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Public M&As in India: Takeover Code Dissected

A detailed analysis of Securities and Exchange Board of India

(Substantial Acquisition of Shares and Takeovers) Regulations, 2011

August 2013

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Introduction

I buy companies, break them up into pieces and then I sell that off; it's worth more than the whole, explains the callous corporate acquirer enacted by Richard Gere in the celebrated movie, *Pretty Woman.* The movie shows him scheming to acquire a financially distressed company through a hostile bid and strip it of its assets, completely disregarding the years of hard work invested in the company by its promoters. Evidently, in this highly competitive business world, it is critical for each of the stakeholders in a company to guard their interests in the company from all forms of third party interferences. Shareholding in companies and ownership of business are amongst the most prized assets today and around the globe. States have enacted various securities laws to protect the interests of the stakeholders in a company. It is a widely recognized fact that one of the key elements of a robust corporate governance regime in any country is the existence of an efficient and well-administered set of takeover regulations.[1]

Takeover laws have been enacted by most of the countries, prescribing a systematic framework for acquisition of stake in listed companies, thereby ensuring that the interests of the shareholders of listed companies are not compromised in case of an acquisition or takeover. Protection of the interests of minority shareholders is a fundamental corporate governance principle that gains further significance in case of listed companies. Highest standards of corporate governance and transparency ought to be ensured in the management and operation of companies that have public participation as the public shareholders rely on the management and the promoters while investing in the company.

The takeover regulations ensure that public shareholders of a listed company are treated fairly and equitably in relation to a substantial acquisition in, or takeover of, a listed company thereby maintaining stability in the securities market. It is also the objective of the takeover regulations to ensure that the public shareholders of a company are mandatorily offered an exit opportunity from the company at the best possible terms in case of a substantial acquisition in, or change in control of, a listed company.

Paragraph 2(a) of the City Takeover Code, United Kingdom summarises the objective of the City Takeover Code as, mentioned herein below:

The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

In line with international jurisprudence, Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as the "**Takeover Code**"), the extant Indian takeover regulations also regulate the acquisition of stake in Indian listed companies and ensure transparency in the affairs of the company. Further, the interests of the public shareholders are protected by the Takeover Code by obligating the acquirers to mandatorily provide an exit opportunity to the public shareholders in case of a takeover or substantial acquisition. Also, the Takeover Code seeks to ensure that the securities market in India operates in a fair, equitable and transparent manner.

The evolution of the Takeover Code began with the SEBI Act, 1992 which expressly mandated SEBI to regulate substantial acquisition of shares and takeovers by suitable measures. Accordingly,

1. Report of TRAC under the chairmanship of Mr. C. Achuthan dated July 19, 2010

SEBI provided a legal framework by enacting the takeover regulations, 1994, which came into force on November 4, 1994. In November 1995, SEBI appointed a committee to review the takeover regulations, 1994 under the chairmanship of Justice P.N. Bhagwati (the Bhagwati Committee). The said committee submitted its report in January 1997. Taking into consideration its recommendations, the Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the "**1997 Code**") was notified by SEBI on February 20, 1997, repealing the takeover regulations, 1994. The 1997 Code was periodically amended in response to the developments in the marketplace, regulatory and judicial rulings as well as evolving global practices as considered appropriate. In 2001, a review of the 1997 Code was carried out by a reconstituted committee chaired by Justice P.N. Bhagwati. The reconstituted Bhagwati committee submitted its report in May 2002. Based on the same, further amendments were made to the 1997 Code.

Taking into consideration the growing level of M&A activity in India, the increasing sophistication of the takeover market, the decade-long regulatory experience and various judicial pronouncements, it was felt necessary to review the 1997 Code. Accordingly, SEBI, vide its order dated September 4, 2009, constituted the Takeover Regulations Advisory Committee ("**TRAC**") under the chairmanship of Mr. C. Achuthan with the mandate to examine and review the 1997 Code and to suggest suitable amendments, as deemed fit. Based on the recommendations made by the Takeover Regulations Advisory Committee, SEBI brought to effect the Takeover Code, repealing the 1997 Code with effect from October 23, 2011.

With the introduction of the Takeover Code, SEBI has completely overhauled the takeover regime in India and has re-written the rules of the public M&A. In comparison to the 1997 Code, the Takeover Code offers a much simpler, precise, and unambiguous regulatory regime. While the basic premises of the 1997 Code have been retained under the Takeover Code, TRAC has also analysed the international best practices, jurisprudence laid down by the courts and tribunals over the years and the changing needs of the market to propose a new set of takeover regulations. SEBI included most of the recommendations made by the TRAC in the Takeover Code and has attempted to strike a balance between the interests of various stakeholders including the acquirers, shareholders, and the target company. The overarching philosophy of protecting the interests of public shareholders in takeover situations remains intact even under the Takeover Code but other critical changes have been introduced.

While the fundamental objective of this Lab is to familiarize the reader with the law, we have also attempted to highlight the lacunae in the law that need to be considered and reviewed by the market regulators. Unless specifically mentioned otherwise, all the references to specific regulations / provisions in this Lab are references to the regulations / provisions under the Takeover Code.

Abbreviations

Abbreviation	Meaning/ full-form
1997 Code	SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997
BSE	Bombay Stock Exchange
Companies Act	Companies Act, 1956
DPS	Detailed Public Statement
FAQs	Frequently asked questions
ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009
Lab	This lab prepared by Nishith Desai Associates
LOO	Letter of Offer
NSE	National Stock Exchange
PA	Public Announcement
PAC	Persons acting in concert
SE	Stock Exchange
SEBI	Securities and Exchange Board of India
SEBI Act	SEBI Act, 1992
Takeover Code	SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
TRAC	Takeover Regulations Advisory Committee
TRAC Report	Report of TRAC dated July 19, 2010

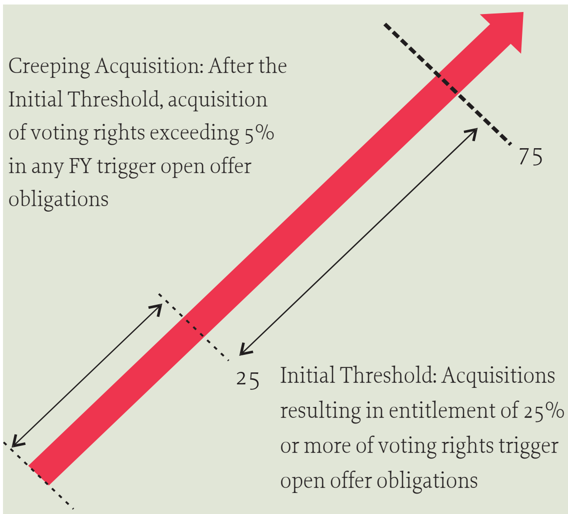
1. Gist of the Takeover Code

I. Triggers Redefined

Mandatory open offer obligations

The crucial obligation under the takeover regulations is the requirement to make an 'open offer' to the public shareholders of the target company upon a substantial acquisition of shares or voting rights or acquisition of control of the target company, directly or indirectly. The thresholds for acquisition of shares have been redefined by the Takeover Code from those under the 1997Code.

Acquisition of shares or voting rights



Regardless of the level of shareholding, acquisition of control continues to trigger the obligation to make an open offer.

Mandatory open offer = At least 26% of the shareholding of the target company

The mandatory open offer requirements have been discussed and analysed more fully in **Chapter 4** of this Lab.

i. Voluntary Open Offer

The Takeover Code provides for an acquirer holding 25% or more of the shareholding of the target company to make a voluntary open offer.

Acquisitions pursuant to the voluntary open offer will not trigger the mandatory open offer obligations.

Voluntary open offer = At least 10% of the shareholding of the target company

SEBI has clarified in the FAQs dated December 12, 2011 that a person holding less that 25% shall also be entitled to make a voluntary offer subject to the fulfilment of the prescribed conditions. The voluntary open offer requirements have been discussed and analysed more fully in **Chapter 4** of this Lab.

ii. Competing Offers

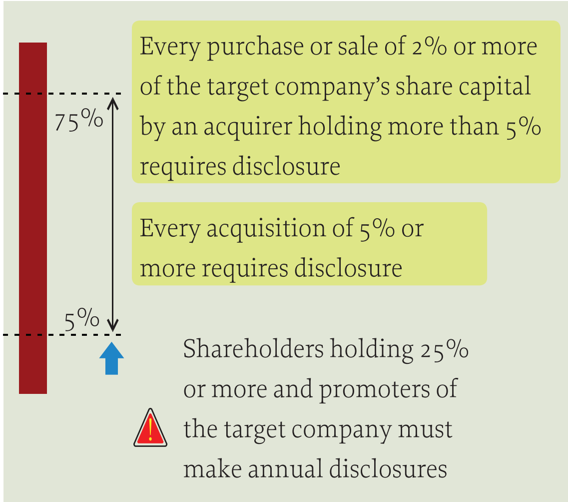
Similar to the 1997 Code, the Takeover Code provides for competing offers to be made within 15 working days of the detailed public announcement being published for the acquisition of shares in the target company.

Competing offer = At least such number of shares equal to shares held by acquirer in target company + shares to be acquired as part of open offer + shares to be acquired vide the primary transaction

The competing open offer requirements have been discussed and analysed more fully in **Chapter 4** of this Lab.

II. Disclosure Obligations

As under the 1997 Code, the acquirer is required to make necessary disclosures to the target company and to each of the stock exchanges on which target company's shares are listed within 2 working days of: (a) receipt of allotment intimation; or (b) acquisition of shares / voting rights, when such acquisition exceeds the following thresholds:



The Takeover Code provides for lesser triggers for disclosures as opposed to the 1997 Code. The disclosure obligations have been discussed and analysed more fully in **Chapter 3** of this Lab.

III. Open Offer Obligations

Making of an 'open offer' in effect means making an offer to buy shares from the public shareholders of the target company. One of the objectives of the Takeover Code is to provide the public shareholders an opportunity to exit their investment in the target company when a substantial acquisition of shares in, or takeover of the target company takes place, on terms that are not inferior to the terms on which substantial shareholders make their investments.[2] The Takeover Code sets out in more detail the manner in which the open offer is required to be carried out. Key changes in the Takeover Code include: (i) Pricing of the offer, (ii) Timing of the offer especially where indirect acquisitions are concerned, (iii) the manner in which the open offer is conducted and withdrawn, and(iv) role and duties of the intermediaries in the open offer process.

The obligations relating to open offers are discussed and analysed more fully in **Chapter 4** of this Lab.

IV. Exemptions

The Takeover Code exempts some acquisitions of shares, voting rights or control from the requirements of making an open offer. The Takeover Code streamlines some of the exemptions earlier provided under the 1997 Code. Some forms of passive transactions such as increase in voting rights due to buy back of shares, schemes of arrangements involving the target company, inter-se transfer of shares amongst promoters, relatives and acquisitions in the ordinary course of business by merchant bankers, stock brokers are also some of the exemptions provided.

Over and above the exempt transaction specifically provided for under the Takeover Code, SEBI continues to have the power to grant exemptions from making an open offer under the Takeover Code. Additionally, SEBI also has the power to grant relaxation from strict compliance with the procedural requirements of the Takeover Code as opposed to a full-fledged exemption.

The obligations have been discussed and analysed more fully in **Chapter 5** of this Lab.

V. Other Obligations

In addition to the acquirer, the target company and the intermediaries are also saddled with obligations during an open offer. For instance the target company is not permitted to carry out certain corporate transactions during this period unless the approval of shareholders of the target company by way of a special resolution by postal ballot is obtained. The manager to the offer is also prohibited from trading in shares of the target company during the offer period.

The obligations have been discussed and analysed more fully in **Chapter 6** of this Lab.

VI. Key Terms Defined

The Takeover Code has defined and redefined various key terms. Some definitions like that of the promoter and promoter group are more to align

2. TRAC Report.

such definition across SEBI related legislations. Other definitions such as control, acquisition, distinction between shares and convertible securities bring more clarity to the Takeover Code.

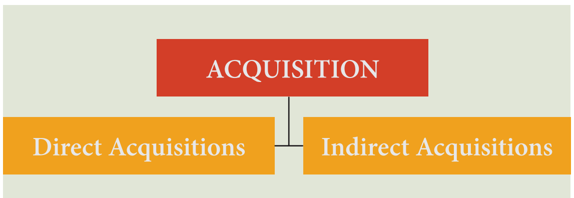
The definitions have been discussed and analysed more fully in **Chapter 2** of this Lab.

