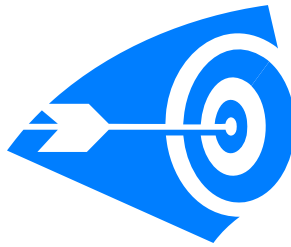


STUDY IV TAKEOVERS

LEARNING OBJECTIVES



This chapter will enable the students to understand:

- Concept of takeover
- Kinds of takeover
- Takeover bids
- Legal aspects of takeover
- Bail out takeover and takeover of sick units
- Takeover Defenses
- Cross Border Takeovers

1. MEANING AND CONCEPT OF TAKEOVER

A high level of competitive pressure and an increasing appetite for growth have led firms across geographies and industries to choose the inorganic growth path. Mergers & Acquisitions and Takeovers provide a robust growth vehicle often best suited for such firms seeking an entry into a market, geography, product category or broadening its product and / or client base.

Takeover, an inorganic corporate growth device whereby one company acquires control over another company, usually by purchasing all or a majority of its shares.

Takeover implies acquisition of control of a company, which is already registered, through the purchase or exchange of shares. Takeovers usually take place when shares are acquired or purchased from the shareholders of a company at a specified price to the extent of at least controlling interest in order to gain control of that company.

Takeover of management and control of a business enterprise could take place in different modes. The management of a company may be acquired by acquiring the majority stake in the share capital of a company. A company may acquire shares of an unlisted company through what is called the acquisition under Section 395 of the

Companies Act, 1956. Where the shares of the company are closely held by a small number of persons, a takeover may be effected by agreement with the holders of those shares. However, where the shares of a company are widely held by the general public, it involves the process as set out in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Ordinarily, a larger company takes over a smaller company. In a reverse takeover, a smaller company acquires control over a larger company.

The takeover strategy has been conceived to improve corporate value, achieve better productivity and profitability by making optimum use of the available resources in the form of men, materials and machines.

Company Secretaries have important role to play in the take over process especially with regard to compliances under the Companies Act, SEBI (SAST) Regulations 2011, Competition Law aspects, FEMA regulations etc. The role would be with respect to preparation of checklist, drafting of documents, obtaining of necessary approvals etc. The advisory role of company secretaries in the effective execution of takeover deals is vital throughout the takeover process.

Emergence of concept of takeover

Corporate Sector is an attractive medium for carrying on business as it offers a lot of benefits. Raising money from public has its own positive features and it helps setting up big projects. When promoters of a company desire to expand, they take a quick view of the industrial and business map. If they find there are opportunities, they will always yearn for capitalizing such opportunities. Compared to the efforts required, cost and time needed in setting up a new business, it would make sense to them to look at the possibilities of acquiring an existing entity.

While the possibility of takeover of a company through share acquisition is desirable for achieving certain strategic objectives, there has to be well defined regulations so that the interests of all concerned are not jeopardized by sudden takeover threats. In this perspective, if one were to analyse, it would be clear that there has to be a systematic approach enabling and leading the takeovers, while simultaneously providing adequate opportunity to the original promoters to protect/counter such moves. Thus, while the acquirer should adopt a disciplined method with proper disclosure of intentions so that not only the original promoters who are in command are protected but also the investors. It would be in the interests of all concerned that the takeover is carried out in a transparent manner.

When adequate checks and balances are introduced and ensured, takeovers become a good tool. That is the reason why regulations have been put in place and these regulations require sufficient disclosures at every stage of acquisition. These regulations take so much care that they cover not only direct acquisition of the acquirer but also includes acquisitions through relatives and associates and group concerns.

In India, the process of economic liberalisation and globalisation ushered in the early 1990's created a highly competitive business environment, which motivated many companies to restructure their corporate strategies. The restructuring process

led to an unprecedented rise in strategies like amalgamations, mergers including reverse mergers, demergers, takeovers, reverse takeovers and other strategic alliances.

Objects of takeover

The objects of a takeover may *inter alia* be

- (i) To effect savings in overheads and other working expenses on the strength of combined resources;
- (ii) 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;
- (iii) 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;
- (iv) To improve productivity and profitability by joint efforts of technical and other personnel of both companies as a consequence of unified control;
- (v) To create shareholder value and wealth by optimum utilisation of the resources of both companies;
- (vi) To achieve economy of numbers by mass production at economical costs;
- (vii) To secure advantage of vertical combination by having under one command and under one roof, all the stages or processes in the manufacture of the end product, which had earlier been available in two companies at different locations, thereby saving loading, unloading, transportation costs and other expenses and also by affecting saving of time and energy unnecessarily spent on excise formalities at different places and stages;
- (viii) 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;
- (ix) To increase market share;
- (x) 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:

- (i) **Friendly Takeover:** Friendly takeover is with the consent of taken over 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.

- (ii) **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.
- (iii) **Bail Out Takeover:** Takeover of a financially sick company by a profit earning company to bail out the former is known as bail out 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. Banks and other lending financial institutions would evaluate various options and if there is no other go except to sell the property, they will invite bids. Such a sale could take place in the form by transfer of shares. While identifying a party (acquirer), lenders do evaluate the bids received, the purchase price, the track record of the acquirer and the overall financial position of the acquirer. Thus a bail out takeover takes place with the approval of the Financial Institutions and banks.

TAKEOVER BIDS

“Takeover bid” is an offer to the shareholders of a company, whose shares are not closely held, 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 offeror 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 introduced through a public announcement through 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 ending on 31st March 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.

Factors Determining Vulnerability of Companies to Takeover Bids

The enquiry into such strategies is best initiated by an analysis of factors, which determine the “vulnerability” of companies to takeover bids. It is possible to identify such characteristics that make a company a desirable candidate for a takeover from the acquirer’s point of view. Thus, the factors which make a company vulnerable are:

- Low stock price with relation to the replacement cost of assets or their potential earning power;
- A highly liquid balance sheet with large amounts of excess cash, a valuable securities portfolio, and significantly unused debt capacity;
- Good cash flow in relation to current stock prices;
- Subsidiaries and properties which could be sold off without significantly impairing cash flow; and
- Relatively small stockholdings under the control of an incumbent management.

A combination of these factors can simultaneously make a company an attractive proposition or investment opportunity and facilitate its financing. The company’s assets may act as collateral for an acquirer’s borrowings, and the target’s cash flows from operations and divestitures can be used to repay the loans.

5. LEGAL ASPECTS OF TAKEOVER

The legislations/regulations that mainly govern takeover is as under

1. SEBI (SAST) Regulations 2011
2. Companies Act, 1956
3. Listing Agreement

SEBI (SAST) Regulations 2011 lays down the procedure to be followed by an acquirer for acquiring majority shares or controlling interest in another company.

As far as Companies Act is concerned, the provisions of Section 372A apply to the acquisition of shares through a Company. Section 395 of the Companies Act lays down legal requirements for purpose of take-over of an unlisted company through transfer of undertaking to another company.

The takeover of a listed company is regulated by clause 40A and 40B of the Listing Agreement. These clauses in the Listing Agreement seek to regulate takeover activities independently and impose certain requirements of disclosure and transparency.

Takeover of Unlisted and Closely Held Companies

Section 395 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 Court Orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

When the scheme is binding on minority shareholders including dissenting shareholders?

When the scheme is approved by the holders of not less than nine tenth (90%) in value of the shares of the transferor company whose transfer is involved, it shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Court Orders otherwise.

Case Law 1: Power of Acquisition of Shares of dissentient minority shareholders is not *ultra vires* the constitution of India. *S Viswanathan V East India Distilleries & Sugar Factories Limited*(1957) 27 Com Cases 175: AIR 1957 Mad 341.

Case Law 2: Where the scheme or contract has been approved by 90% of the shareholders, the offer of the transferee company will be treated as prima-facie a fair one and the onus will be on the dissentients to show the contrary. *Benarasi Das Saraf V dalmia Dadri Cement Ltd*(1958)28 Com cases 435(Punj)

Accordingly, the transferor 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 395 of the 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 2 months of the expiry of the period of 4 months envisaged under Section 395 of the Act.

When a Company intends to take over another Company through acquisition of 90% or more in value of the shares of that Company, the procedure laid down under Section 395 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 miserable minority. They do not even command a 10% stake so as to make any meaningful utilization of the power. Such minority can not even call an extra-ordinary general meeting under Section 168 of the Act nor can they constitute a valid strength on the grounds of their proportion of issued capital for making an application to Company Law Board under Section 397 and 398 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 395 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 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 395 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 Court's discretion to prevent compulsory acquisition.

Section 395 requires mandatory compliance of certain formalities including registration of a scheme or contract for acquisition of shares of Transferor Company. The scheme or contract between the Transferee Company and Transferor Company is solemnized with blessings of the Board of Directors of both the companies.

The following are the important ingredients of the Section 395 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 395 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” join 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.
- 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.
- Every circular containing or recommending acceptance of the offer made by the transferee Company shall be duly accompanied by e-Form No. 35A of the Companies (Central Govt.'s) General Rules and Forms, 1956. They shall be filed with the Registrar for registration. Only after such registration can the Transferee Company arrange for circulation of the scheme or contract or the recommendatory letter, if any, of the directors of the transferor company to the shareholders of the Transferor Company.
- The Registrar may refuse to register any such circular, which does not contain the prescribed information, if such information is given in a manner likely to give a false impression.

