FOR PRIVATE CIRCULATION ONLY

PROPOSED TAKEOVER REGULATIONS

Recommendations by Takeover Regulations Advisory Committee appointed by SEBI

22 July 2010

CONTENTS

LETTER TO THE READER

Changes welcomed in the proposed Takeover Code

Dear Reader,

SEBI, in keeping with its continuous efforts to evolve the Indian regulatory framework fairer and more equitable to each participant, had appointed an Advisory Committee to give their recommendations on changes to be made to the existing Code. This Committee, headed by the illustrious Shri. C. Achuthan, has recommended a new Takeover Code to replace the existing one.

The Committee has proposed many welcome changes which are expected to be beneficial to minority shareholders and promoters alike and in line with best practices globally. The timelines are also expected to shorten, with better streamlining of the various activities proposed and better clarity in terms of a variety of provisions.

We are pleased to share with you our analysis on the key changes proposed.

We hope you will find it useful in understanding and appreciating the changes proposed to be brought in our Indian M&A landscape. Do get in touch with us and we will be happy to help in discussing the proposed regulations in greater detail as required.

Yours truly,

Sunil Sharma	Kirti Shah
CEO	National Head – Corporate Finance Advisory Services

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Initial Acquisition Trigger for Open Offer	• Acquiring an aggregate of 25 % or more voting rights in a target company	• Acquiring or agreeing to acquire shares or voting rights exceeding 15% in a target company	• Financial investors (including PE funds) expected to view this positively • We expect more PIPE transactions going forward • However, promoters with low shareholding will have to beef up their current stakes to prevent losing control
Creeping Acquisition Trigger for Open Offer	• An acquirer holding 25 % or more voting rights in a target company, acquiring additional voting rights in excess of 5% within a financial year (without breaching the maximum non-public shareholding limit)	• If present holding is more than 15% but less than 55%, then acquirer acquiring additional voting rights in excess of 5% within a financial year • If present holding is more than 55% but less than 75%, a one-time allowance is made to increase shareholding by 5% within a financial year through market purchases or pursuant to a buy back by the target company without having to make an open offer(provided the maximum non-public shareholding limit is not breached)	• Consolidation of shareholding by promoters/ controlling entities has been simplified • However, distinction between different promoter holding levels has been done away with

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Control Trigger for Open Offer	• Where acquisition of control would trigger an open offer, the definition is proposed to be modified to include the "ability" in addition to the "right" to appoint majority of the directors or to control the management or policy decisions • However, a director or officer of the target company would not be regarded as being in control merely by virtue of holding such position	• Existing regulations define control as including the right to appoint majority of directors or to control the management OR policy decisions exercisable by a person OR persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholder agreements or voting agreements OR in any other manner	• Control will be inferred after taking into account due facts of the case, and not merely on the basis of principle
Size of Open Offer	• Any open offer under the proposed regulations would be for 100%, i.e., for all the shares held by all the other shareholders of the target company	• Mandatorily required to make a minimum open offer for 20% of the voting capital	• Minority shareholders will be benefited, as all shareholders will now have an option to exit if they so desire • Seriousness of acquirers will increase, however, they may need support from banking circles for acquisition funding on such a scale. The concept of debt funding for acquisitions is still evolving in India

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Minimum Public Shareholding Requirements	• At the time of open offer, the acquirer can state its intention to delist the target company, and if the acquirer's shareholding crosses the delisting threshold post-offer, then the target company can stand delisted • In case such delisting happens, other shareholders who had not participated in the open offer, as well as holders of equity-linked instruments, would also get to tender their shares at the same price subsequently • If such an intention to delist is not stated upfront, or the open offer response is such that the public shareholding could fall below the minimum level required under the listing agreement but remains above the delisting threshold, the acquirer would be required to either bring his holding down to ensure compliance by the target company with the listing agreement, or proportionately reduce both his acquisitions under the agreement that triggered the open offer and the acquisitions under the open offer (except those arising from allotments made by target company)	• Pursuant to the open offer, in case the public shareholding level falls below the minimum level as per the Listing Agreement, the acquirer will need to take necessary steps to bring it back into compliance i.e. sell-down their holding or make another offer under the Delisting regulations, within the specified time period	• With the proposed changes, it will be easier for acquirer to declare either upfront whether he would be willing to delist the target company subsequent to the open offer. This would streamline the entire procedure as well as save time • Proportionately reducing both the acquirer's original acquisition (except due to allotments by target) and in the open offer would also be in the acquirer's interest vis-à-vis selling down his holding subsequently

