to exercise more than 5% of the voting rights in any financial year ending March 31, only after making an open offer.

Exemptions by the Board

According to Regulation 11(1), the Board may for reasons recorded in writing, grant exemption from the obligation to make an open offer for acquiring shares under these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

According to Regulation 11(2), the Board may for reasons recorded in writing, grant a relaxation from strict compliance with any procedural requirement under Chapter III and Chapter IV subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market on being satisfied that,—

a) the target company is a company in respect of which the Central Government or State Government or any other regulatory authority has superseded the board of directors of the target company and has appointed new directors under any law for the time being in force, if,—

    i. such board of directors has formulated a plan which provides for transparent, open, and competitive process for acquisition of shares or voting rights in, or control over the target company to secure the smooth and continued operation of the target company in the interests of all stakeholders of the target company and such plan does not further the interests of any particular acquirer;

    ii. the conditions and requirements of the competitive process are reasonable and fair;

    iii. the process adopted by the board of directors of the target company provides for details including the time when the open offer for acquiring shares would be made, completed and the manner in which the change in control would be effected; and

b) the provisions of Chapter III and Chapter IV are likely to act as impediment to implementation of the plan of the target company and exemption from strict compliance with one or more of such provisions is in public interest, the interests of investors in securities and the securities market.

According to Regulation 11(3), for seeking exemption under sub-regulation (1), the acquirer shall, and for seeking relaxation under sub-regulation (2) the target company shall file an application with the Board, supported by a duly sworn affidavit, giving details of the proposed acquisition and the grounds on which the exemption has been sought.

According to Regulation 11(4), the acquirer or the target company, as the case may be, shall along with the application referred to under sub-regulation (3) pay a non-refundable fee of rupees five lakh, by way of direct credit in the bank account through NEFT/RTGS/IMPS or any other mode allowed by RBI or by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board.

According to Regulation 11(5), the Board may after affording reasonable opportunity of being heard to the applicant and after considering all the relevant facts and circumstances, pass a reasoned order either granting or rejecting the exemption or relaxation sought as expeditiously as possible:

Provided that the Board may constitute a panel of experts to which an application for an exemption under sub-regulation (1) may, if considered necessary, be referred to make recommendations on the application to the Board.

According to Regulation 11(6), the order passed under sub-regulation (5) shall be hosted by the Board on its official website.

OPEN OFFER PROCESS

Manager to the open offer

Regulation 12(1) states that, prior to making a public announcement, the acquirer shall appoint a merchant banker registered with the Board, who is not an associate of the acquirer, as the manager to the open offer.

Explanation.— For the purposes of this regulation the term "associate" has the same meaning as in the Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992.

Regulation 12(2) states that, the public announcement of the open offer for acquiring shares required under these regulations shall be made by the acquirer through such manager to the open offer.

Timing

Regulation 13(1) states that, the public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company.

Regulation 13(2) states that, such public announcement,—

a) in the case of market purchases, shall be made prior to placement of the purchase order with the stock broker to acquire the shares, that would take the entitlement to voting rights beyond the stipulated thresholds;

b) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon converting convertible securities without a fixed date of conversion or upon conversion of depository receipts for the underlying shares of the target company shall be made on the same day as the date of exercise of the option to convert such securities into shares of the target company;

c) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon conversion of convertible securities with a fixed date of conversion shall be made on the second working day preceding the scheduled date of conversion of such securities into shares of the target company;

d) pursuant to a disinvestment shall be made on the same day as the date of executing the agreement for acquisition of shares or voting rights in or control over the target company;

e) in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-regulation (2) of regulation 5 are met, may be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

f) in the case of indirect acquisition of shares or voting rights in, or control over the target company where any of the parameters referred to in sub- regulation (2) of regulation 5 are met shall be made on the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

g) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company, under preferential issue, shall be made on the date on which the board of directors of the target company authorises such preferential issue;

h) the public announcement pursuant to an increase in voting rights consequential to a buy-back not qualifying for exemption under regulation 10, shall be made not later than the ninetieth day from the date of closure of the buy-back offer by the target company;

i) the public announcement pursuant to any acquisition of shares or voting rights in or control over the target company where the specific date on which title to such shares, voting rights or control is acquired is beyond the control of the acquirer, shall be made not later than two working days from the date of receipt of intimation of having acquired such title.

Regulation 13(2A) states that, notwithstanding anything contained in sub-regulation (2), a public announcement referred to in regulation 3 and regulation 4 for a proposed acquisition of shares or voting rights in or control over the target company through a combination of,-

i. an agreement and any one or more modes of acquisition referred to in sub- regulation (2) of regulation 13, or

ii. any one or more modes of acquisition referred in clause (a) to (i) of sub-regulation(2) of regulation 13,

shall be made on the date of first such acquisition, provided the acquirer discloses in the public announcement the details of the proposed subsequent acquisition.

Regulation 13(3) states that, the public announcement made under regulation 6 shall be made on the same day as the date on which the acquirer takes the decision to voluntarily make a public announcement of an open offer for acquiring shares of the target company.

Regulation 13(3) states that, pursuant to the public announcement made under sub-regulation (1) and sub- regulation (3), a detailed public statement shall be published by the acquirer through the manager to the open offer in accordance with regulation 14 and regulation 15, not later than five working days of the public announcement:

Provided that the detailed public statement pursuant to a public announcement made under clause (e) of sub-regulation (2) shall be made not later than five working days of the completion of the primary acquisition of shares or voting rights in, or control over the company or entity holding shares or voting rights in, or control over the target company.

Explanation.— It is clarified that in the event the acquirer does not succeed in acquiring the ability to exercise or direct the exercise of voting rights in, or control over the target company, the acquirer shall not be required to make a detailed public statement of an open offer for acquiring shares under these regulations.

Publication

Under Regulation 14(1), the public announcement shall be sent to all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public.

Under Regulation 14(2), a copy of the public announcement shall be sent to the Board and to the target company at its registered office within one working day of the date of the public announcement.

Under Regulation 14(3), the detailed public statement pursuant to the public announcement referred to in sub-regulation (4) of regulation 13 shall be published in all editions of any one English national daily with wide circulation, any one Hindi national daily with wide circulation, and any one regional language daily with wide circulation at the place where the registered office of the target company is situated and one regional language daily at the place of the stock exchange where the maximum volume of trading in the shares of the target company are recorded during the sixty trading days preceding the date of the public announcement.

Under Regulation 14(4), simultaneously with publication of such detailed public statement in the newspapers, a copy of the same shall be sent to,—

i. the Board through the manager to the open offer,

ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public,

iii. the target company at its registered office, and the target company shall forthwith circulate it to the members of its board.