- An appeal shall lie to the Court against an order of the Registrar refusing to register any such circular.
- Any person issuing a circular containing any false statement or giving any false impression or containing any omission shall be punishable with fine, which may extend to five hundred rupees.
- 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 takeover 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 extra ordinary 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 transferee 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 this Section 395 of the Act will not fall within the meaning of amalgamation under the Income Tax Act 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

The transferor company has to take care of the following points:

1. The offer of a company (Transferee Company) to acquire shares of a Transferor Company should be received from the transferee company.
2. It should have been approved by the Board of Directors at a duly convened and held meeting. If proviso to Sub-section (1) of Section 395 is attracted, the terms of offer should be same for all the holders of that class of shares, whose transfer is involved.
3. Offer received from the transferee company along with other documents, particulars etc. should have been circulated to the members of the company in e-Form No. 35A prescribed in the Companies (Central Government's) General Rules and Forms, 1956. [For e-form 35A, see Part B of the Company Secretarial Practice Study]
4. E-form No. 35A must be filed with the Registrar of companies before issuing to the members of the company.
5. The scheme or contract for transfer of shares of the company to the transferee company has been approved by the shareholders of not less than nine-tenths in value of the shares within the stipulated period of four months. If proviso to Sub-section (1) of Section 395 is attracted, the number of such approving shareholders should comprise not less than three-fourths in number of the holders of the shares proposed to be transferred.
6. Comply with any order of the court if any dissenting shareholder had approached the Court against the proposed transfer and if the Court had passed any order contrary to the proposed transfer.
7. If the transferee company wanted to acquire the shares held by dissenting shareholders, the transferor company has received from the transferee company a copy of the notice sent by the transferor company to the dissenting shareholders together with duly filled in and signed transfer instruments along with value of the shares sought to be transferred.
8. The transferee company should have been registered as holder of the transferred shares and the consideration received for the shares has been deposited in a separate bank account to be held in trust for the dissenting shareholders.

Documents etc. involved in this process:

1. Offer of a scheme or contract from the transferee company.

2. Minutes of Board meeting containing consideration of the offer and its acceptance or rejection.
3. Notice calling general meeting.
4. e-form No. 35A circulated to the members.
5. Minutes of general meeting of the company containing approval of the offer by statutory majority in value and in numbers also, if required.
6. Court order if any.
7. Copy of e-form No. 21 which has been filed with the Registrar along with a copy of the Court Order.
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 Pass Book 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

The transferee company has to take care of the following points:

1. Offer made to the transferor company.
2. Copy of notice for the general meeting along with a copy of e-form No. 35A circulated by the transferor company to its members.
3. Intimation received from the transferor company in respect of approval of the offer by the requisite majority of the shareholders of that company.
4. Notice as prescribed in Section 395 of the Companies Act, 1956 given by the company to dissenting shareholders of the transferor company for the purpose of acquiring their shares.
5. If there is any Court order in favour of the dissenting shareholders of the transferor company, terms of the same has been complied with.
6. If Sub-section (2) is attracted, the company must ensure that the prescribed notice has been sent to those shareholders of the transferor company who have not assented to the transfer of the shares and that such shareholders have agreed to transfer their shares to the company.
7. To ensure that a copy of the notice has been sent to the dissenting shareholders of the transferor company and duly executed instrument(s) of

transfer together with the value of the shares have been sent to the transferor company.

Documents etc. involved in this process

1. Minutes of Board meeting containing consideration and approval of the offer sent to the transferor company.
2. Offer of a scheme or contract sent to the transferor company.
3. Notice to dissenting shareholders if any, of the transferor company.
4. Notice to the remaining shareholders of the transferor company, who have not assented to the proposed acquisition, if any.
5. e-form No. 35A received from the transferor company, which has been circulated to its members by that company.
6. Minutes of general meeting of the company containing approval of the shareholders to the offer of scheme or contract sent to the transferor company.
7. Court order, if any.
8. Copy of e-form No. 21 which has been filed with the Registrar along with a copy of the Court Order.
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.

TAKEOVER OF LISTED COMPANIES

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

Frequently Asked Questions on takeovers are enclosed at Annexure 1.

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 Listing Agreement and the Companies Act. There could also be some compliance requirements under the Foreign Exchange Management Act if acquirer were a person resident outside India.

Listing Agreement

Conditions for continued listing

Clauses 40A and 40B of the listing agreement were amended to bring them in consonance with the Regulations. These clauses are placed under the heading “Conditions for Continued Listing”.

40A. – Minimum level of public shareholding

(i) The issuer company agrees to comply with the requirements specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulation) Rules, 1957.

(ii) Where the issuer company is required to achieve the minimum level of public shareholding specified in Rule 19(2)(b) and/or Rule 19A of the Securities Contracts (Regulation) Rules, 1957, it shall adopt any of the following methods to raise the public shareholding to the required level:-

- (a) issuance of shares to public through prospectus; or
- (b) offer for sale of shares held by promoters to public through prospectus; or
- (c) sale of shares held by promoters through the secondary market.

Provided that for the purpose of adopting the method specified at sub-clause (c) above, the issuer company agrees to take prior approval of the Specified Stock Exchange (SSE) which may impose such conditions as it deems fit.

Explanation: For the purposes of this clause the term “Specified Stock Exchange (SSE)” shall mean: -

- (a) where the issuer company is listed on one stock exchange only, then that stock exchange;
- (b) where the issuer company is listed on one or more stock exchange(s) having nationwide trading terminal(s) and / or on one or more stock exchange(s) not having nationwide trading terminal(s), then all such stock exchange(s) having nationwide trading terminal(s); and
- (c) where the issuer company is listed on one or more stock exchange(s) and none of those stock exchanges have nationwide trading terminals, then the stock exchange which was chosen as the Designated Stock Exchange by the company for the previous issue of its shares, or the regional Stock Exchange, as the case may be.”

40 B – Take Over Offer

A company agrees that it is a condition for continued listing that whenever the take-over offer is made or there is any change in the control of the management of the company, the person who secures the control of the management of the company and the company whose shares have been acquired shall comply with the relevant provisions of the SEBI (Substantial Acquisition of Shares and Take-overs) Regulations, 2011.

REQUIREMENTS UNDER SEBI REGULATIONS

Introduction

The earliest attempts at regulating takeovers in India can be traced back to the 1990s with the incorporation of Clause 40 in the Listing Agreement.

- While, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 which were notified in November 1994 made way for regulation of hostile takeovers and competitive offers for the first time; the subsequent regulatory experience from such offers brought out certain inadequacies existing in those Regulations. As a result, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were introduced and notified on February 20, 1997, pursuant to repeal of the 1994 Regulations.
- Owing to several factors such as the growth of Mergers & Acquisitions activity in India as the preferred mode of restructuring, the increasing sophistication of takeover market, the decade long regulatory experience and various judicial pronouncements, it was felt necessary to review the Takeover Regulations 1997. Accordingly, SEBI formed a Takeover Regulations Advisory Committee (TRAC) in September 2009 under the Chairmanship of (Late) Shri. C. Achuthan, Former Presiding Officer, Securities Appellate Tribunal (SAT) for this purpose. After extensive public consultation on the report submitted by TRAC, SEBI came out with the SAST Regulations 2011 which were notified on September 23, 2011. The Takeover Regulations, 1997 stand repealed from October 22, 2011, i.e. the date on which SAST Regulations, 2011 come into force.

Meaning of certain terms

Acquirer

Acquirer means any person who, whether by himself, or through, or with persons acting in concert with him, directly or indirectly, acquires or agrees to acquire shares or voting rights in, or control over a target company. An acquirer can be a natural person, a corporate entity or any other legal entity.

Person Acting in Concert (PACs)

PACs are individual(s)/company (ies) or any other legal entity (ies) who, with a common objective or purpose of acquisition of shares or voting rights in, or exercise of control over the target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly cooperate for acquisition of shares or voting rights in, or exercise of control over the target company. SAST Regulations, 2011 define various categories of persons who are deemed to be acting in concert with other persons in the same category, unless the contrary is established.

Target Company

The company / body corporate or corporation whose equity shares are listed in a stock Exchange and in which a change of shareholding or control is proposed by an acquirer, is referred to as the 'Target Company'.

Control

“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:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position;

Disclosures related provisions

It may be noted that the word “shares” for disclosure purposes include convertible securities also.

Event based Disclosures

(a) Any person, who along with PACs crosses the threshold limit of 5% of shares or voting rights, has to disclose his aggregate shareholding and voting rights to the Target Company at its registered office and to every Stock Exchange where the shares of the Target Company are listed within 2 working days of acquisition as per the format specified by SEBI.

(b). Any person who holds 5% or more of shares or Voting rights of the target company and who acquires or sells shares representing 2% or more of the voting rights, shall disclose details of such acquisitions/sales to the Target company at its registered office and to every Stock Exchanges where the shares of the Target Company are listed within 2 working days of such transaction, as per the format specified by SEBI.

Shares taken by way of encumbrance shall be treated as an acquisition and on release of such encumbrances it is a disposal.

Continual Disclosures

Continual disclosures of aggregate shareholding shall be made within 7 days of financial year ending on March 31 to the target company at its registered office and every stock exchange where the shares of the Target Company are listed by:

- (a) Shareholders (along with PACs, if any) holding shares or voting rights entitling them to exercise 25% or more of the voting rights in the target company.
- (b) Promoter (along with PACs, if any) of the target company irrespective of their percentage of holding.

Disclosures of encumbered shares

The promoter (along with PACs) of the target company shall disclose details of shares encumbered by them or any invocation or release of encumbrance of shares held by them to the target company at its registered office and every stock exchange

where shares of the target company are listed, within 7 working days of such event.

As per Regulation 28(3), the term “encumbrance” shall include a pledge, lien or any such transaction, by whatever name called.” The promoters have to understand the nature of encumbrance and those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly, are required to be disclosed to the stock exchanges in terms of the Takeover Regulations, 2011.