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations

Open Offer Pricing-Minimum price payable	• The minimum price payable as the offer price continues to be regulated and shall be the highest of:
	  • *the negotiated price under the agreement that attracted the open offer;*
	  • *volume-weighted average price paid by the acquirer and persons acting in concert in the preceding 52 weeks;*
	  • *highest price paid by the acquirer or persons acting in concert with him during the preceding 26 weeks;*
	  • *60 trading day volume weighted average market price (for frequently traded shares)*
	• Frequently traded shares are proposed to be defined as shares which have a trading volume of 10 % or more of the total number of shares during a period of 12 calendar months preceding the month in which the public announcement is made
		• For frequently traded shares, the minimum price payable includes the price under the agreement for acquisition that attracted the open offer, any price paid by the acquirer or persons acting in concert during a 26-week period preceding the public announcement (look back period), and the historical market average price of the shares for a proximate past period
		• In case of infrequently traded shares, offer price is computed on the basis of financial parameters such as return on net worth, industry price-earnings multiples and such other, apart from any price actually paid by the acquirer or persons acting in concert during the look back period, or in the transaction that triggers the open offer obligation
		• Frequently traded shares have been defined as shares which have annualized trading volume of 5% or more of the listed share capital during a period of 6 calendar months preceding the month in which the public announcement is made
			• The look-back period has been expanded in a bid to increase the 'fairness' of the offer price made to the shareholders

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Non-compete fees	• Non-compete fee provision has been done away with and all payments made vide such ancillary and collateral agreements would be taken into consideration while calculating negotiated price above	• If non-compete fees in excess of 25% of the open offer price have been paid, then the open offer price will have to be increased to that extent	• Payment of non-compete fees to substantial shareholders, which was earlier allowed up to 25%, is proposed to be done away with, and all payments with respect to ancillary and collateral agreements be included in the negotiated price. This is a bid to bring about parity in compensation to all classes of shareholders, as well as reduce the possibility of abuse of the non-compete clause

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Indirect Acquisitions- treatment like direct acquisitions	• If the indirectly acquired target company is a predominant part of the business or entity being acquired (more than 80 % of the net asset value, sales turnover or the deal value for the parent transaction), such indirect acquisition would be treated as a direct one for all purposes and no leeway would be provided for making the public announcement • The acquirer must specify the value of the stake in the Indian company that has been factored in and the basis of such valuation in such cases • In all other cases, the public announcement can be made within four business days of such date, and in such cases the detailed public statement should be issued within five business days of the consummation of the primary acquisition	• Presently, indirect acquisitions are not treated separately on the basis of size of the businesses indirectly bought and their relative importance to the overall acquisition • However, open offer is still required to be made when there is direct or indirect change of control of the target company irrespective of any direct acquisition of shares of the target company	• This becomes especially important in terms of acquiring holding companies / shell companies, wherein the acquirer is more interested in the acquisition of the underlying associate/ subsidiary