Contents

According to Regulation 15(1), the public announcement shall contain such information as may be specified, including the following,—

a) name and identity of the acquirer and persons acting in concert with him;

b) name and identity of the sellers, if any;

c) nature of the proposed acquisition such as purchase of shares or allotment of shares, or any other means of acquisition of shares or voting rights in, or control over the target company;

d) the consideration for the proposed acquisition that attracted the obligation to make an open offer for acquiring shares, and the price per share, if any;

e) the offer price, and mode of payment of consideration;

f) offer size, and conditions as to minimum level of acceptances, if any; and

g) intention of the acquirer to either delist the target company or retain the listing of the target company. In case of proposed delisting under regulation 5A, the proposed open offer price and indicative price as required under regulation 5A shall be disclosed along with an explanation setting out the rationale and basis for justifying the indicative price.

According to Regulation 15(2), the detailed public statement pursuant to the public announcement shall contain such information as may be specified in order to enable shareholders to make an informed decision with reference to the open offer.

According to Regulation 15(3), the public announcement of the open offer, the detailed public statement, and any other statement, advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares under these regulations shall not omit any relevant information, or contain any misleading information.

Filing of letter of offer with the Board

Regulation 16(1) provides that, within five working days from the date of the detailed public statement made under sub-regulation (4) of regulation 13, the acquirer shall, through the manager to the open offer, file with the Board, a draft of the letter of offer containing such information as may be specified along with a non-refundable fee, as per the following scale, by way of direct credit in the bank account through NEFT/RTGS/IMPS or online payment using the SEBI Payment Gateway or any other mode as may be specified by the Board from time to time.

Sl. No.	Consideration payable under the Open Offer	Fee (Rs.)
a.	Upto ten crore rupees.	Five lakh rupees (Rs. 5,00,000)
b.	More than ten crore rupees, but less than or equal to one thousand crore rupees.	0.5 per cent of the offer size
c.	More than one thousand crore rupees.	Five crore rupees (Rs. 5,00,00,000) plus 0.125 per cent of the portion of the offer size in excess of one thousand crore rupees (1000,00,00,000).

Regulation 16(2) provides that, the consideration payable under the open offer shall be calculated at the offer price, assuming full acceptance of the open offer, and in the event the open offer is subject to differential pricing, shall be computed at the highest offer price, irrespective of manner of payment of the consideration:

Provided that in the event of consideration payable under the open offer being enhanced owing to a revision to the offer price or offer size the fees payable shall stand revised accordingly, and shall be paid within five working days from the date of such revision.

Regulation 16(3) provides that, the manager to the open offer shall provide soft copies of the public announcement, the detailed public statement and the draft letter of offer in accordance with such specifications as may be specified, and the Board shall upload the same on its website.

Regulation 16(4) provides that, the Board shall give its comments on the draft letter of offer as expeditiously as possible but not later than fifteen working days of the receipt of the draft letter of offer and in the event of no comments being issued by the Board within such period, it shall be deemed that the Board does not have comments to offer:

Provided that in the event the Board has sought clarifications or additional information from the manager to the open offer, the period for issuance of comments shall be extended to the fifth working day from the date of receipt of satisfactory reply to the clarification or additional information sought.

Provided further that in the event the Board specifies any changes, the manager to the open offer and the acquirer shall carry out such changes in the letter of offer before it is dispatched to the shareholders.

Regulation 16(5) provides that, in the case of competing offers, the Board shall provide its comments on the draft letter of offer in respect of each competing offer on the same day.

Regulation 16(6) provides that, in the event the disclosures in the draft letter of offer are inadequate the Board may call for a revised letter of offer and shall deal with the revised letter of offer in accordance with sub-regulation (4).

What is a letter of offer? What are the disclosures required under the Letter of offer?

The letter of offer is a document which is dispatched to all shareholders of the target company as on identified date. This is also made available on the website of SEBI. Letter of offer contains details about the offer, background of Acquirers/PACS, financial statements of Acquirer/ PACs, escrow arrangement, background of the target company, financial statements of the target company, justification for offer price, financial arrangements, terms and conditions of the offer, procedure for acceptance and settlement of the offer. SEBI has prescribed the format for Letter of offer, which enumerates minimum disclosure requirements. The Manager to the offer/ acquirer is free to add any other disclosures which in his opinion are material for the shareholders. The format is available in the SEBI website.

Provision of escrow

Under Regulation 17(1), not later than two working days prior to the date of the detailed public statement of the open offer for acquiring shares, the acquirer shall create an escrow account towards security for performance of his obligations under these regulations, and deposit in escrow account such aggregate amount as per the following scale:

Sl. No.	Consideration payable under the Open Offer	Escrow Amount
a.	On the first five hundred crore rupees	an amount equal to twenty-five per cent of the consideration
b.	On the balance consideration	an additional amount equal to ten per cent of the balance consideration

Provided that where an open offer is made conditional upon minimum level of acceptance, hundred percent of the consideration payable in respect of minimum level of acceptance or fifty per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.

Provided further that in case of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations, an amount equivalent to hundred per cent of the consideration payable in the open offer shall be deposited in the escrow account.

Under Regulation 17(2), the consideration payable under the open offer shall be computed as provided for in sub-regulation (2) of regulation 16 and in the event of an upward revision of the offer price or of the offer size, the value of the escrow amount shall be computed on the revised consideration calculated at such revised offer price, and the additional amount shall be brought into the escrow account prior to effecting such revision.

Under Regulation 17(3), the escrow account referred to in sub-regulation (1) may be in the form of,—

a) cash deposited with any scheduled commercial bank;

b) bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank; or

c) deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin:

   Provided that securities sought to be provided towards escrow account under clause (c) shall be required to conform to the requirements set out in sub-regulation (2) of regulation 9.

   Provided further that the deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations

   Explanation: The cash component of the escrow account as referred to in clause above may be maintained in an interest bearing account, subject to the merchant banker ensuring that the funds are available at the time of making payment to the shareholders.

Under Regulation 17(4), in the event of the escrow account being created by way of a bank guarantee or by deposit of securities, the acquirer shall also ensure that at least one per cent of the total consideration payable is deposited in cash with a scheduled commercial bank as a part of the escrow account.

Under Regulation 17(5), for such part of the escrow account as is in the form of a cash deposit with a scheduled commercial bank, the acquirer shall while opening the account, empower the manager to the open offer to instruct the bank to issue a banker's cheque or demand draft or to make payment of the amounts lying to the credit of the escrow account, in accordance with requirements under these regulations.

Under Regulation 17(6), for such part of the escrow account as is in the form of a bank guarantee, such bank guarantee shall be in favour of the manager to the open offer and shall be kept valid throughout the offer period and for an additional period of thirty days after completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer.

Under Regulation 17(7), for such part of the escrow account as is in the form of securities, the acquirer shall empower the manager to the open offer to realise the value of such escrow account by sale or otherwise, and in the event there is any shortfall in the amount required to be maintained in the escrow account, the manager to the open offer shall be liable to make good such shortfall.