Computation of trigger limits for disclosures.

The word “shares” for disclosure purposes include convertible securities also. Hence for computation of trigger limits for disclosures given above, percentage w.r.t shares shall be computed taking in to account total number of equity shares and convertibles and the percentage w.r.t voting rights shall be computed after considering voting rights on equity shares and other securities (like GDRs, if such GDRs carry voting rights)

Illustration

An illustration is provided below for the calculation of trigger limits for disclosures.

Total Shares/voting capital of the company

- Company A has 100 equity shares, 50 partly convertible Debentures (PCDs) and 10 GDRs. 1 GDR carries 1 voting right.
- Total shares of company A= $100+50+10 = 160$
- Total voting capital of Company A= $100+10=110$

Persons B's holding of shares and voting rights

- Person B has 8 equity shares, 7 PCDs and 1 GDR.
- Person B has $8+7+1 = 16$ shares (shares for disclosure purpose includes convertible securities)
- Person B's holding in terms of shares= $16/160=10\%$ of shares
- Person B's voting rights= $8+1= 9$ voting rights
- Person B's holding in terms of voting rights = $9/110=8\%$ of voting rights

Since person B is holding more than 5% of shares or voting rights, he is required to make disclosures for any acquisition/ sale of 2% or more of shares or voting rights.

Acquisition by Person B

Scenario I

- Person B acquires 2 equity shares and 2 PCDs.

- In terms of shares, person B has acquired $4/160=2.5\%$ of shares
- In terms of voting rights, person B has acquired $2/110= 1.8\%$ of voting rights
- Since acquisition done by person B represents 2 % or more of shares, the disclosure obligation is triggered.

Scenario II

Person B acquires 20 PCDs

In terms of shares, person B has acquired 20 shares, i.e. $20/160$ i.e. 12.5% shares.

In terms of voting rights, he has not acquired a single voting right i.e. 0 voting right

However, since acquisition done by person B represents 2% or more of shares (though no voting rights), the disclosure obligations is triggered.

Open offer thresholds (Regulation 3)

The following 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.

Maximum Permissible non-Public Shareholding means Such percentage shareholding in the target Company excluding the minimum Public Shareholding required under Securities Contracts Regulation (Rules) 1957. The SCRR requires minimum Public Shareholding in case of every listed company other than Public Sector Company to be at least 25%. In case of listed public sector company minimum Public Shareholding to be maintained at least 10%. Thus maximum permissible non public Share holder may be 75% and in case of Public Sector company 90%.

Voluntary Offer (Regulation 6)

A voluntary open offer under Regulation 6, is an offer made by a person who himself or through Persons acting in concert ,if any, holds 25% or more shares or voting rights in the target company but less than the maximum permissible non-public shareholding limit.

Restrictions on 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.

Exemptions from open offer (Regulation 10)

Exemption may be

Automatic Exemption (under Regulation 10)

Exemption by SEBI (Regulation 11)

Exemption under Regulation 10 (Automatic exemption)

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 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;
 - (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 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 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,—

- (i) 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
 - (ii) 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 stabilizing 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 (1 of 1986) 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, pursuant to an order of a court or a competent authority under any law or regulation, Indian or foreign; or
 - (iii) 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 competent authority 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.
- (e) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (f) acquisition pursuant to the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;

- (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 87 of the Companies Act, 1956 (1 of 1956).

(2) The acquisition of shares of a target company, not involving a change of control over such target company, pursuant to a scheme of corporate debt restructuring in terms of the Corporate Debt Restructuring Scheme notified by the Reserve Bank of India vide circular no. B.P.BC 15/21.04, 114/2001 dated August 23, 2001, or any modification or re-notification thereto provided such scheme has been authorised by shareholders by way of a special resolution passed by postal ballot, shall be exempted from the obligation to make an open offer under regulation 3.

(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 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 on which the voting rights so increase.

(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 77A of the Companies Act, 1956 (1 of 1956);
- (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 buyback, 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 77A of the Companies Act, 1956 (1 of 1956); 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 on which the voting rights so increase, 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 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 foreign venture capital investor and such promoters.

(5) In respect of 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.

(6) In respect of 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.

(7) In respect of 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 twenty five thousand 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.

Exemptions by the SEBI (Regulation 11)

(1) SEBI(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.

(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.

(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.

(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 fifty thousand, by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board.

(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.

(6) The order passed under sub-regulation (5) shall be hosted by the Board on its official website.

Open offer Process

1. Appointment of Manager to the offer

Prior to making of a public announcement, the acquirer shall appoint Merchant Banker registered with the Board, who is not an associate of the acquirer, as manager to the offer.

2. 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.

3. Public announcement.

SEBI (SAST) Regulation, 2011 provides that whenever Acquirer acquires the shares or voting rights of the Target Company in excess of the limits prescribed under Regulation 3 and 4, then the Acquirer is required to give a Public Announcement of an Open Offer to the shareholders of the Target Company. During the process of making the Public Announcement of an Open Offer, the Acquirer is required to give Public Announcement and publish Detailed Public Statement. The regulations have prescribed the separate timeline for Public Announcement as well as for Detailed Public Statement.

(i) Public Announcement

(ii) Detailed Public Statement

Publication and Timing of Public Announcement (Regulation 13 and Regulation 14)

The Public Announcement shall be sent to all the stock exchanges on which the shares of the target company are listed. Further, a copy of the same shall also 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. The time within which the Public Announcement is required to be made to the Stock Exchanges under different circumstances is tabulated below:

<i>Applicable Regulation</i>	<i>Particulars</i>	<i>Time of making Public Announcement to Stock Exchange</i>
13(1)	Agreement to Acquirer Shares or Voting Rights or Control Over The Target Company	On the same day of entering into agreement to acquire share, voting rights or control over the Target Company.
13(2)(a)	Market Purchase of shares	Prior to the placement of purchase order with the stock broker.
13(2)(b)	Acquisition pursuant to conversion of Convertible Securities without a fixed date of conversion or upon conversion of depository receipts for the underlying shares	On the same day when the option to convert such securities into shares is exercised.
13(2)(c)	Acquiring shares or voting rights or control pursuant to conversion of Convertible Securities with a fixed date of conversion	On the second working day preceding the scheduled date of conversion of such securities into shares.
13(2)(d)	In case of disinvestment	On the date of execution of agreement for acquisition of shares or voting rights or control over the Target Company.
13(2)(e)	In case of Indirect Acquisition where the parameters mentioned in Regulation 5(2) are not met	Within four working days of the following dates, whichever is earlier: a. When the primary acquisition is contracted; And b. Date on which the intention or decision to make the primary acquisition is announced in

		the public domain.
13(2)(f)	In case of Indirect Acquisition where the parameters mentioned in Regulation 5(2) are met	On the same day of the following dates, whichever is earlier: a. When the primary acquisition is contracted; And b. Date on which the intention or decision to make the primary acquisition is announced in the public domain.
13(2)(g)	Acquisition of shares, voting rights or control over the Target Company pursuant to Preferential Issue	On the date when the Special Resolution is passed for allotment of shares under Section 81(1A) of Companies Act 1956.
13(2)(h)	Increase in voting rights pursuant to a buy-back not qualifying for exemption under Regulation 10	Not later than 90th day from the date of increase in voting rights.
13(2)(i)	Acquisition of shares, voting rights or control over the Target Company where the such acquisition is beyond the control of acquirer	Not later than two working days from the date of receipt of such intimation.
13(3)	Voluntary Offer	On the same day when the Acquirer decides to make Voluntary Offer

Timing of Detailed Public Statement

In terms of Regulation 13(4) of SEBI (SAST) Regulations, 2011, a Detailed Public

Statement shall be published by the acquirer through the Manager to the Open Offer within maximum **5 working days from the date of Public Announcement**.

However in case of Indirect Acquisition where none of condition specified in Regulation 5(2) are satisfied, the Detailed Public Statement shall be published 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.

Publication of Public Announcement and Detailed Public Statement

Regulation 14 of SEBI (SAST) Regulation, 2011 provides the requirements relating to publication of Public Announcement and Detailed Public Statement which are tabulated below:

<i>Regulation</i>	<i>Particulars</i>	<i>Time</i>	<i>To whom</i>
14(1)	Public Announcement	On the same day	All the stock exchanges on which the shares of the target company are listed. The stock exchanges shall forthwith disseminate such information to the public.
14(2)	Public Announcement	One working day of the date of the public announcement	Board and to the target company at its registered office
14(3)	Detailed Public Statement	5 working days from the date of Public Announcement.	Publication in the following newspaper: (a) One Hindi national language daily with wide circulation (b) One English national language daily with wide circulation

			(c) One regional national language daily with wide circulation language at a place where registered office of the company is situated. (d) One regional language daily with wide circulation at the place of the stock exchange where the maximum volume of trading in the shares of the target company is recorded during the sixty trading days preceding the date of the public announcement.
14(4)	Detailed Public Statement		A copy of 'Detailed Public Statement shall be sent to followings: (a) Board (b) All the stock exchanges in which the shares of the target company are listed (c) The target company at its registered office

Contents of Public announcement (Regulation 15)

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

(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.

(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 Draft Letter of offer (Regulation 16)

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 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.

