

Takeover Regulations, 2011-Effective from 22nd October, 2011-updated till March, 2013

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1. http://india-financing.com/Article_on_Meaning_of_encumbrance_under_takeover_code.pdf

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New Takeover Code

On most of the recommendations of TRAC, new SEBI (SAST) Regulations, 2011 introduced repealing the existing 1997 Regulations

The new code notified on 23rd September, 2011 and shall come into force on and from 22nd October, 2011

Purpose to ease the acquisition by Indian Companies

Listing Agreements and the formats for disclosure and reporting under the Takeover Code also consequentially amended in line with the new Code

Apart from some changes, rearranging and reordering of the existing code making it more reader friendly

Notification dated March 26, 2013 amended the new Takeover Code to iron out some ambiguities





Snapshot on Major Amendments



- Amendment in some existing Definitions
- Insertion of some new definitions
- Increase in initial mandatory public offer trigger from 15% to 25%
 - It would mean persons holding below 15% can now shore up their holding upto below 25% without obligation to make an offer
- Increase in minimum offer size from 20% to 26%
 - It would mean that acquirers must commit additional financial resources for acquiring a higher number of shares
- Requirement of making disclosures under Regulation 6 has been done away with
- Regulation for indirect acquisition and pricing of offers of such acquisitions
- One reference date for calculating open offer price



Snapshot on Major Amendments continued...

- “Short Form Public Announcements” immediately on direct or indirect acquisition
- Additional provision for withdrawal of open offer
- ▶ Removal of whitewash provisions like acquisition of control will still require open offer even if a special resolution has been passed
- ▶ Mandatory recommendation by Independent director to be appointed on the board of target company
- ▶ Concept of voluntary offer and its restrictions
- ▶ Deletion of provisions with regard to payment of non-compete fee to the promoters of target company
- ▶ Procedural timelines for various activities in the open offer process has been reduced from 95 days to 57 business days from the date of public announcement



Some amended definitions

Control

Directors and officers of target company kept outside the purview

Explanation to the definition in old Code dropped

- Implying that in case of joint control, the cessation of one or more joint controller may be treated as acquisition of control by the remaining joint controllers



Some amended definitions continued..



- ▶ Disinvestment
 - Both direct and indirect acquisitions now covered government companies and unlisted public sector undertakings also brought into the picture
- ▶ Promoter
 - Same meaning assigned as given in SEBI (ICDR) Regulations





Some amended definitions continued...



Offer period

- to begin with the date of contract, formal or informal till payment of consideration to offerors



Person acting in concert (PAC)

- scope expanded to include others like
 - a CIS and its collective investment management company, trustees and trustee company,
 - venture capital fund and its sponsor,



Some amended definitions continued...

▶ Shares

- To include shares and securities carrying voting rights
- Convertible securities excluded and defined separately
- the new definition also included the Depository Receipts. If further says all Depository Receipts which entitle the holder to exercise the voting rights in the target company are also treated as shares.
 - **Important point:** Unclear on preference shares, whether pref. shares included in the definition of securities or not
 - Also unclear on whether pref. shares acquiring voting rights u/s 87(2)(b) on non-declaration of dividend for a consistent period amounts to acquisition of control

▶ Target Company

- Also to include body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange

Some newly inserted definitions

Acquisition

- Meaning directly or indirectly acquiring or agreeing to acquire shares or voting rights in, or control over, a target company.
 - Not a clear definition
 - Does not include increase in shareholding or control by any other mode of increasing voting rights or stake in the company for example buy-back of shares by the company
 - Controversies have been there in the past on passive acquisitions
 - No positive action by “acquirer”
 - However, voting rights going up – for example, in case of buyback

Convertible Securities

- Meaning securities convertible or exchangeable with equity shares and includes convertible debt instruments and convertible preference shares;
 - Earlier any acquisition of convertible securities also triggered the Takeover Code. But, now it has been made clear that the Code will be hit only at the time of conversion of such securities.





Some amended definitions continued...

