A NOTE ON TAKEOVERS

(SUPER SUMMARY)

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Disclaimer

This article is written to serve as a summary on Takeover Regulations and I have tried my best to make it error free. I am not being responsible for any action taken based on this article.

WHY THIS FILE IS IMPORTANT ?

This file is a short compilation of the Takeover Chapter as in the course curriculum of C.S.Professional Programme. This chapter is covered in two subjects of C.S Professional i.e. broadly in Corporate Restructuring and Insolvency and also in Due Diligence. No doubt we must be through with the detailed stuff along with case laws and explanations for confidence but thinking upon the crucial hours before examinations and looking into the portfolios of the syllabus of CRI and the time constraints for the last revision day i.e. before exam it must be acknowledged that proper time management is must. Since Chapters like Takeovers and Amalgamations, etc kills 2-4 hours minimum each (though it varies to each individual) a systematic approach must be followed and as I found this write-ups of mine useful for me during my exams and as I expect that it can benefit readers fraternity I had compiled it in a shareable media to share it.

Since Case laws are not compiled in it is advised while going through details from the texts one must mark important case laws which can be read a day before examination.

This note is just a summary which is an attempt to save hours before examination and for a quick reference.

LEGAL FRAMEWORK FOR TAKEOVERS:

1. Section 395 of the Companies Act, 1956 for UNLISTED Companies.
2. SEBI (Substantial Acquisitions of Shares and Takeovers) Regulation, 1997 for LISTED Companies

   Special cases only:-
3. SARFAESI Act, 2002
4. Sick Industrial Companies (Special Provisions) Act

SEBI TAKEOVER CODE

MAIN IDEA BEHIND THE CODING OF TAKEOVER CODE

Some group of individuals commonly referred to as "promoters" come together to form a company and offer shares to the public for subscription. Public subscribe to such shares based on the credentials of the promoters. Now is it fair on the part of public shareholders to allow these promoters to dilute their stake in the company leaving the public shareholders in the hands of the new management or substantially change their shareholding in the company? To protect the investors, the Takeover Code has been codified by the Securities and Exchange Board of India, the regulator of Securities Market, which requires the promoters to give mandatory offer to the public to decide if they wish to continue to be the shareholders of the company in the changed circumstances.

To fulfill the intent as stated above, the Code therefore ensures the following:

- Exit opportunity to the investors if they do not want to continue with the new management.
- Full and truthful disclosure of all material information relating to the open offer to enable the investors to take an informed decision.
- Ensuring the sufficiency of financial resources by the promoters for the payment of acquisition price to the investors.
- Timely completion of takeover formalities.

PURPOSE AND SCOPE OF THE CODE

- Transparency
- Fairness
- Protection

The code has been framed with a view to protect the interests of investors in securities and to promote development of and to regulate the securities market and for matters connected therewith or incidental thereto. ➔ **K.K. Modi v. SAT**
The code has a limited role and is not meant to ensure proper management of the business of companies or to provide remedies in the event of mismanagement. The main objective of the code is to ensure quality of treatment of opportunity to all shareholders and afford protection to them➔**Punjab State Industrial Corporation Ltd. v. SEBI**

EVOLUTION

-Clause 40, the listing agreement
-Clause 40 A and 40 B, the listing agreement
-The SEBI Act 1992
-The SEBI (Substantial Acquisition of Shares And Takeovers) Regulations, 1994
-Bhagwati Committee's report

WHAT IS TAKEOVER?

- a transaction or series of transactions whereby a person (individual, groups of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company.
-Where shares are closely held (i.e. by a small number of persons), a takeover will generally be effected, by agreement with the holders of the majority of the share capital of the company being acquired.
-Where the shares are held by the public generally, the takeover may be effected, (1) by agreement between the acquirer and the controllers of the acquired company; (2) by purchase; or (3) by means of a 'takeover bid'. - M.A. Weinberg

WHAT IS PUBLIC OFFER?

Public offer refers to the exit opportunity given to the public to dilute their shareholding in the Target Company if there is a substantial change in the shareholding pattern as envisaged in the Code or if there is a change in control of the Target Company. The acquirers are compulsorily required to make public offer to acquire 20% of the shares or voting rights from public in cases where the Code is hit which we will discuss in detail herein below.