4. Escrow account (Regulation 17)

Escrow Account means a bank account which is required to be opened by an acquirer who proposes to make public announcement of offer in pursuance of regulation 3, 4, 5 and 6 of SEBI (SAST) Regulations, 2011. The Regulations have made detailed provisions regarding the Escrow Account. These provisions are contained in regulation 17 of SEBI (SAST) Regulations, 2011. Regulation 17(1) of SEBI (SAST) Regulations, 2011 provides that "Not later than two working days prior to the date of the detailed public statement of 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 specified. The purpose of these provisions is to ensure that the acquirer has sufficient funds to pay the consideration under the offer and he has secured sufficient financial arrangement.

I. Timing of opening of Escrow Account: [Regulation 17(1)]

The Acquirer shall open an escrow account *atleast two working days* prior to the date of Detailed Public Statement.

II. Amount to be deposited in Escrow Account: [Regulation 17(1)]

<i>Sl. No.</i>	<i>Consideration payable under the Open Offer</i>	<i>Escrow Amount</i>
a.	On the first Rs. 500 Crores	25% of the consideration
b.	On the balance consideration	An additional amount equal to 10%

It is further provided that where offer is made conditional upon minimum level of acceptance, then higher of following two shall be deposited in the Escrow Account:

Hundred percent of the consideration payable in respect of minimum level of acceptance	Fifty per cent of the consideration payable under the open offer
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If the Acquirer makes any upward revision in the open offer, whether by way of increase in offer price, or of the offer size, then the Acquirer shall make corresponding increases to the amount kept in escrow account prior to making such revision. [Regulation 17(2)]

III. Mode of Deposit in Escrow Account: [Regulation 17(3)]

(a) **Cash Deposit** with any scheduled commercial bank

(b) **Bank guarantee** issued in favor of the manager to the open offer by any scheduled commercial bank

(c) Deposit of **frequently traded and freely transferable equity shares** or other freely transferable securities with appropriate margin subject to compliance with regulation 9(2).

Important Points:

<i>Applicable Regulation</i>	<i>Details</i>	
17(4)	Bank Guarantee or Deposit of Security	Deposit at least 1% of the total consideration payable in cash with schedule commercial bank as part of Escrow Account.
17(5)	Cash deposit	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 lying to the credit of the escrow account

17(6)	Bank Guarantee	The bank guarantee shall be in the favor of manager to the offer and shall be kept valid throughout the offer period and additional 30 days after the payment to the shareholders who have tendered their shares have been made.
17(7)	Securities	Manager to the Open Offer shall be empowered to realize the value of escrow account by way of sale or otherwise. Further in case of any shortfall in the amount in the escrow account, such shortfall shall be made good by the Manager.

IV. Release of amount from Escrow Account [Regulation 17(10)]

The amount lying in escrow account can be released in the following cases only:

1. In case of withdrawal of offer, the entire amount can be released only after certification by the managers to the open offer.
2. The amount deposited in special escrow account is transferred to special bank account opened with the Bankers to an issue; however the amount so transferred shall not exceed 90% of the cash deposit.
3. The balance 10% is released to the acquirer on the expiry of thirty days from the completion of all obligations under the offer.
4. The entire amount to the acquirer on the expiry of thirty days from the completion of all obligations under the offer where the open offer is for exchange of shares or other secured instruments.
5. In the event of forfeiture of amount, the entire amount is distributed in the following manner:
 - 5.1. One third of the amount to Target Company;
 - 5.2 One third of the escrow account to the Investor Protection and Education Fund established under SEBI (Investor Protection and Education Fund) Regulations, 2009;
 - 5.3 Residual one third is to be distributed to the shareholders who have tendered their shares in the offer.

Draft Letter of offer to Target Company and stock exchanges [Regulation 18(1)]

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.

Dispatch of letter of offer to share holders [Regulation 18(2)]

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 stipulated period in sub-regulation (4) of regulation 16:

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.

Letter of offer to the custodian of shares underlying depository receipts (Regulation 18(3))

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

Offer Price

Offer price is the price at which the acquirer announces to acquire shares from the public shareholders under the open offer. The offer price shall not be less than the price as calculated under regulation 8 of the SEBI (SAST) Regulations, 2011 for frequently or infrequently traded shares.

Revision of offer price [Regulation 18(4&5)]

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 three working days before the commencement of the tendering period.

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.

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 the 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 into account potential increase in the number of outstanding shares as on 10th working day from the closure of the open offer.

Disclosure of acquisition during offer period [Regulation 18(6)]

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.

Advertisement before the tendering period [Regulation 18(6)]

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.

Offer period and tendering period

The term 'offer period' pertains to the period starting from the date of the event triggering open offer till completion of payment of consideration to shareholders by the acquirer or withdrawal of the offer by the acquirer as the case may be.

The term 'tendering period' refers to the 10 working days period falling within the offer period, during which the eligible shareholders who wish to accept the open offer can tender their shares in the open offer.

Tenure of tendering period [Regulation 18(8)]

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.

Tendered shares shall not been withdrawn [Regulation 18(9)]

Shareholders who have tendered shares in acceptance of the open offer shall not be entitled to withdraw such acceptance during the tendering period.

Completion of requirements [Regulation 18(10&11)]

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.

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.

Post offer Advertisement [Regulation 18(12)]

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.

(b) 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 target company are listed, and the target company at its registered office.

Conditional offer (Regulation 19)

An offer in which the acquirer has stipulated a minimum level of acceptance is known as a 'conditional offer'.

'Minimum level of acceptance' implies minimum number of shares which the acquirer desires under the said conditional offer. If the number of shares validly tendered in the conditional offer, are less than the minimum level of acceptance stipulated by the acquirer, then the acquirer is not bound to accept any shares under 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 offer (Regulation 20)

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 PA.

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)

The acquirer shall complete payment of consideration whether in the form of cash, or as the case may be, by issue, exchange/transfer of Securities, to all shareholders who have tendered shares in acceptance of the open offer within 10 working days of the expiry of the tendering period, by transferring the consideration to a Special Escrow Account.

Withdrawal of open offer (Regulation 23)

An open offer once made cannot be withdrawn except in the following circumstances:

- Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the DPS and the letter of offer;
- Any condition stipulated in the SPA attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, subject to such conditions having been specifically disclosed in the DPS and the letter of offer;
- Sole acquirer being a natural person has died;

- Such circumstances which in the opinion of SEBI merit withdrawal of open offer.

Obligations of the acquirer.(Regulation 25)

(1) 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.

(2) 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.

(3) 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.

(4) The acquirer and persons acting in concert with him shall not sell shares of the target company held by them, during the offer period.

(5) The acquirer and persons acting in concert with him shall be jointly and severally responsible for fulfillment of applicable obligations under these regulations.

Obligations of the target company.(Regulation 26)

(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,—

- 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;
- effect any material borrowings outside the ordinary course of business;
- 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.

(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.

Obligations of the manager to the open offer.(Regulation 27)

(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.

DEFENSE STRATEGIES TO TAKEOVER BIDS

A hostile tender offer made directly to a target company's shareholders, with or without previous overtures to the management, has become an increasingly frequent means of initiating a corporate combination. As a result, there has been considerable interest in devising defense strategies by actual and potential targets.

Defenses can take the form of fortifying one self, i.e., to make the company less attractive to takeover bids or more difficult to take over and thus discourage any offers being made. These include, inter alia, asset and ownership restructuring, anti-takeover constitutional amendments, adoption of poison pill rights plans, and so forth. Defensive actions are also resorted to in the event of perceived threat to the company, ranging from early intelligence that a "raider" or any acquirer has been accumulating the company's stock to an open tender offer. Adjustments in asset and ownership structures may also be made even after a hostile takeover bid has been announced.

Defensive Measures

Adjustments in Asset and Ownership Structure

Firstly, consideration has to be given to steps, which involve defensive restructuring 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, sale to the third party of assets which made the target attractive to the bidder, and issuance of new securities with special provisions conflicting with aspects of the takeover attempt.

A second common theme is to create a consolidated vote block allied with target management.

Thus, securities were 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 sizable management-allied block in place.

A third common theme is the dilution of the bidder's vote percentage through issuance of new equity claims. However, this option in India is strictly regulated vide Section 81A and Regulation 23 of the Takeover Code, 1997. A hostile bidder in these circumstances usually fails in the bid if the bidder has resource constraints in increasing its interest proportionately.

The "Crown Jewel" Strategy

The central theme in such a strategy is the divestiture of major operating unit most coveted by the bidder-commonly known as the "crown jewel strategy". 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 this novel strategy, 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, the practice in India is not so flexible. The Companies Act, 1956 has laid down certain restrictions on the power of the Board. Vide Section 293(1), the Board cannot sell the whole or substantially the whole of its undertakings without obtaining the permission of the

company in a general meeting. However, the SEBI (Substantial Acquisitions and Takeover) Regulations, 1997 vide Regulation 23 prescribes general obligations for the Board of Directors of the target company. Under the said regulation, it will be difficult for any target company to sell, transfer, encumber or otherwise dispose of or enter into an agreement to sell, transfer, encumber or for dispose of assets once the predator has made a public announcement. Thus, the above defense can only be used before the predator/bidder makes the public announcement of its intention to takeover the target company.

The "Packman" Defence

This strategy, although unusual, is called the packman strategy. Under this strategy, the target company 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.

Targeted Share Repurchase or "Buyback"

This strategy is really one in which the target management uses up a part of the assets of the company on the one hand to increase its holding and on the other 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" the world over is used when the excess money with the company neither gives it adequate returns on reinvestment in production or capital nor does it allow the company to redistribute it to shareholders without negative spin offs.

An example that demonstrates this contention is the distribution of high dividends in a particular year if not followed in the next sends the share prices spiraling down. Also the offer once made cannot be withdrawn unlike a public offer under the Takeover Regulations. This means that if the raider withdraws its public offer it would imply that the target company would still have to go through with the buyback. This is an expensive proposition if the only motivation to go for the buyback was to dissuade the raider.