2. Key Takeover Terms

I. Acquisition

The occurrence of an 'acquisition' is the pivotal determination under the Takeover Code pursuant to which the obligations under the Takeover Code are triggered. Despite being a term of such pertinence, the takeover legal regime in India never had a formal definition for the term till the Takeover Code came into effect; probably because the regulators then deemed it appropriate to define the term on a case to case basis.Through Regulation 2(1)(b) of the Takeover Code, SEBI has newly introduced the definition of "acquisition" as "directly or indirectly, *acquiring or agreeing to acquire shares or voting rights in, or control over, a target company"*[3]. Further, the Takeover Code identifies an "acquirer" *as any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.*[4] Barring few literal alterations, the definition of "acquirer" under the 1997 Code has been retained in the Takeover Code. The term acquisition is used widely in the Takeover Code -- defining the term gives it a uniform meaning throughout the Code.

The definitions of 'acquisition' and 'acquirer' clarify that an agreement to acquire and an actual acquisition are treated alike for the purposes of the Takeover Code. Accordingly, all the obligations triggered by an acquisition are triggered from the date of agreement to acquire. Acquisitions are divided into 2 sorts:



Depending on whether the 'acquisition' is a direct acquisition or an indirect acquisition, the acquirer is accordingly bound by different obligations under the Takeover Code.

- Direct acquisition, as the name suggests, is an acquirer directly acquiring shares / voting rights or control of the target company.
- Indirect acquisition is defined under Regulation 5(1) of the Takeover Code, as any acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and PAC to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company. Accordingly, any acquisition of shares / voting rights or control of a target company consequent to acquisition of shares or voting rights or control of another company is 'indirect acquisition' for the purposes of the Takeover Code.

Types of 'indirect acquisitions'

The Takeover Code classifies 'indirect acquisitions' into two types as follows:

i. Indirect Acquisition Deemed to be Direct Acquisition[5]

An 'indirect acquisition' shall be deemed to be a 'direct acquisition' for the purposes of the Takeover Code if the proportionate net asset value or sales turnover or market capitalisation[6] of the indirectly acquired target company, represented as a percentage respectively of the consolidated net asset value or sales turnover or enterprise value of the directly acquired entity is in excess of 80%, on

3. Regulation 2(1)(b) of the Takeover Code.
4. Regulation 2(1)(a) of the Takeover Code.
5. Regulation 5(2) of the Takeover Code.
6. Method to calculate Market Capitalization, **Annexure C**.

the basis of the most recent audited annual financial statements.[7]

ii. Indirect Acquisition

All other 'indirect acquisitions' that do not fulfil the above mentioned criterion are treated as indirect acquisitions for the purposes of the Takeover Code.

For all 'indirect acquisitions' which are not deemed as direct acquisition but however, the proportionate net asset value or sales turnover or market capitalisation[8] of the indirectly acquired target company, represented as a percentage respectively of the consolidated net asset value or sales turnover or enterprise value of the directly acquired entity is in excess of 15%[9], the acquirer is under an obligation to specifically compute and disclose a value per share for the shares of the indirectly acquired company in the LOO.

TRAC Insight

TRAC was of the opinion that there ought to be no differentiation in the imposition of the obligation to make an open offer when it comes direct or indirect change in control, or acquisition of substantial shares or voting rights in a listed company. TRAC recognized although materiality of an indirect acquisition for the entire transaction is not a very important aspect for determining whether an open offer is required to be made, however, the materiality criterion is important for ascribing a value to the indirectly acquired target company. Further, there is a risk of transactions being structured as indirect acquisitions to avoid the price computation methodology and the open offer process prescribed for direct acquisitions. Accordingly, TRAC recommended flexibility in case of immaterial indirect acquisitions while material indirect acquisitions are treated as direct acquisitions for all practical purposes.

In the informal guidance dated August 28, 2012 issued to *Arch Pharmalabs Ltd.,* SEBI has suggested that for the purposes of determination of indirect acquisition, the actual control / shareholding that the acquirer is able to exercise in the indirectly acquired company through the intermediary company will be considered. Mathematical calculation of the proportionate shareholding that the acquirer may hold in the indirectly acquired company through the intermediary company shall not be relevant for determination of indirect acquisition.

II. Shares

The obligations under the Takeover Code are triggered on acquisition of, 'voting rights' or 'shares'entitling the acquirer to exercise voting rights in the target company, beyond the prescribed thresholds. Regulation 2(1)(v) of the Takeover Code defines 'shares' as, *shares in the equity share capital of a target company carrying voting rights, and includes any security which entitles the holder thereof to exercise voting rights.* The definitionclarifies that 'shares' includes all depository receipts carrying an entitlement to exercise voting rights in the target company removing any confusion that had arisen under the 1997 Code with respect to the obligations of depository receipt holders.

The emphasis of the Takeover Code is on the acquisition of 'voting rights' attached with the shares. Consequently, the acquisition of'preference shares'may not attract the same obligations as that of the acquisition of shares under the Takeover Code. This is further clarified in the exemption under Regulation 10(1)(h) whereby the acquisition of voting rights or preference shares carrying voting rights arising out of the operation of section 87(2) of the Companies Act, 1956 (hereinafter referred to as the "**Companies Act**") is exempt from the open offer obligation under the Takeover Code. Preference shares were not included in the definition of shares even under the 1997 Code.

7. The calculation should be based on latest audited financials of the entities.
8. Method to calculate Market Capitalization, **Annexure C**
9. The calculation should be based on latest audited financials of the entities.

Unlike the 1997 Code, the Takeover Code has introduced the definition of *"convertible security" as a security which is convertible into or exchangeable with equity shares of the issuer at a later date, with or without the option of the holder of the security, and includes convertible debt instruments and convertible preference shares.*[10] With the introduction of this new definition, the difference in the trigger of obligations on acquisition of 'shares' (with voting rights) and acquisition of convertible securities (that gives voting rights on conversion or exchange) is made very clear.

Since the definition of shares under the 1997 Code also included convertible securities it was not clear whether the open offer and disclosure obligations would be triggered at the time of acquisition of convertible instruments or at the time of conversion of such instruments into equity shares. SEBI and SAT had dealt with this question in many cases and had held that the disclosure obligation shall be triggered at the time of acquisition of convertible instruments and the open offer obligation shall be triggered on conversion of the convertible instruments into equity shares.[11] The law laid down by SAT and SEBI have now been expressly incorporated under the Takeover Code by separating convertible securities from 'shares' and including the following provision in Chapter V that deals with disclosure obligations:

For the purposes of this Chapter, the acquisition and holding of any convertible security shall also be regarded as shares, and disclosures of such acquisitions and holdings shall be made accordingly.[12]

However, this clarification applies only to disclosure obligation and the open offer obligation shall be triggered only upon conversion of the convertible securities into shares with voting rights. A stricter standard is applicable to disclosure obligation when compared to open offer obligation because it is critical to ensure transparency in the interests held by each of the stakeholders in the target company.

III. Persons Acting in Concert

Regulation 2(1)(q)(1) of the Takeover Code defines persons acting in concert ("**PAC**") as persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

Further, Regulation 2(1)(q)(2) of the Takeover Code prescribes certain categories of persons / entities that are presumed to be PACs unless the contrary is established. Please refer to **Annexure A** hereto for the categories of persons that constitute "deemed PACs" under the Takeover Code.

The definition of PAC under the Takeover Code is broadly the same as the definition under the 1997 Code but few additional categories of deemed PACs have been introduced in the Takeover Code. The newly introduced classes of deemed PACs include the following:

i. promoters and members of the promoter group;
ii. immediate relatives;
iii. collective investment scheme and its collective investment management company, trustees and trustee company; and
iv. venture capital fund and its sponsor, trustees, trustee company and asset management company;

The test for determination of PACs is provided under Regulation 2(1)(q)(1) of the Takeover Code. The pre-requisites for constituting PACs are as follows:

i. Two or more persons must share a common objective or purpose;
ii. That common objective or purpose must be for acquisition of shares or voting rights in, or

10. Regulation 2(1)(f) of the Takeover Code
11. Eight Capital Master Fund Limited v. SEBI Appeal No. 111 of 2008, July 22, 2009; Mr. Deepak Mehra v. SEBI and BhartiAirtel Limited Appeal No. 140 of 2009, August 28, 2009; Informal Guidance dated February 22, 2006 in the matter of Nagreeka Exports Limited; Informal Guidance dated May 4, 2007 in the matter of Strides Arcolab Limited.
12. Regulation 28(2) of the Takeover Code.

exercising control over the target company;

iii. The persons must co-operate with each other for acquisition of shares or voting rights in, or exercise of control over the target company; and

iv. Such cooperation must be pursuant to an agreement or understanding, formal or informal.

It is a well settled legal principle that the question of whether or not two persons are PACs is a question of fact, to be answered after evaluating the facts and circumstances of each case.[13] Hence, the test under Regulation 2(1)(q)(1) of the Takeover Code has to be applied to the facts of each case to determine if the alleged persons constitute PACs in fact.

In case of deemed PACs it is the onus of the alleged PACs to prove and establish that they are not acting in concert for the purposes of the acquisition. All the obligations under the Takeover Code are joint and several liabilities of all the acquirer and its PACs.[14] When the aggregate shareholding and the voting rights of the acquirer are considered for determining the trigger of obligations under the Takeover Code, the consolidated shareholding and the voting rights of the acquirer and the PACs is considered and the acquirer and the PACs shall at all times be deemed to be one block of acquirers acting under a common objective. All the PACs shall be jointly and severally liable for the fulfilment of all the obligations under the Takeover Code inter alia including the disclosure and open offer obligations. Even though the primary liability for fulfilment of the obligations rest with the acquirer, the regulators can proceed against the PAC independently or jointly with acquirer in case of any violation or non-compliance.

IV. Control

The Takeover Code defines "control" *to include 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;

This inclusive definition of "control" is more or less the same as the definition of 'control' under the 1997 Code. Interestingly, TRAC's recommendation to widen the scope of this definition as below has been rejected by SEBI:

*"Control" includes the right **or the ability** to appoint majority of the directors or to control the management or policy decisions of the target company, 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.*

The debate on whether SAT has narrowed down the definition of "control" order in the matter of *Subhkam Ventures India Private Limited v. SEBI*[15] by clarifying that veto rights (right to veto certain actions proposed to be undertaken by the company) do not constitute 'control' under the 1997 Code is still very much alive. Pursuant to the controversial SAT ruling, SEBI had appealed to the Supreme Court of India against this SAT order and the matter was sub – judice when the Takeover Code was being finalised by SEBI.

In light of the SAT ruling, TRAC had discussed the implications of revising the definition of the "control" under the Takeover Code. Accordingly, TRAC had recommended including the "***ability** to appoint majority of the directors or to control the management or policy decisions of the target company"* along with the ***right*** to do so in the definition of "control". The recommendation was intended to emphasize that acquisition of de facto control should also trigger an open offer obligation

13. Hitachi Home and Life Solutions Inc v. SEBI (SAT Order dated July 6, 2005).
14. Regulation 25(5) of the Takeover Code.
15. Appeal No. 8 of 2009 decided on 15.01.2010.

and not just acquisition of de jure control.

However, SEBI elected to retain the definition as it is, probably, because the matter was pending resolution before the Supreme Court. Interestingly, the Supreme Court vide its order dated November 16, 2011 has disposed of the appeal filed by SEBI on the basis of mutual agreement arrived at by the parties with a specific clarification that that the SAT order will not be treated as a precedent on the definition of "control".

V. Promoter

The definition of the term 'promoter' although used across various SEBI regulations did not have a uniform definition across the regulations. The Takeover Code has put an end to this ambiguity in cross referencing the definition of "promoter" to that as defined under the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009 ("**ICDR Regulations**"). The ICDR Regulations in essence defines 'promoter' to mean (i) person or persons that are in control of the company (ii) the person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public;(iii) the person or persons named in the offer document as promoters. The 1997 Code also had an additional criteria being 'persons named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchange pursuant to the listing agreement, whichever is later'. Since typically only persons in control of the target company will be named as promoters in the filings made by the target company pursuant to the listing agreement, this criteria in the 1997 Code was in effect redundant. The main purpose such a criteria served was to determine at what time a promoter would be entitled to the exemption from making an open offer granted in the takeover regulations with respect to inter-se transfers between promoters. This criteria is now captured within the exemption in Regulation 10(a)(ii).

3. Disclosure Obligations Under The Takeover Code

I. Disclosure Obligations

The guiding principle of the Takeover Code is the protection of the interests of the public shareholders of a company. The public stakeholders do not generally participate in the affairs of the company and therefore, rely on the promoters or controlling shareholders to manage the company in, their best interests and the highest standards of corporate governance.

To that extent, the change in shareholding, voting rights or control of the target company will have a bearing on the interests of the public shareholders. It is important that the target company and the shareholders are not taken by surprise by the shareholding / voting rights of an acquirer and its PAC. Further, the acquisition of shares / voting rights and the price of such acquisition are relevant for determining the minimum offer price for an open offer.