Financial Year:

- Adopting April–March as FY
- Clears the confusion as the Companies Act provides a company to chose any financial year of its choice

Maximum permissible non-public shareholding

- To be the same as specified in SCRA
- At present 75% or 90%

Weighted average number of total shares

- Meaning shares at the beginning of the period multiplied by a time weighing factor
- Weighing factor has not been prescribed
- Whether it is to be calculated on days or months basis has not been made clear



3 modes of acquisitions

Acquisition of shares

- One –shot
- Creeping

Acquisition of control

- In the management of target company

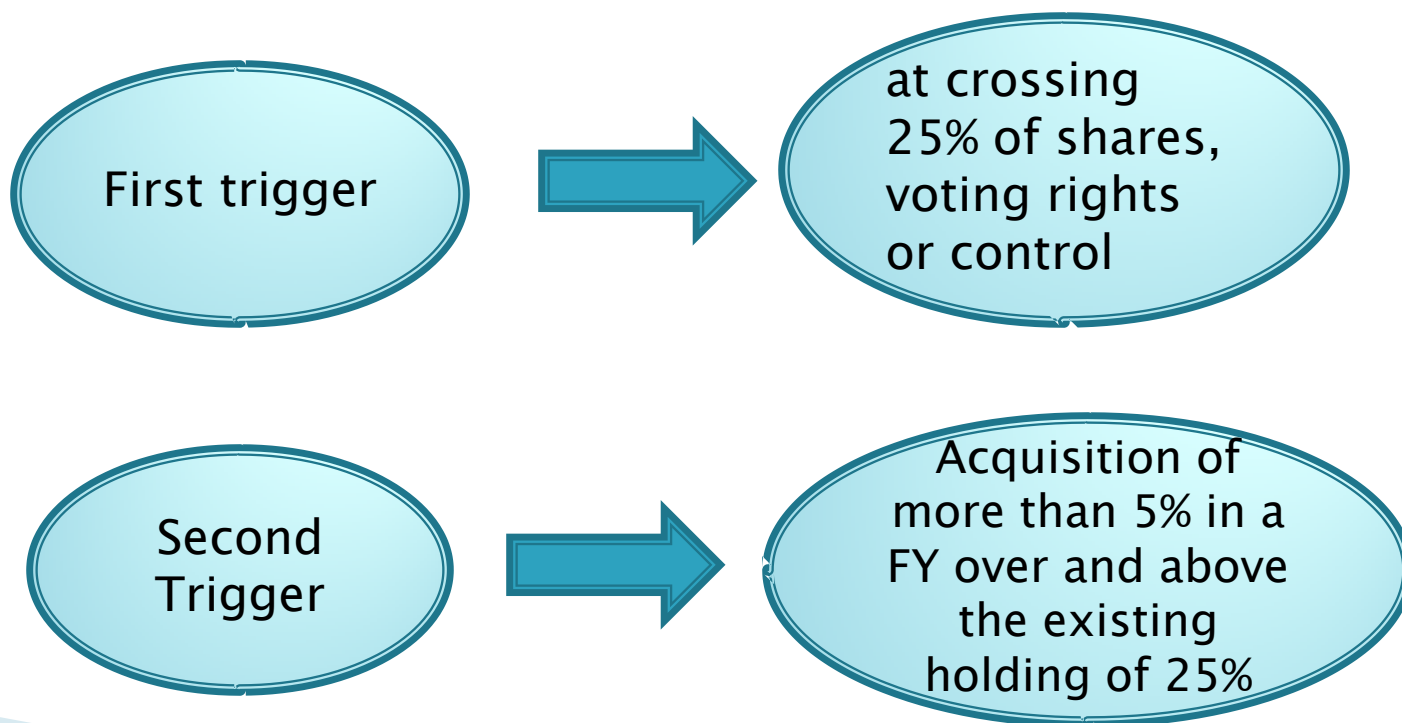
Indirect acquisition

- May be taken as direct in circumstances



Increased trigger limit for open offer – Regulation 3

- ▶ Substituting old Reg 10 and 11
- ▶ Increase in limit from previous threshold of 15% to 25% for making public announcement and making public offer