"Golden Parachutes"

Golden parachutes refer to the "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. The provisions which would govern a "golden parachute" employment contract in India would be Sections 318-320 of the Companies Act, 1956 which govern the provisions compensation for loss of office. Thus, a perusal of the said provisions would show that payments as compensation for the loss of office is allowed to be made only to the managing director, a director holding an office of manager or a whole time director. Therefore, "golden parachute" contracts with the entire senior management, as is the practice in the U.S., is of no consequence in India. Moreover, payment of compensation is expressly disallowed if in the case of a director resigning as a consequence of reconstruction of the company, or its amalgamation with any other corporate bodies. Furthermore, there exists a maximum limit as to the quantum of the compensation, subject to the exclusionary categories, to the total of the remuneration the director would have earned for the unexpired residue of term of office, or three years, whichever is less.

Anti-takeover amendments or “shark repellants”

An increasingly used defense mechanism is anti-takeover amendments to the company's constitution or articles of association, popularly called “shark repellants”. Thus, as with all amendments of the charter/articles of association of a company, the anti-takeover amendments have to be voted on and approved by the shareholders. The practice consists of the companies changing the articles, regulations, bye-laws etc. to be less attractive to the corporate bidder.

Anti takeover amendments generally impose new conditions on the transfer of managerial control of the firm through a merger, tender offer, or by replacement of the Board of Directors. In India every company has the clear power to alter its articles of association by a special resolution as provided under Section 31 of the Companies Act. The altered articles will bind the members just in the same way as did the original articles. But that will not give the altered articles a retrospective effect. The power of alteration of the articles as conferred by Section 31 is almost absolute. It is subject only to two restrictions. In the first place, the alteration must not be in contravention of the provisions of the Act, i.e. should not be an attempt to do something that the Act forbids. Secondly, the power of alteration is subject to the conditions contained in the memorandum of association i.e. alter only the articles of the company as relate to the management of the company but not the very nature and constitution of the company. Also the alteration should not constitute a ‘fraud on the minority’.

Types of Anti-Takeover Amendments

There are four major types of anti-takeover amendments.

Supermajority Amendments

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

Fair-Price Amendments

These are supermajority provisions with a board out clause and an additional clause waiving the supermajority requirement if a fair-price is paid for the purchase of all the shares. The fair price is normally defined as the highest priced paid by the bidder during a specified period. Thus, fair-price amendments defend against two-tier tender offers that are not approved by the target's board.

Classified Boards

Another major 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 United States, the legal position of such classified or staggered boards is quite flexible. An ideal example is when a nine-member board may be divided into 3 classes, with only three 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 two annual general meetings to gain control of the Board of Directors. In the Indian company law regime, the scope for such amendments is highly restricted. Section 255 of the Companies Act, 1956 is designed to eradicate the mischief caused by perpetual managements. At an AGM only one-third of the directors of the company, whose offices are determinable by retirement, will retire. Therefore putting the example in the Indian context, in case of 9 directors, 3 can be made permanent directors by amending the articles i.e. one-third can be given permanent appointment, under Section 255. Thus the acquirer would have to wait for atleast three annual general meetings before he gains control of the board. But this is subject to Section 284, which provides that the company may by an ordinary resolution, remove a director before the expiration of his period of office. Thus any provision in the articles of the company or any agreement between a director and a company by which the director is rendered irremovable from office by an ordinary resolution would be void, being contrary to the Act. Therefore, to ensure domination of the board of the target management, there needs to be strength to defeat an ordinary resolution.

Authorization of Preferred Stock

Vide such provisions, the Board of Directors is authorized 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 contest. Thus, this device is a defense against hostile takeover bids, although historically it was used to provide the Board of Directors with flexibility in financing under changing economic conditions.

Refusal to Register Transfer of Shares

Refusal by the Board of Directors to register a transfer is an important strategy to avert a takeover.

Poison Pill Defenses

A controversial but popular defense mechanism against hostile takeover bids is the creation of securities called "poison pills". These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event such as a tender offer for the control or the accumulation of a specified percentage of target shares. These rights take several forms but all are difficult and costly to acquire control of the issuer, or the target firm. 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 anytime 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. Proponents of the poison pill argue that poison pills do not prohibit all takeovers but enhance the ability of the Board of Directors to bargain for a "fair price".

Legal Issues Concerning Poison Pill Devices

The legality of poison pills has been questioned in courts of law because they alter the relationships among the principals (shareholders) without their approval by vote. In most poison pills, the agents (Board of Directors) adopt rights plans which

treat shareholders of the same class unequally in situation involving corporate control. Thus poison pills have been vulnerable to court review especially in the United States.

Corporate restructuring through the M&A route is here to stay. The defenses mentioned above are only enumerative of the fast evolving corporate practice in this regard. This kind of corporate synergy requires that the legal paradigm so adjust itself, that it is in a position to optimize the benefits that accrue from such restructuring.

Globalization of the Indian economy started changing the landscape of the Indian industry. Following economic reforms, there was a discernible trend among promoters and established corporate groups towards consolidation of market share and diversification into new areas, in a limited way through acquisition of companies, but in a more pronounced manner through mergers and amalgamations.

Perhaps the biggest facilitators for Indian businessmen were the most flexible norms and terms announced by the Indian government, which had announced that the companies with a proven track would be allowed to make acquisitions abroad in non-related areas as well as their major fields. In addition, the government removed the \$100 million cap on foreign investment by Indian companies and raised it to the net worth of the companies. The Reserve Bank of India (RBI), also stipulated that the local companies could raised external commercial borrowings for overseas direct investments in their joint ventures and wholly owned subsidiaries, including mergers and acquisitions overseas.

As a direct result of such liberal regulations, Indian companies, including branches of multinational, became more adventurous in their business forays.

CROSS BORDERS 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.

The firms engaged in Cross borders takeovers can be of three types:

- First, firm incorporated in one country listed in different countries including its own e.g. ARCELOR.
- Second, firm incorporated in one country listed exclusively in a foreign country e.g. TELVENT.
- And lastly, firms incorporated in one country listed in more than one foreign country e.g. EADS.

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. One has to look outside its boundaries and play out in the global arena to seek new opportunities and scale new heights. Such companies have already improved profitability through better cost management and diversification at the national field.

Another main reason for cross border takeovers is to attain monopoly. Acquirer company is always on the look out for companies which are financially vulnerable but have untapped resources or intellectual capital that can be exploited by the purchaser.

Globalization has certainly helped in the recent spurt in cross border takeovers. The key feature of globalization is that it integrates world economies together. Many nations have opened their economies and made laws and regulations that attract new companies to come into the country.

What are the legal implications to a cross border merger and takeover? International law prescribes that in a cross-border merger, the target firm becomes a national of the country of the acquirer. Among other effects, the change in nationality implies a change in investor protection, because the law that is applicable to the newly merged firm changes as well. More generally, the newly created firm shares features of the corporate governance systems of the two merging firms. Therefore, Cross-border mergers provide a natural experiment to analyse the effects of changes-both improvements and deteriorations, in corporate governance on firm value.

There are various benefits of cross border takeovers. Firstly, they provide newer and better technology. It also provides employment opportunities as the firm is bigger than before and more employees are to be inducted in the merged company. It generally enhances the market capitalization of the combined entity.

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.

Gross-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.

There are various challenges to cross border takeovers. Global takeovers may result into a skyrocketing share prices because merger and acquisition have a substantial effect on the whole economy. Management also faces a big challenge as there is explosion of new services, new products, new industries and new markets and new technological innovations as well.

But the biggest challenge to a cross border merger and takeover are the cultural issues. According to KPMG study, "83% of all the mergers and acquisitions failed to produce any benefit for the shareholders and over half actually destroyed value". Interviews of over 100 senior executives involved in these 700 deals over a two year period revealed that the overwhelming cause of failure is the people and the cultural differences. So, the cultural issues are to be aptly dealt with.

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

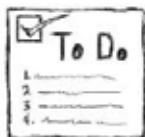
proposals but also a corporate bonding for which both the entities have to sit and arrive at a meaningful and deep understanding of all the issues as mentioned above. It will also help them to get meaningful solutions.

There has been a substantial increase in the quantum of funds flowing across nations in search of takeover candidates. The UK has been the most important foreign investor in the USA in recent years, with British companies making large acquisitions. With the advent of the Single Market, the European Union now represents the largest single market in the world. European as well as Japanese and American companies have sought to increase their market presence by acquisitions.

Many cross-border deals have been in the limelight. The biggest were those of Daimler Benz-Chrysler, BP-Amoco, Texas Utilities-Energy Group, Universal Studios-Polygram, Northern Telecom-Bay Networks and Deutsche Bank-Bankers Trust. Nearly 80 per cent of the transactions were settled in stock rather than through cash.

The 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 strategical acquisitions. Tata Motors acquisition of Daewoo Commercial Vehicle Company, Tata Steel acquisition of Singapore's NatSteel, Reliance's acquisition of Flag is the culmination of Indian Company's efforts to establish a presence outside India.

Students may note that the economic, accounting, taxation, financial, stamp duty aspects are explained in Chapter 3.