BDO

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Open Offer Pricing-Indirect Acquisitions	• To compute the offer price for indirect acquisitions, in addition to the above parameters, any higher price paid during the period between contracting of the primary transaction and the public announcement has also to be considered • In case of indirect acquisitions of the target company, the offer price would be increased at the rate of 10 % p.a., calculated on a pro-rata basis for the period from the date of the primary transaction being announced in the public domain until the date of actual detailed public statement in respect of the target company; and shall be payable to all shareholders who tender their shares in the open offer • If the indirectly acquired target company is more than 80 % of the net asset value, sales turnover or the deal value for the parent transaction, the acquirer must specify the value of the stake in the Indian company that has been factored in and the basis of such valuation in such cases; and where such size is more than 15%, the acquirer shall be required to compute and disclose the per share value taken into account and the basis of such valuation	• Existing regulations currently do not differentiate between direct and indirect acquisitions and the same offer pricing formula is used • The practice is to compute the offer price as of the date of the announcement of primary acquisition and as of the date of the public announcement for the target company, whichever is higher • Moreover, a public announcement may be made by the acquirer at any time from the date of the initial announcement of the intention to acquire or entering in to the acquisition agreement, until completion of three months after the consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company	• Clearer guidelines in terms of identifying and pricing of indirect acquisitions would lead to greater transparency in terms of offer to be made to indirect target's shareholders

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Competing Offers	• Competing offer needs to be made within 15 business days from the date of the original detailed public statement • An acquirer having made a voluntary offer is permitted to switch to a normal full-sized offer when a competing offer is made • Within 21 business days from expiry of the offer period, any competing acquirer would be free to negotiate and acquire the shares tendered to the other competing acquirer, at the same price that was offered by him to the public (without breaching the maximum non-public shareholding limit)	• Competing offer presently needs to be made within 21 calendar days from the date of the original public announcement • Currently also provide that any competitive offer by an acquirer shall be for such number of shares which, when taken together with shares held by him shall be at least equal to the holding of the first bidder including the number of shares for which the present offer by the first bidder has been made	• Extending the timeline for competing offer will give opportunity to additional potential bidders to come forward and submit competing offers

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Voluntary Open Offer	• A voluntary open offer can be made for the acquisition of shares representing at least 10 % (without breaching the maximum non-public shareholding limit) • An acquirer who has acquired shares in the preceding 52 weeks would not be eligible to make such a voluntary open offer • Such an acquirer would also be barred from making any acquisition for six months after the open offer • Upon a competing offer being made, such an acquirer would be permitted to increase his offer size to a normal full-sized open offer within 15 business days	• Currently regulations provide for consolidation of shareholding by an acquirer through making such a voluntary open offer to the extent of 20% or the maximum permissible acquisition without breaching the minimum public shareholding requirement, whichever is lower	• Promoters can consolidate their holdings now in a more simplified manner, and moreover, will not be able to use a combination of creeping acquisition and voluntary open offer to consolidate their holdings

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Corporate Governance- Conducting business operations	• Material transactions outside the ordinary course of business can be undertaken during the offer period, either at the level of the target company or at the level of any subsidiary of the target company, only with the approval of shareholders of the target company (through a special resolution)	• Currently provide that the target company shall not, during the offer period sell, transfer, encumber or otherwise dispose of assets of the company or its subsidiaries or enter into any material contracts	• To ensure that target company is not affected in its day-to-day business transactions, it is proposed to allow material transactions, with shareholders' approval
Corporate Governance- Independent Directors' opinion on Open Offer to shareholders	• A committee of independent directors of the target company shall be formed to consider and give its reasoned recommendations on the open offer, which shall be published by the target company	• Currently such communication is at the discretion of the independent directors	• This is to ensure additional comfort to minority shareholders and ensure a more active and participative role of independent directors in line with global practices