More on the triggers

- ▶ Are the triggers based on net accretion to the holdings of the acquirer?
 - Under Reg 3 (1), the trigger is based on increase of holdings above 25%
 - Hence, based on net increase
- ▶ Under Reg 3 (2), triggers are based on gross acquisitions
 - That is, total acquisition in a financial year cannot exceed 5%
- ▶ My holding has gone up by more than 25%/ 5% but my PAC's holdings have fallen – do we need to look at the individual holdings or aggregate holdings
 - Individual holdings – Reg 3 (3)
- ▶ In case of increase in holdings due to allotment, the difference between the pre-allotment and post-allotment percentage holding



Acquisition of control – Regulation 4

- ▶ All direct and indirect acquisitions of control over the target company irrespective of holding of shares, voting rights now requires public announcement
- ▶ Exemption if the control acquired by passing Special Resolution in the old Regulation has been done away with
 - Curious implication
 - If the company passes a special resolution amending articles of association, whether open offer formalities triggered?
 - Does not sound logical as after all special resolution itself requires members' consent
 - What if the present management already had control, and articles are now amended, fortifying control?



Indirect acquisition – Regulation 5

- ▶ Indirect acquisitions will also trigger the requirement of public announcement
- ▶ Certain indirect acquisitions fulfilling assets, turnover or capitalisation criteria would be deemed as indirect acquisitions [Reg 5(2)]
- ▶ Apex court in *Technip SA v. SMS Holding Private Limited*, (2005) 5 SCC 465 demonstrated 2 criteria for determining indirect acquisition irrespective of size and intention

Proportionate Test



a mathematical test wherein the indirect shareholding of the acquirer is determined by calculating *pro rata* shareholding

Effectuality Test

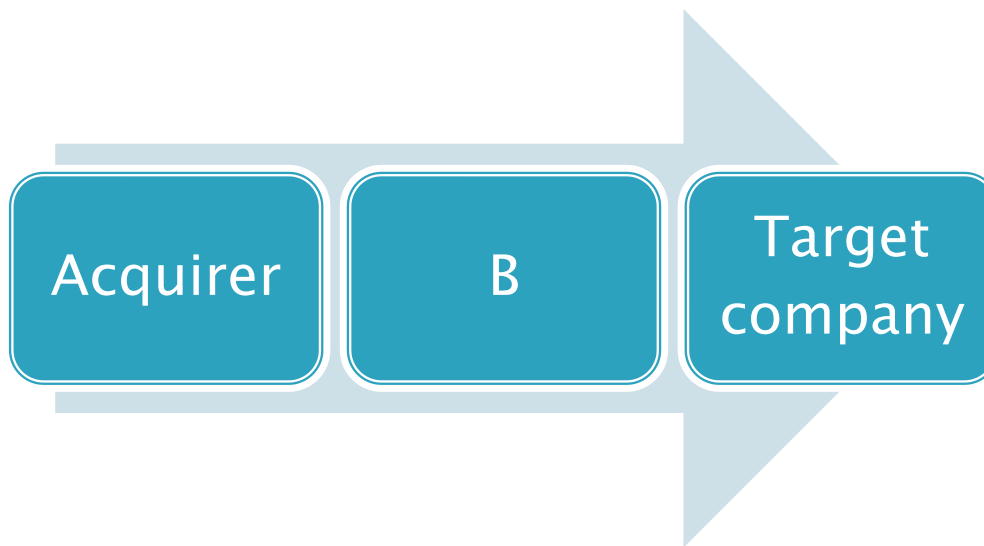


depends on whether the acquisition of shares etc over the intermediate company has had any effect and how the shares of the target company held by the intermediate company are voted



