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TAKEOVER REGULATIONS

18.1 Introduction

One of the most popular modes of corporate expansion is by the acquisition of an existing company. However, when the company being acquired is a listed company, then along with the promoters' stake, there are a lot of other interests, such as, public shareholders, financial institutions, foreign shareholders, etc. It is essential that all these shareholders also get a fair deal in case of an acquisition. To address all such concerns, SEBI has framed the SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997, more popularly known as the Takeover Regulations or the Takeover Code. Whenever an acquisition or sale of shares/ voting rights in a listed company takes place, one must consider the applicability of the SEBI Takeover Regulations. The Regulations are modeled on the London Takeover Code. They contain various operative and procedural provisions and several gateways or exemptions to the substantial provisions. Of all the capital market regulations, the Takeover Regulations are the most complex and sophisticated. The importance of the Takeover Regulations can be judged from the fact that in 1999-00, 75 open offers were made for a total amount of Rs. 461 crores. The corresponding figures for 2004-05 are 61 open offers for a total of Rs. 4,632 crores and for the period from April 2005 to February 2006 it was 97 open offers for a total amount of Rs. 4,004 crores. The Regulations have witnessed regular amendments and modifications. In fact, the latest amendments in May 2006 have substantially modified and deleted the last amendments made only in January, 2005. This Chapter looks at some of the important facets of this very important piece of legislation.

18.2 Definitions

18.2.1 The Regulations defines various terms which are relevant for these Regulations. Some of these definitions are applicable to various provisions of these Regulations, whereas the others are relevant only for a particular Regulation.

18.2.2 Acquirer

An "Acquirer" has been defined to mean any person who:

- directly or indirectly
- acquires or agrees to acquire
- shares or voting rights in the target company or
- acquires or agrees to acquire control over the target company
- either by himself or with any person acting in concert with the acquirer.

The following propositions emerge from this definition:

- (a) Any person can be an acquirer. The term "person" has not been defined in the Regulations. Further, this term has also not been defined in the SCRA or SEBI Act or the Companies Act. Hence, an individual, HUF, company, firm, AOP, BOI and every other artificial juridical person will be covered.
- (b) Even indirect acquisition would be covered. E.g., if an unlisted company holds the shares of a listed company and an individual acquires the shares of the unlisted company, it would be a case of an indirect acquisition and the individual would be treated as an "acquirer".
- (c) Both the acts of actual acquisition and agreeing to acquire would make the person an "acquirer". In case of an agreement to acquire shares or voting rights, it must be a binding agreement on both the parties to the agreement.
- (d) Both acquisition of shares and voting rights of the target company are covered. The term "voting rights" has not been defined in the Regulations. According to section 87(1) of the Companies Act, every member of a company holding equity shares has a right to vote in respect of such shares on every resolution placed before the company. However, according to the provisions of s.86, it a company can issue equity shares with differential rights as to voting. Hence, all equity shares need not carry voting rights. Further, a person who does not own any equity shares can still acquire voting rights by agreement with any shareholder who has such rights.
- (e) Even acquisition of control over a target company is covered.
- (f) The acquisition can be either by the person himself or along with any person acting in concert with him.

18.2.3 Control

This definition is an inclusive definition and can be defined as follows:

- "Control" includes
- the right to appoint majority of the directors or
- to control the management or policy decisions
- exercisable by a person or persons acting individually or in concert
- directly or indirectly
- including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

18.2.4 Person Acting in Concert

The definition is in two limbs. The first limb provides for the general category whereas the second limb provides for a deeming category. The first limb of the definition can be paraphrased as under:

- persons who
- for a common objective or purpose of
- substantial acquisition of shares or voting rights or gaining control over the target company
- pursuant to an agreement or understanding (formal or informal)
- directly or indirectly co-operate by acquiring or agreeing to acquire
- shares or voting rights in the target company or control over the target company.

The following table summarises the persons who fall within the purview of the deeming category, unless established otherwise:

Acquirer	Deemed PAC
Company	<ul style="list-style-type: none"> • Its Holding company, its Subsidiary company, Company under the same management (individually or together with each other) • Its Directors and their Associates (Relatives/Family trust/HUFs) or any person entrusted with management of its funds • Directors of its Holding Company and their Associates or of its Subsidiary Company and their Associates or of Company under the same management and their Associates
Sponsor or Trustee or AMC of Mutual Fund	Mutual Fund
Sub-accounts of FIIs	FIIs
Client of Portfolio Managers and Merchant Bankers	Its Portfolio Managers and Merchant Bankers
Sponsors	Its Venture Capital Funds
Any acquirer	Its banks, its Holding Company's banks, its Subsidiary Company's banks or its Relative's banks [Above deeming fiction N.A. if the aforesaid banks are providing normal commercial banking services or such activities in connection with the Offer like confirmation of funds availability, handling acceptances and other registration works]
Investment Company	<ul style="list-style-type: none"> • Its director or fund manager or trustee or a shareholder holding 2% or more of its paid-up capital • Any other Investment Company in which above person or his associate holds 2% or more of paid capital of such other Investment Company.