Under Regulation 17(8), the manager to the open offer shall not release the escrow account until the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, save and except for transfer of funds to the special escrow account as required under regulation 21.

Under Regulation 17(9), in the event of non-fulfilment of obligations under these regulations by the acquirer the Board may direct the manager to the open offer to forfeit the escrow account or any amounts lying in the special escrow account, either in full or in part.

Under Regulation 17(10), the escrow account deposited with the bank in cash shall be released only in the following manner,—

a) the entire amount to the acquirer upon withdrawal of offer in terms of regulation 23 as certified by the manager to the open offer:

Provided that in the event the withdrawal is pursuant to clause (c) of sub-regulation (1) of regulation 23, the manager to the open offer shall release the escrow account upon receipt of confirmation of such release from the Board;

b) for transfer of an amount not exceeding ninety per cent of the escrow account, to the special escrow account in accordance with regulation 21;

c) to the acquirer, the balance of the escrow account after transfer of cash to the special escrow account, on the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer;

d) the entire amount to the acquirer upon the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, upon certification by the manager to the open offer, where the open offer is for exchange of shares or other secured instruments;

e) the entire amount to the manager to the open offer, in the event of forfeiture for non-fulfillment of any of the obligations under these regulations, for distribution in the following manner, after deduction of expenses, if any, of registered market intermediaries associated with the open offer,—

   i. one third of the escrow account to the target company;

   ii. one third of the escrow account to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009; and

   iii. one third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open offer.

Other Procedures

Regulation 18(1) provides simultaneously with the filing of the draft letter of offer with the Board under sub-regulation (1) of regulation 16, the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address and to all stock exchanges where the shares of the target company are listed.

Regulation 18(2) provides the letter of offer shall be dispatched to the shareholders whose names appear on the register of members of the target company as of the identified date, not later than seven working days from the receipt of comments from the Board or where no comments are offered by the Board, within seven working days from the expiry of the period stipulated in sub-regulation (4) of regulation 16:

Explanation:

i. Letter of offer may also be dispatched through electronic mode in accordance with the provisions of Companies Act, 2013.

ii. On receipt of a request from any shareholder to receive a copy of the letter of offer in physical format, the same shall be provided.

iii. The aforesaid shall be disclosed in the letter of offer.

Provided that where local laws or regulations of any jurisdiction outside India may expose the acquirer or the target company to material risk of civil, regulatory or criminal liabilities in the event the letter of offer in its final form were to be sent without material amendments or modifications into such jurisdiction, and the shareholders resident in such jurisdiction hold shares entitling them to less than five per cent of the voting rights of the target company, the acquirer may refrain from dispatch of the letter of offer into such jurisdiction:

Provided further that every person holding shares, regardless of whether he held shares on the identified date or has not received the letter of offer, shall be entitled to tender such shares in acceptance of the open offer.

Regulation 18(3) provides simultaneously with the dispatch of the letter of offer in terms of sub-regulation (2), the acquirer shall send the letter of offer to the custodian of shares underlying depository receipts, if any, of the target company.

Regulation 18(4) provides irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last one working day before the commencement of the tendering period.

Regulation 18(5) provides that in the event of any revision of the open offer, whether by way of an upward revision in offer price, or of the offer size, the acquirer shall,—

a. make corresponding increases to the amount kept in escrow account under regulation 17 prior to such revision;

b. make an announcement in respect of such revisions in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and

c. simultaneously with the issue of such an announcement, inform the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

Regulation 18(6) provides the acquirer shall disclose during the offer period every acquisition made by the acquirer or persons acting in concert with him of any shares of the target company in such form as may be specified, to each of the stock exchanges on which the shares of the target company are listed and to the target company at its registered office within twenty-four hours of such acquisition, and the stock exchanges shall forthwith disseminate such information to the public:

Provided that the acquirer and persons acting in concert with him shall not acquire or sell any shares of the target company during the period between three working days prior to the commencement of the tendering period and until the expiry of the tendering period.

Also, the acquirer shall facilitate tendering of shares by the shareholders and settlement of the same, through the stock exchange mechanism as specified by the Board.

Regulation 18(7) provides the acquirer shall issue an advertisement in such form as may be specified, one working day before the commencement of the tendering period, announcing the schedule of activities for the open offer, the status of statutory and other approvals, if any, whether for the acquisition attracting the obligation to make an open offer under these regulations or for the open offer, unfulfilled conditions, if any, and their status, the procedure for tendering acceptances and such other material detail as may be specified:

Provided that such advertisement shall be,—

a. published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and

b. simultaneously sent to the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

Regulation 18(8) provides the tendering period shall start not later than twelve working days from date of receipt of comments from the Board under sub-regulation (4) of regulation 16 and shall remain open for ten working days.

Regulation 18(9) provides the shareholders who have tendered shares in acceptance of the open offer shall not be entitled to withdraw such acceptance during the tendering period.

Regulation 18(10) provides that, the acquirer shall, within ten working days from the last date of the tendering period, complete all requirements under these regulations and other applicable law relating to the open offer including payment of consideration to the shareholders who have accepted the open offer.

Regulation 18(11) provides that, the acquirer shall be responsible to pursue all statutory approvals required by the acquirer in order to complete the open offer without any default, neglect or delay:

Provided that where the acquirer is unable to make the payment to the shareholders who have accepted the open offer within such period owing to non- receipt of statutory approvals required by the acquirer, the Board may, where it is satisfied that such non-receipt was not attributable to any willful default, failure or neglect on the part of the acquirer to diligently pursue such approvals, grant extension of time for making payments, subject to the acquirer agreeing to pay interest to the shareholders for the delay at such rate as may be specified:

Provided further that where the statutory approval extends to some but not all shareholders, the acquirer shall have the option to make payment to such shareholders in respect of whom no statutory approvals are required in order to complete the open offer.

It also states that, without prejudice to sub-regulation 11, in case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent per annum:

Provided that in case the delay was not attributable to any act of omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of acquirer, the Board may grant waiver from the payment of interest.

Provided further that the payment of interest would be without prejudice to the Board taking any action under regulation 32 of these regulation or under the Act.

Sub clause 12 states that, the acquirer shall issue a post offer advertisement in such form as may be specified within five working days after the offer period, giving details including aggregate number of shares tendered, accepted, date of payment of consideration.

Such advertisement shall be,—

i. published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and

ii. simultaneously sent to the Board, all the stock exchanges on which the shares of the targ1et company are listed, and the target company at its registered office.

Conditional offer

As per Regulation 19, an acquirer may make an open offer conditional as to the minimum level of acceptance:

Provided that where the open offer is pursuant to an agreement, such agreement shall contain a condition to the effect that in the event the desired level of acceptance of the open offer is not received the acquirer shall not acquire any shares under the open offer and the agreement attracting the obligation to make the open offer shall stand rescinded.