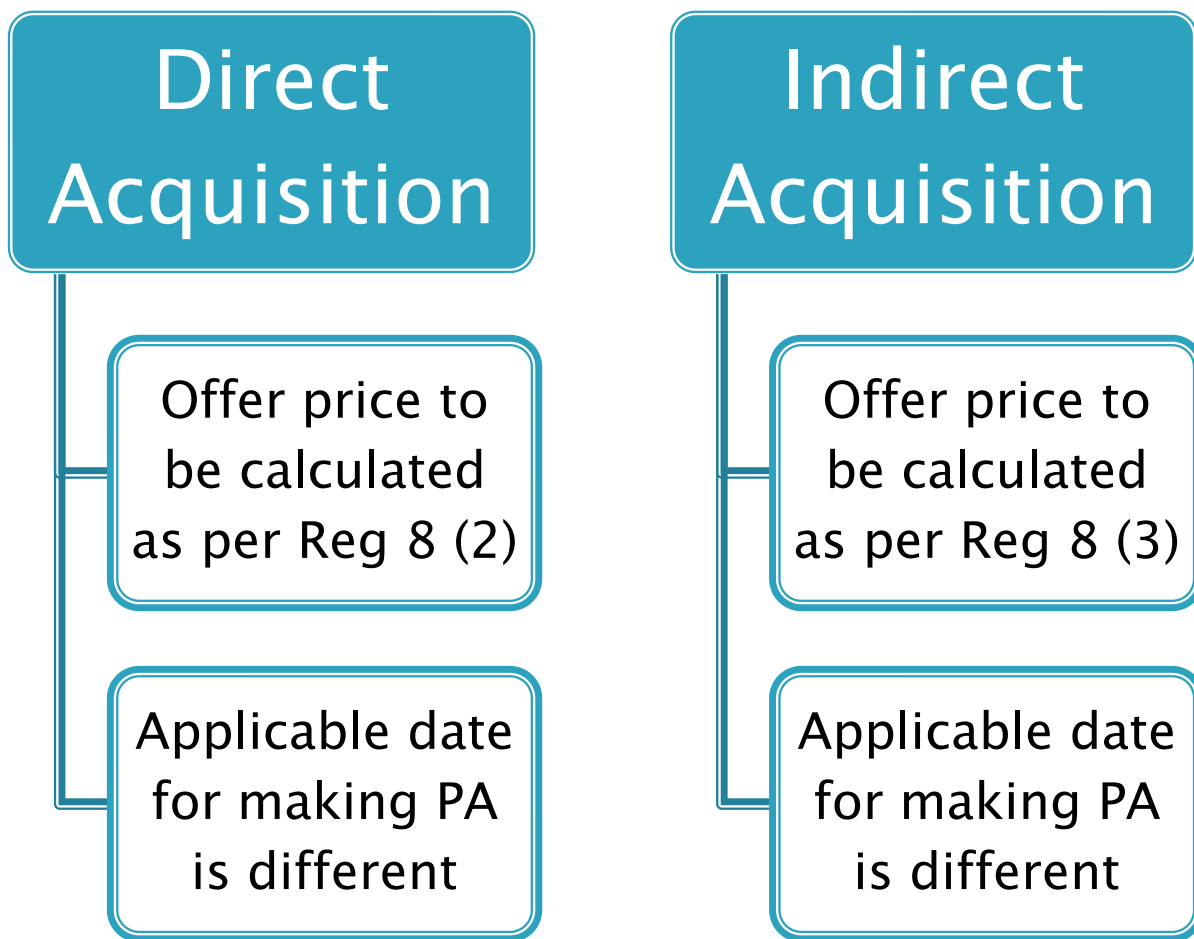
Indirect acquisition to be taken as direct

- ▶ Reg 5 (2) sets a rule where indirect acquisition is to be deemed to be direct
- ▶ If Target company's NAV, sales or market cap is 80% or more of B





Differences between direct and indirect acquisitions



Voluntary Offer – Regulation 6





Voluntary Offer – Regulation 6

Restrictions post open offer

- Not to acquire any shares, except pursuant to another voluntary open offer or by way of a competing offer in an open offer within 6 months after completion of the open offer
- No restriction if the shares acquired through bonus issue or stock splits