Against this backdrop, the significance of disclosure obligations of an acquirer / shareholder under the Takeover Code is self-explanatory. The dealings in shares of a listed company need to be transparent to keep the shareholders informed of the change in shareholding / voting rights in a company and also to guard the securities market form financial mayhem. It is also important to note that the disclosure obligations apply to acquisition of both 'shares' and 'convertible securities'.

The disclosure obligations under the Takeover Code are provided in Chapter V and are as follows:

1. Acquisition based disclosure

Regulation	Made by	Trigger	Timing	Made to
Reg. 29(1)	Acquirer	Acquirer + PAC acquiring 5% or more shares of the target company	2 working days of the receipt of intimtion of allotment of shares, or the acquisition of shares or voting rights	SE where the shares are listed and the target company
Reg. 29(2)	Acquirer	Acquisition or disposal of shares or voting rights, if such change results in shareholding falling below 5%, if there has been change in shareholding since last disclosure and such change exceeds 2% of total shareholding or voting rights in the target company by the Acquirer + PAC holding 5% or more shares of the target company.		

Shares taken by way of encumbrance shall be treated as an acquisition, shares given upon release of encumbrance shall be treated as a disposal, and disclosures shall be accordingly made.[16]

16. Regulation 29(4) of the Takeover Code.

2. Continual disclosure:

Regulation	Trigger	Trigger	Made to
Reg. 30(1)	Any Person + PAC holding more than 25% shares or voting rights in the target to disclose their aggregate shareholding and voting rights	Within 7 working days from the financial year ending 31st March every year	SE where the shares are listed and target company
Reg. 30(2)	Promoters + PAC to disclose their aggregate shareholding and voting rights		

3. Disclosure of encumbered shares

Regulation	Made by	Trigger	Timing	Made to
Reg. 31(1)	Promoter	Promoter + PAC pledging or creating encumbrance on the shares of the target company	Within 7 working days from creation, invocation or release of pledge	Stock Exchange where the shares are listed and target company
Reg. 31(2)	Acquirer	Invocation or release of the pledge or encumbrance on the shares of the target company		

Analysis of the changes proposed by the Takeover Code

i. Thresholds for Disclosure

The 1997 Code prescribed mandatory disclosure of aggregate shareholding or voting rights of an acquirer on, (i) his aggregate shareholding/ voting rights in the Company exceeding 5% or 10% or 14% or 54% or 74% shares or voting rights in a company,[17] and (ii) purchase or sale aggregating 2% or more of the share capital of the target company by an acquirer whose shareholding in the target company is between 15% and 55% of the share capital or voting rights.[18]

Disclosure at various stages of shareholding in the target company has been done away with under the Takeover Code but any person holding 5% or more of the shares of the target company has to mandatorily disclose any acquisition or disposal of shares representing 2% or more of the shares or voting rights. An ambiguity however still lies in these disclosure requirements in that it is not clear as to whether the 2% limit is transaction specific or whether it relates to the difference in the last disclosed shareholding. If the former, any acquisitions and dispositions of shares or voting rights in tranches of less than 2%in each tranche could go unnoticed until such time that the aggregate shareholding increases by 5%.

ii. Shareholding of PAC

Regulations 7(1) and 7(1A) of the 1997 Code did not make any reference to the shareholding of a PAC and had obligated the acquirer exclusively to make prescribed disclosures. However, SEBI and SAT had clarified on multiple occasions that the holdings of the acquirer and PAC had to be aggregated for the purposes of determining trigger of disclosure obligation under the 1997 Code.[19]

17. Regulation 7(1) of the 1997 Code.
18. Regulation 7(1A) of the 1997 Code.
19. RadheyshyamTulsian v. SEBI (SAT Order dated April 26, 2006); Re Money Matters India Pvt. Ltd. Adjudication Order No. VSS/ AO-33/ 2008; Megha Resourses Ltd. SEBI.

In line with the jurisprudence laid down by SEBI and SAT, the Takeover Code expressly provides that the collective shareholding/ voting rights of the acquirer and PAC have to be considered for the purposes of disclosure.

This may become an ambiguous disclosure since the PAC and the acquirer relationship is a transaction specific relationship and does not necessarily continue through the tenure of the investment. Therefore continuing disclosures pertaining to disposal and acquisitions of the target company's shares could become cumbersome from time to time if the PAC relationship breaks away or a new PAC relationship emanates.

iii. Disclosure of Convertible Securities

Since the acquisition of convertible securities does not trigger an open offer until such convertible securities are converted into equity shares, it was a point of debate under the 1997 Code whether the acquisition of convertible securities has to be disclosed at the time of acquisition or at the time of conversion. Precedents have clarified that the disclosure obligation unlike open offer obligation is triggered at the time of acquisition of convertible securities itself.[20]

The Takeover Code seems to have imbibed the law laid down by such precedents and expressly provides that the acquisition and holding of any convertible securities will be regarded as shares for the purposes of disclosure obligations under Chapter V of the Takeover Code. To determine the effective economic interest of any person in the target company at any relevant point in time, it is critical to take into account the equity shares and also the instruments which in the future, will lead to accrual of shares/ voting rights. Therefore, the target company and the shareholders need to be informed of the acquisition of convertible securities at the time of acquisition itself.

iv. Timing of Continual Disclosure

While the 1997 Code had stipulated 21 days from the end of financial year[21] to make continual disclosures, the Takeover Code has reduced the time limit to 7 working days from the end of financial year.[22]

v. Disclosure by the Target Company

The 1997 Code obligated the target company to (i) disclose the aggregate number of shares held by any disclosing acquirer to the relevant stock exchange within 7 days of receipt of disclosure from the acquirer[23], (ii) make certain yearly disclosures to the stock exchanges[24], (iii) maintain a register in the specified format to record the disclosures received from the acquirers[25], and (iv) disclose to the stock exchange, disclosure received on pledge of shares subject to certain conditions.[26]

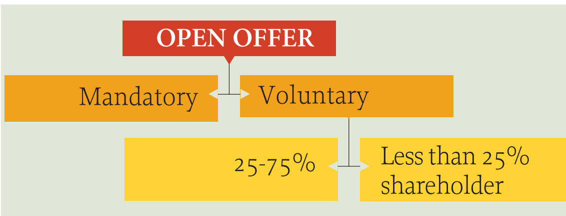
Such obligations are not prescribed under the Takeover Code. Accordingly, the entire disclosure obligations under the Takeover Code are limited to the acquirers and the promoters of the target company.

20. Informal Guidance dated May 4, 2007, CFD/DCR/TO/MM/07 issued to Strides Arcolab Limited.
21. Regulation 8(2) of the 1997 Code.
22. Regulation 30(3) of the Takeover Code.
23. Regulation 7(3) of the 1997 Code.
24. Regulation 8(3) of the 1997 Code.
25. Regulation 8(4) of the 1997 Code.
26. Regulation 8A (4) of the 1997 Code.

4. Open Offer Triggers

Across the globe, the jurisprudence of Takeover Regulations revolves around offering an exit opportunity to the public / minority shareholders of a company in the event of any substantial change in shareholding or change in control of the company. It is only fair and equitable that the public stakeholders who have invested in the company, relying on the management or the promoters of the company are given an opportunity to withdraw their investments when there is a change in the management or promoter shareholding. Therefore, the Takeover Code obligates an acquirer, whose acquisition fulfils the prescribed conditions, to make a mandatory offer to acquire shares from the existing shareholders of the target company prior to consummating his acquisition.

To protect the economic interests of the exiting shareholders, it is mandated that the mandatory open offer should be at the best possible terms for the shareholders. To that extent, the terms of the mandatory offer *inter alia* including timing, price discovery mechanism, minimum offer size etc. are prescribed under the Takeover Code. While the mandatory open offer is a critical legal obligation, the Takeover Code also permits voluntary open offers, at the absolute option of the acquirer.



I. Mandatory Open Offer Triggers

The crucial obligation under the takeover regulations is the requirement to make an 'open offer' to the public shareholders of the target company upon a substantial acquisition of shares or voting rights or acquisition of control of the target company, directly or indirectly. The thresholds for acquisition of shares have been redefined by the Takeover Code from those under the 1997 Code.

25% → Acquisition of shares or voting rights entitling the acquirer and PAC to exercise 25% or more of voting rights in the target company;[27] OR

5% → Acquisition of additional shares or voting rights entitling the acquirer and PAC to exercise more than 5% of voting rights in a financial year by an acquirer who together with PAC already holds 25% or more but less than 75% of the capital in the target company;[28] or

CONTROL → Acquisition of Control over the target company.[29]

TRAC Insight

Why was the initial trigger increased from that provided under the 1997 Code?

As per TRAC the initial trigger of 15% under the 1997 Code had been fixed in an environment where the shareholding pattern in corporate India was such that it was possible to control listed companies with holdings as low as 15%. Information gathered suggested that the current mean and median of promoter shareholdings in listed companies was 48.9% and 50.5%, and the number of companies declared to be controlled by promoters holding 15% or less is less than 8.4%. Further, worldwide jurisprudence suggested that these trigger levels were set primarily based on the level at which a potential acquirer can exercise de facto positive control over a company.It was observed that despite the increase in the mean level of promoter shareholding, there were a number of prominent companies in India, which were controlled by shareholders holding between 25% and 30% of the voting capital of the company.

27. Regulation 3(1) of the Takeover Code.
28. Regulation 3(2) of the Takeover Code; SEBI has clarified in the informal guidance dated March 27, 2012 issued to *Khaitan Electricals Limited* that the creeping acquisition window of 5% per financial year is available to an acquirer in every financial year subject to fulfilment of all the other prescribed conditions.
29. Regulation 4 of the Takeover Code.

Therefore the upward revision to 25% from the initial 15%.

What about after 25%?

TRAC explored the desirability of introducing another open offer trigger at 50% after the initial trigger at 25%. However given the market statistics on promoter shareholders this would make promoter's consolidation efforts very difficult. TRAC was also of the opinion that holding 50% of a listed company did not contribute to additional control since shareholders holding even below 50% were in effect in control given the minimum public shareholding requirement of 25%.

Types of Acquisitions

The obligations under the Regulations are triggered whether the acquisition is a direct acquisition or an indirect acquisition

i. Direct Acquisition

Acquisition of shares or voting rights or control in the target company would be a direct acquisition.

ii. Indirect Acquisition

As per the provisions of Regulation 5 an 'indirect acquisition' is one that would enable any person and PACs to exercise or direct the exercise of such percentage of voting rights or control over the target company, the acquisition of which would otherwise attract the mandatory open offer obligations under the Takeover Code. The 1997 Code did not expressly define whattantamounts to an 'indirect acquisition'. It has always been a bone of contention as to whether the determination of an 'indirect acquisition' would in effect require one to consider a shareholder's proportionate interest in the target company. For instance if an acquirer purchased 36% shares in company X which in turn holds 70% of the shareholding in the target company, could it be said that the acquirer acquired 36% of 70%, being 25.2% of the target company? Since, the 1997 Code did not provide any guidance on how indirect acquisition would be calculated, the proportionate interest method was followed by some in the industry out of abundant caution. However, a more popular argument by other industry players that the proportionate interest method could only be used to determine, at best, the economic interest of a person where indirect acquisitions were concerned. As the obligations under the takeover regulations can always be traced backed to voting rights in the target company as opposed to mere economic benefit, the proportionate interest method was considered infructuous by such industry players. Regulation 5, though not providing absolute clarity on the calculation of indirect interest in the target company, does not pointedly link the same to proportionate interest in the target company. An indirect acquisition as per the Takeover Code is not an objective determination but more a subjective one. For an indirect acquisition obligation to be triggered under the Takeover Code, the acquirer must, pursuant to such indirect acquisition be able to direct the exercise of such percentage of voting rights or control over the target companyas would otherwise attract the mandatory open offer obligations under the Takeover Code.

As discussed above, an indirect acquisition may be deemed to be a direct acquisition for the purposes of the Takeover Code if the proportionate net asset value or sales turnover or market capitalisation[30] of the indirectly acquired target company, represented as a percentage respectively of the consolidated net asset value or sales turnover or enterprise value of the directly acquired entity is in excess of 80%, on the basis of the most recent audited annual financial statements.[31]

II. Points to be Noted

i. Individual Standalone Holding v/s Individual + PAC Holding

Regulation 3(3) clarifies that the acquisition of

30. Method to calculate Market Capitalization, **Annexure C**.
31. The calculation should be based on latest audited financials of the entities.

shares by any person resulting in his individual shareholding exceeding the prescribed thresholds shall trigger open offer obligation irrespective of whether there is a **change** in the aggregate shareholding with PAC. This clarification is intended to negate the claim that the increase in individual shareholding / voting rights beyond a prescribed threshold should not trigger an open offer if the aggregate shareholding / voting rights of the acquirer and PAC do not exceed the threshold applicable to such aggregate shareholding / voting rights.

