

SEBI revisits Takeover Code

By CS Dipanjali Nagpal, March 29, 2018

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SEBI at its meeting held on March 28, 2018¹ has invited the public for its comments on the proposed changes in Takeover Regulations. A brief of the changes as suggested in the discussion paper², as placed before the Committee have been discussed in this write-up.

- **Regulation 2(1)(j), which provides for the definition of “frequently traded shares”**

- **Existing provision-**

*frequently traded shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement **is made**, is at least ten per cent of the total number of shares of such class of the target company:*

Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares;

- **Proposed provision-**

*frequently traded shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement **is required to be made under these regulations**, is at least ten per cent of the total number of shares of such class of the target company:*

Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares.

- **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision.

- **Inserting Regulation 2(1)(ma) after Regulation 2(1)(m), providing for the definition of “Listing Regulations”**

- **New provision-**

¹ https://www.sebi.gov.in/media/press-releases/mar-2018/sebi-board-meeting_38473.html

² https://www.sebi.gov.in/sebi_data/commondocs/mar-2018/Disscussionpaper11_p.pdf

“listing regulations” means the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.”

- **VK&Co. Comments-** Clarificatory change, updating reference to new SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015

- **Regulation 2(1)(r), which provides for the definition of “postal ballot”**
 - **Existing provision-**

*“postal ballot” means a postal ballot as provided for under the **Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 made under the Companies Act, 1956 (1 of 1956);***
 - **Proposed provision -**

*“(r) “postal ballot” means a postal ballot as provided for under **Rule 22 of the Companies (Management and Administration) Rules, 2014 made under the Companies Act, 2013.”***
 - **VK&Co. Comments-** Clarificatory change, updating reference to provisions of the Companies Act, 2013

- **Regulation 2(2), which provides for reference to other provisions for certain expressions not defined in these Regulations**
 - **Existing provision-** *All other expressions unless defined herein shall have the same meaning as have been assigned to them under the Act or the Securities Contracts (Regulation) Act, 1956, (42 of 1956) or the **Companies Act, 1956 (1 of 1956)** or any statutory modification or re-enactment thereto, as the case may be.*
 - **Proposed provision -** *All other expressions unless defined herein shall have the same meaning as have been assigned to them under the Act or the Securities Contracts (Regulation) Act, 1956, (42 of 1956) or the **Companies Act, 2013 (18 of 2013)** or any statutory modification or re-enactment thereto, as the case may be.*
 - **VK&Co. Comments-** Clarificatory change, updating reference to provisions of the Companies Act, 2013

- **Proviso to sub-regulation 5A(1), which contains the provisions for delisting offer**
 - **Existing provision-**

*Provided that the acquirer shall have declared upfront his intention to so delist at the time of making the **detailed public statement.***
 - **Proposed provision –**

*Provided that the acquirer shall have declared upfront his intention to so delist at the time of making the **detailed public statement and a subsequent declaration of delisting shall not suffice.***

- **VK&Co. Comments-** The provision provides an acquirer making a public announcement of an open offer to acquire the shares of the target company in terms of Regulation 3, 4 or 5 of these Regulations may delist the company post such acquisition and his intention to delist must be clearly stated at the time of making the detailed public statement.

The proposed provision debars a company making an open offer for acquisition to delist the company post the acquisition, in the event such intention is not stated at the detailed public statement at the time of making the acquisition.

- **Regulation 5A(3), which contains the provisions for delisting offer**

- **Existing provision-**

In the event of the failure of the delisting offer made under sub-regulation (1), the acquirer, through the manager to the open offer, shall within five working days from the date of the announcement under sub-regulation (2), file with the Board, a draft of the letter of offer as specified in sub-regulation (1) of regulation 16 and shall comply with all other applicable provisions of these regulations-

Provided that the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the scheduled date of payment of consideration to the shareholders and the actual date of payment of consideration to the shareholders

Explanation: For the purpose of this sub-regulation, scheduled date shall be the date on which the payment of consideration ought to have been made to the shareholders in terms of the timelines in these regulations.

- **Proposed provision-**

In the event of failure of the delisting offer made under sub-regulation (1), the open offer obligations shall be fulfilled by the acquirer in the following manner:-

(i) the acquirer, through the manager to the open offer, shall within five working days from the date of the announcement under sub-regulation (2), file with the Board, a draft of the letter of offer as specified in sub-regulation (1) of regulation 16; and (ii) shall comply with all other applicable provisions of these regulations.

Provided that the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the scheduled date of payment of consideration to the shareholders and the actual date of payment of consideration to the shareholders.

Explanation: For the purpose of this sub-regulation, scheduled date shall be the date on which the payment of consideration ought to have been made to the shareholders in terms of the timelines in these regulations.