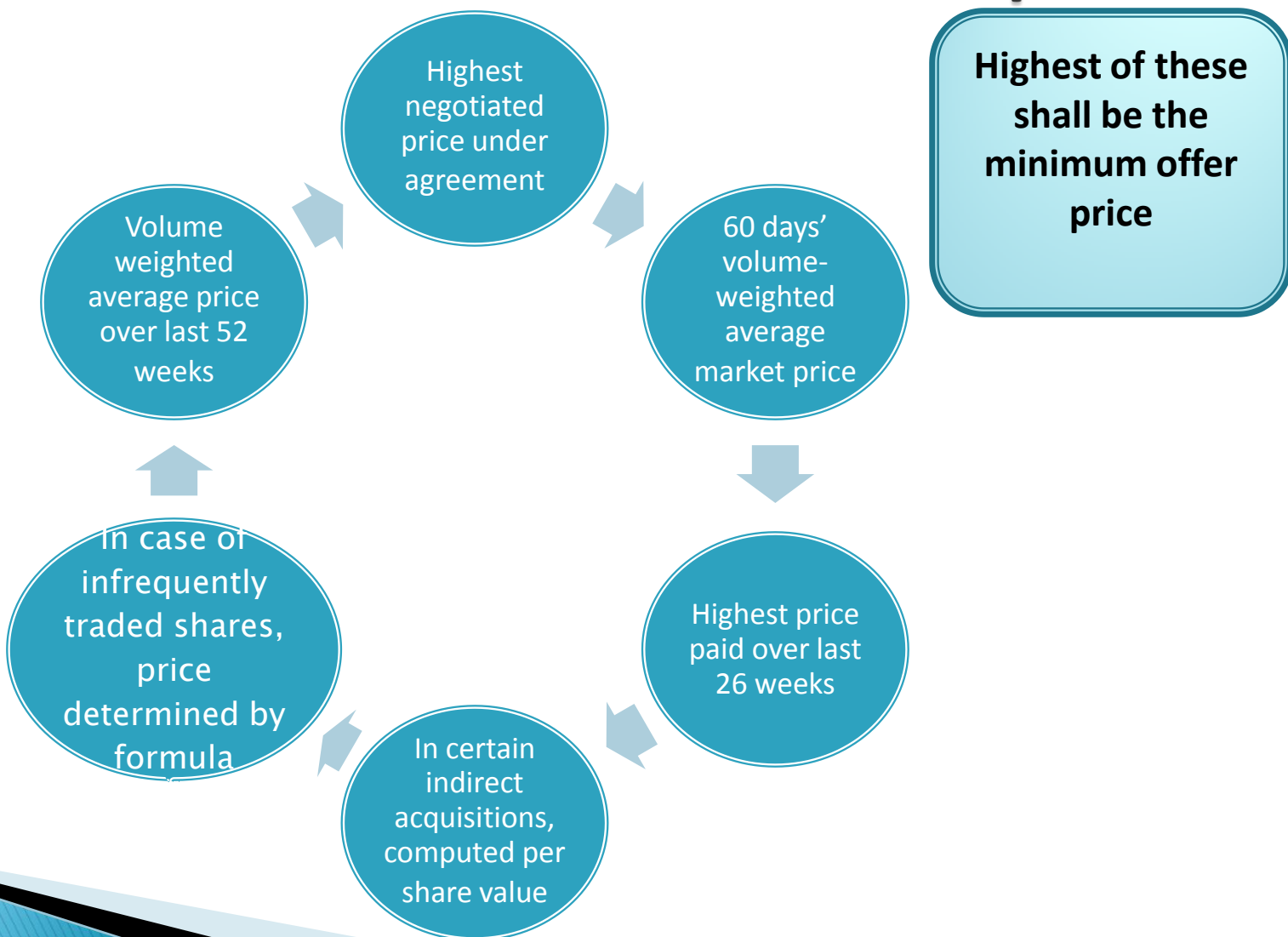


Offer size – Regulation 7

- ▶ Minimum offer size increased from 20% to 26%
- ▶ The increase in offer size shall be proportionate to the increase total shares after public announcement
- ▶ Offer size is 10% in case of voluntary offers
 - Several elaborate provisions in case of increase in offer size pursuant to a competing offer
- ▶ Shareholding of acquirer cannot exceed 75% or 90% at any time
 - If exceeded, same to be brought down within the specified time
- ▶ Open offers not to be made to acquirers, PAC and parties to the underlying agreement



Offer price in case of direct acquisition or deemed direct acquisitions





Offer price in case of indirect acquisitions – Regulation 8 (3)

Highest negotiated price under the agreement

Volume weighted average price paid or payable by the acquirer in the 52 weeks preceding earlier of announcement in public domain and date of contracting the primary acquisition

Highest price paid or payable by the acquirer 26 weeks preceding earlier of announcement in public domain and date of contracting the primary acquisition