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Corporate Governance- Appointment of Acquirer's representative to Target's board	• If the acquirer places in escrow 100 % of the consideration under the open offer in cash, appointment of its representatives to the Board of the target company is allowed. However, such appointment can be made only after the deadline for making competing offers expires. During the pendency of competing offers, irrespective of the amount deposited in escrow account by acquirers, there shall be no appointment of additional directors to the board of directors of the target company	• Till the offer formalities are completed, the target company shall be precluded from inducting any person or person nominated by the acquirer or belonging to his group into the board of the target company other than in cases, where acquirer deposits full consideration in an escrow account	• Additional provision has been made for non-appointment of nominated person(s) to the board, till the period for competing offer expires • Also, if a competing offer has been made, then no appointments of directors would take place in the offer period and only casual vacancies arising out of death or incapacitation may be filled with prior approval of shareholders
Mode of Payment	• The offer price may be paid in the form of cash or securities like shares, convertibles, secured debt instruments of the acquirer or of persons acting in concert with him or a combination of these modes. To ensure that the equity shares given in consideration for the open offer are liquid, eligibility conditions have been stipulated. However, if shares of the target company carrying more than 10 % voting rights have been acquired for cash in the preceding 52 weeks, shareholders to whom the open offer is made may opt to receive the offer price only in cash	• The offer consideration shall be payable either (a) by way of cash; (b) by issue, exchange and, or transfer of shares (other than preference shares) of acquirer company, if the person seeking to acquire the shares is a listed body corporate; or (c) by issue, exchange and, or transfer of secured instruments of acquirer company with a minimum ‗A' grade rating from a credit rating agency registered with the Board; or (d) a combination of clause (a), (b) or (c)	• Shareholders tendering shares in open offer now have the option to receive consideration in cash if the acquirer has acquired shares carrying more than 10% voting rights for cash in the preceding 52 weeks • This will ensure fairer treatment to minority shareholders

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Open Offer- Others	• Timelines of various activities in the open offer process have been revised. A normal open offer process is expected to be completed within 57 Business Days from the date of Public Announcement • It is recommended that the acquirer as well as persons acting in concert should be prohibited from acquiring any shares in the target company during the 26 weeks following the open offer completion • 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 • An agreement that triggered an open offer obligation would have to be completed within 26 weeks after the offer period	• Existing provisions require a public announcement regarding the open offer to be made within four working days of acquiring or agreeing to acquire shares in the target company. Presently it takes around 95 calendar days to complete the open offer	• Timelines for completing the open offer have been streamlined in a bid to ensure faster closure • Acquirer and persons acting in concert cannot acquire shares for 26 weeks post-open offer, thereby reducing chances of under-pricing the issue • Timelines have now been put in place for completion of the original transaction which triggered the open offer

BDO

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Exemptions to Open Offer- salient changes proposed	• The following additions/modifications to exemptions have been proposed – • *CDR schemes as prescribed by RBI have now been explicitly exempted if the scheme has been authorized by the shareholders through a special resolution passed by postal ballot, and no change in control over the target company takes place through such acquisition* • *Underwriters have been included in the definition of people acquiring shares in the commercial course of business and thereby exempt from making open offer, while Public Financial Institutions acquiring shares on their own account in the ordinary course have been excluded* • *Acquisition of pledged shares by a banker in case of default on loan repayments by a company, and/or subsequent re-transfer to the pledger of shares after removal of pledge, is now specifically exempt* • *Increase in shareholding beyond threshold trigger limit, by way of buyback of shares by the company are now exempt* • *Voting rights arising out of non-payment of dividend on preference shares would not now attract an obligation to make an open offer*	• Existing regulations currently provide for fourteen categories of transactions which are exempted from making an open offer. In case of transactions that are not covered explicitly, an application can be made for seeking exemption from SEBI. Such applications are then referred to a takeover panel for its recommendations, and post-that SEBI passes an appropriate order, after taking the said recommendations into account	• Acquisition of shares by parties in the commercial course of business has been clarified in a more explicit manner • Certain areas where SEBI's approval was always required e.g. CDR schemes, banker acquiring pledged shares, etc have now been explicitly exempted