- **VK&Co. Comments** – Clarificatory change, simplifying the language of the provision
- **Regulation 7(2), which contains the provision for offer size**
 - **Existing provisions-**

*The open offer made under regulation 6 shall be for acquisition of at least such number of shares as would entitle the holder thereof to exercise an additional ten per cent of the **total shares of** the target company, and shall not exceed such number of shares as would result in the post-acquisition holding of the acquirer and persons acting in concert with him exceeding the maximum permissible non-public shareholding applicable to such target company:*
 - **Proposed provisions-**

*The open offer made under regulation 6 shall be for acquisition of at least such number of shares as would entitle the holder thereof to exercise an additional ten per cent of the **voting rights in** the target company, and shall not exceed such number of shares as would result in the post-acquisition holding of the acquirer and persons acting in concert with him exceeding the maximum permissible non-public shareholding applicable to such target company:*
 - **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision
- **Regulation 9(2), which contains the provision for mode of payment**
 - **Existing provision-**

(d) the issuer of such class of shares has been in material compliance with the **listing agreement** for a period of at least two years immediately preceding the date of the public announcement:

*Provided that in case where the Board is of the view that a company has not been materially compliant with the provisions of the **listing agreement**, the offer price shall be paid in cash only;*
 - **Proposed provision-**

(d) the issuer of such class of shares has been in material compliance with the **listing regulations** for a period of at least two years immediately preceding the date of the public announcement:

*Provided that in case where the Board is of the view that a company has not been materially compliant with the provisions of the **listing regulations**, the offer price shall be paid in cash only;*

- **VK&Co. Comments-** Clarificatory change, updating reference to the provisions of Listing Regulations
- **Explanation to clause (c) of Regulation 9(5), which contains the provision for mode of payment-**

Existing provision –

*Explanation.— For the purposes of this sub-regulation, the “relevant date” shall be the thirtieth day prior to the date on which the meeting of shareholders is held to consider the proposed issue of shares under **sub-section (1A) of Section 81 of the Companies Act, 1956 (1 of 1956)***

- **Proposed provision –**

*Explanation.— For the purposes of this sub-regulation, the “relevant date” shall be the thirtieth day prior to the date on which the meeting of shareholders is held to consider the proposed issue of shares under **clause (c) of sub-section (1) of section 62 of the Companies Act, 2013 (18 of 2013)***

- **VK&Co. comments –** Clarificatory change, updating reference to Companies Act, 2013

- **Regulation 10, which provides for general exemptions from the obligation to make an open offer under Regulation 3 & 4**

- **Existing provision-**

(10)(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being-

*(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the **listing agreement** or these regulations for not less than three years prior to the proposed acquisition;*

*(iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the **listing agreement**;*

*(v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the **listing agreement**, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:*

- **Proposed provision-**

(10)(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being-

*(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the **listing regulations** or these regulations for not less than three years prior to the proposed acquisition;*

*(iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the **listing regulations**;*

*(v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the **listing regulations**, 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:*

- **VK&Co. Comments-** Clarificatory change, updating reference to new SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015

- **Insertion of the following explanation after sub-clause(iii) of clause (a) of Regulation 10(1)-**

- **New provision-**

Explanation: For the purpose of this sub-clause, the company shall include a body corporate, whether Indian or foreign.

- **VK&Co. Comments-** General exemption is available from the obligation to make an open offer under regulation 3 & 4 for acquisitions pursuant to inter-se transfer of shares between a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons.

The change is clarificatory in nature, for the purpose of determining holding subsidiary relationships body corporates, whether Indian or foreign shall also be included.

- **Regulation 10(1)(h), which relates to general exemptions from the obligation to make an open offer under Regulation 3 & 4**

- **Existing provision-**

*acquisition of voting rights or preference shares carrying voting rights arising out of the operation of **sub-section (2) of section 87 of the Companies Act, 1956 (1 of 1956)***

- **Proposed provision-**

*acquisition of voting rights or preference shares carrying voting rights arising out of the operation of **sub-section (2) of section 47 of the Companies Act, 2013 (18 of 2013)***

- **VK&Co. Comments-** Clarificatory change, updating reference to the provisions of the Companies Act, 2013.

- **First and third clause of the proviso to clause (c) of sub-regulation (4) of Regulation 10(1), which provides for exemption from making an open offer under sub-regulation (2) of regulation 3**
 - **Existing provision-**

Increase in voting rights in a target company of any shareholder pursuant to buy-back of shares:-

Provided that-

*(i) such shareholder has not voted in favour of the resolution authorising the buy-back of securities under **section 77A of the Companies Act, 1956 (1 of 1956);***

*(iii) where a resolution of shareholders is not required for the buy-back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under **section 77A of the Companies Act, 1956 (1 of 1956);***

 - **Proposed provision-**

Increase in voting rights in a target company of any shareholder pursuant to buy-back of shares:-

Provided that-

*(i) such shareholder has not voted in favour of the resolution authorising the buy-back of securities under **section 68 of the Companies Act, 2013 (18 of the Act, 2013)***

*(iii) where a resolution of shareholders is not required for the buy-back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under **section 68 of the Companies Act, 2013 (18 of the Act, 2013)***

 - **VK&Co. Comments-** Clarificatory change, updating reference to Companies Act, 2013

- **Inserting explanation after proviso to Regulation 17(3), which provides for provisions of an escrow account**
 - **New provision-**

Explanation: The cash component of the escrow account as referred to in clause (a) above may be maintained in an interest bearing account, subject to the merchant banker ensuring that the funds are available at the time of making payment to the shareholders.