For instance, shareholder X holds 23% of the equity share capital in the target company while the aggregate shareholding of X and PACs is 54%. X acquires additional 3% shares in the FY 2010-11 which increases X's individual shareholding to 26% and the aggregate shareholding of X and PACs to 57%. X and PACs have not made any other acquisitions in that FY. To that extent, X has individually breached the 25% limit under Regulation 3(1) but the collective shareholding has not breached the 5% limit under Regulation 3(2).

Another instance covered under Regulation 3(3) would be inter se transfer of shares between PACs which do not fulfil the condition under Regulation 10(1)(iv). In such a case the individual shareholding of the acquirer PAC could trigger the open offer obligation without any change in the aggregate shareholding of all the PACs.

During the regime of the 1997 Code, there have been instances where the acquirers had mooted that individual shareholding should not be considered if aggregate shareholding of all PACs remains the same citing the following rationale:

i. The aggregate shareholding of acquirer and PACs is considered for determining trigger of Regulations 3(1) and 3(2) and if that is not increasing then trigger cannot occur; and
ii. Effective control on the target company is not altered if the aggregate shareholding of acquirer and PACs is not increasing and therefore, no exit opportunity should be afforded to the public shareholders.

ii. Creeping Acquisition Limit of 5% Taken on a Gross Basis

The 1997 Code permitted acquisition of shares or voting rights by acquirers already holding voting rights between 15% and 55% to acquire additional 5% voting rights every financial year without triggering the open offer. The calculation of quantum of acquisition in relation to this 5% window was always a moot point with different permutations and combinations of acquisition, dilution, disposal etc. being tried and tested. It was not clear whether the acquisition in a financial year has to be determined on a gross basis or net basis, whether the original paid up capital was to be considered or increased paid up capital, if an acquisition is exempt from open offer obligation will that acquisition be counted in relation to the 5% window.[32]

Amidst the confusion, SEBI amended the 1997 Code to permit shareholders holding voting rights between 55% and 75% to acquire additional 5% voting rights, once in the life time of the target company subject to certain conditions and it goes without saying that the issue was further intensified.

SEBI vide a Circular dated August 6, 2009, clarified that the calculation of 5% acquisition for shareholders between 55% and 75% shall be determined on a gross basis by aggregating all purchases, without netting the sales.[33] However, SEBI did not clarify if the same rule (gross basis) would be applicable to the 5% window available in every financial year to the shareholders between 15% and 55%.

The Takeover Code now provides for a 5% window for every financial year for the shareholders holding shares between 25% and 75%.[34] The calculation for

32. Informal Guidance dated August 26, 2009 in the matter of Gulf Oil Corporation Limited.
33. http://www.sebi.gov.in/circulars/2009/cfdcir012009.pdf
34. SEBI has clarified in the informal guidance dated March 27, 2012 issued to *Khaitan Electricals Limited* that the creeping acquisition window of 5% per financial year is available to an acquirer in every financial year subject to fulfilment of all the other prescribed conditions.

this 5% window must be on gross basis regardless of any intermittent fall in shareholding or voting rights and in the case of issuance of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

iii. Shares v/s convertibles

The Takeover Code distinguishes between 'shares' and 'convertible securities'. Unlike the 1997 Code which rolled the definition of convertible securities and that of shares into one, the Takeover Code distinguishes between the two. In keeping with its objective, the mandatory open offer obligations get triggered upon the acquisition of shares that carry voting rights including any security that entitles the holder thereof to exercise voting rights or the acquisition of voting rights, over and above the thresholds prescribed. Convertible securities that are exchangeable into shares at a later date do not trigger the mandatory open offer requirements until such time that they are converted.

iv. Acquisition of Control

The Takeover Code has brought about significant changes to the acquisition of control of a target company. For instance, the 1997 Code exempted an acquisition of control (both direct and indirect) of a target company from the open offer obligations under the 1997 Code if the change was supported by a special resolution passed by the shareholders of the target company. Further the 1997 Code also provided for an acquisition of control under the 1997 Code to be a onetime trigger as regards that acquirer in that if consequent upon change in control of the target company in accordance, the control acquired was equal to or less than the control exercised by person(s) prior to such acquisition of control, such control was not be deemed to be a change in control triggering open offer obligations under the 1997 Code. A cessation of joint control to sole control was also not deemed to be a change in control warranting open offer obligations. The Takeover Code does not make such exceptions perhaps because the exemptions under Regulation 10 are meant to cover all scenarios that warrant an exemption from the open offer obligations. For instance, the concerns in terms of joint to sole control may be covered in the exemptions relating to inter-se transfer between promoters given that the definition of the term 'promoters' in essence denotes those who control the target company. The TRAC was reluctant to retain under the Takeover Code,the whitewash provision exempting a change in control with shareholder consent from the open offer obligations. TRAC was sceptical about the possibility of misuse of such exemption due to the lack of shareholder democracy in India and lack of sophistication in the proxy voting mechanism. Acquisition of 'additional control' still remains an area that needs clarification as to whether this too would trigger the obligations under the Takeover Code.

III. Voluntary Open Offers

Regulation 6 of the Takeover Code permits an acquirer, who together with PACs, holds shares or voting rights in a target company entitling them to exercise at least 25% or more of the voting right in the target company but less than the maximum permissible non-public shareholding, to make a public announcement of an open offer for acquiring shares of the target company. The acquirer is required to make a voluntary open offer for at least such number of shares as would entitle the acquirer to exercise an additional 10% of the total shares of the target company.[35]

TRAC Insight

The TRAC felt that voluntary offers were important means for substantial shareholders to consolidate their stake and therefore recognized the need to introduce a specific framework for such open offers. The minimum offer size was to discourage frivolous open offers.

There has been a lot of debate as to whether the right to make a voluntary open offers is only accorded to

35. Regulation 7(2).

acquirers+ PACs holding 25% or more but less than the maximum permissible non-public shareholding of the target company since the intent of the provision is to enable consolidation. Although there is no proper jurisprudence on the subject matter, SEBI has clarified in the FAQs dated December 12, 2011 any person holding less than 25% of shares/ voting rights in a target company should also be entitled to make an open offer, voluntarily. This open offer should be for a minimum of 26% of the share capital of the target company (as opposed to 10% as permitted under Regulation 6). SEBI has also clarified in the FAQs dated December 12, 2011 that the restrictive conditions applicable to voluntary offer under Regulation 6 may not be applicable to a voluntary offer made by a person holding less than 25% shares. However, the other conditions under the Takeover Code like procedural compliances, offer price calculation etc. should applicable alike to voluntary offer under Regulation 6 and voluntary offer made by a shareholder holding less than 25%.

IV. Points to be Noted

i. Minimum Offer Size

Regulation 7(2) requires that voluntary offers under Regulation 6 be for a minimum size of 10% of the share capital of the target company. Regulation 6 also stipulates another condition to be complied with at the time of making a voluntary open offer namely that the shareholding of the acquirer along with PACs after completion of the open offer cannot exceed the maximum permissible non-public shareholding (as set out in the Securities Contracts (Regulations) Rules, 1957). Put together, these conditions may make it impossible for a person who along with PACs holds more than 65% of the share capital of a target company to make a voluntary offer since the maximum permissible non-public shareholding (as set out in the Securities Contracts (Regulations) Rules, 1957) is 75% of the share capital of the target company and consequently such an acquirer cannot acquire an additional 10% of the share capital of the target company without breaching this limit.

ii. Other Obligations

To be eligible to make a voluntary offer under Regulation 6, the acquirer must be compliant with the following conditions

i. The acquirer or any person acting in concert with him must not have acquired shares of the target company in the preceding 52 weekswithout attracting the obligation to make a public announcement of an open offer;[36] and
ii. An acquirer and persons acting in concert with him, who have made a voluntary open offer under Regulation 6 are not entitled to acquire any shares of the target company for a period of 6months after completion of the open offer except (i) pursuant to another voluntary open offer or (ii) through bonus issues or stock splits or (iii) through a competing offer.[37]

iii. When Does a Voluntary Offer Become a Mandatory Offer?

If, during a voluntary offer, a competing offer is made, the acquirer making the voluntary offer is entitled to increase the number of shares for which the open offer was originally made to such number of shares as he deems fit.[38] In such a situation, the open offer changes from being a voluntary one to a mandatory open offer under Regulation 3(2).[39] A consequence of this is that the offer size must then be a minimum of 26% of the shareholding of the target company as is required for a mandatory open offer. However, the benefit of this conversion is that the acquirer is no longer bound by the restrictions on market purchases to be able to effectively compete with the competing acquirer.

V. Competing Offer

When the Takeover Code aims to protect the interests of the public shareholders by providing an

36. Regulation 6(1).
37. Regulations 6(2) and 6(3).
38. Regulation 7(2).
39. Regulation 7(3).

exit opportunity at the best possible terms, it only adds to their benefit if there are multiple competing acquirers. It is significant to refer to the *takeover battle between Bharati Shipyard Limited and ABG Shipyard Limited* to acquire the shares of Great Offshore Limited which resulted in both the bidders revising the offer price multiple times and the public shareholders getting a highly beneficial exit from the target company. Accordingly, the Takeover Code permits, a third person to make an open offer to acquire the shares of the target company when the acquirer's open offer is subsisting. At the same time it is of prime importance to achieve orderly competition between acquirers vying for the same target company. Therefore, the Takeover Code regulates competing offers as provided herein below:

i. What are the pre-requisites for making a competing offer?

a. There has to be a subsisting public announcement of an open offer by an acquirer under the Takeover Code.[40]

b. Any person other than the original acquirer who has made the subsisting open offer can make the competing offer.[41]
Interestingly, the Takeover Code permits all persons other than the original acquirer to make a competing offer and does not restrict even the PACs of the acquirer from making a competing offer. This omission could be an oversight by the regulators but even if the PAC of an acquirer makes a competing offer, the offers of the acquirer and the PAC shall be consolidated as a single offer for the purposes of the Takeover Code.

c. The Takeover Code does not impose any restriction on the number of competing offers provided all the offers are made within the timeframe prescribed.

d. Competing offer can be conditional as to the minimum level of acceptances only if the original open offer conditional as to the minimum level of acceptances.[42]

e. Though a competing offer under the Takeover Code is made by the acquirer voluntarily, a competing offer shall not constitute voluntary offer under the Takeover Code. Therefore, the conditions applicable to a voluntary offer under the Takeover Code shall not be applicable to a competing offer.[43]

f. The schedule of activities and the tendering period for all competing offers shall be identical and the last date for tendering shares in acceptance of the every competing offer shall stand revised to the last date for tendering shares in acceptance of the competing offer last made.[44]

g. Timing of competing offer
   - Competing offer has to be made within fifteen working days from the public announcement of the original open offer.[45]
   - No person can make a public announcement of an open offer for acquiring shares, or enter into any transaction that would trigger the Takeover Code requiring a mandatory open offer, after fifteen working days from the date of public announcement of an open offer under the Takeover Code (voluntary or mandatory) till the expiry of the offer period for such open offer.

This provision is meant to ensure that there are no overlapping or simultaneous open offers in a target company except as competing offers which are made within fifteen days of public announcement of first open offer. However, the question is what if existing convertible securities are converted into equity shares pursuant to Regulation 26(2)(c)(i) of the Takeover Code during that period resulting in trigger of an open offer.

h. Offer size
   - Competing offer shall be for such number

40. Regulation 20(1) of the Takeover Code.
41. Ibid.
42. Regulation 20(6) of the Takeover Code.
43. Regulation 20(3) of the Takeover Code.
44. Regulation 20(8) of the Takeover Code.
45. Regulation 20(1) of the Takeover Code.

of shares which, when taken together with shares held by the acquirer and the PAC, shall be at least equal to the aggregate holding of the acquirer who has made the first public announcement including the shares proposed to be acquired by such acquirer under the agreement that has triggered the first open offer.[46]

- In case of a competing offer, the subsisting mandatory offer's size can be increased up to 3 working days prior to the commencement of the tendering period.[47]
- In case of a competing offer, the subsisting voluntary offer's size can be increased within a period of fifteen working days from the public announcement of a competing offer.[48]

i. Offer Price

- Offer price for each of the competing offers will be determined in accordance with the parameters prescribed above.
- In case of competing offers upward revisions of the offer price is permitted at any time up to 3 working days prior to the commencement of the tendering period.[49]

VI. Comparison Between Mandatory Offer and Voluntary Offers

Sr. No.		Mandatory offer	Voluntary offer by shareholders holding more than 25% shares/ voting rights in the target company.	Voluntary offer by any person other than a shareholder holding more than 25% shares/ voting rights in the target company.
1.	Eligibility of the offeror	Compulsory offer to be made by any person triggering the trigger events mentioned below. Can be triggered by direct or indirect acquisitions.	Shareholder in the target company holding shares / voting rights in excess of 25% but not more than the maximum public shareholding	a Voluntary offer by any person other than a share-holder holding more than 25% shares / voting rights in the target company.
2.	Trigger events	Acquisition of shares or voting rights entitling the acquirer and PAC to exercise 25% or more of voting rights in the target company;[50] or Acquisition of additional shares or voting rights entitling the acquirer and PAC to exercise more than 5% of voting rights in a financial year by an acquirer who together with	No trigger event. As the name suggests, the offer is made at the absolute discretion of the shareholder.	No trigger event. As the name suggests, the offer is made at the absolute discretion of the acquirer.