Highest price paid or payable by acquire between the earlier of the date of contracting the primary acquisition and the date of the public announcement of open offer

EPS of the target company provided that NAV or turnover or market capitalization exceeds 15%

In case of incapability, price to be determined by the acquirer and the manager to the open offer

Highest of these shall be the minimum offer price

- Reg 8 (12) imposes a 10% pa interest for the time between primary acquisition and PA under the Regs



One reference date for calculating offer price

- ▶ One reference date for calculating offer price i.e. the date on which the parent acquisition is announced in the public domain, or the date on which the parent enters into any agreement, whichever is earlier

Not just a date on which official PA made

the acquirer is protected from the volatility in the share prices in the stock exchange as soon as the deal is announced for all subsequent periods

introduces clarity in cases where the parent company is unlisted



Offer price – ensuring equal treatment to minorities

- Not counted as offer price

- Recommendation of Achutan Committee

Earlier, non-
compete fee
could be paid

Transparency
of price paid

Language still
leaves lot of
scope

Reg 8 (7) now
regulates this

- What is included is price paid for shares, voting rights or control
- For eg, compensation for loss of office is not a part of price

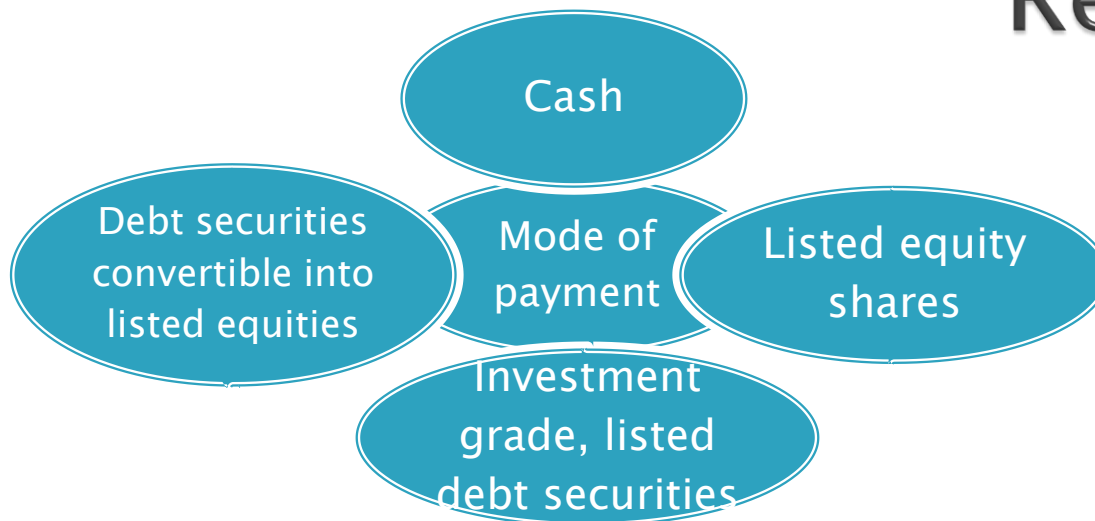
- Price paid in any form be included
- Whether as control premium or non-compete fee



More on offer price

- ▶ If acquirer or PACs acquire any shares during 26 weeks after tendering period at a price higher than the offer price, they will pay the difference to all shareholders who accepted the offer
 - Apparently unfair provision to those who did not accept the offer
- ▶ Provision not applicable to open market purchases
 - However, applicable to bulk purchases, block deals, etc

Mode of payment of offer price – Regulation 9



- ▶ Option to receive the payment in cash where the acquirer or the PAC with him acquires or agrees to acquire more than 10% in 52 weeks preceding the date of PA
- ▶ All compliance requirements to be done before commencement of tendering period if securities are offered else whole payment in cash
- ▶ Provides for the methodology of computation of the value of listed securities offered as consideration
- ▶ In case of payment of offer price by equity/debt of the acquirer/PACs, several conditions have been laid down in Reg 9 (5)