- **VK&Co. Comments-** The change relates to the provisions of the amount required to be maintained in the escrow account by the acquirer towards security of his performance of his obligations under these Regulations, prior to opening of the offer. This is an enabling change which allows the acquirer to earn interest on the amount, subject to performance of his obligations.

- **Inserting new explanation after Regulation 18(2), before the proviso, which provides for dispatch of letter of offer to members of the target company-**

- **New provision-**

Explanation-

(i) Letter of offer may also be dispatched through electronic mode in accordance with the provisions of Companies Act, 2013.

(ii) On receipt of a request from any shareholder to receive a copy of the letter of offer in physical format, the same shall be provided.

(iii) The aforesaid shall be disclosed in the letter of offer.

- **VK&Co. Comments-** This is an enabling changes, which allows the acquirer to effectively provide the letter of offer to the members of the target company.

- **Regulation 18(4), which provides for the procedure to be followed in case of upward revisions to the offer price-**

- **Existing provision-**

Irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last three working days before the commencement of the tendering period

- **Proposed provision-**

Irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last four working days before the closure of the tendering period

- **VK&Co. Comments-** This is an enabling changes, which allows for a longer period to the acquirer to make upward revision in the offer price.

- **Insertion of new sub-regulation (4A) after Regulation 18-**

- **New provision-**

(4A) In the event of any revision of the offer price on or after the commencement of the tendering period, the shareholders who have already tendered their shares at the previous offer price shall be entitled to receive the revised offer price

- **VK&Co. Comments-** The change is in line with the amendment proposed for increasing the time period for revising the offer price, after the commencement of the tendering period.

- **Regulation 22(2), which provides for the provisions for completion of acquisition-**

- **Existing provision-**

*Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash of an amount equal to **one hundred per cent of the consideration payable under the open offer** assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.*

- **Proposed provision-**

*Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash of an amount equal to **entire** consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.*

- **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision

- **First proviso to Regulation 24(1), which provides for the provisions for obligations of the directors of the target company-**

- **Existing provision-**

Provided that after an initial period of fifteen working days from the date of detailed public statement, appointment of persons representing the acquirer or persons acting in concert with him on the board of directors may be effected in the event the acquirer deposits in cash in the escrow account referred to in

regulation 17, **one hundred per cent of the** consideration payable under the open offer

- **Proposed provision-**

*Provided that after an initial period of fifteen working days from the date of detailed public statement, appointment of persons representing the acquirer or persons acting in concert with him on the board of directors may be effected in the event the acquirer deposits in cash in the escrow account referred to in regulation 17, **entire** consideration payable under the open offer*

- **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision

- **Regulation 29(3), which provides for the provisions relating to disclosure of acquisition or disposal**

- **Existing provision-**

The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights in the target company to,—
(a) every stock exchange where the shares of the target company are listed; and
(b) the target company at its registered office.

- **Proposed provision-**

*The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights **or the disposal** in the target company to,—*
(a) every stock exchange where the shares of the target company are listed; and
(b) the target company at its registered office.

- **VK&Co. Comments-** Clarificatory change, removing the inconsistency of the Regulation as per the intent

- **Regulation 32(1), which provides for the provisions relating to power to issue directions-**

- **Existing provisions-**

Without prejudice to its powers under Chapter VIA and section 24 of the Act, the Board may, in the interest of investors in securities and the securities market, issue such directions as it deems fit under section 11 or section 11B or section 11D of the Act, including,—

- **Proposed provisions-**

*Without prejudice to its powers under Chapter VIA and section 24 of the Act, the Board may, in the interest of investors in securities and the securities market, issue such directions **or any other order** as it deems fit under section 11 or section 11B or section 11D of the Act, including,—*

- **VK&Co. Comments-** Clarificatory change, enabling decisions passed as SEBI orders to be a part of the Regulation

- **Regulation 33, which provides for provisions relating to the powers to remove difficulties**

- **Existing provision-**

In order to remove any difficulties in the interpretation or application of the provisions of these regulations, the Board shall have the power to issue directions through guidance notes or circulars

- **Proposed provision-**

*In order to remove any difficulties in the interpretation or application of the provisions of these regulations, the Board **may issue clarifications or guidelines from time to time***

- **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision

- **Omission of the proviso to Regulation 33, which provides for provisions relating to the powers to remove difficulties**

- **Omitted provision-**

~~Provided that where any direction is issued by the Board in a specific case relating to interpretation or application of any provision of these regulations, it shall be done only after affording a reasonable opportunity of being heard to the concerned persons and after recording reasons for the direction.~~

- **VK&Co. Comments-** Clarificatory change, removing redundant provision

- **Regulation 35(1), which provides for**

- **Existing provision-**

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stand repealed from the date on which these regulations come into force

- **Proposed provision-**

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stands repealed from the date on which these regulations come into force

- **VK&Co. Comments-** Clarificatory change, simplifying the language of the provision.