DEFINATIONS

"**Acquirer**" - any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert (PACs) with the acquirer; Thus PACs are included in the definition of Acquirer itself and any reference to Acquirer would therefore include PACs also.

"**control**" includes

- the right to appoint majority of the 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
  - shareholders agreements or
  - voting agreements or
  - in any other manner.

"**promoter**" means—

(a) any person who is in control of the target company;

(b) any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later; and includes any person belonging to the promoter group.

"**public shareholding**" means shareholding held by persons other than promoters

"**promoter group**" shall include:	
(a) in case promoter is a body corporate— (i) a **subsidiary** or **holding** company of that body corporate; (ii) any **company in which the promoter holds 10 % or more** of the equity capital or which holds 10 % or more of the equity capital of the promoter; (iii) any company in which a **group of individuals or companies or combinations thereof who holds 20 % or more** of the equity capital in that company also holds 20 % or more of the equity capital of the target company; and	(b) in case the promoter is an individual— (i) the **spouse** of that person, or any **parent, brother, sister or child** of that person or of his spouse; (ii) any company in which 10 % or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member; (iii) any company in which a company specified in (i) above, holds 10 % or more, of the share capital; and (iv) any HUF or firm in which the aggregate share of the promoter and his immediate relatives is equal to or more than 10 per cent of the total.

EXEMPTIONS FROM TAKEOVER REGULATIONS

REGULATION 3(EXEMPTION FROM REGULATION 10, 11 & 12):-

A. ***AUTOMATIC EXEMPTION :-***

- ***A***cquisition through underwriting agreement
- Acquisition in ordinary course of business by Merchant bankers, Stock brokers, Fin.Institutions,etc
- Acquisition under delisting regulations
- Acquisition by way of transfer or inheritance
- Acquisition by transfer from venture capital fund to venture capital undetaking or to its promoters
- Acquisition by Government Companies and Statutory Corporations
- Acquisition of shares by exchange of shares under a public offer.
- Acquisition under Scheme of Amalgamation , demerger, merger or BIFR scheme under law of any country
- Acquisition in any way under SARFAESI Act
- Acquisition of ADR/GDR where holder have not entitled to excercise voting rights

B. ***CONDITIONAL EXEMPTION :-***

These are conditional exemptions and can be availed IFF such conditions are followed:-

(Submission of report to SEBI within 21 daays along with fees of Rs. 25000/- is mandatory in all the below mentioned points.)

- Acquisition in Public Issue if full disclosure is made in Prospectus
- Acquisition in Rights Issue to the extent of his entitlement upto the creeping acquisition.

-HOWEVER, beyond the Creeping Acquisition limits is also exempted ONLY by

- Person in control over the company
- Disclosure of intention to acquire additional issue.

-ANY OF SUCH acquisition shouldnot result in change in control.
-Submit report to SEBI within 21 daays along with fees of Rs. 25000/-.

- Inter se transfers among group companies(as per MRTP) OR Relatives(as per Comanies act)
- Inter se transfers amongst :-

Qualifying Promoters,
Qualifying Promoters and foriegn collaborators &
Acquirer and PAC

Price not to exceed 125% of price determined in terms of takeover regualtions.

EXEMPTION THROUGH TAKEOVER PANEL (REGULATION 4):-

To get exemption **other than** Reg. 3 like:- Preferential Allotment can be exempt pursuant to SEBI(ICDR) Reg. 2009, if permission from Takeover Panel(TP) is taken.

Procedure

(i) APPLICATION
(ii) AFFIDAVIT, details of proposed acquisition with fees Rs.1lac.
(iii) SEBI forwards to Takeover Panel in 5 days or within 15days if SEBI recommends
(iv) SEBI's order thereafter.

➔"Recently in Bhagyanagar India Ltd., SEBI granted relief from Takeover Code applicability, which triggered Reg.11 (basically Co. gave certain assurances which SEBI considered & gave relief)"

EXEMPTION FROM CHAP III OF TAKEOVER CODE (REG. 29A) - (SATYAM AMENDMENT):-

Exemption available if:-

(i) CG/SG/other regulatory bodies have appointed Directors.
(ii) Such Directors have devised a PLAN which provides for transparent, open, competitive process & operation of T.C.
(iii) Competitive process must be reasonable & fair.
(iv) Competitive process should give details including timing of Public offer.
(v) Provision of Chap III to act as IMPEDIMENT to implement plant of target co.