46. Regulation 20(2) of the Takeover Code.
47. Regulation 18(4) of the Takeover Code.
48. Regulation 7(2) of the Takeover Code.
49. Regulation 20(9) of the Takeover Code.
50. Regulation 3(1) of the Takeover Code.

		PAC already holds 25% or more but less than 75% of the capital in the target company;[51] or Acquisition of control over the target company.[52]		
3.	Size of offer	Minimum: 26% of the total shares of the target company. Maximum: The maximum offer size is linked to maximum permissible nonpublic shareholding permitted under Securities Contracts (Regulations) Rules, 1957.	Minimum: 10% of the total shares of the target company. Maximum: The maximum offer size is linked to maximum permissible non-public shareholding permitted under Securities Contracts (Regulations) Rules, 1957.	Minimum: 26% of the total shares of the target Maximum: Entire share capital of the target company.
4.	Revision of offer size	An acquirer may make upward revisions to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last 3 working days before the commencement of the tendering period.[53]	Acquirer is permitted to increase the offer size if there is a competing offer, within a period of fifteen working days from the public announcement of a competing offer.[54] If there is no competing offer acquirer is permitted to increase the offer size at any time prior to the commencement of the ast 3 working days before the commencement of the tendering period.[55] If the offer size of a voluntary offer is increased on account of a competing offer then the voluntary offer post such increase shall be deemed to be a mandatory offer under 56 Regulation 3(2).[56]	Though specific clarification has not been provided by SEBI, this should be same as in case of mandatory offer.

51. Regulation 3(2) of the Takeover Code.
52. Regulation 4 of the Takeover Code.
53. Regulation 18(4) of the Takeover Code.
54. Regulation 7(2) of the Takeover Code.
55. Regulation 18(4) of the Takeover Code.
56. Regulation 7 (3) of the Takeover Code.

5.	Other conditions	As detailed herein below	Same as for mandatory open offer. An acquirer may make upward revisions to the offer price at any time prior to the commencement of the last 3 working days before the commencement of the tendering period.[57]	Same as for mandatory open offer. An acquirer may make upward revisions to the offer price at any time prior to the commencement of thelast 3 working days before the commencement of the tendering period.
6.	Timing and procedure	As detailed herein below	Same as for mandatory open offer	Same as for mandatory open offer
7.	Other conditions	No such conditions	The acquirer or PAC should not have acquired shares of target Company without the obligation to make mandatory offer during the preceding 52 weeks; The acquirer cannot acquire shares of the target company during the offer period otherwise than under the voluntary open offer; Acquirer and PAC cannot acquire any shares of the target company for a period of 6 months after completion of the voluntary open offer except pursuant to another voluntary open offer or competing offer. **Exception**- Shares acquired through bonus issue or stock splits shall not dis-entitle the acquirer from making voluntary open offer.	No such conditions
8.	Conditional offer	An open offer under the Takeover Code can be conditional to the minimum level of acceptance subject to the following:[58] i. The agreement resulting in the	Same as in case of mandatory offer	Same as in case of mandatory offer

57. Regulation 18(4) of the Takeover Code.
58. Regulation 19.

		open offer should contain a condition that in the event the desired level of acceptance of the open offer is not received the acquirer shall not acquire any shares under the open offer or such agreement. ii. The acquirer and PAC shall not acquire any shares of the target company during the offer period. Where a conditional offer is made upon minimum level of acceptance, 100% of the payable consideration with respect of minimum level of acceptance or 50% of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.		
9.	Withdrawal of offer once made	The general rule under the Takeover Code is that an open offer cannot be withdrawn once the public announcement is made. However, the following exceptions permit withdrawal of open offer[59]: i. The required and already disclosed statutory approvals have been refused; ii. The acquirer, being a natural person has expired; iii. Any condition stipulated under the agreement triggering the open offer for effecting such agreement has not been met *for reasons outside the control* of the acquirer;	Same as in case of mandatory offer	Same as in case of mandatory offer

59. Regulation 23(1).

		iv. Any such circumstances which in the opinion of the Board merit the withdrawal. On withdrawal of an open offer, the acquirer will have to make disclosures as mentioned in Chapter 7.[60]		

60. Regulation 23(2) of the Takeover Code.

5. Exemption from open Offer Obligation[61]

While the fundamental objective of the Takeover Code is investor protection, the Takeover Code like the 1997 Code also provides for certain exemptions from the open offer obligation without deviating from its objective.

It is common for promoters and companies to engage in corporate restructuring to achieve enhanced economic performance and better management. More often than not, such corporate restructuring of listed companies carry the risk of triggering the open offer obligation under the Takeover Code. The commercial advantage of corporate restructuring cannot be at the peril of the public shareholders but at the same time a blanket prohibition on such structuring will be a draconian measure. Further, there could be acquisitions that are not intended to vest ownership rights on the acquirer but are undertaken in the ordinary course of business of the acquirer. On similar lines, it may not be a healthy trend to compel shareholders to make a mandatory open offer for unintended and inadvertent increase in voting rights.

To balance these conflicting interests, the Takeover Code recognizes certain specific exemptions to the open offer obligation. In comparison to the 1997 Code, the exemptions under the Takeover Code are less but more streamlined. Few very popular exemptions that were frequently relied upon by acquirers under the 1997 Code like the inter se transfer between "group" as defined in the Monopolies and Restrictive Trade Practices Act, 1969 and identified in the last published Annual Report of the target company and the transfer between qualifying promoter and the any firm or company, directly or indirectly, controlled by his relative have not been included in the Takeover Code.

The exemptions available to the acquirer and the PAC under the Takeover Code are divided into (i) exemptions with respect to open offer obligations under Regulations 3 and 4[62] (ii) exemption with respect to open offer obligations under Regulation 3[63] (iii) exemption with respect to open offer obligations under Regulation 3(1)[64] and (iv) exemptions with respect to open offer obligations under Regulation 3(2).[65]

The exemptions under the 1997 Code were not bifurcated as currently in the Takeover Code. Under the 1997 Code if a transaction was exempted, it meant that the regulation itself did not apply to the transaction. In addition to the bifurcations made under the Takeover Code with respect to exemptions for specific transactions and corresponding regulations, it may be pointed that Regulation 10 suggests that whilst undertaking an exempt transaction, have otherwise been applicable stands the open offer obligation that would withdrawn. It is not clear therefore as to whether the other restrictions – for instance the restrictions under Regulation 3(2) with respect to the maximum quantum of shareholding that can be acquired – continues to apply.

I. Exemptions With Respect to Open Offer Obligations Under Regulations 3 and 4

In essence what this means is that if any of the transactions result in the acquisition by one or more persons of (i) 25% of more of the shares or voting rights of the target company or (ii) for persons holding more than 25% of shares or voting rights of the target company, of more than 5% of the shares or voting rights in the target company in a financial year or (iii) control in the target company, the transaction would not trigger the open offer obligations.

61. Regulation 10.
62. Regulation 10(1).
63. Regulation 10(2).
64. Regulation 10(3).
65. Regulation 10(4).

As seen below, only limited transactions are exempt under both Regulation 3 and 4 i.e. whether they cross the shareholding thresholds or result in a change in control. These are as under:

i. Inter se transfer of shares among qualifying persons.

Qualifying Persons are:

a. immediate relatives[66]

b. promoters identified in the shareholding pattern filed by the target company under the listing agreement or Takeover Code for not less than 3 years prior to the proposed acquisition;

c. a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than 50% of the equity shares of such company, other companies in which such persons hold not less than 50% of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;

d. persons acting in concert for not less than 3 years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement;

Under the 1997 Code, this exemption could be availed only 3 years after the closure of public offer by the acquirer and PAC. To that extent, an open offer was mandatory to avail of the benefit.

e. shareholders of a target company who have been persons acting in concert for a period of not less than 3 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.

The exemption for qualifying persons is subject to the following:

a. In case of frequently traded shares, the acquisition price per share shall not be higher than the volume-weighted average market price for a period of 60 trading days preceding the date of issuance of notice for the proposed inter se transfer by more than 25%.

b. In case of infrequently traded shares, the acquisition price shall not be exceed the price determined under the Takeover Code by more than 25%; and

c. Applicable disclosure requirements shall have been complied with.

The 1997 Code had exempted all transfers between "qualifying promoters" provided the transferee and the transferor had held shares in the target, in aggregate, for a period of 3 years and the transfer price did not exceed 25% of the offer price. "Qualifying promoter' meant persons who were directly or indirectly in control of the company and persons identified as promoters under offer documents or listing agreement. Further, party related to or controlled by or controlling a "qualifying promoter" was deemed to be a qualifying promoter thereby exempting inter se transfer between such entities

ii. Acquisition in the ordinary course of business by an underwriter registered with SEBI, a stock broker registered with SEBI, a merchant banker registered with SEBI, a scheduled commercial bank acting as an escrow agent, a scheduled commercial bank or public financial institutions as pledgee, a registered market-maker of a stock exchange and any person acquiring shares pursuant to a scheme of safety net under ICDR Regulations are exempt from open offer obligation subject to certain prescribed conditions.

Exemptions that were available under the 1997 Code for acquisition of shares by public financial institutions on their own account in the ordinary course of business, acquisition by certain international financial institutions and

66. Defined under Regulation 2(1)(l) to mean any spouse of a person, and includes parent, brother, sister or child of such person or of the spouse.

government companies are not available under the Takeover Code.

SEBI in the informal guidance issued to IL&FS Trust Company Limited and IDBI Trusteeship Services Limited on April 12, 2012 and April 26, 2012, respectively has clarified that this exemption of acquiring shares as a pledgee is not applicable to trustees holding shares for the benefit of banks or public financial institutions.

iii. 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.

iv. Acquisition pursuant to a scheme[67]:

a. made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) or any statutory modification or re-enactment thereto
b. 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
c. 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 25% of the consideration paid under the scheme; and (b) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least 33% 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.

The 1997 Code provided for a blanket exemption for acquisitions pursuant to scheme of arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, Indian or foreign. This has now been made more stringent under the Takeover Code as above.

v. Acquisitions

a. pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
b. pursuant to the provisions of the Delisting Regulations;
c. by way of transmission, succession or inheritance; and
d. 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.

The exemption regarding acquisition of voting rights on preference shares under Section 87 of the Companies Act is a new addition to the exemption list. As per the provisions of the Companies Act, where public companies are concerned preference shares have no voting rights as are accorded to equity shareholders. This is the case except where dividend has not been paid by such company when due on the preference shares for 2 years in which case preference shareholders are entitled to vote at par with equity shareholder. The TRAC was of the opinion that since such voting rights are temporary in nature and upon dividend being paid, cease to exist, acquisition thereof does not warrant an open offer. Whilst this may be true, it is questionable as to whether this exemption can be misused to exercise control over a target company for elongated periods of time without the need to make an open offer.

67. Regulation 10(1)(d).

II. Other Exemptions with Respect to open offer Obligations under Regulation 3

Certain transactions are exempt only when the transaction results in the shareholding thresholds under Regulation 3 being crossed and not if the transaction results in a change in control. This is limited to an acquisition of shares of a target company under 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 as approved by the shareholders, not amounting to a change in control.

Corporate Debt Restructuring Schemes permit infusion of funds in financially weak companies. This exemption is also a new addition to the exemption list and was added on account of the various exemption requests that the SEBI has previously received for such transactions.

III. Other Exemptions with Respect to open offer Obligations under Regulation 3(2)

With respect to the exemptions, in addition to making a distinction between the exemptions granted if voting rights thresholds are crossed and a change in control, the Takeover Code also distinguishes between exemptions granted with respect to transactions that cross the initial threshold under Regulation 3(1) being 25% of the voting rights or shareholding of a target company and those that cross the creeping acquisition threshold under Regulation 3(2).

The following transactions are exempt only if they exceed the 5% creeping acquisition threshold under Regulation 3(2). Consequently this means that to avail of these exemptions the acquirer must already hold at least 25% of the target company.