Where an open offer is made conditional upon minimum level of acceptances, the acquirer and persons acting in concert with him shall not acquire, during the offer period, any shares in the target company except under the open offer and any underlying agreement for the sale of shares of the target company pursuant to which the open offer is made.

If the minimum level of acceptance is not reached, can the acquirer acquire shares under the Share Purchase Agreement, which triggered the offer?

In a conditional offer, if the minimum level of acceptance is not reached, the acquirer shall not acquire any shares in the target company under the open offer or the Share Purchase Agreement which has triggered the open offer.

Competing offers

Under Regulation 20, upon a public announcement of an open offer for acquiring shares of a target company being made, any person, other than the acquirer who has made such public announcement, shall be entitled to make a public announcement of an open offer within fifteen working days of the date of the detailed public statement made by the acquirer who has made the first public announcement.

The open offer made under sub-regulation (1) shall be for such number of shares which, when taken together with shares held by such acquirer along with persons acting in concert with him, shall be at least equal to the holding of the acquirer who has made the first public announcement, including the number of shares proposed to be acquired by him under the offer and any underlying agreement for the sale of shares of the target company pursuant to which the open offer is made.

Notwithstanding anything contained in these regulations, an open offer made within the period referred to in sub-regulation (1) shall not be regarded as a voluntary open offer under regulation 6, and the provisions of these regulations shall apply accordingly.

Every open offer made under sub-regulation (1) and the open offer first made shall be regarded as competing offers for purposes of these regulations.

No person shall be entitled to make a public announcement of an open offer for acquiring shares, or enter into any transaction that would attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, after the period of fifteen working days referred to in sub-regulation (1 and until the expiry of the offer period for such open offer.

Unless the open offer first made is an open offer conditional as to the minimum level of acceptances, no acquirer making a competing offer may be made conditional as to the minimum level of acceptances.

No person shall be entitled to make a public announcement of an open offer for acquiring shares, or enter into any transaction that would attract the obligation to make a public announcement of an open offer under these regulations until the expiry of the offer period where,—

i. the open offer is for acquisition of shares pursuant to disinvestment, in terms of clause (d) of sub-regulation (2) of regulation 13; or
ii. the open offer is pursuant to a relaxation from strict compliance with the provisions of Chapter III or Chapter IV granted by the Board under sub- regulation (2) of regulation 11.

The schedule of activities and the tendering period for all competing offers shall be carried out with identical timelines and the last date for tendering shares in acceptance of the every competing offer shall stand revised to the last date for tendering shares in acceptance of the competing offer last made.

Upon the public announcement of a competing offer, an acquirer who had made a preceding competing offer shall be entitled to revise the terms of his open offer provided the revised terms are more favourable to the shareholders of the target company:

Provided that the acquirers making the competing offers shall be entitled to make upward revisions of the offer price at any time up to one working day prior to the commencement of the tendering period.

Except for variations made under this regulation, all the provisions of these regulations shall apply to every competing offer.

What is a competitive offer? What happens if there is a competing offer?

Competitive offer is an offer made by a person, other than the acquirer who has made the first public announcement. A competitive offer shall be made within 15 working days of the date of the Detailed Public Statement (DPS) made by the acquirer who has made the first public announcement. If there is a competitive offer, the acquirer who has made the original public announcement can revise the terms of his open offer provided the revised terms are favorable to the shareholders of the target company. Further, the bidders are entitled to make revision in the offer price up to 3 working days prior to the opening of the offer. The schedule of activities and the offer opening and closing of all competing offers shall be carried out with identical timelines.

Payment of consideration

Regulation 21 stipulates, for the amount of consideration payable in cash, the acquirer shall open a special escrow account with a banker to an issue registered with the Board and deposit therein, such sum as would, together with cash transferred under clause (b) of sub- regulation (10) of regulation 17, make up the entire sum due and payable to the shareholders as consideration payable under the open offer, and empower the manager to the offer to operate the special escrow account on behalf of the acquirer for the purposes under these regulations.

Subject to provisos to sub-regulation (11) of regulation 18, the acquirer shall complete payment of consideration whether in the form of cash, or as the case may be, by issue, exchange or transfer of securities, to all shareholders who have tendered shares in acceptance of the open offer, within ten working days of the expiry of the tendering period.

Any unclaimed balances lying to the credit of the special escrow account referred to in sub-regulation (1) at the end of seven years from the date of deposit thereof, shall be transferred to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.

Completion of acquisition

Under Regulation 22 (1), the acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period:

Provided that in case of an offer made under sub-regulation (1) of regulation 20 of these regulations, pursuant to a preferential allotment, the offer shall be completed within the period as provided under sub-regulation (1) of regulation 170 of the Securities and Exchange Board of India (Issue of Capital and Disclosure requirements) Regulations, 2018, subject to the non-obstante clause in sub-regulation (4) of regulation 7 of these regulations.

Provided further that in case of a delisting offer made under regulation 5A, the acquirer shall complete the acquisition of shares attracting the obligation to make an offer for acquiring shares in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5, only after making the public announcement regarding the success of the delisting proposal made in terms of sub-regulation (4) of regulation 17 of the Delisting Regulations.

Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash or providing unconditional and irrevocable bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, subject to the approval of the Reserve Bank of India, of an amount equal to the entire consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.

Explanation. - For the purpose of sub-regulation (2), bank guarantee shall only be issued by such scheduled commercial bank having ‘AAA’ rating from a credit rating agency registered with the Board, on any of its long term debt instrument.

Provided that in case of proportionate reduction of the shares or voting rights to be acquired in accordance with the relevant provision under sub-regulation (4) of regulation 7, the acquirer shall undertake the completion of the scaled down acquisition of shares or voting rights in the target company.

Under Regulation 22(2A), notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, subject to,-

i. such shares being kept in an escrow account,

ii. the acquirer not exercising any voting rights over such shares kept in the escrow account:

Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

Under Regulation 22(3), the acquirer shall complete the acquisitions contracted under any agreement attracting the obligation to make an open offer not later than twenty-six weeks from the expiry of the offer period:

Provided that in the event of any extraordinary and supervening circumstances rendering it impossible to complete such acquisition within such period, the Board may for reasons to be published, may grant an extension of time by such period as it may deem fit in the interests of investors in securities and the securities market.

Withdrawal of open offer

An open offer for acquiring shares once made shall not be withdrawn except under any of the following circumstances,—

a. statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer under these regulations having been finally refused, subject to such requirements for approval having been specifically disclosed in the detailed public statement and the letter of offer;

b. the acquirer, being a natural person, has died;

c. any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer; or Provided that an acquirer shall not withdraw an open offer pursuant to a public announcement made under clause (g) of sub-regulation (2) of regulation 13, even if the proposed acquisition through the preferential issue is not successful.

d. such circumstances as in the opinion of the Board, merit withdrawal.