18.2.5 Promoter

The definition of the term “promoter” is probably the most crucial definition in the entire Regulations. It is interesting to note that although several SEBI Regulations and Guidelines refer to this definition, it is defined only in these Regulations. The new definition incorporated in January 2005, totally replaced the old definition and made several changes. The definition was again amended in May, 2006. What is interesting is that the amended Regulations contain two definitions of the term Promoter, one for the purposes of availing exemption under Regulation 3(1) (discussed later) and a general definition for all other purposes. The general definition would be relevant for several purposes, e.g., for making the continual disclosures under Regulation 8, for disclosures under the Letter of Offer, etc. The general definition contained under Regulation 2(1)(h) is also relevant for the purposes of the SEBI Delisting Guidelines, since those Guidelines rely on this definition.

General Definition

The general definition is comprised of two parts, an exhaustive definition and an inclusive definition. The first part defines the term to mean, any person:

- (a) Who is in control of the company; or
- (b) Who is named as a promoter in any document for offer of securities to the public or existing shareholders. Further, the new definition also states that any person named as a promoter in the Listing Agreement disclosures or other disclosures would also be a promoter. Similarly, persons named as persons acting in concert in the Listing Agreement disclosures or other disclosures would also be promoters. Thus, any person named as a promoter, in the Quarterly Shareholding Pattern to be filed by all listed Companies under Clause 35 of the Listing Agreement, would also become a promoter under the Takeover Regulations.

The second part of the definition creates a deeming fiction, by which the persons belonging to the promoter group are also deemed to be promoters. The term promoter group includes the following:

- (a) If the promoter is an individual:
 - (i) His spouse, parents, brothers, sisters or children of the promoter or his spouse. The earlier definition covered all relatives as per s.6 of the Companies Act. Thus, now the following relatives of a promoter are not deemed promoters for the general definition:
 - Spouses of a promoter’s children
 - Promoter’s grand parents
 - Promoter’s grandchildren
 - Spouses of Promoter’s grandchildren

- (ii) Any company, in which he or his immediate relatives or any firm or HUF in which he or any of his immediate relatives, hold $\geq 10\%$ of the share capital;
 - (iii) Any company in which a company specified above holds $> 10\%$ of the equity share capital;
 - (iv) Any HUF or firm in which the aggregate of his holding and the holdings of his immediate relatives is $> 10\%$.
- (b) If the promoter is a body corporate:
- (i) A subsidiary or holding company of that body corporate;
 - (ii) Any company in which the promoter holds 10% of the equity share capital or which holds $\geq 10\%$ of the equity share capital of the promoter;
 - (iii) Any company in which a group of individuals or companies or combination who holds $\geq 20\%$ of the equity share capital in that company also holds $\geq 20\%$ of the equity share capital in the target company;

An FI, scheduled commercial bank, FII, mutual fund and a venture capital fund is not deemed to be a promoter merely by virtue of its shareholding. However, they are deemed to be promoters of their respective subsidiaries and/ or mutual funds sponsored by them. Further, Directors of the target company only acting in an professional capacity are not deemed to be a promoter.

18.2.6 Public Shareholding

Intertwined with the definition of 'promoter' is the new definition of the term public shareholding. The earlier definition stated that all shareholding other than that held by the acquirer and persons acting in concert with him was public shareholding. However, as per the new definition, the shares held by all persons other than the promoters as defined above would be public shareholding. For instance, the Quarterly Disclosure mentions the holding of the promoters and persons acting in concert with him. All other shareholders would fall within the purview of the term public shareholding.

18.2.7 Shares

Shares is defined to mean shares in the share capital of a company carrying voting rights and includes any security which would entitle the holder to receive shares with voting rights but does not include preference shares.

18.2.8 Target Company

Target Company means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired.

18.3 Applicability of the Regulations

- (a) These Regulations apply to certain acquisitions only in respect of a listed company and not in respect of an unlisted company.
- (b) Further, the Regulations apply in respect of the acquisition of any one or more of the following in a listed company:

- Shares
- Voting Rights
- Control

- (c) Indirect Acquisition

The Regulations apply even in case of an indirect acquisition. The Regulations do not contain a specific definition of the term "indirect acquisition". However, R.11 provides useful guidance wherein it is mentioned that acquisition includes indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad. Hence, indirect acquisition would even cover cases where a person acquires the shares of a company whose downstream investment company/ies hold the shares or voting rights of an Indian listed company.