1. Buy-back

If the voting rights of a shareholder increase in excess of 5% during a financial year pursuant to buy back of shares, he shall be exempt from open offer obligation if:

i. such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 77A of the Companies Act[68] and 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;
ii. the increase in voting rights does not result in an acquisition of control by such shareholder over the target company:

In case the above mentioned conditions are not met, the acquirer will still be exempt from open offer obligation if he reduces his voting rights such that the increase in voting rights for that financial year is not more than 5% within 90 days of increase of voting rights

As per the 2013 amendment to the Takeover Code, the time limit of ninety days to reduce the shareholding below the threshold pursuant to buy-back of shares is calculated from the date of closure of the buy-back offer rather than the date on which the voting rights so increase as provided in sub-regulation (3) of Regulation 10 of the Takeover Code. The intent behind introducing this change seems to be in line with the basic principle of Takeover Code for trigger of open offer i.e. at the time of acquisition of shares or agreeing to acquire the shares, whichever is earlier. The date of closure of buy-back offer precedes the date of increase in voting rights post buy-back since post the date of closure of buy-back offer, payment of buy-back consideration is required to be made and the shares tendered are required to be bought back. The date of closure of buy-back is the date by when the event of crossing the threshold for trigger of open offer becomes certain and hence the timeline of 90 days post this amendment will happen from the date of closure of the buy-back offer instead of date of increase in voting rights.

68. In the case of a shareholder resolution,

If the increase in voting rights pursuant to buy-back is unintended and merely consequential, it may not be fair to obligate the shareholder to make a mandatory offer under the Takeover Code. At the same time, a shareholder cannot be permitted to benefit from such an increase in voting rights. To strike a balance between these conflicting interests, the Takeover Code requires the shareholder to reduce the voting rights below the relevant threshold within 90 days from the date of closure of the buy-back if the acquirer has to be exempt from the open offer obligation. Also, the conditions imposed on the acquirer for availing the exemption ensure that a shareholder who facilitates buy back will not be permitted to increase his voting rights by not tendering shares in the buy-back

2. Rights Issue

i. acquisition of shares by any shareholder of a target company, up to his entitlement, pursuant to rights issue;
ii. acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to the rights issue, subject to the conditions provided in **Annexure B:**
iii. 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 Takeover Code;
iv. 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;
v. 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.

The 1997 Code did not distinguish between exemptions on the basis of shareholding of the acquirer in the target company. Therefore all the exemptions were available to all the acquirers irrespective of their shareholding in the target company. However, under the Takeover Code the above-mentioned exemptions are available only in case of trigger of open offer obligation under Regulation 3(2). The basic rationale for not offering this exemption for trigger of 25% threshold could be that increase in shareholding/ voting rights beyond 25% is a critical change in the management and ownership of the target company enabling the acquirer to block special resolutions. With such a change, the public shareholders that would typically be affected by such a change cannot be denied an exit opportunity.

IV. Reporting Requirements

An acquirer who avails of an exemption is not devoid of all obligations. The acquirer is under an obligation to report the exemption availed by the acquirer or PAC with the relevant stock exchanges and SEBI within the time period prescribed and in the manner specified. The acquirer must be vigilant with respect to the reporting requirements as some exemptions require a pre-acquisition filing whilst others require a post-acquisition filing requirement. Further certain exemptions require a filing fee to be paid along with the reporting.

V. Exemptions and Relaxations Granted by Sebi

SEBI, by virtue of being the market regulator is empowered to grant exemption to acquirers from the open offer obligation under the Takeover Code on a case to case basis.[69] Further, deviating from the 1997 Code, the Takeover Code has introduced provisions authorising SEBI to grant relaxation to acquirers from the strict compliance with any procedural requirements under Chapter III and Chapter IV of the Takeover Code.[70] The relaxation from strict compliance with the procedural requirements of the Takeover Code may not qualify for an exemption per se since the obligations with

69. Regulation 11(1) of the Takeover Code.
70. Regulation 11(2) of the Takeover Code.

respect to an open offer will still have to be complied with except in a more relaxed manner. This is a welcome change and could help the acquirers and companies to better handle unforeseen eventualities.

For availing the exemption granted by SEBI, the acquirer or the target company, as the case may be, need to file a specific application with SEBI together with a non-refundable fee of INR 50,000.[71] SEBI will pass a reasoned order on the application, after affording reasonable opportunity of being heard to the applicant and after considering all the relevant facts and circumstances.[72]

Under the 1997 Code, it was mandatory for SEBI to refer such exemption applications to the Takeover Panel, constituted under the 1997 Code[73] but the recommendations made by the Takeover Panel were only persuasive.[74] Revamping the procedure, the Takeover Code authorises SEBI to decide on the exemption application without referring the matter to experts unless SEBI on its own volition, constitutes a panel of experts and refers the application to such panel for recommendations.[75]

The very first exemption from mandatory open offer under the Takeover Code was granted by SEBI to the Government of India vide its order dated September 24, 2012[76] for the proposed increase in stake in IFCI Ltd. from 0.0000011% to 55.57%.

Under the 1997 Code, a time frame of 50 days from the date of application was prescribed for SEBI to pass a reasoned order on the application for exemption. The Takeover Code does not prescribe any time limit and provides that SEBI shall decide on the exemption application as expeditiously as possible.

71. Regulation 11(4) of the Takeover Code.
72. Regulation 11(5) of the Takeover Code.
73. Regulation 4(4) of the 1997 Code.
74. Regulation 4(6) of the 1997 Code.
75. Regulation 11(5) of the Takeover Code.
76. WTM/RKA/CFD/DCR-I/38/2012.

6 .Open Offer Process

I. Open Offer Road Map

Compulsory actions

Optional actions

Action	Timing
Appointment of merchant banker	Prior to the public announcement
Open Depository Account for shares tendered	Prior to or simultaneous with the public announcement
Public Announcement	On the date of agreeing to acquire shares or voting rights in, or control over the target company. Please refer to FAQ below for timing of PA based on the mode of acquisition.
Open escrow account- deposit consideration	Not later than 2 working days prior to the date of the DPS. This is as security for performance of acquirer's obligations. Please refer to FAQs for the details of the escrow ccount funds.
DPS	Not later than 5 working days of the public announcement
Filing of draft LOO with SEBI	Within 5 working days from the date of the DPS along with non-refundable fee. Fee prescribed
Manager to submit a due diligence certificate	This certificate has to be filed with SEBI together with the draft LOO
Draft LOO to be sent to target and SE	Simultaneous with submission to SEBI

	Timing
Competing Offer	Within 15 working days of the date of DPS
SEBI to provide comments on the LOO	Not later than 15 working days of the receipt of the draft LOO and if no comments are issued within such period, it shall be deemed that SEBI has no comments. Clarifications sought by SEBI: period for issuance of comments extended to the 5th working day from the date of receipt of satisfactory reply to the clarification.
Dispatch of final LOO to the shareholders	Within 7 working days of receiving comments from SEBI or in case no comments are received within 7 working days from expiry of 15 days from filing of the draft LOO with EBI.
Upward revision in number and/ or price of shares	Anytime till last 3 business days prior to the commencement of the tendering period.
Intimation of upward revision	Public announcement in the same newspapers in which the DPS was published and simultaneous intimation to SEBI, SE and the target company
Comments on the offer by Independent Directors	2 working days prior to commencement of the tendering period
Advertisement of schedule of activities	1 working day before the commencement of the tendering period. Together with the schedule of activities for the open offer, the status of statutory and other approvals, the procedure for tendering acceptances etc to be advertised.
Disclosure of acquisition during the offer period	Disclosure to the SE and the target company within 24 hours of acquisition
Commencement of tendering period	Not later than 12 working days from the date of receipt of the comments on draft LOO from SEBI.

	Timing
Closure of tendering period	Offer has to be kept open for 10 working days
Post offer advertisement	Within 5 working days after the offer period. Advertisement to be published in newspaper and sent to SEBI and SE, providing details of aggregate number of shares tendered, accepted, date of payment of consideration.
Open special escrow account	Immediately after closing the tendering period as the acquirer has to complete payment of consideration within 10 working days of expiry of tendering period. Transfer aggregate consideration payable to the special escrow account.
Completion of all obligations by acquirer including payment of consideration	Within 10 working days from the from the last date of the tendering period
Merchant Banker to release the remaining escrow funds	Within 30 days from the payment of the consideration to the shareholders.

7. Frequently Asked Questions

1. When does the Open Offer Process Start? Does it Differ for a Mandatory Offer v/s a Voluntary Offer?

The open offer process always begins with the appointment of a merchant banker as the manager to the offer by the acquirer. There is no difference between mandatory open offer and voluntary open offer on this count and the first step in both kinds of open offers is the appointment of the manager to the offer.

2. Is There a Difference Between the PA, DPS and the LOO?

Yes. The PA, DPS and the LOO are three different documents to be issued by the acquirer and the PACs at three different stages of the open offer process.

The PA is the first announcement made by the acquirer of the open offer disclosing details of the transaction and the intention to acquire shares of the target company from existing shareholders by means of an open offer. The PA has to be made on the date of agreeing to acquire shares or voting rights in, or control over the target company but depending upon the mode of acquisition, specific timing has been prescribed for making the PA. Please see the next question for such prescribed timing.

The DPS is the next announcement made by the acquirer and the PACs disclosing all the relevant details of the open offer as may be specified in order to enable shareholders to make an informed decision with reference to the Open Offer. The DPS has to be made within 5 working days from the date of making the PA.

While the PA and the DPS are disclosures made by the acquirer and the PACs to intimate to the public of an exit opportunity available to them, the LOO is the offer made by the acquirer to the identified shareholders of the target company to purchase their shares. The acquirer has to submit a draft of the LOO to SEBI for its comments. The LOO has to be dispatched by the acquirer to the shareholders of the target company after incorporating the comments provided by SEBI, if any.

3. When Should a Public Announcement be Made?

Transaction	PA Timing
Market purchase of shares	Prior to placement of purchase order with stock broker
Acquisition of shares or voting rights, upon conversion of convertible securities: • Without fixed date of conversion; • With fixed date of conversion	 • On the date ofexercise of option to convert such securities; • On second working day prior to the scheduled date of conversion
Acquisition pursuant to disinvestment	On the date of executing agreement
Acquisition or control under preferential issue	On the date board of directors of the target company authorizes such preferential issue.
Increase in voting rights consequential to a buyback not qualifying for exemption.	Not later than 90th day from the date of closure of the buy-back leading to increase in voting rights beyond the threshold.
Acquisition where the specific date on which the title to such shares or voting rights or control acquired is beyond the control of the acquirer.	Not later than 2 working days from the date of receipt of intimation of having acquired such title.

Indirect acquisition where value of the target company is not more than 80% of overall transaction	Within 4 working days from the earlier of: • The date on which primary acquisition is contracted; • The date on which the intention or the decision to make the primary acquisition is announced in public domain
Indirect acquisition where value of the target company is more than 80% of overall transaction	On the earlier of: • The date on which primary acquisition is contracted; • The date on which the intention or the decision to make the primary acquisition is announced in public domain
In case of more than one mode of acquisition either by way of an agreement and the one or more modes of acquisition of shares as provided under Regulation 13(2) of the Takeover Code or only through one or more modes of acquisition as provided under Regulation 13(2) of the Takeover Code	On the date of first such acquisition giving the details of the proposed subsequent acquisition.

4. Should the LOO be Sent to all the Shareholders of the Target Company?

The LOO has to be dispatched to all the shareholders whose names appear on the register of members of the target company as of the Identified Date. "Identified date" means the date falling on the 10th working day prior to the commencement of the tendering period.

5. What is the Offer Period?

"Offer period" means the period between the date of entering into an agreement to acquire shares, voting rights in, or control over a target company requiring a public announcement, or the date of the public announcement, as the case may be, and the date on which the payment of consideration to shareholders who have accepted the open offer is made, or the date on which open offer is withdrawn, as the case may be.[77] In light of the criticality of the time period for the success of the open offer and the interests of the stakeholders, the Takeover Code imposes certain obligations on the target company and its directors, the acquirer and the manager to the open offer to be fulfilled during the 'offer period'.

77. Regulation 2(1)(p) of the Takeover Code.

6. What is the Offer Size? Can it Ever be Increased or Decreased?

In case of mandatory open offer, the minimum offer size is 26% of the total shares of the target company as of 10th working day from the closure of the tendering period taking into account all potential increases in the shares of the target company during the open offer.

In case of voluntary offer made by a shareholder holding in excess of 25% of shares or voting rights of the target company, the minimum offer size shall be an additional 10% of the total shares of the target company, and the maximum offer size shall be such number of shares as would result in the post-acquisition holding of the acquirer and PACs with him not exceeding the maximum permissible non-public shareholding applicable to such target company.