Explanation. — For the purposes of clause (d) of sub-regulation (1), the Board shall pass a reasoned order permitting withdrawal, and such order shall be hosted by the Board on its official website.

In the event of withdrawal of the open offer, the acquirer shall through the manager to the open offer, within two working days,—

a. make an announcement in the same newspapers in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal of the open offer; and

b. simultaneously with the announcement, inform in writing to,—

    i. the Board;

    ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public; and

    iii. the target company at its registered office.

OTHER OBLIGATIONS

Directors of the Target Company

Under Regulation 24, during the offer period, no person representing the acquirer or any person acting in concert with him shall be appointed as director on the board of directors of the target company, whether as an additional director or in a casual vacancy:

Provided that after an initial period of fifteen working days from the date of detailed public statement, appointment of persons representing the acquirer or persons acting in concert with him on the board of directors may be effected in the event the acquirer deposits in cash in the escrow account referred to in regulation 17, the entire consideration payable under the open offer:

Provided further that where the acquirer has specified conditions to which the open offer is subject in terms of clause (c) of sub-regulation (1) of regulation 23, no director representing the acquirer may be appointed to the board of directors of the target company during the offer period unless the acquirer has waived or attained such conditions and complies with the requirement of depositing cash in the escrow account.

Where an open offer is made conditional upon minimum level of acceptances, the acquirer and persons acting in concert shall, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to regulation 17, not be entitled to appoint any director representing the acquirer or any person acting in concert with him on the board of directors of the target company during the offer period.

During the pendency of competing offers, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to in regulation 17, by any acquirer or person acting in concert with him, there shall be no induction of any new director to the board of directors of the target company:

Provided that in the event of death or incapacitation of any director, the vacancy arising therefrom may be filled by any person subject to approval of such appointment by shareholders of the target company by way of a postal ballot.

In the event the acquirer or any person acting in concert is already represented by a director on the board of the target company, such director shall not participate in any deliberations of the board of directors of the target company or vote on any matter in relation to the open offer.

Obligations of the Acquirer

Prior to making the public announcement of an open offer for acquiring shares under these regulations, the acquirer shall ensure that firm financial arrangements have been made for fulfilling the payment obligations under the open offer and that the acquirer is able to implement the open offer, subject to any statutory approvals for the open offer that may be necessary.

In the event the acquirer has not declared an intention in the detailed public statement and the letter of offer to alienate any material assets of the target company or of any of its subsidiaries whether by way of sale, lease, encumbrance or otherwise outside the ordinary course of business, the acquirer, where he has acquired control over the target company, shall be debarred from causing such alienation for a period of two years after the offer period:

Provided that in the event the target company or any of its subsidiaries is required to so alienate assets despite the intention to alienate not having been expressed by the acquirer, such alienation shall require a special resolution passed by shareholders of the target company, by way of a postal ballot and the notice for such postal ballot shall *inter alia* contain reasons as to why such alienation is necessary.

The acquirer shall ensure that the contents of the public announcement, the detailed public statement, the letter of offer and the post-offer advertisement are true, fair and adequate in all material aspects and not misleading in any material particular, and are based on reliable sources, and state the source wherever necessary.

The acquirer and persons acting in concert with him shall-

i. not sell shares of the target company held by them, during the offer period.

ii. be jointly and severally responsible for fulfillment of applicable obligations under these regulations.

Obligations of the Target Company

Following are the obligations of a target company –

1. Upon a public announcement of an open offer for acquiring shares of a target company being made, the board of directors of such target company shall ensure that during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice.

2. During the offer period, unless the approval of shareholders of the target company by way of a special resolution by postal ballot is obtained, the board of directors of either the target company or any of its subsidiaries shall not,—

   (a) alienate any material assets whether by way of sale, lease, encumbrance or otherwise or enter into any agreement therefor outside the ordinary course of business;

   (b) effect any material borrowings outside the ordinary course of business;

   (c) issue or allot any authorised but unissued securities entitling the holder to voting rights:

   Provided that the target company or its subsidiaries may,—

   i. issue or allot shares upon conversion of convertible securities issued prior to the public announcement of the open offer, in accordance with pre-determined terms of such conversion;

   ii. issue or allot shares pursuant to any public issue in respect of which the red herring prospectus has been filed with the Registrar of Companies prior to the public announcement of the open offer; or

   iii. issue or allot shares pursuant to any rights issue in respect of which the record date has been announced prior to the public announcement of the open offer.

   (d) implement any buy-back of shares or effect any other change to the capital structure of the target company;

   (e) enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party, outside the ordinary course of business, whether such contract is with a related party, within the meaning of the term under applicable accounting principles, or with any other person; and

   (f) accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the target company by way of employee stock options or otherwise.

3. In any general meeting of a subsidiary of the target company in respect of the matters referred to in sub-regulation (2), the target company and its subsidiaries, if any, shall vote in a manner consistent with the special resolution passed by the shareholders of the target company.

4. The target company shall be prohibited from fixing any record date for a corporate action on or after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

5. The target company shall furnish to the acquirer within two working days from the identified date, a list of shareholders as per the register of members of the target company containing names, addresses, shareholding and folio number, in electronic form, wherever available, and a list of persons whose applications, if any, for registration of transfer of shares are pending with the target company:

Provided that the acquirer shall reimburse reasonable costs payable by the target company to external agencies in order to furnish such information.

6. Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations:

   Provided that such committee shall be entitled to seek external professional advice at the expense of the target company.

   Provided further that while providing reasoned recommendations on the open offer proposal, the committee shall disclose the voting pattern of the meeting in which the open offer proposal was discussed.

7. The committee of independent directors shall provide its written reasoned recommendations on the open offer to the shareholders of the target company and such recommendations shall be published in such form as may be specified, at least two working days before the commencement of the tendering period, in the same newspapers where the public announcement of the open offer was published, and simultaneously, a copy of the same shall be sent to,—

   i. the Board;

   ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public; and

   iii. to the manager to the open offer, and where there are competing offers, to the manager to the open offer for every competing offer.

8. The board of directors of the target company shall facilitate the acquirer in verification of shares tendered in acceptance of the open offer.

9. The board of directors of the target company shall make available to all acquirers making competing offers, any information and co-operation provided to any acquirer who has made a competing offer.

10. Upon fulfillment by the acquirer, of the conditions required under these regulations, the board of directors of the target company shall without any delay register the transfer of shares acquired by the acquirer in physical form, whether under the agreement or from open market purchases, or pursuant to the open offer.

What is the role of the target company in the open offer process?