Exemptions – Regulation 10

- ▶ Inter-se transfers with several conditions
- ▶ Acquisitions pursuant to
 - Underwriting
 - Broking transactions on behalf of a client
 - Merchant banker pursuant to market making
 - Pursuant to a safety net u/r 44 of ICDR Regs
 - Stabilising agent etc u/r 45 of ICDR Regs
 - Bank as escrow agent
 - By a bank or PFI on invocation of a pledge
 - Acquisitions pursuant to SARFAESI Act
 - Acquisitions pursuant to Delisting Regulations
 - Acquisition by way of transmission, inheritance or succession
 - Voting rights in case of preference shares due to non-payment of dividends
- ▶ Acquisition without change of control pursuant to a CDR



Exemptions – Regulation 10

▶ More on buy back of shares

- The Takeover Code exempted the requirement of making public announcement provided the increase in voting rights pursuant to buy back was reduced within 90 days *on which the voting rights so increased*
- The Notification now exempts the need to make public announcement if the increased voting rights are brought down within 90 days *from date of closure of buy back offer* for buy back of shares *of the target company.*

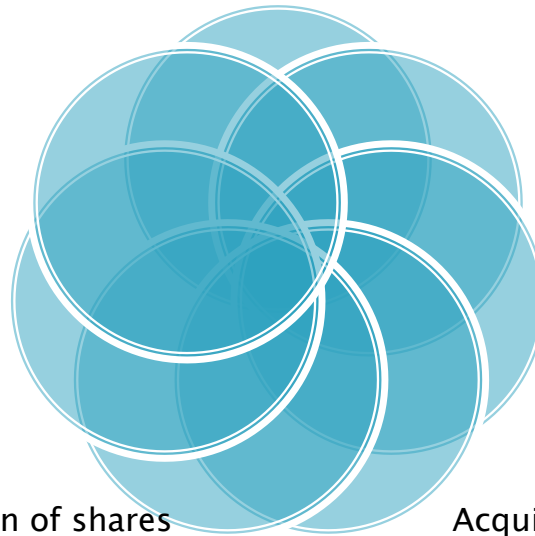
More exemptions

As a condition for all exempted acquisitions, acquirer shall file a report with stock exchanges within 4 working days

Acquisition of shares from a venture capital fund by promoters

Acquisition of shares from state financial institutions, by promoters of such companies

Acquisition of shares, upto entitlement, pursuant to a rights



Acquisition of additional shares in a rights issue, beyond entitlement, subject to several conditions

Increase in voting rights due to a buyback, subject to conditions

Acquisition of shares of the acquirer in case of an exchange of securities in an offer under these Regs



Steps in the open offer process

• Short form PA immediately on acquisition or as per Reg 13 (1)

• Creation of escrow – 2 days prior to DPS

• Detailed Public statement, through Manager, within 5 working days of PA – reg 14 (3)

• Filing of draft of Letter of offer with SEBI, within 5 working days of DPS – reg 16 (1)

• SEBI's comment on draft letter of offer – within 15 days

• Circulation of letter of offer – within 7 days of SEBI's comments

• Revision of the offer price – at least 3 days prior to tendering period; corresponding increase in escrow