In case of voluntary offer made by a shareholder holding less than 25% of shares or voting rights of the target company, the minimum offer size is 26% of the total shares of the target company.

The Takeover Code does not permit the acquirer to reduce the open offer size but an upward revision of offer size is permitted subject to fulfilment of the prescribed conditions.

7. What is a Conditional Offer?

A conditional offer is an open offer made under the Takeover Code where the offer is conditional upon minimum level of acceptances. In such case, the acquirer will disclose a minimum percentage / number of shares that the acquirer intends to acquire in the open offer, failing which the acquirer shall have the option not to acquire any shares in the open offer or under the agreement that triggered the mandatory open offer. Conditional offers are also subject to the other conditions prescribed under the Takeover Code.

8. How is the Offer Price Determined? Does this Differ if the open Offer is a Voluntary Offer or the Open Offer is Launched Pursuant to an Indirect Acquisition or a Change in Control? Can the Offer Price be Increased or Decreased?

The fundamental principle of the Takeover Code is to provide an exit opportunity to the public shareholders when there is a change in control or substantial acquisition of shares of the target company at the best possible terms. Therefore, the offer price to be paid to the public shareholders is the highest of the prices under Regulation 8 of the Takeover Code. The parameters for determining as prescribed under Regulation 8 of the Takeover Code are the same for a mandatory offer and a voluntary offer but certain additional parameters are prescribed for determining the offer price when the offer is pursuant to an indirect acquisition.

The Takeover Code does not permit the acquirer to reduce the offer price but an upward revision of the offer price is permitted subject to fulfilment of certain prescribed conditions.

9. Should the Offer Price Always be Paid in Cash? What are the Other Means of Paying the Offer Price?

The offer price can be paid in any of the following forms:[78]

a. Cash;
b. Listed shares in the equity share capital of the acquirer or any PAC;
c. Listed secured debt instruments issued by the acquirer or any PAC, which has been given a rating not less than investment grade by a SEBI registered credit rating agency;
d. Convertible debt securities convertible to the listed shares of the acquirer or any PAC; or
e. A combination of any of the above.

10. Who are the Advisors to the Acquirer During the Period?

The acquirer should compulsorily appoint a SEBI registered merchant banker as the manager to the offer. The acquirer may at its option a registrar to the offer and shall also engage other legal and financial advisors.

If securities of listed company are offered as consideration in the open offer then the share exchange ratio will have to be duly certified by an independent merchant banker (other than the manager to the open offer) or an independent chartered accountant having a minimum experience of 10 years.

11. What are their Obligations?

The following are the key obligations of the manager to the open offer:

a. Make the prescribed announcements and disclosures on behalf of the acquirer.
b. Ensure, prior to public announcement that the acquirer is able to implement the open offer; and firm arrangements for funds have been made by the acquirer.

78. Regulation 9(1) of the Takeover Code.

c. Ensure that the contents of all the announcements and disclosures made by the acquirer and PAC in relation to the open offer are true, fair, not misleading and in compliance with Takeover Code
d. Furnish to SEBI a due diligence certificate along with the draft LOO.
e. Ensure that the market intermediaries engaged for the purposes of the open offer are registered with SEBI.
f. Exercise diligence, care and professional judgment to ensure compliance with Takeover Code.
g. Operate and manage the escrow account.
h. Provide clarifications sought by SEBI in the draft LOO and incorporate comments if any made by SEBI in the LOO.
i. Not deal on his own account in the shares of the target company during the offer period.
j. File a report with SEBI within fifteen working days from the expiry of the tendering period, in the prescribed format, confirming status of completion of various open offer requirements.

12. What are the Obligations of the Directors of the Target Company?[79]

The Takeover Code requires the board of directors of the target company to do the following:

i. to facilitate the acquirer in the verification of shares tendered in acceptance of the open offer;
ii. to make available to all acquirers making competing offers, any information and co-operation provided to any acquirer who has made a competing offer;
iii. to register without delay 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;
iv. to ensure that, during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice; and
v. to ensure that the obligations of / restrictions on the target company (discussed below) are adhered to.

79. Regulation 24 of the Takeover Code.

The board of the target company is also required to constitute a committee of independent directors on the board to provide reasoned recommendations on the open offer which recommendations are then published by the target company.

Under Regulation 23(4) of the 1997 Code, it was optional for the board of the target company to provide unbiased comments and recommendations on the offer to the shareholders. The Takeover Code has made this a mandatory obligation, in line with global practice.

Further directors appointed or proposed to be appointed by the acquirer are saddled with the following obligations / restrictions.

a. A representative of the acquirer or the PAC is not entitled to be appointed as the director of the target company during the offer period unless:
   i. fifteen working days have expired from the date of DPS;
   ii. acquirer has deposited 100% of the consideration payable under the open offer in the escrow account, in cash;
   iii. acquirer has not specified any conditions to which the agreement triggering the open offer is subject to; and
   iv. open offer is not made conditional upon minimum level of acceptances.
b. Any director already on the board representing the acquirer or PAC is not entitled to participate in any deliberations of the board of the target company or vote on any matter in relation to the open offer.

Further, during the pendency of competing offers, no directors may be inducted on the board of the target company unless the a vacancy is created by death or incapacitation of an existing director and shareholders permit for this vacancy to be filled up through a postal ballot.

13. What are the Obligations of the Target Company During the Offer Period?

The target company and its subsidiaries are forbidden to carry out certain corporate actions (enlisted below) unless the approval of shareholders of the target company is obtained by way of a special resolution by postal ballot. These include the following:

a. Alienation of material assets or effecting material borrowings;
b. Issuance of new securities or affecting a change in the capital structure subject to certain exceptions;
c. Entering, amending, terminating material contracts;
d. Accelerating any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation (including ESOP option).

14. What are the Obligations of the Acquirer?

a. Prior to making the PA of an open offer, 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 necessary statutory approvals.
b. Not to alienate any material assets of the target company or of any of its subsidiaries outside the ordinary course of business for a period of 2 years after the offer period unless:
    i. the acquirer has declared an intention in the DPS and the LOO to do so; or
    ii. the alienation is approved by a special resolution passed by shareholders of the target company, by way of a postal ballot and the notice for such postal ballot inter alia contains the reasons for the alienation.
c. Ensure that the contents of all the announcements and disclosures made in relation to the open offer, are true, fair, not misleading and are based on reliable sources, and state the source wherever necessary.
d. The acquirer and PAC shall not sell shares of the target company held by them, during the offer period.
e. The acquirer and PAC shall be jointly and severally responsible for fulfilment of obligations under the Takeover Code.

15. Can 2 open Offers Occur Simultaneously?

Other than competing offers that are made within 15 working days of public announcement of first open offer there can be no other open offer made during the subsistence of one open offer. Regulation 20(5) prohibits persons from making a public announcement of an open offer for acquiring shares, or entering into any transaction that would trigger the Takeover Code requiring a mandatory open offer, after 15 working days from the date of public announcement of an open offer under the Takeover Code (voluntary or mandatory) till the expiry of the offer period

16. When can a Competing Offer be Launched? Does this Differ in a Voluntary Offer?

Any person other than the original acquirer who has made the subsisting open offer can make a competing offer within 15 working days of the date of the DPS made by the first acquirer. The Takeover Code does not impose any restriction on the number of competing offers provided all the offers are made within the timeframe prescribed. If competing offers are made then the schedule of events of all the competing offers shall be so stream lined that all the competing offers run parallel and simultaneously.

17. Are there any Restrictions Post the Culmination of the Open Offer?

In case of a voluntary offer made by a shareholder holding in excess of 25% of shares or voting rights of the target company, acquirer and PAC cannot acquire any shares of the target company for a period of 6 months after completion of the voluntary open offer except pursuant to another voluntary open offer or competing offer except as specifically permitted under the Takeover Code.

18. If an Acquirer is Making an Open Offer Under the Creeping Acquisition Route will this also be Tantamount to Acquiring Control? Will 2 Open Offers have to be Launched, One Under Regulation 3(2) and the Other Under Regulation 4?

Creeping acquisition can also result in the acquisition of control of the target by the acquirer if pursuant to such acquisition the acquirer acquires the right to appoint majority of the directors or to control the management or policy decisions of the target company. If certain creeping acquisition triggers mandatory open offer under both Regulation 3(2) and Regulation 4, the acquirer can make a single open offer under both Regulations 3(2) and 4. It is not required to launch two separate open offers.

19. Can an open Offer ever be Unsuccessful? If no Shareholders Tender their Shares During the Open Offer can the Acquirer Complete his Original Transaction?

If an offer is not a conditional offer then the acquirer is under an obligation to acquire all the shares tendered in the open offer if the open offer is undersubscribed. On the other hand, if the shares tendered in the open offer are in excess of the minimum offer size, the acquirer can choose to purchase all the shares tendered or only up to the minimum offer size (26%) on a proportionate basis.

The obligation on the acquirer is to provide an exit opportunity to the public shareholders but if the public shareholders elect not to tender their shares in the open offer then there is no restriction on the acquirer in consummating its transaction subject to compliance with the requirements under the Takeover Code.

20. Can an Open Offer be Withdrawn? What are the Consequences?

The general rule under the Takeover Code is that an open offer cannot be withdrawn once the public announcement is made. However, the following exceptions permit withdrawal of open offer[80]:

a. The required and already disclosed statutory approvals have been refused;
b. The acquirer, being a natural person has expired;
c. Any condition stipulated under the agreement triggering the open offer for effecting such agreement has not been met for reasons outside the control of the acquirer provided such conditions were specifically disclosed in the DPS and the LOO;
d. Any such circumstances which in the opinion of the Board merit the withdrawal.

Withdrawal of open offer in accordance with Takeover Code has to be announced in all the newspapers in which the DPS pursuant to the public announcement was made; and disclosed to SEBI, all the relevant stock exchanges and the target company at its registered office, within 2 working days.[81]

Through the 2013 amendment to the Takeover Code, SEBI has clarified by adding a proviso to clause (C) of sub-regulation (1) of Regulation 23 of the Takeover Code that an acquirer shall not be permitted to withdraw an open offer pursuant to the public announcement made as per Regulation 13(2) even if the proposed acquisition though a preferential issue is unsuccessful.

The amendment has been introduced to address the issue of price volatility between the date of Board resolution and date of shareholders resolution. Post this amendment, the acquirer will have to be doubly sure about the success of the shareholders' special resolution for approving the preferential issue failing which the acquirer will be obligated to make an open offer even in absence of any preferential allotment of shares by the target company.

21. When can the Original Transaction be Consummated?

The acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares

80. --
81. Regulation 23(2) of the Takeover Code.

or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period.

Exceptions:

i. SEBI has clarified in the informal guidance dated July 9, 2012, issued to *R Systems International Limited* that this rule will not apply to market purchases as the public announcement in case of market purchases is made prior to placing of the order with a stock broker.

ii. Acquirer can consummate the original transaction after, (i) depositing in the escrow account cash of an amount equal to 100% of the consideration payable under the open offer assuming full acceptance of the open offer, (ii) the expiry of 21 working days from the date of DPS.

The 2013 amendment to the Takeover Code has inserted a new Regulation 22(2A)[82], which intends to plug the loophole with respect to the issue dealt with in R Systems International Limited. Prior to this amendment and referring to the informal guidance, earlier SEBI was distinguishing between market purchase and negotiated purchase. However, based on the observations made and the issues analyzed in the above case, SEBI realized that market purchase could be pre-negotiated without a written agreement and thereby acquirer could avoid the compliance of Regulations 22(1) and 22(2). In order to plug this loophole, SEBI has now imposed certain restrictions in case of acquisition of shares through market purchases and in this regard has inserted a new Regulation 22(2A) in the Takeover Code. With the insertion of sub-regulation (2A), acquirers can now acquire the shares via preferential issue or stock exchange settlement process subject to the compliance of the conditions mentioned therein

22. What if the Acquirer Cannot Consummate his Original Transaction Because a Certain Condition Precedent has not been Met – Must he Continue with the Open Offer and Purchase the Shares Tendered?

The acquirer can withdraw the open offer if a condition precedent to the primary transaction is not met provided:

a. The reasons for non-completion of the condition precedent were outside the reasonable control of the acquirer;
b. The condition precedent has been specifically disclosed in the DPS and the LOO; and
c. The definitive agreements for the primary transaction have been rescinded.

23. What is an Escrow Account? Who has Control over the Escrow Account?

The Takeover Code envisages the following two types of escrow accounts:

a. General escrow account; and
b. Special escrow account

The general escrow account has to be opened and maintained by the acquirer to secure the obligations of the acquirer, within a period of 2 working days prior to the date of the DPS.