- ***Once a PA is made, the board of directors of the Target Company is expected to ensure that the business of the target company is conducted in the ordinary course. Alienation of material assets, material borrowings, issue of any authorized securities, announcement of a buy- back offer etc. is not permitted, unless authorized by shareholders by way of a special resolution by postal ballot.***
- ***The target company shall furnish to the acquirer within two working days from the identified date, a list of shareholders and a list of persons whose applications, if any, for registration of transfer of shares, in case of physical shares, are pending with the target company.***
- ***After closure of the open offer, the target company is required to provide assistance to the acquirer in verification of the shares tendered for acceptance under the open offer, in case of physical shares.***
- ***Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations and such committee shall be entitled to seek external professional advice at the expense of the target company. The recommendations of the Independent Directors are published in the same newspaper where the Detailed Public Statement is published by the acquirer and are published at least 2 working days before opening of the offer. The recommendation will also be sent to SEBI, Stock Exchanges and the Manager to the offer.***

Obligations of the Manager to the Open Offer

Regulation 27 provides for obligations of the manager to the open offer. They are-

1) Prior to public announcement being made, the manager to the open offer shall ensure that,—

   a. the acquirer is able to implement the open offer; and

   b. firm arrangements for funds through verifiable means have been made by the acquirer to meet the payment obligations under the open offer.

2) The manager to the open offer shall ensure that the contents of the public announcement, the detailed public statement and the letter of offer and the post- offer advertisement are true, fair and adequate in all material aspects, not misleading in any material particular, are based on reliable sources, state the source wherever necessary, and are in compliance with the requirements under these regulations.

3) The manager to the open offer shall furnish to the Board a due diligence certificate along with the draft letter of offer filed under regulation 16.

4) The manager to the open offer shall ensure that market intermediaries engaged for the purposes of the open offer are registered with the Board.

5) The manager to the open offer shall exercise diligence, care and professional judgment to ensure compliance with these regulations.

6) The manager to the open offer shall not deal on his own account in the shares of the target company during the offer period.

7) The manager to the open offer shall file a report with the Board within fifteen working days from the expiry of the tendering period, in such form as may be specified, confirming status of completion of various open offer requirements.

DISCLOSURES OF SHAREHOLDING AND CONTROL

Disclosure-related provisions

Regulation 25 provides for Disclosure-related provisions. This regulation stipulates that, the disclosures under this Chapter shall be of the aggregated shareholding and voting rights of the acquirer or promoter of the target company or every person acting in concert with him.

For the purposes of this Chapter, the acquisition and holding of any convertible security shall also be regarded as shares, and disclosures of such acquisitions and holdings shall be made accordingly.

It may be noted that –

"*Convertible Security*" means a security which is convertible into or ex- changeable with equity shares of the issuer at a later date, with or without the option of the holder of the security, and includes convertible debt instruments and convertible preference shares. [Regulation 2(1)(f)]

For the purposes of this Chapter, the term "encumbrance" shall include,-

(a) any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly;

(b) pledge, lien, negative lien, non-disposal undertaking; or

(c) any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly.

Upon receipt of the disclosures required under this Chapter, the stock exchange shall forthwith disseminate the information so received.

Disclosure of Acquisition and Disposal

According to Regulation 29 any acquirer, together with persons acting in concert with him acquiring shares or voting rights in a target company, which taken together aggregates to five per cent or more of the shares of such target company, shall disclose their aggregate shareholding and voting rights in such target company in such form as may be specified:

Provided that in case of listed entity which has listed its specified securities on Innovators Growth Platform, any reference to "five per cent" shall be read as "ten per cent"

Any person together with persons acting in concert with him, holds shares or voting rights entitling them to five per cent or more of the shares or voting rights in a target company, shall disclose the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below five per cent, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds two per cent of total shareholding or voting rights in the target company, in such form as may be specified.

Provided that in case of listed entity which has listed its specified securities on Innovators Growth Platform, any reference to "five per cent" shall be read as "ten per cent" and any reference to "two per cent" shall be read as "five per cent".

The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition or the disposal of shares or voting rights in the target company to,—

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office.

For the purposes of this regulation, shares taken by way of encumbrance shall be treated as an acquisition, shares given upon release of encumbrance shall be treated as a disposal, and disclosures shall be made by such person accordingly in such form as may be specified:

Provided that such requirement shall not apply to a scheduled commercial bank or public financial institution or a housing finance company or a systemically important non-banking financial company as pledgee in connection with a pledge of shares for securing indebtedness in the ordinary course of business.

Explanation. - For the purpose of this sub-regulation, -

A. a "housing finance company" means a housing finance company registered with the National Housing Bank for carrying on the business of housing finance and is either deposit taking or having asset size worth rupees five hundred crores or more; and

B. a "systemically important non-banking financial company" shall have the same meaning as assigned to it in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

TAKEOVER BIDS

"Takeover bid" is an offer to the shareholders of a company, who are not the promoters of the company or the sellers of the shares under an agreement, to buy their shares in the company at the offered price within the stipulated period of time. It is addressed to the shareholders with a view to acquiring sufficient number of shares to give the Offer or Company, voting control of the target company.

A takeover bid is a technique, which is adopted by a company for taking over control of the management and affairs of another company by acquiring its controlling shares.

Type of takeover bids

A takeover bid may be a "friendly takeover bid" or a "hostile takeover bid". Bids may be mandatory/competitive bids.

Mandatory Bid

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, require acquirers to make bids for acquisition of certain level of holdings subject to certain conditions. A takeover bid is required to be made by way of a public announcement issued to the stock exchanges, followed by a Detailed Public Statement in the newspapers. Such requirements arise in the following cases:

a. for acquisition of 25% or more of the shares or voting rights;

b. for acquiring additional shares or voting rights to the extent of 5% of the voting rights in any financial year beginning April 01, if such person already holds not less than 25% but not more than 75% or 90% of the shares or voting rights in a company as the case may be;

c. for acquiring control over a company.

DEFENSE STRATEGIES TO TAKEOVER BIDS

A hostile bid made directly to the shareholders of the target company with or without previous overtures to the management of the company has become a means of creating corporate combinations. Hence, there has been considerable interest in developing defense strategies by actual and potential targets. Defenses can take the form of fortifying oneself, i.e., making the company less attractive to takeover bids or more difficult to takeover and thus discourage any offers being made. Defensive actions are also resorted to in the event of perceived threat to the company ranging from early intelligence that an acquirer is accumulating shares.

FINANCIAL DEFENSE MEASURES

Adjustments in Asset and Ownership Structure

1. Firstly, consideration has to be given to developing defense structures that create barriers specific to the bidder. These include purchase of assets that may cause legal problems, purchase of controlling shares of the bidder itself, and sale to their party of assets which made the target attractive to the bidder and issuance of new securities with special provisions conflicting with the aspects of the takeover attempt.

   It must however be borne in mind that as per the Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot alienate its assets, make any material borrowings, issue any new shares with voting rights or terminate any material contract during the offering period (which commences once the public announcement is made) except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to bring about adjustments in Assets and Ownership structure in India.