It is also relevant to note that in case of an indirect acquisition, the company whose shares are acquired need not be an Indian company and need not be listed on a stock exchange in India.

18.4 Disclosures of Shareholding and Control in a Listed Company(Regs. 6 to 9)

18.4.1 Introduction

Chapter II (Regs. 6 to 9) of the Takeover Regulations govern the disclosure requirements by the substantial shareholders and the promoters of a listed company. The disclosure requirements would enable the listed company and its shareholders to get prompt information about the changes in the shareholding pattern and the takeover of the listed company.

Regulation 6 provides for the transitional disclosure requirements which were required to be made at the time the Takeover Regulations were made effective (i.e., in 1997).

Regulation 7 provides for the disclosure requirements to be made at the time of acquisition of 5% or more shares or voting rights and other changes in the shareholding pattern.

Regulation 8 provides for the annual disclosure requirements to be made by certain shareholders and the promoters of the company.

Regulation 9 empowers the SEBI to call for information relating to the above disclosures from the stock exchanges and the company.

18.4.2 Responsibility

The responsibility for the disclosure is cast upon the following persons:

- A shareholder holding the prescribed % of shares or voting rights
- A person who acquires the prescribed % of shares or voting rights
- A promoter of the company
- A person having control over the company
- The company

The following table summarises the disclosure requirements:

I. Disclosure by the Shareholder/ Acquirer to the Company

Sr. No	Disclose what	By whom	When
A.	Acquisition of 5% or more shares (R.7)		
	Aggregate shareholding or voting rights	Acquirer or Pledgee (other than a bank or a FI)	Acquisition of shares or voting rights which entitles the acquirer to : <ul style="list-style-type: none"> • 5%, • 10%, • 14%, • 54% or • 74% shares or voting rights Disclosure to be made at each stage – Within 2 working days of receipt of intimation of allotment or of such acquisition In case of a pledgee – Within 2 days of creation of pledge
	Purchase or sale aggregating 2% or more of the share capital along with the aggregate shareholding after such acquisition or sale	Acquirer who acquires shares or voting rights u/R. 11(1) or Pledgee (other than a bank or a FI)	Within 2 days of such purchase or sale In case of a pledgee – Within 2 days of creation of pledge

B.	Continual disclosures (R.8)		
	Shareholding as on 31 st March if more than 15 % of total share capital or voting rights	Each such shareholder	On or before 21 st April of that year
	No. and % of shares or voting rights held by the person and by his PAC	Promoter or person having control over Company	On or before 21 st April of that year and Within 21 days from the end of each Record Date for dividend purpose

II. Disclosure by the Acquirer to the Stock Exchanges

Sr. No	Disclose what	By whom	When
	Acquisition of 5% or more shares (R.7)		
1.	Aggregate shareholding or voting rights	Acquirer or Pledgee (other than a bank or a FI)	Acquisition of shares of voting rights which entitles the acquirer to: <ul style="list-style-type: none"> • 5%, or • 10%, or • 14% shares or voting rights Disclosure to be made at each stage – Within 2 days of receipt of intimation of allotment or of such acquisition In case of a pledgee – Within 2 days of creation of pledge
2.	Purchase or sale aggregating 2% or more of the share capital along with the aggregate shareholding after such acquisition or sale	Acquirer who acquires shares or voting rights u/R. 11(1) or Pledgee (other than a bank or a FI)	Within 2 days of such purchase or sale In case of a pledgee – Within 2 days of creation of pledge

III. Disclosure by the Company to the Stock Exchanges

Sr. No.	Particulars	Disclosure by whom	When
A	Acquisition of 5% or more shares		
	Aggregate no. of shares held by acquirer/pledgee mentioned in R. 7(1) and 7(1A)	Company	within 7 days of receipt of information u/R. 7(1) and 7(1A)
B.	Continual disclosures		
	The changes in respect of shareholding of : <ul style="list-style-type: none"> • Shareholders holding more than 15% of total share capital or voting rights • Promoters or person having control over Company as on 31st March 	Company	On or before 30 th April of each financial year and Within 30 days from the end of each Record Date for dividend purpose

18.5 Limit on Acquisition of Shares/ Voting Power/ Control (Regs. 10 to 12)

18.5.1 Introduction

Regulations 10 to 12 of the Takeover Regulations can be equated to the heart in the human body. They provide for the requirement of making an Open Offer to the public in certain situations.