COMPANIES GRANTED EXEMPTION UNDER THESE REGULATIONS IS ALSO GIVEN EXEMPTIONS FROM CERTAIN CLAUSES OF CHAP III OF ICDR REG. REGARDING PREFERENTIAL ALLOTMENT.

REGULATION 3	**REGULATION 4**	**REGULATION 29A**
No Application to takeover panel. **Exemption from Reg. 10,11 &12.**	Application to Takeover panel mandatory. (if no exemption in Reg.3)	Application to SEBI to relax any or more provisions of other regulations.
Automatic exemption.	Subject to Takeover Panel.	Subject to SEBI.
Reg. 3 condition shall be complied with.	Order of exemption to be complied.	Reg. 29A (a) to (e).
Post acquisition compliance can be made.	Exemption to be sought before acquisition.	Seek exemption before acquisition.

CHAPTER – II

REGULATION 6 TO REGULATION 9 :-

A. EVENT BASED DISCLOSURES

	By	To	Within	What/When
i)	Any acquirer	Target co. & SE	2 Days	Acquiring more than 5%, 10%, 14%, 44% & 54%
ii)	Any person holding 15% to 55% or 55% to 75%	Target co. & SE	2 Days	Acquiring or selling more than 2%

Following the above 2, now:-

	By	To	Within	What/When
i)	Target Co.	SE & Register to update.	7days of receipt of above 2	Aggregate amount & number of shares held by the Acquirer
ii)	Stock Exchange	General Public	As soon as possible	Information given to it by Target co.

B. PERIODICAL DISCLOSURES

	By	To	Within	What/When
i)	Holder more than 15%	Target Co.	21days from end of F.Y.	Holding as on 31st March
ii)	Promoters/Directors (if Promoters missing)having control	Target Co.	21days from end of F.Y. and on Record date for purpose of dividend declaration	Number & percentage of shares held by him along with PAC as on 31st March
iii)	Any promoter or promoter group	Target Co.	7 working days	Creating or invoking or revoking pledge.

Following the above 2, now:-

	By	To	Within	What/When
i)	Target Company	Stock Exchange	30days of end of F.Y. & record date of Dividend declaration	Receiving information from person holding more than 15% or PAC
ii)	Target Company	Stock Exchange	7 working days of receipt of information.	Shareholders pledged during quarter >25000/- OR 1% of paid up capital, whichever is lower.

% = % of voting rights (not only shares)

CHAPTER – III

REGULATIONS 10 TO 12 :-

· Points leading open offer
· Substantial Acquisition of shares
· Conditions for Public Announcements

Reg.10 → Acquisition of more than or equal to 15% is not authorised unless PA (or OPEN offer) is given

Reg.11→
1)Unless PA given, cant acquire more than 5% in a F.Y. when holding is greater than equal to 15% to less than equal to 55%.

2)Unless PA given, any additional share when holding greater than equal to 55% to less than equal to 75%.
Two provisos:-
i) Sec 81 case = X i.e. no right issue & preferential allotment.
ii) When such Sec 81 work is done by co. then disinvestment is done by acquirer below 55%

2A) Acquirer can't acquire enough to reduce Public Shareholding
Proviso → Indirect Acquisition of shares is excluded from above.

3) Notwithstanding Reg10,11 & 12 → PSU once gave PA will not give again and again, provided –
· both acquire & seller is same at all stages.
· Disclosures, if any, are made in LOO.

Reg. 12→ If above Regulations are not to be followed: i.e. done want to give PA then-
'Take approval by SR in GM of *Target* Company through postal ballot confirming that they are ready to leave control'· Control is important term here whether by Shares or whatever.

Reg 13 →Appointment of Category I Merchant Banker BEFORE making any P.A.

Reg.14→
- P.A.is to be made within 4 days of entering into agreement of Acquisition of shares.
- In PSU- within 4days of executing agreement with CG/SG.
- PA for Reg.12 within 4days of acquisition of control.
- Indirect Acquisition case-3 months of such acquisition or change in control.

Reg15→:P.A in1 Eng 1 Hindi 1 Regional
1 copy to Board
1 copy to all Stock Exchange where shares listed
1 copy to PA to Target Company.