2. A second common method is to create a consolidated vote block allied with target management. Thus securities are issued through private placements to parties friendly or in business alliance with management or to the management itself. Moreover another method can be to repurchase publicly held shares to increase an already sizeable management block in place.

   It must however be borne in mind that as per the Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot, issue any new shares with voting rights or terminate any material contract during the offering period (which commences once the public announcement is made) and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to bring about adjustments in Assets and Ownership structure in India. However in anticipation of a perceived threat of takeover, the management can issue shares or convertible securities beforehand so that they can be converted once the public announcement for an open offer is made.

3. A third common theme has been the dilution of the bidders vote percentage through issuance of new equity shares. However, this option will not work in India due to the strict procedures laid down in Regulation 26(2) of the SEBI (SAST) Regulations, 2011.

4. **The “Crown Jewel” Strategy**

   The central theme is this strategy is to divest the most coveted asset by the bidder, commonly known as the “crown jewel”. Consequently the hostile bidder is deprived of the primary intention behind the takeover bid. A variation of the crown jewel strategy is the more radical “scorched earth approach”, vide which approach, the target sells off not only the crown jewel, but also properties to diminish its worth. Such a radical step may however be self-destructive and unwise in the company’s interest.

   However as per the Companies Act, 2013, selling of whole or substantially the whole of its undertaking requires the approval of the shareholders in a general meeting by way of a special resolution and Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot alienate any of its material assets during the offering period (which commences once the public announcement is made) and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the “Crown Jewel” Strategy as a defense mechanism in India.

5. **The Pacman Defence**

   This strategy although unusual attempts to purchase the shares of the raider company. This is usually the scenario if the raider company is smaller than the target company and the target company has a substantial cash flow or liquidable asset.

   Regulation 26(2) of the SEBI (SAST) Regulations, 2011, however prohibits the target company to enter into any agreement which is not in the ordinary course of business during the offering period (which commences once the public announcement is made) except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the “Pacman Defense” Strategy as a defense mechanism in India.

6. **Targeted Share Repurchase or “Buy-back”**

   This strategy is one in which the management of the target company uses up a part of the assets of the company on the one hand to increase its holding and on their hand it disposes of some of the assets that make the target company unattractive to the raider. The strategy therefore involves a creative use of buyback of shares to reinforce its control and detract a prospective raider. But “Buyback” would involve the use of the free reserves of the company and would be an expensive proposition for the target company. Further as per Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot implement a buy-back during the offer period except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use this defense mechanism also in India.

7. **Golden Parachutes**

   These are separation clauses of an employment contract that compensate managers who lose their jobs under a change of management scenario. The provision usually calls for a lump-sum payment or payment over a specified period at full and partial rates of normal compensation. Target Companies invoke this provision and pay off a huge compensation to large number of employees so as to make themselves unattractive to the raider.

   However section 192 and Section 202 of the Companies Act, 2013 provide for compensation to be paid for loss of office only to a Managing Director, Whole Time Director or a Manager and not the entire senior management, as is the practice in the United States of America. Hence this defense mechanism is of no consequence in India.

ANTI TAKEOVER AMENDMENTS OR "SHARK REPELLANTS"

An increasingly used defense mechanism being used is anti-takeover amendments to the company's constitution or articles of association, popularly called as "shark repellants". This practice consists of changing the articles of associations, regulations, bye-laws, etc. to be less attractive to the raider / hostile bidder. This again may not work out in India as any change to the Articles of Association or the Memorandum of Association would require approval of the shareholders.

1. **Supermajority Amendments**

   These amendments require shareholder approval by at least 2/3rds vote and sometimes as much as 90% of the voting power of outstanding capital for all transactions involving change of control. In most existing cases, however the super majority agreements have a board out clause which provides the board with the power to determine when and if the super majority provisions will be in effect. Pure or inflexible super majority provisions would seriously limit the management's scope of options and flexibility in takeover negotiations.

2. **Classified Boards**

   Another type of anti-takeover amendments provides for a staggered or classified board of directors to delay effective transfer and control in a takeover. The much touted management rationale in proposing a classified board is to ensure continuity of policy and experience in the USA. The legal position of such classified or staggered boards is quite flexible. An example is when a 9 member board may be divided into 3 categories, with only 3 members standing for election to a three year term each, such being the modalities of the retirement by rotation. Thus a new majority shareholder would have to wait for at least 2 AGMs to gain control of the Board of Directors. Section 152 of the Companies Act, 2013 warrants that 1/3rd of the directors whose office is determinable by retirement will retire. Therefore continuing the example of 9 directors, 3 can be made permanent directors by amending the Articles and therefore the acquirer would have to wait for at least 3 AGMs to gain control over the Board. However the company may by an ordinary resolution remove a director before the expiration of his period of officer. Thus any provision in the Articles of the Company or any agreement between the company and a director by which the director is rendered irremovable from office by an ordinary resolution would be void and contrary to the Act.

3. **Authorisation of Preferred Stock**

   The Board is authorised to create a new class of securities with special voting rights. This security, typically preferred stock may be issued to a friendly party in a control context. This is referred to as issuance of Shares with Differential Voting Rights, which is subject to restrictions under the Companies Act, 2013 and SEBI (ICDR) Regulations, 2009 and hence has been rendered unattractive over a period of time.

4. **Poison Pill Defenses**

   This is a controversial but popular defense mechanism. These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event. These rights take several forms but all are difficult and costly to acquire control of the issuer or the target company. Poison pills are generally adopted by the Board of Directors without shareholder approval. Usually the rights provided by the poison pill can be altered quickly by the Board or redeemed by the Company any time after they become exercisable following the occurrence of the triggering event. These provisions force the acquirer to negotiate directly with the target company's board and allow some takeover bids to go through. Many proponents of this mechanism argue that this enhances the ability of the Board of Directors to bargain for a fair price.

CROSS BORDER TAKEOVERS

Cross Border Takeover is a much sort after term in recent years. Competitiveness among the domestic firms forces many businesses to go global. There are various factors which motivate firms to go for global takeovers.

Apart from personal glory, global takeovers are often driven by market consolidation, expansion or corporate diversification motives. Also, financial, accounting and tax related matters inspire such takeovers.

Expansion and diversification are one of the primary reasons to cross the border as the domestic markets usually do not provide the desired growth opportunities. Another main reason for cross border takeovers is to attain monopoly. Acquirer company is always on the lookout for companies which are financially vulnerable but have untapped resources or intellectual capital that can be exploited by the purchaser.

Global takeovers are complex processes. Despite some harmonized rules, taxation issues are mainly dealt within national rules, and are not always fully clear or exhaustive to ascertain the tax impact of a cross-border merger or acquisition. This uncertainty on tax arrangements sometimes require seeking of special agreements or arrangements from the tax authorities on an ad hoc basis, whereas in the case of a domestic deal the process is much more deterministic.