18.5.2 Acquisition of 15% or more shares or voting rights - R.10

Regulation 10 provides for making an Open Offer to the public in the case of acquisition of 15% or more of the shares or voting rights. A person can acquire shares or voting rights through various modes such as:

- Transfer of shares
- Public issue
- Rights issue
- Preferential issue
- Bonus issue
- Convertible instruments like Convertible debentures/ bonds, Warrants/ Options, GDR, ADR
- ESOP/ Sweat Equity
- Underwriting obligation
- Exchange of shares
- Transmission, succession or inheritance

- Scheme of reorganisation like amalgamation/ merger, demerger, reconstruction, etc.
- Pursuant to shareholders' agreement.

The key provisions of R.10 are as follows:

- It applies in cases where a person acquires 15% or more of the shares or voting rights of a company. Hence, a person is not required to make an Open Offer for acquisition up to 14.99% of the shares or voting rights of a company.
- The existing shareholding or voting rights of the acquirer and that of his PAC also have to be considered for reckoning the above limit of 15%.
- If the acquisition is likely to exceed 15% as mentioned above, then the acquirer has to make a PA to acquire the shares as provided in the Regulations.
The acquisition of shares can be completed once the PA is made in accordance with the Regulations. The completion of the Offer process is not a necessity.
- Regulation 3 provides that certain transactions are exempt from the purview of Regulation 10 even though the acquisition is of 15% or more of the shares or voting rights of a company. Hence, the acquirer does not have to make an Open Offer for the acquisition in the modes specified in Regulation 3 (see para 18.6).

18.5.3 Consolidation of Holdings – R.11

Regulation 11 provides for making an Open Offer to the public in the case of consolidation of holdings beyond 15% of the shares or voting rights. The key provisions of Regulation 11 are as follows:

- A person who holds 15% or more of the shares or voting rights can acquire up to 5% of the voting rights in any financial year ending on 31st March, without the requirement of making an Open Offer. This is commonly referred to as the creeping acquisition route for consolidation of holdings. The above benefit is not available if the acquirer already holds 55% or more of the shares or voting rights. Earlier, acquirers who along with their persons acting in concert had 15% or more but less than 75% of the shares or voting rights of a company, were entitled to acquire an additional 5% shares every financial year.
- The shareholding or voting rights of the acquirer's PAC also has to be considered for reckoning the above limit of 15% / 55%.
- An acquirer who along with persons acting in concert with him has acquired more than 55% but less than 75% shares, can acquire additional shares or voting rights only by making an open offer.

If the target company had made an IPO under R.19(2)(b) of the Securities Contract Regulations Rules, 1957 by virtue of which it was eligible to offer only 10% to the public, then the 75% limit is replaced by 90%.

- Further, if any acquirer, who together with PACs owns 55% or more but less than 75% of the shares of the target company, desires to acquire any shares or voting rights while ensuring that the public shareholding in the target company is not reduced to a level below the limit specified in Cl. 40A of the Listing Agreement (e.g., 10% or 25%), then he may make such acquisition only by making an open offer.
- The acquisition of further voting rights can be completed once the Public Announcement is made in accordance with the Regulations.
- In case of disinvestment of a PSU, where an acquirer has already made a Public Announcement, he does not have to make another Public Announcement for subsequent acquisition of shares or voting rights if the following conditions are fulfilled:
 - Both the acquirer and the seller are the same at all the stages of acquisition
 - Disclosures regarding all the stages of acquisition, if any, are made in the letter of offer issued in terms of Regulation 18 and in the first Public Announcement
- Regulation 3 provides that certain transactions are exempt from the purview of Regulation 11. Hence, the acquirer does not have to make an Open Offer for the acquisition in the modes specified in Regulation 3 (see para 18.6).

18.5.4 Acquisition of control over a company (R. 12)

Regulation 12 provides for making an Open Offer to the public in the case of acquisition of control over a company. The important provisions of this Regulation are as follows:

- It applies in a case where a person acquires control over a company.
- Actual acquisition of shares or voting rights in the company is not a relevant criterion for the above purpose.
- A person who intends to acquire control over a company has to make a Public Announcement to acquire the shares and acquires such shares as provided in the Regulations.

Hence, under this regulation, a person can acquire control only when the Open Offer process is completed, unlike Regulations 10 and 11 where the completion of the Offer process is not a necessity before the acquisition of the shares or voting rights.
- However, a person can acquire control over a company without making an Open Offer if the change in control takes place pursuant to a special resolution passed by the shareholders in a general meeting of the company.

The postal ballot facility has to be provided to the shareholders for passing the special resolution.

- Both direct and indirect acquisition of control are covered.
- An acquisition of control which is exempt under Regulation 3 does not attract an open offer.
- Regulation 3 provides that certain transactions are exempt from the purview of Regulation 12. Hence, the acquirer does not have to make an Open Offer for the acquisition in the modes specified in Regulation 3 (see para 18.6).

18.6 Exempt modes of acquisition

In the cases mentioned below, even though there is an acquisition, the provisions of Regulations 10 to 12 do not apply. Hence, there is no requirement on the part of the Acquirer to make an open offer. However, certain procedural requirements would need to be fulfilled.