Activities to do

1. Reading and referring to open offer document filed with SEBI/published in the news paper
2. Reading various case studies on Indian and overseas takeovers.
3. Reading of SEBI (SAST) Regulation 2011

Annexure -I

FREQUENTLY ASKED QUESTIONS ON SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011*

These FAQs offer only a simplistic explanation/clarification of terms/concepts related to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ["SAST Regulations, 2011"]. Any such explanation/clarification that is provided herein should not be regarded as an interpretation of law nor be treated as a binding

**Source:* www.sebi.gov.in

opinion/guidance from the Securities and Exchange Board of India ["SEBI"]. For full particulars of laws governing the substantial acquisition of shares and takeovers, please refer to actual text of the Acts/Regulations/Circulars appearing under the Legal Framework Section on the SEBI website.

1. Please provide details as to how the regulatory framework governing Takeovers has evolved over a period?

- The earliest attempts at regulating takeovers in India can be traced back to the 1990s with the incorporation of Clause 40 in the Listing Agreement.
- While, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 which were notified in November 1994 made way for regulation of hostile takeovers and competitive offers for the first time; the subsequent regulatory experience from such offers brought out certain inadequacies existing in those Regulations. As a result, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were introduced and notified on February 20, 1997, pursuant to repeal of the 1994 Regulations.
- Owing to several factors such as the growth of Mergers & Acquisitions activity in India as the preferred mode of restructuring, the increasing sophistication of takeover market, the decade long regulatory experience and various judicial pronouncements, it was felt necessary to review the Takeover Regulations 1997. Accordingly, SEBI formed a Takeover Regulations Advisory Committee (TRAC) in September 2009 under the Chairmanship of (Late) Shri. C. Achuthan, Former Presiding Officer, Securities Appellate Tribunal (SAT) for this purpose. After extensive public consultation on the report submitted by TRAC, SEBI came out with the SAST Regulations 2011 which were notified on September 23, 2011. The Takeover Regulations, 1997 stand repealed from October 22, 2011, i.e. the date on which SAST Regulations, 2011 come into force.

2. What is the significance of the notification related to SAST Regulations, 2011 published on September 23, 2011?

Vide the said notification dated September 23, 2011, the SAST Regulations, 2011 were notified to replace SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, since repealed.

SAST Regulations, 2011 come into force with effect from October 22, 2011.

SAST Regulations, 2011 are available on SEBI's website under the section legal framework.

3. When the Takeover Regulations, 2011 have come in to force?

October 22, 2011 i.e. 30th day from the date of notification. (September 23, 2011 i.e. date of notification has been taken as the first day for computing 30 days).

4. What is meant by Takeovers & Substantial acquisition of shares?

When 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.

5. Who is an 'Acquirer'?

Acquirer means any person who, whether by himself, or through, or with persons acting in concert with him, directly or indirectly, acquires or agrees to acquire shares or voting rights in, or control over a target company. An acquirer can be a natural person, a corporate entity or any other legal entity.

6. What is meant by Persons acting in Concert or 'PAC' in the context of SAST Regulations, 2011?

PACs are individual(s)/company (ies) or any other legal entity (ies) who, with a common objective or purpose of acquisition of shares or voting rights in, or exercise of control over the target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly cooperate for acquisition of shares or voting rights in, or exercise of control over the target company.

SAST Regulations, 2011 define various categories of persons who are deemed to be acting in concert with other persons in the same category, unless the contrary is established.

7. What is a 'Target Company'?

The company/body corporate or corporation whose equity shares are listed in a stock Exchange and in which a change of shareholding or control is proposed by an acquirer, is referred to as the 'Target Company'.

8. What is an open offer under the SAST Regulations, 2011?

An open offer is an offer made by the acquirer to the shareholders of the target company inviting them to tender their shares in the target company at a particular price. The primary purpose of an open offer is to provide an exit option to the shareholders of the target company on account of the change in control or substantial acquisition of shares, occurring in the target company.

9. Under which situations is an open offer required to be made by an acquirer?

If an acquirer has agreed to acquire or acquired control over a target company or shares or voting rights in a target company which would be in excess of the threshold limits, then the acquirer is required to make an open offer to shareholders of the target company.

10. Can the acquisitions, resulting from any agreement attracting the obligation to make an open offer, be completed by way of transactions settled on stock exchange such as bulk/block deals?

No. Regulation 22(1) of Takeover Regulations 2011 specifically provides that the acquirer shall not complete the acquisition of shares and voting rights in, or control over, the target company, whether by way of subscription of shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period.

In cases where acquisitions, resulting from any agreement triggering open offer are sought to be completed through transactions such as bulk/block deals, settled on a recognized stock exchange, the same would get completed/settled on T+2 basis i.e. within 2 days after the date

of such transaction. Therefore such acquisitions, if done, will not be in line with the provisions of Regulation 22(1) since the same would result in completion of the triggering acquisition before the expiry of the offer period. Hence the acquisition resulting from any agreement attracting the obligation to make an open offer cannot be executed through transactions such as block/bulk deal.

11. 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.

12. 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.

13. 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.

14. Whether for the purpose of the creeping acquisition in terms of the

Takeover Regulations, 2011, the Creeping Acquisition made during the period 01.04.2011 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.

15. Whether hostile offers/bids are permitted under the new regulations?

There is no such term as hostile bid in the regulations. The hostile bid is generally understood to be an unsolicited bid by a person, without any arrangement or MOU with persons currently in control.

Any person with or without holding any shares in a target company, can make an offer to acquire shares of a listed company subject to minimum offer size of 26%.

16. What is a voluntary open offer?

A voluntary open offer under Regulation 6, is an offer made by a person who himself or through Persons acting in concert ,if any, holds 25% or more shares or voting rights in the target company but less than the maximum permissible non-public shareholding limit.

17. 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.

18. 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.

19. 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 6 months after the completion of the open offer except for a voluntary open offer.
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20. Proposed acquisition of which type of securities, beyond the stipulated thresholds, leads to an obligation of making an open offer?

Acquisition of equity shares carrying voting rights or any security which entitles the holder thereof to exercise voting rights, beyond the prescribed threshold limits, leads to the obligation of making an open offer. GDR (Global Depository Receipts) which by virtue of depository agreement or otherwise, carrying voting rights is an example of a security which entitles the holder to exercise voting rights but is not an equity share.

21. Do all acquisitions of shares in excess of the prescribed limits and / or control lead to an open offer?

No. In respect of certain acquisitions, SAST Regulations, 2011 provide exemption from the requirements of making an open offer, subject to certain conditions being fulfilled. For example, acquisition pursuant to interse transfer of shares between certain categories of shareholders; acquisition in the ordinary course of business by entities like Underwriter registered with SEBI, stock brokers, merchant bankers acting as stabilizing agent, Scheduled Commercial Bank (SCB), acting as an escrow agent; etc. For more details, please refer to regulation 10 of SAST Regulations, 2011.

22. Does SEBI have the power to grant exemption to an acquirer from making an open offer or grant relaxation from the strict compliance with prescribed provisions of the open offer process, even if the proposed acquisition of shares or control is not covered under the exemptions prescribed in SAST Regulations, 2011?

Yes. In the interest of the securities market, upon an application made by the acquirer, SEBI has the power to grant exemption from the requirements of making an open offer or grant a relaxation from strict compliance with prescribed provisions of the open offer process.

Before undertaking such acquisition, SEBI may at its discretion refer the application to a panel of experts constituted by SEBI. The orders passed in such matters would be uploaded on SEBI's website.

23. Do only direct acquisitions of shares or control of the target company lead to the requirement of making an open offer?

No. The requirement to make an open offer arises even if there is an indirect acquisition of shares and/or control of the target company. An indirect acquisition would be the acquisition of shares or control over another entity by an acquirer that would enable the acquirer to exercise or direct to exercise voting rights beyond the stipulated thresholds or control over the target company.

24. What is a competitive 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 PA.

25. What happens if there is a competitive offer?

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.

26. What is a conditional offer?

An offer in which the acquirer has stipulated a minimum level of acceptance is known as a 'conditional offer'.

27. What is meant by the term 'minimum level of acceptance'?

'Minimum level of acceptance' implies minimum number of shares which the acquirer desires under the said conditional offer. If the number of shares validly tendered in the conditional offer, are less than the minimum level of acceptance stipulated by the acquirer, then the acquirer is not bound to accept any shares under the offer.

28. 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.

29. 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.

30. What is 'offer price' and can the acquirer revise the offer price?

Offer price is the price at which the acquirer announces to acquire shares from the public shareholders under the open offer. The offer price shall not be less than the price as calculated under regulation 8 of the SAST Regulations, 2011 for frequently or infrequently traded shares.

Acquirer can make an upward revision to the offer price at any time up to 3

working days prior to the opening of the offer.

31. How do you determine whether the shares of the target company are frequently traded or infrequently traded?

The shares of the target company will be deemed to be frequently traded if the traded turnover on any stock exchange during the 12 calendar months preceding the calendar month, in which the PA is made, is at least 10% of the total number of shares of the target company. If the said turnover is less than 10%, it will be deemed to be infrequently traded.

32. 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.

33. 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.

34. Will the promoter be entitled to non-compete or any other fees other than the offer price?

As per the SAST Regulations, 2011, all shareholders will be given equitable treatment and no Promoter or shareholder can be paid any extra price, by whatever name it may be called.

35. 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.

36. What is the difference between 'offer period' and 'tendering period'?

The term 'offer period' pertains to the period starting from the date of the event triggering open offer till completion of payment of consideration to shareholders by the acquirer or withdrawal of the offer by the acquirer as the case may be.

The term 'tendering period' refers to the 10 working days period falling within the offer period, during which the eligible shareholders who wish to accept the open offer can tender their shares in the open offer.

37. Who are eligible shareholders?

All shareholders of the target company other than the acquirer, persons acting in concert with him and the parties to underlying agreement which triggered open offer including persons deemed to be acting in concert with such parties, irrespective of whether they are shareholders as on identified date or not.