Cross-border takeover bids are complex transactions that may involve the handling of a significant number of legal entities, listed or not, and which are often governed by local rules (company law, market regulations, self-regulations, etc.). Not only a foreign bidder might be hindered by a potential lack of information, but also some legal complexities might appear in the merger process resulting in a deadlock, even though the bid would be 'friendly'. This legal uncertainty may result in a significant execution risk and act as a major hurdle to cross-border consolidation.

Going global is rapidly becoming Indian company's mantra of choice. Indian companies are now looking forward to drive costs lower, innovate speedily, and increase their international presence. Companies are discovering that a global presence can help insulate them from the vagaries of domestic market and is one of the best ways to spread the risks. Indian corporate sector has witnessed several strategic acquisitions. Tata Motors acquisition of Daewoo Commercial Vehicle Company, Tata Steel's acquisition of Singapore's NatSteel, Reliance's acquisition of Flag is the culmination of Indian Company's efforts to establish a presence outside India.

It is expected that the cross borders takeovers will increase in the near future. The companies will have to keep in mind that global takeovers are not only business proposals but also a corporate bonding for which both the entities have to sit and arrive at a meaningful and deep understanding of all the issues as mentioned above.

CASE LAWS - SEBI ORDERS

SEBI Order in the matter of ***Kesar Petroproducts Limited, SEBI, 9 March 2020***

The promoter company of a listed company transferred 48.16% to two children of an individual promoter. Consequently, each child held under 25% in the target. This transfer caused no change in the overall promoter shareholding or effective control of the target. SEBI ruled that since (i) the acquirers along with PACs held over 25% in the target; and (ii) the acquisition resulted in the children's individual shareholding crossing 5%, Regulation 3(3) read with the Creeping Acquisition Threshold was triggered.

SEBI order in the matter of ***M/s. Patels Airtemp (India) Ltd, July 25, 2018***

In this matter there was an inter-se transfer of shares of 0.30% between 2 (two) promoters. However, as a result of the inter-se transfer, the shareholding of one of the promoters (i.e. the purchaser) ("Noticee") increased from 24.74% to 25.04%, thereby breaching the threshold limit of 25%, as provided under regulation3(1) read with 3(3) of Takeover Regulations. The total shareholding of the promoter group did not change and it remained at around 45%. The Noticee argued that the above mentioned acquisition does not trigger the applicability of either regulation 3(1) or 3(3) of the Takeover Regulations, as the said acquisition of shares by the Noticee was an inter se transfer among the promoter entities and the overall shareholding of the promoter group, of which the Noticee is a part, remained unchanged after the said acquisition. However, SEBI held that the 2 (two) promoters in this case cannot be held to be 'persons acting in concert' because the persons must have a common objective or purpose of acquisition of shares or voting rights. In the instant case, the acquisition in question was an inter se transfer of shares from one promoter entity to another promoter entity, which implies that the promoter entities, including the Noticee, did not have a common objective or purpose of acquisition but were rather acting in

opposite directions, where one promoter entity had purchased the shares and another entity had sold the same shares. Hence, SEBI rejected the Noticee's claim that it was acting in concert with other promoter entities, while acquiring the said shares. Since the Noticee had acquired shares as a result of which its individual shareholding had increased from 24.74% to 25.04% of the total shareholding of the Target Company (even though the overall shareholding of the promoter group remain unchanged), the threshold limit provided under regulation 3(1) of the Takeover Regulations was breached. SEBI ordered the Noticee to make an open offer and also pay interest @ 10% (ten percent) per annum along with the offer price to the public shareholders.

SEBI Order in the matter of ***Praxis Home Retail Limited, 28 April 2023***

Praxis Home Retail Limited ("Praxis") equity shares aggregating to 30 lakh were allotted to one of its promoter entities Future Corporate Resources Pvt Ltd ("FCRL"), following the exercise of the conversion option of 3,180 compulsorily convertible debentures ("CCDs") by FCRL, out of the 7,500 CCDs initially allotted to it. After exercising the conversion option, the shareholding of FCRL in Praxis rose from 47.43 per cent in the quarter ended December 2019 to 53.13 per cent, an increase of 5.71 per cent in shareholding as of February 11, 2020.

SEBI noted that as the increase in shareholding of FCRL in Praxis post-allotment is 5.71 per cent, which is more than five per cent, FCRL along with the other Noticees (PACs) allegedly were required to make a public announcement of the open offer under Takeover Regulation.

SEBI order in the matter of ***Automative Axles Ltd ("AAL"), 8 May 2023***

The case relates to Cummins indirectly acquiring a 35.52 per cent share in Automotive Axles Ltd ("AAL"). The acquisition was contracted on February 21, 2022, which triggered the requirement of public announcement of making of an open offer by the applicant under the Takeover Regulations. The open offer announcement was made belatedly with a delay of 227 days. Consequently, a settlement application was filed to settle the matter.

LESSON ROUND-UP

- Takeover is a corporate device whereby one company acquires control over another company, usually by purchasing all or a majority of its shares.
- Takeovers may be classified as friendly takeover, hostile takeover and bailout takeover.
- Consideration for takeover could be in the form of cash or in the form of shares.
- The Regulations, provide certain events, on the happening of which the Acquirer is required to make a public announcement for acquiring the shares from the public shareholders of the company.
- The Regulations provide for voluntary offer, competing offer and conditional offer. Regulation 10 and 11 provide for automatic exemptions and specific exemptions.
- The regulations provide a detailed procedure once the public announcement is made.
- There are certain conditions when the open offer made can be withdrawn.
- The Regulations also provide for obligations on the part of the target company, acquirers, board of directors of the target company and the merchant banker.
- The Regulations also provide the situations in which the disclosures are to be made.
- Takeover bids may be mandatory, partial or competitive bids.
- Defense strategies to takeover bids are adopted by companies to counter takeover attempts.
- Competitiveness among the domestic firms forces many businesses to go global. There are various factors which motivate firms to go for Cross Border Takeovers.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation).

1. What do you mean by the term 'Takeover'? What are the objectives which takeover seeks to achieve?
2. "SEBI has formulated a comprehensive code for takeover of listed companies". Do you agree?
3. Who are the persons considered to be 'persons acting in concert' under the SEBI (SAST) Regulations, 2011?
4. How does an acquirer make a delisting cum open offer?
5. What are the general obligations of 'Acquirer' and 'Merchant Banker' under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011?

LIST OF FURTHER READINGS

- SEBI (SAST) Regulation 2011 Law and Practice by Abha Jaiswal, Bharat's Publication
- The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011
- The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirement) Regulations, 2015
- The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009

OTHER REFERENCES (Including Websites / Video Links)

- https://www.sebi.gov.in/