18.6.1 Allotment in a Public Issue

The following conditions must be fulfilled in case of allotment pursuant to a firm allotment:

- Full disclosures must be made in the prospectus about the:
 - Identity of the acquirer,
 - Purpose of acquisition,
 - Consequential changes in voting rights, shareholding pattern of the company and in the Board of Directors of the Company, if any, and
 - Whether there would be change in control over the company.
- If existing shareholding of acquirer and his PAC + proposed acquisition \geq 15% of the voting rights in the Target Company, the acquirer must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.

18.6.2 Allotment in a Rights Issue

The following conditions must be fulfilled:

- Allotment must be to the extent of the entitlement of the shareholder, and
- Aggregate shareholding of the shareholder should not become 55% or more as a result of such allotment (However, the shareholding can become 55% or more if the acquisition is made by a person presently in control of the company and such person has made a disclosure in the Offer Document about his intention to acquire additional shares beyond his entitlement in case of under-subscription of the issue)
- Acquisition of securities should not result in a change of control of management

- If existing shareholding of acquirer and his PAC + proposed acquisition \geq 15% of the voting rights in T, the acquirer must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.

18.6.3 Transfer of shares amongst certain persons

- (a) Inter se transfers amongst a "Group" as defined in the MRTTP (Monopolies and Restrictive Trade Practices) Act.

Conditions:

- Persons constituting such group must have been shown as group in the last published Annual Report of the Target Company,
- Transferor/s and transferee/s must have made the requisite disclosures
- If acquisition $>$ 5% of the voting share capital of the Target Company, transferee must notify stock exchanges about the details of the proposed transactions at least 4 working days in advance
- If existing shareholding of transferee and his PAC + proposed acquisition \geq 15% of the voting rights in the Target Company, transferee must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.

- (b) Inter se transfers amongst "Relatives" within the meaning of Section 6 of the Companies Act.

Conditions:

- Transferor/s and transferee/s must have made the requisite disclosures
- If acquisition $>$ 5% of the voting share capital of the Target Company, transferee must notify stock exchanges about the details of the proposed transactions at least 4 working days in advance
- If existing shareholding of transferee and his PAC + proposed acquisition \geq 15% of the voting rights in the Target Company, transferee must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.

- (c) Inter se transfer amongst Acquirer and his PAC

Conditions:

- Transfer must take place 3 years after the date of closure of the public offer made by them
- Transfer price must not exceed 25% of the offer price.
- Transferor/s and transferee/s must have made the requisite disclosures
- If acquisition $>$ 5% of the voting share capital of the Target Company, transferee must notify stock exchanges about the details of the proposed transactions at least 4 working days in advance

- If existing shareholding of transferee and his PAC + proposed acquisition $\geq 15\%$ of the voting rights in the Target Company, transferee must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.
- (d) Inter se transfer amongst Qualifying Indian promoters and foreign collaborators who are shareholders
Conditions:
- Transfer price must not exceed 25% of the offer price.
 - Transferor/s and transferee/s must have made the requisite disclosures
 - If acquisition $> 5\%$ of the voting share capital of the Target Company, transferee must notify stock exchanges about the details of the proposed transactions at least 4 working days in advance
 - If existing shareholding of transferee and his PAC + proposed acquisition $\geq 15\%$ of the voting rights in the Target Company, transferee must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.
- (e) Inter se transfer amongst Qualifying Promoters
Conditions:
- Transfer price must not exceed 25% of the offer price.
 - Transferor/s and transferee/s must have held the shares in the Target Company for at least 3 years prior to such transaction
 - Transferor/s and transferee/s must have made the requisite disclosures
 - If acquisition $> 5\%$ of the voting share capital of the Target Company, transferee must notify stock exchanges about the details of the proposed transactions at least 4 working days in advance
 - If existing shareholding of transferee and his PAC + proposed acquisition $\geq 15\%$ of the voting rights in the Target Company, transferee must within 21 days of the date of acquisition, submit a report to SEBI along with supporting documents giving all details in respect of acquisitions.
- (f) A new definition of promoter has been inserted, exclusively for the purposes of the "transfer inter se promoters" exemption under Regulation 3(1)(e)(iii), i.e., (d) and (e) above. The term promoter for this purpose is defined to mean:
- (i) Any person who is directly or indirectly in control of the company; or
 - (ii) Any person named as promoter in any document for offer of securities or in Listing Agreement disclosures, whichever is later.