38. 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 working days of the completion of payments under the open offer.

39. What is 'identified date' in the context of SAST Regulations, 2011?

Identified date means the date 10 working days prior to the commencement of the tendering period, for the purposes of determining the shareholders of the target company to whom the letter of offer along with the form of acceptance shall be sent.

40. What is the purpose of the escrow account in the open offer process?

The acquirer is required to deposit some percentage of the offer price, in an escrow account before issuing a Detailed Public Statement. This serves as a security for performance of acquirer's obligations under the open offer.

41. At what point of time in the process does a Merchant Banker need to be appointed and what is its role in the open offer process?

The Acquirer is required to appoint a Merchant Banker, registered with SEBI, as manager to the open offer before making the PA. The PA is required to be made through the said manager to the open offer.

The manager to the open offer has to exercise due diligence and ensure compliance with SAST Regulations, 2011. The manager to the open offer has to ensure that the contents of the PA, DPS, letter of offer and the post offer advertisement are true, fair and adequate in all material aspects and are in compliance with the requirements of SAST Regulations, 2011. Further, the manager to the open offer has to ensure that the acquirer is able to implement the open offer and firm arrangements for funds through verifiable means have been made by the acquirer to meet the payment obligations under the open offer.

42. What is a letter of offer? Does SEBI approve the draft 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.

Prior to dispatch of letter of offer to shareholders, a draft letter of offer is submitted to SEBI for observations. SEBI may give its comments on the draft letter of offer as expeditiously as possible, but not later than 15 working days of the receipt of the draft letter of offer. SEBI may also seek clarifications and additional information from the manager to the offer and in such a case the period for issuance of comments shall be extended to the fifth working day from the date of receipt of satisfactory reply to the clarifications or additional information sought.

Filing of draft Letter of Offer with SEBI should not in any way be deemed or construed to mean that the same has been cleared, vetted or approved by SEBI. The draft Letter of Offer is submitted to SEBI for the limited purpose of overseeing whether the disclosures contained therein are generally adequate and are in conformity with the Regulations. SEBI does not take any responsibility either for the truthfulness or correctness of any statement, financial soundness of acquirer, or of PACs, or of the Target Company, whose shares are proposed to be acquired or for the correctness of the statements made or opinions expressed in the Letter of Offer.

43. How do I find the status of the draft letter of offer filed with SEBI?

SEBI updates the processing status of draft letter of offers filed with it on its website on a periodic basis under the section “offer documents”.

44. What are the disclosures required under the Public Announcement?

Public Announcement contains minimum details about the offer, the transaction that triggered the open offer obligations, acquirer, selling shareholders (if any), offer price and mode of payment. SEBI has prescribed format of Public Announcement, which is available in the SEBI website.

45. What are the disclosures required under the Detailed Public Statement?

Detailed Public Statement contains disclosure in more detail about the acquirer/PACs, target company, financials of the acquirers/PACs/target company, the offer, terms & conditions of the offer, procedure for acceptance and settlement of the offer, escrow account etc. SEBI has prescribed the format for Detailed Public Statement. The same is available in the SEBI website.

46. What are the disclosures required under the Letter of offer?

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.

47. Is the financial disclosure standard as outlined in the Format for Detailed Public Statement (DPS) to the Shareholders of the Target Company (TC) in terms of Regulation 15(2) in point I(A) applicable to PACs too since the above clause refers just to the Acquirer ?

Yes, as clearly indicated in the format, the details of financial disclosure are required to be given for the acquirer as well Persons acting in concert with Acquirers.

48. If an acquirer enters into a SPA and triggers an open offer, when can the acquirer acquire shares proposed to be transferred under the SPA?

The acquirer can acquire shares under the SPA only after payment in respect of shares accepted under the open offer is complete but not later than 26 weeks from the expiry of the offer period.

49. 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 buyback 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.

50. What is the manner in which the acquirer decides the acceptances from each shareholder?

The registrar to the open offer validates all the tenders in the open offer and creates a basis of acceptance in consultation with the manager to the open offer detailing validly and invalidly tendered shares received in the open offer.

In case, the valid shares tendered are less than the offer size, all the valid tendered shares are accepted. If the validly tendered shares in the open offer are more than the offer size, then the valid tenders are accepted on a proportionate basis. This is illustrated as below:

The company has a paid up share capital of Rs. 10,000/- (1000 shares of Rs. 10/- each) and shareholder A is holding 50 shares totaling to Rs. 500. In case an open offer is made for 26% of the share capital and the shares tendered are 300 which are in excess of the 26% shareholding, the shares will be accepted by the acquirer on a proportionate basis.

No of shares of A accepted =

$$\frac{(\text{total number of shares offered} \times \text{no. of shares tendered by A})}{\text{Total shares tendered in the open offer by all investors}}$$

$$= \frac{260}{300} \times 50 = 43.33 \text{ shares} \sim 43 \text{ shares}$$

Shares which are invalid or are rejected due to the valid acceptances being more than the offer size are subsequently returned to the respective shareholders within 10 working days of the closure of the open offer.

51. What are the modes of payment under the open offer?

Payment considerations by the acquirer under the open offer can be made by cash and/or by issue of equity shares and/or secured debt instruments (investment grade) and / or convertible debt instruments (convertible to equity shares) of acquirer (or PACs, if any) if such equity shares and secured debt instruments are listed.

The chosen mode of payment is required to be disclosed in the open offer document meant for shareholders of the target company.

52. Can an acquirer withdraw the open offer once made?

An open offer once made cannot be withdrawn except in the following circumstances:

- Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the DPS and the letter of offer;
- Any condition stipulated in the SPA attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, subject to such conditions having been specifically disclosed in the DPS and the letter of offer;
- Sole acquirer being a natural person has died;
- Such circumstances which in the opinion of SEBI merit withdrawal of open offer.

53. If post open offer the shareholding of the acquirer goes beyond the maximum permissible non public shareholding limit, can the acquirer immediately make a delisting offer in terms of Delisting Regulations. ?

No. The acquirer cannot launch a voluntary delisting offer in terms of Delisting Regulations of SEBI, unless a period of twelve months has elapsed from the date of the completion of the offer period.

54. I was not holding shares on the identified date but acquired shares subsequently. Am I eligible to participate in the open offer?

Yes. Shareholders who acquire shares after the identified date are eligible to

participate in the open offer provided they submit their valid tenders before the end of the tendering period.

You may send a request to the registrar to the open offer or manager to the open offer for obtaining the letter of offer including the form of acceptance. Alternately, you can make an application on plain paper giving certain specific details. Please refer to the Detailed Public Statement of the acquirer for instructions in this regard.

55. How will shareholder of the target company know that an open offer is made by the acquirer?

SAST Regulations, 2011 provides for wide dissemination of the information related to an open offer. The DPS and pre-offer announcements before commencement of the tendering period are published in national newspapers as well as in one newspaper of the regional language of the place where registered office of the target company is located.

The final letter of offer is required to be dispatched to all shareholders whose names appear as shareholders as on the identified date. Further, the PA, the DPS and other announcements are also filed with the stock exchange and SEBI, and are uploaded on their respective websites for information dissemination.

56. For how many days is an open offer required to be kept open?

The offer is required to be kept open for ten working days.

57. How do I get the Letter of Offer and tender my shares under the open offer?

The letter of offer along with form of acceptance is sent to all eligible shareholders of the target company, who are shareholders of the target company as on the identified date. The eligible shareholder has to fill in the form of acceptance sent along the letter of offer and submit the same to the registrar to the open offer or the manager to the open offer. In case the shareholder has not received the letter of offer, such shareholder can request the registrar to the open offer or manager to the open offer for the same. Further, the letter of offer along with the form of acceptance will also be available on SEBI's website.

58. What are the documents that the shareholders should go through before tendering their shares pursuant to the open offer?

Before tendering their shares pursuant to the open offer, the shareholders are advised to go through the Detailed Public Statement, Letter of offer and also the recommendations and observations of the Committee of Independent Directors on the offer. It may be noted that all the aforesaid documents are available on SEBI website. Further 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.

59. Do I need to convert my physical shares into demat before tendering in the open offer?

Shareholders need not convert their physical shares into demat form before tendering shares in the open offer. Physical shares can be tendered in an open offer along with the form of acceptance and such documents as mentioned in the section 'Procedure for acceptance and settlement of the Offer' in the letter of offer.

60. Can I withdraw or revise my tender?

No. Once a shareholder has tendered his shares in the open offer made by the acquirer, he/ she cannot withdraw/ revise his/her request.

61. Can I tender my shares after the closure of the tendering period?

No. Your acceptance for tendering shares in the offer should reach the collection center on or before the last date of tendering period.

62. I hold shares which are partly paid-up. Can I tender these shares in the open offer?

Yes, partly paid-up shares can be tendered in the open offer. The letter of offer contains the offer price of the partly paid up share, which can be different from the offer price for fully paid up share.

63. When will the shareholder receive (i) intimation about acceptance/ rejection of his shares tendered under the open offer or (ii) consideration for shares accepted by the acquirer?

The shareholder shall receive (i) intimation about acceptance/ rejection of his shares tendered under the open offer or (ii) consideration for shares accepted by the acquirer, within 10 working days of the closure of the open offer.

64. What happens if regulatory approvals are delayed?

If the regulatory approvals required for completing the open offer and acquisition are delayed, the acquirer may be unable to make the payment within 10 working days of closure of open offer. In such an event, SEBI may grant extension of time for making payments, subject to the acquirer agreeing to pay interest to the shareholders of the target company for the delay at such rate as may be specified by SEBI.