The amount of consideration to be deposited in the general escrow account is as follows:

Consideration payable for open offer	Escrow amount
On the first INR 500 crore	On the first INR 500 crore
On the balance consideration	An additional 10% of the balance consideration

82. Regulation 22(2A) of the Takeover Code:
Notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement pr ocess, other than through bulk deals or block deals, subject to,-
(i) such shares being kept in an escrow account,
(ii) the acquirer not exercising any voting rights over such shares kept in the escrow account:
Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

- The general escrow account may be in the form of:
  - » Cash deposited with a scheduled commercial bank,
    In such a case, the manager of the open offer will be empowered to instruct the bank to make payments in the form of a bankers cheque or demand draft of the amount lying to the credit of the escrow account.

  - » Bank guarantee in favour of the manager; or
    The bank guarantee shall be in favor of the manager of the open offer and be valid for the open offer period and an additional period of 30 days after the payment has been made to the shareholders in acceptance of the open offer.
    The acquirer shall also ensure that at least 1 % of the total consideration is deposited in cash with the scheduled bank as a part of escrow account.

  - » Deposit of acceptable security with appropriate margin.
    In such a case, the manager of the open offer shall be empowered to realize the value of the escrow account through sale or in any other manner. The manager shall be liable to make good any such shortfall which may arise in the amount required to be maintained in the escrow.
    The acquirer shall also ensure that at least 1 % of the total consideration is deposited in cash with the scheduled bank as a part of escrow account.

The special escrow account is opened to actually pay the shareholders who have tendered shares in the open offer and the entire consideration payable to such shareholders will have to be transferred to the special escrow account immediately after closure of the tendering period.

Both the general escrow account and the special escrow account shall be operated and managed by the manager to the open offer.

24. What are the Consequences of not Complying with the Open Offer Process? Can SEBI make the Acquirer Divest his Shareholding?

The Takeover Code and the SEBI Act have laid down the consequences of any failure to comply with the provisions of the Takeover Code.

Prescribed penalties include:

a. Forfeiture of the escrow account;
b. Directing the acquirer to divest the shares acquired in violation of the Takeover Code and directing appointment of merchant banker for such divestiture;
c. Transfer the shares or any proceeds of a directed sale of shares acquired in violation of the Takeover Code to Investor Protection and Education Fund;
d. Directing the target company or any depository not to give effect to any transfer of shares acquired in violation of the Takeover Code;
e. Directing not to exercise any voting or other rights attached to shares acquired in violation of the Takeover Code;
f. Debarring any person who has violated the Takeover Code from accessing the capital market or dealing in securities;
g. Directing the acquirer to make an open offer at an offer price determined by SEBI;
h. Stop the acquirer and the target company from disposing off the assets of the target company or any of its subsidiaries contrary to the contents of the LOO;
i. Cease and desist the acquirer from exercising control acquired over any target company;
j. 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;
k. Initiate enquiry proceedings against the intermediary registered for failure to carry out the requirement of the Takeover Code; and
l. Monetary penalties and adjudication proceedings.

25. Can the Shareholders Claim Interest for Delay in Payment of Consideration by the Acquirer?

Acquirers are required to complete the payment of consideration to shareholders who have accepted the offer within 10 working days from the date of expiry of the tendering period. In case the delay in payment is on account of non-receipt of statutory approvals and if the same is not due to wilful default or neglect on part of the acquirer, SEBI may grant extension of time for making payment, subject to the acquirers paying interest to the shareholders for the delayed period at such rate as may be specified by SEBI. If the delay in payment of consideration is not due to the above reasons, it would be treated as a violation of the Takeover Code and therefore, also liable for other action in terms of the Takeover Code.

26. Can the Shareholders Withdraw the Shares Tendered in the Open Offer?

The shareholders who have tendered their shares in the open offer are not entitled to withdraw their acceptance during the tendering period.

27. Is it Permitted to pay Non-Compete fee to the Promoters?

There is no prohibition on payment of non-compete fee or control premium to the promoters but any monies paid to the promoters as consideration for shares, voting rights or control will have to be mandatorily included in the offer price paid to the public shareholders also. The objective is to treat all the shareholders of the target company at par with each other.

8. Hostile Takeovers

480 Indian companies are vulnerable to hostile takeover risk, declared The Economic Times on April 3, 2012 based on its study of around 3000 Indian listed companies.[83] Though the message was alarming for the Indian M&A market that has not witnessed many hostile takeovers in the past, the news did not come as a complete surprise. Market experts had highlighted this possibility when the Takeover Code had revised the initial trigger limit to 25% of the shares of the target company from 15% under the 1997 Code. Acquirers and investors are now at liberty to acquire upto 24.99% of the shares of a listed company without triggering an open offer requirement and Indian target companies with scattered promoter shareholding can therefore, easily fall prey to hostile takeover threats. According to the Business Standard Research Bureau, only seven of the top 500 listed firms had non-promoter shareholders holding of more than 25%, as of June 30, 2011 and promoter's stake in 290 companies are below 15%.

More critically, the Takeover Code now permits voluntary open offers to acquire up to the entire share capital of the company or up to 75% of the shares of the target company depending upon the existing shareholding of the person making the voluntary open offer. This will enable competitors and potential acquirers to make a voluntary offer, which if successful can give them higher stake in the target company than the existing promoters. Additionally, the Takeover Code retains the provisions on competing offers that were there under the 1997 Code and therefore, an acquirer is permitted to make competing offers within fifteen days of an acquirer making a public announcement. To that extent, a potential acquirer can make a hostile bid for taking over a target company by making a competing bid under the Takeover Code. While the changes in the Takeover Code enhance the possibilities of hostile takeovers, the Takeover Code does not have any provisions to prevent or avert hostile takeovers. Accordingly, the risk of hostile takeovers is much higher than ever before.

The reported history of hostile bids in India begins with the attempt by London-based businessman Lord Swraj Paul, to take over Escorts and DCM in 1980s, which was thwarted by the Nandas. Thereafter, and after almost 15 years, corporate India witnessed the only successful hostile takeover of Raasi Cements by Indian Cements in 1998.

Most recently, the Essel Group, controlled by media baron Subhash Chandra had steadily accumulated around 12.27% shares of IVRCL to become the single largest shareholder in IVRCL. The original proposal of Essel Group was to acquire the entire shareholding of the existing promoters of IVRCL and thereby acquire control of IVRCL. However, now it appears that Essel Group has decided to put the proposal on hold and observe the target company for some more time before any comprehensive action is taken. This is a clear indication of the beginning of an era of hostile takeovers and takeover battles in India.

With the changes in the Takeover Code, the potential acquirers now have a better chance of making hostile bids successful. Constant fear of hostile takeover bids puts the promoters of Indian companies on the edge, which will compel the promoters to adhere to highest corporate governance standards in the matters of the target company. Further, the promoters shall also be careful enough to put in place protective measures to safeguard their interests and avert hostile takeovers.

I. Hostile Takeover Defences

Indian corporate and securities laws do not permit in India most of the hostile takeover defenses like 'poison pills' and 'staggered board' that are generally used by corporates in other jurisdictions. A close review of the Indian companies would clarify that

83. http://articles.economictimes.indiatimes.com/2012-04-03/news/31281493_1_hostile-takeover-promoter-holdings-new-takeover

they are generally promoter driven or closely held and managed as family business. To that extent, the most effective defense against a hostile takeover in an Indian company is substantial promoter shareholding. To make an Indian company hostile takeover-proof, promoters should ideally follow the strategy adopted by Tata Sons and the Birla group to consolidate promoter shareholding in the company through creeping acquisition under the Takeover Code. Also, some of the Indian companies have adopted embedded defenses like (i) trusts that guarantee lifetime chairmanship provisions and long-term rights of the promoters to nominate a certain percentage of the board of directors, (ii) contractual term that prevents a hostile bidder who succeeds in taking control of the target company from using the brand name of the company[84], and (iii) contractual restrictions on change in control.

Some of the typical takeover defences recognised in the US are as follows:

i. Poison Pills

The company issues and allots special stock warrants or grants certain rights to its shareholders that entitle shareholders to purchase shares of the company at a substantial discount in the event of a hostile takeover attempt. In case any person acquires shares or voting rights in the target company in excess of certain prescribed thresholds, without permission of the board, then all the remaining shareholders shall be entitled to exercise their special rights or to exercise warrants to acquire additional shares of the target company thereby diluting the stake of the hostile bidder. Though Regulation 26(2)(c)(I) of the Takeover Code permits issuance of shares on conversion of existing convertible securities during the offer period, the exercise of warrants at a substantial discount is not permitted under the provisions of the ICDR Regulations which prescribes a minimum price for exercise of warrants by listed companies.

ii. Staggered Board

This concept ensures that only a third of the board can change each year. Hence, it would not be possible for a hostile bidder to replace the board, except through a gradual process of changing a third of the board each year. In India, Section 256 of the Companies Act actually requires companies to maintain staggered boards by default. However, Section 284 of the Companies Act permits the shareholders of the company to remove all the directors without cause at any time by a simple majority of voting shareholders in a shareholders meeting. Therefore, the staggered nature of the board does not serve as a takeover defence in India as it does in the United States." Indeed, the right to remove directors as such is guaranteed by statute and cannot be revoked by amendment to the charter or bylaws of an Indian company."

iii. Pac-Man Defense

When a hostile bid is made on the target company, the target company shall make a counter bid on the acquirer. There will be a role reversal and the target will hunt the acquirer when the acquirer tries to take over the target company.

iv. White Knight

Under this defense, the target company and/ or the promoters will make an offer to the public shareholders of the target company that is more enticing and beneficial than the offer of the hostile bidder. If the competing offer of the target company and/ or the promoters is accepted by the public shareholders in preference to the offer of the hostile bidder then the aggregate shareholding of the promoters shall be further consolidated. If the target company and/ or the promoters cannot make the counter offer, then they can approach an affiliate or associate company to make a more beneficial counter offer to acquire the shares of the target company. Such counter offer by the affiliate or associate company shall constitute a competing offer permitted under Regulation 20 of the Takeover Code.

This strategy was successfully utilized by the promoters of the GESCO real estate company when

84. Tata Group has adopted this 'brand pill'.

there was a hostile bid on it by the Dalmia group. The white knight was the Mahindra group that was recruited by the promoters to keep the Dalmia group at bay. Also, when East India Hotels, the luxury business and resort hotel group controlled by the Oberoi family faced a hostile takeover attempt by rival hotel group, ITC, Reliance Industries stepped in as a white knight and acquired around 18.53% stake and certain board representation in East India Hotels.

Conclusion

Since its introduction, the Takeover Code has weathered many a challenge and SEBI's efforts to keep the Takeover Code abreast of the latest global developments in the public M&A scenario seem to be bearing dividends. The 2013 amendment has resolved numerous ambiguities which existed in relation to certain provisions of the Takeover Code and will prepare the Takeover Code for a third year.

Whilst the rapidly evolving public M&A landscape will, no doubt, throw up new challenges and questions for SEBI to address, it can be safely said that the Takeover Code in its present form is at par with any foreign code governing public mergers and acquisitions.

Annexure A Deemed Pacs

Regulation 2(1)(q)(2) of the Takeover Code defines PAC as *persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.*

Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established:

i. a company, its holding company, subsidiary company and any company under the same management or control;
ii. a company, its directors, and any person entrusted with the management of the company;
iii. directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;
iv promoters and members of the promoter group;
v. immediate relatives;
vi. a mutual fund, its sponsor, trustees, trustee company, and asset management company;
vii. a collective investment scheme and its collective investment management company, trustees and trustee company;
viii. a venture capital fund and its sponsor, trustees, trustee company and asset management company;
ix. a foreign institutional investor and its sub-accounts;
x. a merchant banker and its client, who is an acquirer;
xi. a portfolio manager and its client, who is an acquirer;
xii. banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual: Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;
xiii. an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unit holder having not less than 10% of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10% of the paid-up capital of that investment company or unit capital of that fund:

i. Note: 'Associate' means

i. any immediate relative of such person;
ii. trusts of which such person or his immediate relative is a trustee;
iii. partnership firm in which such person or his immediate relative is a partner; and
iv. members of Hindu undivided families of which such person is a coparcener.

Annexure B Conditions for Rights Issue Exemptions

Acquisition of shares by any shareholder of a target company, beyond his entitlement pursuant to a rights issue, shall be exempt from open offer obligations subject to fulfilment 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 sharesof 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 60 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 however, 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.

Annexure C Market Capitalisation

The market capitalisation of the target company shall be determined on the basis of the volumeweighted average market price of the shares of the target company on the stock exchange for a period of 60 trading days preceding the earlier of,

i. the date on which the primary acquisition is contracted; and
ii. the date on which the intention or the decision to make the primary acquisition is announced in the public domain.

as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

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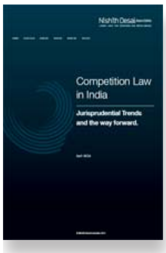

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