The definition also includes:

- (a) Where the promoter is an individual:
- (i) a relative of the promoter as per s. 6 of the Companies Act
 - (ii) any firm or company, directly or indirectly, controlled by the promoter or a relative of the promoter or a firm or HUF in which the promoter or his relative is a partner or a coparcener or a combination thereof. Provided that, in case of a partnership firm, the share of such promoter or his relative, in such firm should be $\geq 50\%$.
- (b) Where the promoter is a body corporate,
- (i) a subsidiary or holding company of that body; or
 - (ii) any firm or company, directly or indirectly, controlled by the promoter of that body corporate or by his relative or a firm or Hindu undivided family in which the promoter or his relative is a partner or coparcener or a combination thereof: Provided that, in case of a partnership firm, the share of such promoter or his relative, in such firm should be $\geq 50\%$.

18.6.4 Acquisition in the ordinary course of business

Acquisition by the following person/s in the ordinary course of business:

- a registered stock-broker of a stock exchange on behalf of clients,
- a registered market maker of a stock exchange in respect of shares for which he is the market maker, during the course of market making,
- by PFIs on their own account,
- by banks and public financial institutions as pledgees,
- the International Finance Corporation, Asian Development Bank, International Bank for Reconstruction and Development, Commonwealth Development Corporation and such other international financial institutions,
- a merchant banker or a promoter of Target Company pursuant to a scheme of safety net under the provisions of DIP Guidelines in excess of 5% in a financial year.

18.6.5 Transfers between certain financial institutions

- (a) transfer of shares from state level financial institutions, including their subsidiaries, to co-promoters of the company or their successors or assignees or an acquirer who has substituted an erstwhile promoter pursuant to an agreement between such financial institution and such co-promoters
- (b) transfer of shares from venture capital funds/ foreign venture capital investors to promoters of a venture capital undertaking or venture capital undertaking

18.6.6 Restructuring

Acquisition pursuant to a scheme framed under the Sick Industrial Companies (Special Provisions) Act, 1985 for rehabilitation of a sick company or a scheme of

arrangement or reconstruction including amalgamation, merger, demerger under any law or regulation, Indian or foreign.

18.6.7 Unlisted Company's shares

Acquisition of shares in companies whose shares are not listed on any stock exchange. However, this exemption is not available if by virtue of the acquisition or by change of control of any unlisted company, whether in India or abroad, the acquirer acquires shares or voting rights or control over a listed company.

18.6.8 Securitisation

A change in control by the takeover of management of the borrower target company by a secured creditor or by restoration of management to the said target company by the said secured creditor in terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

18.6.9 Other Acquisitions

- (a) Acquisition by a person in exchange of shares received under a public offer made
- (b) Allotment to the underwriters pursuant to an underwriting agreement
- (c) Acquisition by way of transmission on succession or inheritance
- (d) Acquisition by government companies within the meaning of Section 617 of Companies Act and statutory corporations
- (e) Acquisition of GDRs/ ADRs so long as they are not converted into shares carrying voting rights. Once they are converted into equity shares then the exemption ceases to operate.
- (f) Any other cases which are exempted by SEBI on an application made to it under Regulation 4.

Prior to 9.9.2002, allotment of shares by way of a preferential issue was one of the most popular modes of acquisition of shares or voting rights in a company since it was exempt from the purview of Regulations 10-12. However, with effect from 9.9.2002, the exemption available for acquisition by this mode has been withdrawn. Accordingly, now, a person who acquires shares or voting rights under a preferential issue will have to comply with all the requirements of making an Open Offer if it attracts the provisions of Regulations 10-12.

18.7 Public Offer

18.7.1 Introduction

Regs. 13 to 29 prescribes the procedure for making an Open Offer to the public. These regulations provide for an elaborate procedure including adequate disclosures to enable the shareholders of the company to make an informed decision whether or not to tender their shares under the Open Offer.

18.7.2 Minimum stake

The Open Offer has to be made for a minimum of 20% of the voting capital of the company. The latest amendments provide that if the acquisition made pursuant to the open offer results in the public shareholding falling below the levels specified in the Listing Agreement (Cl.40A), then the acquirer must take necessary steps to shore up such non-promoter holding.

18.7.2 Some of the important steps involved in the Open Offer process are as under:

- The acquirer has to appoint a merchant banker who is not an associate of or group of Acquirer or the Target Company.
- The acquirer has to determine the offer price.
- The acquirer has to deposit the following amount in the Escrow Account assuming full acceptance at the highest price:

Consideration payable under the Open Offer	Amount
Up to and including Rs. 100 crores	25%
> Rs. 100 crores	25 crores + 10% of amount > 100 crores

- Within 4 working days of deciding to acquire the shares, the acquirer has to make a Public Announcement of Offer ("PA")
- Within 14 days from the date of PA, the acquirer has to file a Letter of Offer ("LO") with the SEBI through the merchant banker.
- The offer should be kept open for a period of 30 days.