If statutory approvals are required for some but not all shareholders, the acquirer can make payment to such shareholders in respect of whom no statutory approvals are required in order to complete the open offer.

65. If the payment is delayed beyond 10 working days of the closure of the tendering period (closure of open offer), will the acquirer be required to compensate the public shareholders who have participated under the offer?

Acquirer is required to complete the payment of consideration to shareholders who have accepted the offer within 10 working days from the date of closure of the open offer. If there is a delay in payment of consideration (not due to non receipt of statutory approvals), it would be treated as a violation of the SAST Regulations, 2011 and SEBI may issue direction to such acquirer including direction to pay interest.

66. Whom do I approach if I have any grievance in respect of the open offer, delay in receipt of consideration / unaccepted shares etc.?

The shareholder of the target company should approach the manager to the open offer or the registrar to the open offer for any grievance. However, if the shareholder is not satisfied or does not receive a satisfactory response to his / her grievance, he may approach SEBI through online SEBI Complaint Redressal System (SCORES) at www.scores.gov.in.

In case, during the open offer or before the starting of the open offer, any investor has any comment/ complaint about the disclosures given by the acquirer in Public Announcement or in Detailed Public statement or in draft Letter of offer information, he can write to Corporate Finance Department, Division of Corporate Restructuring at SEBI Bhavan, Plot No.C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai 400 051. Please note that PA/DPS, Draft Letter of offer are also available on website of SEBI.

67. Where can an investor get more information related to the SAST Regulations, 2011?

An investor can get more information related to the SAST Regulations, 2011 from the SEBI website and from the Investors website of SEBI.

68. What are the disclosures (other than the ones given in PA/ DPS/ Letter of offer for the open offer) required to be made in terms of SAST Regulations, 2011, by whom, when and to whom?

Event based Disclosures

(Please note the word "shares" for disclosure purposes include convertible securities also.)

- (a) Any person, who along with PACs crosses the threshold limit of 5% of shares or voting rights, has to disclose his aggregate shareholding and voting rights to the Target Company at its registered office and to every Stock Exchange where the shares of the Target Company are listed within 2 working days of acquisition as per the format specified by SEBI.
- (b) Any person who holds 5% or more of shares or Voting rights of the target company and who acquires or sells shares representing 2% or more of the voting rights, shall disclose details of such acquisitions/sales to the Target company at its registered office and to every Stock Exchanges where the shares of the Target Company are listed within 2 working days of such transaction, as per the format specified by SEBI. Continual disclosures of aggregate shareholding shall be made within 7 days of financial year ending on March 31 to the target company at its registered office and every stock exchange where the shares of the Target Company are listed by:
 - (i) Shareholders (along with PACs, if any) holding shares or voting rights entitling them to exercise 25% or more of the voting rights in the target company.
 - (ii) Promoter (along with PACs, if any) of the target company irrespective of their percentage of holding.

Disclosures of encumbered shares

- (a) The promoter (along with PACs) of the target company shall disclose details of shares encumbered by them or any invocation or release of encumbrance of shares held by them to the target company at its registered office and every stock exchange where shares of the target company are listed, within 7 working days of such event.

69. How to compute trigger limits specified above for disclosures.

The word “shares” for disclosure purposes include convertible securities also. Hence for computation of trigger limits for disclosures given above, percentage w.r.t shares shall be computed taking in to account total number of equity shares and convertibles and the percentage w.r.t voting rights shall be computed after considering voting rights on equity shares and other securities (like GDRs, if such GDRs carry voting rights)

An illustration is provided below for the calculation of trigger limits for disclosures given in point (b) of the reply to query (13).

Total Shares/ voting capital of the company

- Company A has 100 equity shares, 50 partly convertible Debentures (PCDs) and 10 GDRs. 1 GDR carries 1 voting right.
- Total shares of company A= $100+50+10 = 160$
- Total voting capital of Company A= $100+10=110$

Persons B's holding of shares and voting rights

- Person B has 8 equity shares, 7 PCDs and 1 GDR.
- Person B has $8+7+1 = 16$ shares (shares for disclosure purpose includes convertible securities)
- Person B's holding in terms of shares= $16/160=10\%$ of shares
- Person B's voting rights= $8+1= 9$ voting rights
- Person B's holding in terms of voting rights = $9/110=8\%$ of voting rights

Since person B is holding more than 5% of shares or voting rights, he is required to make disclosures for any acquisition/ sale of 2% or more of shares or voting rights.

Acquisition by Person B

Scenario I

- Person B acquires 2 equity shares and 2 PCDs.
- In terms of shares, person B has acquired $4/160=2.5\%$ of shares
- In terms of voting rights, person B has acquired $2/110= 1.8\%$ of voting rights

Since acquisition done by person B represents 2 % or more of shares, the disclosure obligation as stated at Reply of Q-13(b) is triggered.

Scenario II

Person B acquires 20 PCDs

In terms of shares, person B has acquired 20 shares, i.e. 20/160 i.e. 12.5% shares.

In terms of voting rights, he has not acquired a single voting right i.e. 0 voting right

However, since acquisition done by person B represents 2% or more of shares (though no voting rights), the disclosure obligations as stated at (b) in reply 13 is triggered.

70. Whether promoters are required to disclose details of arrangements which place encumbrances on shares like lock-in stipulations, non-disposal undertaking, right of first refusal etc?

As per Regulation 28(3), the term “encumbrance” shall include a pledge, lien or any such transaction, by whatever name called.” The promoters have to understand the nature of encumbrance and those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly, are required to be disclosed to the stock exchanges in terms of the Takeover Regulations, 2011.

71. If the shares of the holding company of a target company are pledged, whether the same would be covered under disclosures of “Encumbered shares” by promoters of the Target Company?

Yes, details of such pledge would be covered under disclosure of “encumbrance” as required under the Regulations

72. Whether furnishing of a Non Disposal Undertaking (NDU) by promoters to the lenders would be covered under disclosures of “Encumbered shares” by promoters of the Target Company?

No, mere NDU by promoters will not be covered under the scope of disclosures of “Encumbrance” under the Regulations. However if NDUs are given along with side-agreements which may entail the risk of shares held by the promoters being appropriated or sold by a third party, directly or indirectly, the same needs to be disclosed.

73. What happens if the Acquirer/Target Company / Merchant Banker or the Manager to the open offer violates the provisions of the SAST Regulations, 2011?

SAST Regulations, 2011 have laid down the general obligations of acquirer, Target Company and the manager to the open offer. For failure to carry out these obligations as well as for failure/non-compliance of other provisions of these Regulations, penalties have been laid down there under. These penalties include:

- directing the divestment of shares acquired;
- directing the transfer of the shares/proceeds of a directed sale of shares to the investor protection fund;
- directing the target company/any depository not to give effect to any

- transfer of shares;
- directing the acquirer not to exercise any voting or other rights attached to shares acquired;
- debarring person(s) from accessing the capital market or dealing in securities;
- directing the acquirer to make an open offer at an offer price determined by SEBI in accordance with the Regulations;
- directing the acquirer not to cause, and the target company not to effect, any disposal of assets of the target company or any of its subsidiaries unless mentioned in the letter of offer;
- directing the acquirer to make an offer and pay interest on the offer price for having failed to make an offer or has delayed an open offer;
- directing the acquirer not to make an open offer or enter into a transaction that would trigger an open offer, if the acquirer has failed to make payment of the open offer consideration;
- directing the acquirer to pay interest of for delayed payment of the open offer consideration;
- directing any person to cease and desist from exercising control acquired over any target company;
- directing divestiture of such number of shares as would result in the shareholding of an acquirer and persons acting in concert with him being limited to the maximum permissible non-public shareholding limit or below.

74. What is the procedure for a company or an intermediary in case it needs clarification or an interpretation of some provisions of SAST Regulations, 2011?

SEBI updates its FAQs section based on the queries received. You are advised to see the FAQs section. However for seeking interpretation of a particular provision or a no action letter pertaining to a particular transaction, the applicant is advised to apply under the provisions of SEBI (informal Guidance) Scheme, 2003, details of which are available on the SEBI website.

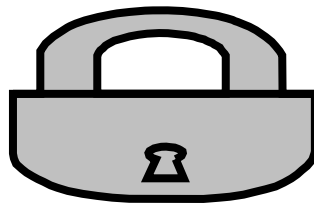
LESSON ROUND UP



- 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 bail out takeover.
- Takeover bids may be mandatory, partial or competitive bids.

- Consideration for takeover could be in the form of cash or in the form of shares.
- When a company intends to take over another company through acquisition of 90% or more in value of the shares of that company, the procedure laid down under Section 395 of the Act could be beneficially utilised.
- Transferor and transferee companies are required to take care of the check points as specified in the chapter.
- Takeover of companies whose securities are listed or one or more stock exchanges is regulated by the provisions of listed agreements and SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011.
- Financial, accounting, taxation and legal aspects are vital in planning a takeover and hence covered in detail in the chapter.
- An increasingly used defense mechanism is anti takeover amendments, which is called "Shark Repellants".

SELF TEST QUESTIONS



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

1. What do you mean by the term 'Takeover'? What are the objectives which takeover seeks to achieve?
 2. Explain the meaning of and different types of takeover bids.
 3. Can unlisted companies affect takeovers? If so, how?
 4. "SEBI has formulated a comprehensive code for takeover of listed companies" Do you agree?
 5. What are the general obligations of 'Acquirer' and 'Merchant Banker' as under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011?
 6. What does the term 'offer price' and 'persons acting in concert' mean under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011?
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