KEY OBSERVATIONS

Issue	Proposed Regulations	Existing Regulations	Key Observations
Open Offer- Options for Withdrawal	• In addition to the grounds currently existing, an open offer may be withdrawn where 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 disclosed in the detailed public statement and the letter of offer	• Currently provide that no open offer, once made, shall be withdrawn except under the following circumstances: • *the statutory approval(s) required have been refused;* • *the sole acquirer, being a natural person, has died;* • *such circumstances as in the opinion of SEBI merits withdrawal*	• An addition is proposed to the existing circumstances under which open offer can be withdrawn, in terms of the parent acquisition itself not being effected on account of certain conditions not being fulfilled, and which have been set out earlier at the time of making the open offer
Other Recommendations			• The Committee has also recommended bringing about parity in the tax treatment of open market transactions and those tendered through open offer, to encourage fulfillment of the over-arching objective of full and fair exit to every shareholder, if so desired. However, this would have to be considered by the Ministry of Finance separately

BDO

CONTACT US

MUMBAI (BOMBAY)

Registered Office
42, Free Press House,
215, Nariman Point, Mumbai – 400 021
Tel: +91 (22) 6132 6999
Fax: +91 (22) 2285 6237

Corporate Office
701 Leela Business Park, Andheri Kurla Road,
Andheri (E), Mumbai - 400 059.
Tel: +91 (22) 6672 9999
Fax: +91 (22) 6672 9777

AHMEDABAD

703, Venus Atlantis, Besides Reliance Petrol Pump, 100 Ft Road,
Prahlad Nagar, Ahemdabad 380015.
Tel: +91 79 4032 0441-2
Fax: +91 79 4032 0442

BENGALURU (BANGALORE)

No 45, First Floor, 2nd Main, Sankey Road,
(Above Indian Bank) Lower Palace Orchards, Bangalore – 560 003
Tel: +91 80 6454 2545-6
Fax: +91 80 6454 2547

CHENNAI (MADRAS)

5B, A Block, Mena Kampala Arcade, New No 18 & 20, Old No 113/114,
Thiagaraya Road, T. Nagar, Chennai – 600 017
Tel: +91 44 4213 2024 / 4554 4143
Fax: +91 44 4354 6876

COIMBATORE

Shree Shanmugappriya, 2nd Floor, 454, Ponnaiyan Street,
Crosscut Road, Gandhipuram, Coimbatore – 641-012.
T: +91 422 2237793 / +91 422 2238793
F:+91 422 2233793

HYDERABAD

Room No.417 & 418, 4th Floor, Model House,
Dwarkapuri Colony, Panjagutta, Hyderabad – 500 082
Tel: +91 40 30621888
Fax: +91 40 6662 0277

JAIPUR

Manish Mansion, Plot No. 247, Frontier Colony,
Adarsh Nagar, Raja Park, Jaipur - 302004
Tel: +91 141 2604743

KOLKATA (CALCUTTA)

Geetanjali Apartments, Suite 7G,
7th floor, 8B, Middleton Street, Kolkata - 700 071
Tel: +91 33 3201 6298
Fax: + 91 33 2226 4140

NEW DELHI

3rd Floor, 52- B, Okhla Industrial Area,
Phase III, New Delhi – 110020
Tel: +91 11 4711 9999
Fax: +91 11 4711 9998

PUNE

'Samanvaya', C.T.S. No. 425/36,
Tilak Vidyapeeth Colony, Gultekdi, Pune – 411 037
Tel: +91 20 2426 2372 / 2543

VADODARA (BARODA)

304, 3rd Floor, Vidhi Complex, Opp BPC,
68 Sampatrao Colony, Alkapuri, Vadodara- 390-005
Tel: +91 265 645 5152-3
Fax: +91 265 234 3233

DISCLAIMER

This publication has been carefully prepared, but it has been written in general terms and should be seen as broad guidance only. This publication cannot be relied upon to cover specific situations and you should not act, or refrain from acting, upon the information contained therein without obtaining specific professional advice. Please contact BDO Consulting Pvt. Ltd. to discuss these matters in the context of your particular circumstances. BDO Consulting Pvt. Ltd., its partners, employees and agents do not accept or assume any liability or duty of care for any loss arising from any action taken or not taken by anyone in reliance on the information in this document or for any decision based on it.

BDO Consulting Private Limited, a private limited company incorporated in India, is a member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.

BDO is the brand name for the BDO network and for each of the BDO Member Firms.