18.8 Offer Price

The key component in the public offer is determining the offer price. The method of computing the offer price depends upon whether the shares are frequently traded or infrequently traded.

18.8.1 Frequently Traded Shares

The shares of a company are frequently traded if they cannot be deemed to be infrequently traded. The shares of a company are deemed to be infrequently traded if the annualised trading turnover in such shares during the 6 calendar months prior to the month in which the PA is made is less than 5% (by number of shares) of the weighted average number of shares listed during that period. In the case of frequently traded shares, the offer price should be the highest of:

- The negotiated price pursuant to the Agreement to acquire shares or voting rights, if applicable

- Highest price paid by the acquirer or PAC for acquisition, if any, during the 26 week period prior to the date of the PA
- The higher of the average of the following closing prices of the shares of Target Company as quoted on the stock exchange where the shares are most frequently traded:
 - weekly high/ low during the 26 weeks preceding the date of PA
 - daily high/ low during the 2 weeks preceding the date of the PA

If any payment is made to the persons (other than the Target Company) in respect of a non-compete agreement > 25% of the offer price, then the offer price (as calculated above) has to be increased by such excess amount.

If any shares are acquired after the date of PA at a price higher than the offer price stated in the LO, then the highest price paid for such acquisition has to be paid under the open offer. The acquirer cannot acquire such shares during the last 7 working days prior to the closure of the offer.

In case the offer is subject to a minimum level of acceptance, the acquirer may indicate a lower price for the minimum acceptance up to 20% if the offer does not receive full acceptance.

18.8.2 Infrequently Traded Shares

In the case of infrequently traded shares, the offer price has to be determined by taking into account the following factors:

- The negotiated price pursuant to the Agreement to acquire shares or voting rights, if applicable
- The highest price paid by the acquirer or PAC for acquisition, if any, during the 26 week period prior to the date of PA
- Other parameters including return on networth, book value of the shares of the Target Company, earning per share, P/E multiple vis-à-vis the industry average.

Practice Pointer: SEBI may require valuation of such shares by an independent merchant banker (other than the manager to the offer) or an independent CA of minimum 10 years' standing or a public financial institution.

In the case of disinvestment of a PSU, the offer price cannot be lower than the price paid by the successful bidder to the CG or SG (under the competitive bidding process).

As in the case of frequently traded shares explained above, adjustments would also be required to be made to the offer price in the case of infrequently traded shares for:

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- Payment in respect of non-compete agreement > 25% of the offer price
- Partly paid-up shares
- Subsequent acquisition of shares at a higher price
- Indirect acquisition of shares or control.

18.9 Payment of Offer Price

The offer price can be paid:

- in cash, or
- If the acquirer is a listed company – by issue, exchange and, or transfer of its shares (other than preference shares), or
- If the acquirer is a company – by issue, exchange and, or transfer of its secured instruments with a minimum 'A' grade rating from a credit rating agency registered with SEBI, or
- a combination of the above.

18.10 Escrow Mechanism

The Acquirer needs to deposit in escrow a performance guarantee. It is computed as under:

- For a consideration amount up to Rs. 100 crores – 25%
- For a consideration amount above Rs. 100 crores – 25% up to Rs. 100 crores and 10% for the excess.

In case of an offer conditional upon a minimum level of acceptance, the acquirer must deposit, in cash, 50% of the consideration payable in the escrow amount if he does not want to acquire a minimum of 20%. In case of an upward revision of offer, at least 10% of the revised consideration amount should be kept in escrow.

Consideration for Escrow

The escrow account must consist of:

Particulars	Remarks
Cash deposited with a scheduled commercial bank	Merchant Banker should be empowered to instruct the bank to issue a banker's cheque or demand draft for such account
Bank guarantee in favour of Merchant Banker	<ul style="list-style-type: none">• Should be valid at least for a period commencing from the date of PA until 20 days after the closure of the offer• It shall not be returned by Merchant Banker till completion of all the acquirer's obligations• Deposit with the bank a sum of at least 1% of the total consideration payable

Deposit of acceptable securities with appropriate margin, with Merchant Banker	<ul style="list-style-type: none"> • Merchant Banker should be empowered to realise the value of escrow by sale or otherwise. In case of deficit on realisation, Merchant Banker is liable to make good the deficit • It shall not be returned till the completion of all of the obligations of the Acquirer. • Deposit with the bank a sum of at least 1% of the total consideration payable
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In case of an offer conditional upon a minimum level of acceptance and the acquirer does not want to acquire a minimum of 20%, the escrow account must consist only of cash, deposited with a scheduled commercial bank.