Reg.16→<u>Content of PA</u> :-

Details such as :- shares, prices, consideration, minimum offer price,
identity of acquirer, existing holding of the acquirer, date of opening and closing of the offer, highest and the average price paid by the Acquirer or PAC of all acquisitions during the last 12 months., salient featurs of the agreement, specified date.approvals of banks and Fis, etc.

Normal summary of P.A./ Offer, etc from the whole chapter shall be merged with the above for more details.

Reg.17→PA or Advertisement must not be misleading

Reg.18→Letter of Offer to Board within 14days of PA & to Shareholders after 21days of LOO to Board.

Reg20→Offer Price:-
-in cash
-by issue of securities of the share
-secured instrument of 'A' grade
-mix of all above

Note: Shares and secured investments are valued by independent merchant banker or independent chartered accountant with 10 years of experience or public financial institutions.

2 proviso's :-

-where any payment has been made to S.hldrs or any class of them in cash preceding 12months from the date of P.A. then acquirer must given an option in LOO to accept in cash, shares or secured investment

-mode of payment may be altered only in case of revision of offer price subject to condition that amt to be paid in cash is not reduced. Acquirer must obtain prior approval of Shareholders if consideration includes securities, if not taken then whole payment is to be made in cash.

OPEN OFFER PRICE—DIRECT ACQUISITION

PSU		OTHERS	
Frequently Traded	**Infrequently Traded**	**Frequently Traded**	**Infrequently Traded**
Average of WEEKLY high & low prices during 26weeks prior to the date when bid opens	Successful Bids	Higher of:-	Higher of:-
		i)Negotiated Price or 26weeks prior to PA price paid by Acquirer	i)Negotiated Price or 26weeks prior to PA price paid by Acquirer
		ii)Average of weekly high & low prices of 26weeks **OR** Daily high ?& low of closing price during 2weeks before PA.	ii)Return on networth, book value, Earning per share, P/E ratio of industry Average
		iii)In case of Firm Allotment it shall be average of 26weeks preceeding BR authorising such allotment	iii)SEBI valuation by merchant banker or 10years experience of a C.A.

OFFER PRICE—INDIRECT ACQUISITION

Offer price as above with reference to date of PA for parent company AND the date of the PA for Acquisition of shares of the target company – whichever is higher.

ACQUISITION OF FURTHER SHARES AFTER PA. :-
Any acquisition at a further price higher than above. AFTER P.A. & BEFORE payment of consideration to shareholder.
That price will be consideration.

Reg.21→Size of open offer:-
Minimum 20% of voting capital but limits of listing agreements (i.e. Public holding:-25%/10%) must not be violated.

Reg 21A→ Minimum price for creeping Acquisition: - Person who made public offer can't acquire at a price below offer price for 6months unless purchased from the market. However this restriction is not on acquisition from stock exchange.

Reg.22→ General obligations of Acquirer Company.*

Reg 23→General obligations of Target Company.*

Reg.24→ General obligations of Merchant Banker.*

** These are normal summary from the whole chapter with respect to obligations/ duties of all these imp.players in a takeover process.Regulations contains an illustrative points and not conclusive.*

Reg 25→COMPETITIVE BID

i) Within 21days of first PA
ii) Minimum offer size of competitive bid shall be post offer holding of offer less than the existing holding of competitive bidder.
iii) Within 14days of competitive bid, the original acquirer may revise the offer.
iv) Date of Closure of original & competitive offer must be same.
v) NOT APPLICABLE to 29A or Bailout Taker or PA in case of Disinvestment of PSU.

Reg.26→Upward Revision of offer Price or size within 7days prior to the closure:-
a) Make a revised PA in the same manner in the details.
b) Inform SEBI, Stock Exchange, Target Company.
c) Increase the value of Escrow A/c.

Reg.27→Withdrawal of offer—can't withdraw except:-
a) Statutory approval refused
b) Sole acquirer, individual died
c) SEBI merits withdrawal
d) Make PA-inform SEBI, Stock Exchange, Target Company

e) Shareholders withdrew consent up to 3 working days prior to closure.

'Then, No acquisition or offer for listed co. for 12months.'

