

Easing Creeping Acquisition Norms

Foreign Institutional Investors that were ecstatic about emerging market growth stories, are now unlearning their previous strategies. Consequently, Securities and Exchange Board of India (SEBI), the regulatory authority, has lately eased Creeping Acquisition norms, prompting Indian promoters to mop up stake in their entities. Associated Chambers of Commerce and Industry (ASSOCHAM), and the corporate world at large had expected SEBI to relax these norms by extracting 'creeping acquisition' from the purview of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code).



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With SEBI's amendment, Indian promoters are seen buying shares of their own companies through the Creeping Acquisition route. Having garnered an excess of 55% holding, such promoters are making the most of an opportune time by bottom fishing. Backed by sound fundamentals, company promoters are supporting stock prices, as well as valuations of their companies, which are significantly undervalued at this point in time. The Creeping Acquisition route governed by Regulation 11 of the Takeover Code is defined as the process through which, the acquirer (including a promoter), together with the person acting in concert (Acquirer), can increase his stake in the target company (Target) by acquiring up to 5% of the voting rights/ equity capital of the company in one financial year.

In October 2008, SEBI amended Regulation 11(2) of the Takeover Code and extended the creeping acquisition limit from 55% to 75% for listed companies. Before the amendment of the law, if the Acquirer, holding more than or equal to 55% stake, acquired any further fraction of an equity interest in the Target, the Acquirer was obliged to make an open offer for acquisition of 20% additional shares by way of a public announcement as stipulated in the

Takeover Code. Post amendment, if the stake holding of the Acquirer is in the range of 55% to 75%, he can buy additional shares up to 5% in one financial year, through open market purchase without triggering the open offer requirement. In this case, the open offer condition is triggered only after the stake holding reaches 75% or if the purchase of shares beyond 55% is affected by way of a bulk deal/ block deal/ preferential allotment or in any other manner other than an open market purchase.

Therefore, while the SEBI has given the window to promoters to consolidate their shareholding beyond 55%, it has, by subjecting consolidation beyond 55% strictly to open market purchases, tried to ensure that such consolidation does not block the retail shareholders window to exit.

In an exclusive interview with IVCJ, Mr. Ruchir Sinha, Senior member of the mergers and acquisitions team at Nishith Desai Associates, clarified, "Despite this amendment, if there is change in control as stipulated in Regulation 12, open offer will still be triggered. The Takeover Code provides for takeover of a company, both, by way of acquisition of shares as well as acquisition of control. This is because the acquisition of control may not always be achieved by way of share acquisition. The creeping acquisition aspect, which is actually covered under Regulation 11 and deals with substantial acquisition of shares, triggers an open offer condition, if the thresholds prescribed in the Takeover Code are breached. However, Regulation 12, which is independent of Regulation 10 & 11, deals with change in control. If you gain control of a company, say for example, if you are on the Board with reasonable decision making authority, you can be said to be in control of the company mandating an open offer, even though you may not have acquired any shares.

Further Mr. Nishchal Joshipura, Practice Head, Mergers and Acquisitions, Nishith Desai Associates explained, "MNCs with Indian listed subsidiaries that are interested in increasing their stake holdings in these subsidiaries, may also start using the creeping acquisition route. Therefore, such MNCs can increase their holding beyond 55%, by buying an additional stake up to 5%, in one financial year through open market purchases, without triggering an open offer condition. As share prices are undervalued in the prevailing market, it is a good option for them."

Throwing light on the flipside of the amendment, Mr. Sinha said, "Through creeping acquisition route, promoters can consolidate their holdings up to 75%. In that case, there will be a slight concentration of shareholding in the hands of promoters. As a result, price manipulation is more probable in the face of lesser public spread. Secondly, if a promoter raises his shareholding to 75%, there is an imminent danger of him casting a special majority or special resolution in his own interest."

Addressing the issue, Mr. Joshipura further added, "The amendment does not clearly specify whether this 5% creeping acquisition limit beyond 55% will be applicable once or per financial year. However we have understood based on the statements made by the SEBI chairman that this limit of 5% is applicable to one financial year, and it is not a one time limit. From 55% an acquirer can go up to 75%, over a period, by acquiring up to 5% stake per financial year."



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