18.11 General Obligations of Acquirer

Some of the key obligations of the Acquirer are as under:

- The Acquirer must make PA to acquire the shares of the Target Company only when he is able to implement the offer.
- During the offer period, the acquirer or PAC cannot be appointed as directors of the Target Company. However, he is entitled to be so appointed after a period of 21 days from the date of PA if he has deposited in the escrow account 100% of the consideration payable (in cash/ securities or a combination thereof). This benefit is not available if the offer is made conditional upon a minimum level of acceptance.
- In case of a conditional offer, the acquirer or any PAC:
 - must acquire minimum 20% shares from the public unless he has deposited in the escrow account, in cash, 50% of the consideration payable under the public offer,
 - must not acquire any shares in the Target Company during the offer period.
 - will be liable for penalty of forfeiture of entire escrow amount, for the non-fulfillment of his obligations.
- The acquirer must ensure that firm financial arrangements are made for fulfilling his obligations and suitable disclosures are made in PA.
- If the acquirer does not obtain the requisite statutory approvals in time on account of willful default or neglect or inaction or non-action on his part, the amount lying in the escrow account is liable to be forfeited he will be liable for penalty.
- An acquirer who has made a public offer cannot acquire further shares under the creeping acquisition route at a price higher than the offer price during the period of 6 months from the date of closure of the public offer. However, this restriction does not apply if the shares are acquired through the stock exchanges.

- If the acquirer withdraws his offer, he cannot make any offer for acquisition of shares of the Target Company for a period of 6 months from the date of PA of withdrawal of offer.
- If the acquirer fails to fulfill his obligations under the Regulations, he cannot make any offer for acquisition of shares of any listed company for a period of 12 months from the date of closure of offer.
- If the acquirer's aggregate shareholding in the Target Company is likely to exceed 15% pursuant to acquisition of shares under an agreement, then the agreement for sale of shares must contain a clause stating that in case of non-compliance of any provisions of the Regulations, such agreement will not be acted upon by the acquirer or the seller.
- The acquirer cannot dispose of or otherwise encumber the assets of the Target Company for a period of 2 years from the date of closure of the public offer if he has not either, in PA or in the LO, stated his intention to do so. However, such disposal or encumbrance is permitted if it is in the ordinary course of business of the Target Company.

18.12 General Obligations of the Target Company

Some of the obligations of the Board of Directors of the Target Company are during the offer period. Accordingly, in this period, the Board cannot without the approval, obtained after the date of PA, of the shareholders of the Target Company:

- sell, transfer, encumber or otherwise dispose of assets or agree to do so unless it is a sale or disposal of assets in the ordinary course of business, of the company or its subsidiaries, or
- issue or allot any authorised but unissued securities carrying voting rights, or (This restriction does not apply to issue or allotment of shares :
 - upon conversion of debentures already issued or upon exercise of option against warrants, as per pre-determined terms of conversion or exercise of option, or
 - pursuant to public or rights issue in respect of which the offer document has already been filed with ROC or SE/s, as the case may be)
- enter into any material contracts.

18.13 Competitive Bid

It means an offer made by a person, other than the acquirer who has made the first PA. Some of the important provisions in relation to a competitive bid are as follows:

- (a) PA for a competitive bid must be made within 21 days of the first PA. A PA for competitive bid in case of disinvestment of a PSU cannot be made after an acquirer has already made the PA pursuant to entering into a Share Purchase or Shareholders Agreement with the Government.

- (b) The number of shares for which the competitive bid has to be made = Number of shares held by acquirer who has made the first PA (+) Number of shares for which offer is made by such acquirer (-) Existing number of shares held by competitive bidder and his PACs.
- (c) Upon PA of a competitive bid, the acquirer who had made PA of the earlier offer will have the option to make a PA for revising the offer. If such PA is not made within 14 days of the announcement of the competitive bid, the earlier offer on the original terms will continue to be valid and binding on such acquirer. Further, the date of closing of the offer will stand extended to the date of closure of the public offer under the last subsisting competitive bid. Hence, the public offers under all the subsisting bids will close on the same date.
- (e) All the provisions applicable for the making of an Open Offer will also apply to the competitive bid.

18.14 Practice Pointers

The Takeover Regulations, at several places, relies on a certificate from a CA for various purposes. These include:

- (a) To determine the offer price of infrequently traded shares, SEBI may require valuation of such shares by an independent CA of a minimum 10 years' standing.
- (b) If shares or secured instruments of the acquirer company are offered in lieu of cash payment as consideration for the offer, then the valuation of such instruments must be certified by an independent CA of a minimum 10 years' standing.
- (c) In case the Acquirer is an individual his net worth as on a particular date, duly certified by a CA must be disclosed in the Public Announcement and the Letter of Offer.
- (d) The merchant banker needs to be satisfied that the acquirers have adequate resources and funding arrangements in place to meet the obligations of the open offer. For this purpose, he relies on a certificate from a CA.