Reg.28→ Provisions for **Escrow A/c** :-

--To be opened before P.A.or Offer and is not released unless all formalities is completed
--Amt to be deposited: 25% of 1ST 100 Crores and 10 % for balance of consideration
--in case of upward revision of offer price, escrow shall be increased by minimum 10 % of consideration payable
--it is subjected to be forfeited in case of any violations after deducting expenses of Merchant Banker, Target Company & Share Transfer Agent and distribute 1/3rd to target company, IEPF Fund of S.Ex. and to accepted shareholders on pro rata basis.
--Consideration by way of Merchant Banker Empowered Cash Deposit IN Sch.Com.Bank OR guarantee to Merchant Banker OR Deposit Securities with Merchant Banker.

Release of Escrow A/c:
-withdrawal of offer
-on trf.of 90% of cash to special bank account
-after merchant banker certifies that all obligations has been duly met.

TYPES OF TAKEOVER

1) **Friendly Takeover –** Agreement between 2 companies with a negotiation of price.
2) **Hostile Takeover –** Acquire doesn't offer the target company but silently control on management of the company.
3) **Bail Out Takeover – CHAPTER IV : Regulations 30 to 37**

   * Takeover of financial company but not sick company (i.e. substantial acquisition of shares of financially company but not sick company), which has at the end of previous Financial year accumulated losses, which has ……… erosion of more than 50% but less than 100%.

   * Chapter III is exempt here though limits must be followed as far as possible.

   * Lead institution is generally PFI or banks who approves schemes of rehabilitation (instead Merchant Banker here its lead institution).

   * Invite offer for acquisition from at least 3 parties.

   * Evaluate the bids not only with purchase price but also track record, resources, reputation of management & transparency in process.

   * Lead institution must consult with mgmt of financially weak company to accept one of the bids.

   * No person shall make COMPETITIVE BID.

   * Here, minimum offer size & price valuation is not prescribed.

   * Acquirer shall –
   ~ Make a formal offer to shareholders.
   ~ Make PA of his intention to acquire shares with details of offer.
   Send a copy to shareholders and offer to acquire entire holdings of individual shareholders who are holding 10shares X Rs.100 or 100shares X Rs.10.

CHAPTER – V

PENAL PROVISIONS(Refer books for details)

SEBI may appoint investigating officer, auditors etc. to investigate after giving 11days notice to acquirers, target companies or merchant banker as the case may be.

* Directives/Penalties (Reg.44 & 45)
~ Disinvestment of shares acquired.
~ Transfer of proceeds to IEPF.
~ Restrict disposal of Assets of Target Company
~ Forfeit sum of Escrow A/c.
~ Freeze transfer of shares.
~ Restrict voting rights.
~ Monetary penalty.
~ To make Public offer.

- Any person aggrieved by order of Board can appeal to SAT (Reg.46)

NOTE ON DISINVESTMENT OF CAPITAL FROM PSUs:-

-Sale by CG/SG of shares or voting rights or control in LISTED PSUs

-Acquisition of shares by Government company u/s 617 of Companies Act, 1956 shall Not Applicable if it acquires through Competitive Bid process.

POINTS TO REMEMBER FOR PSUs:-

1) Acquirer once made PA shall not made again and again at further stages. Provided-
*Acquirer & seller are the same at all stages.
*Disclosures are made in LOF and in first PA.

2)First PA shall be made within 4 working days of acquirer executing the Share Purchase Agreement or Shareholder Agreement with Government.

3) No Competitive Bid within 21days of first PA.

4) Recall PSU offer price in REG.20

5) During offer period Acquirer shall NOT be appointed to the board of Target company.

6) After first PA or above 15%, certain restriction :-
- No transfer of SPC or changes in BOD of Target Company.
- If any violation, control will vest back to government & acquirer will be liable for penalty.

DEFENCE STRATEGIES TO TAKEOVER BIDS

- **Crown Jewel Strategy:-** To diversify its attractive assets.(But Reg.23 opposes section and compare.)

- **Poison Pills Defenses:-** Make oneself so burdened for the acquirer to acquire like taking more debts, increasing Debt Equity Ratio, so as to make unattractive and costlier.

- **Pacman Defense:-** Target company attempts to target raider company.

- **Golden Parachutes:-** Keeping compensation so high for Acquirer to buy as in AOA we can write if Directors/Whole time Director/Managing Director/Manager etc are removed then a lump sum payment will be given.

- **Shark Repellants:-** Charter of company prescribes impossible laws. Not possible in India being Act says company can't go beyond act.

- **Refusal to Register Transfer of shares:-** BOD refuses to transfer shares.

☺ ☺ THANKING YOU☺ ☺

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