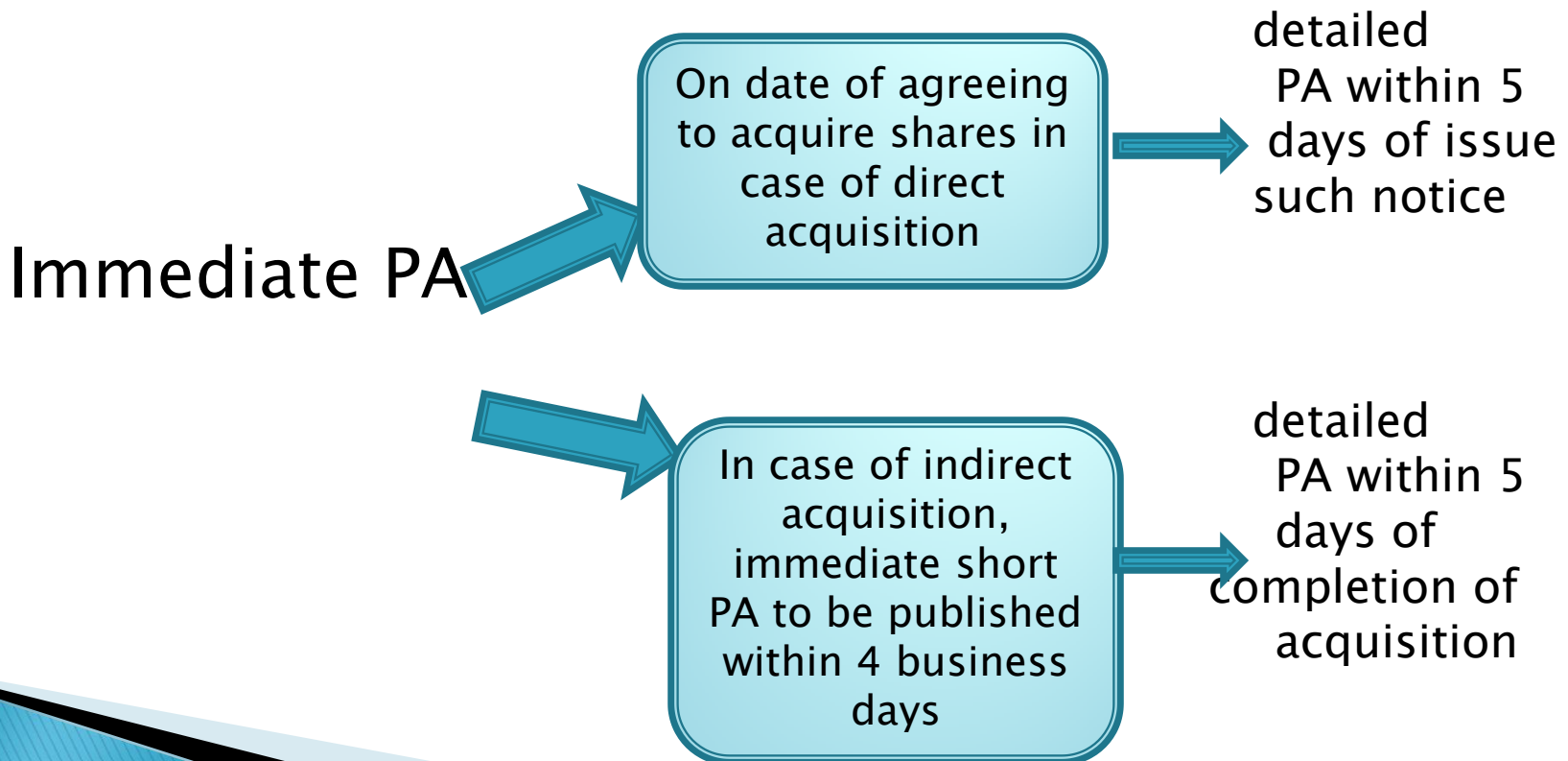
Steps in the offer process – continued...

- Disclosure of any shares acquired during offer period – within 24 hrs of acquisition
- Publication of advertisement, 1 day before the tendering period – reg 18 (7)
- Tendering period to start – not later than 12 days from receipt of SEBI's comment
- Commencement of tendering period – to remain open for at least 10 days
- Payment to all offerors – within 10 days of close of tendering period
- Post-offer advertisement, within 5 days of close of offer period



Short Form Public Announcement

‘Immediate Short Form’ public announcement to be made in case of direct or indirect acquisitions





Immediate PA requirement – reg 13 (2)

- In case of market purchases, prior to placing an order on the stock broker
- In case of convertible securities or Depository receipts, on the date of conversion into voting shares, or in case of conversion on a pre-fixed date, within 2 days of conversion
- In case of disinvestment, on the date of agreement to acquire
- In case of indirect acquisitions, 4 working days of primary acquisition
- In case of preferential issue, on the date of passing of special resolution
 - With the Notification in March, 2013 public announcement is to be done on the date of Board Resolution authorizing preferential issue.
- In case of increase in voting rights pursuant to buyback, not later than the 90th day
 - With the Notification in March, 2013 90th day would be from the date of closure of the buy back offer.
- In case of acquisitions beyond the control of acquirer, within 2 days of intimation

To be done





Immediate PA requirement – Regulation 13 (2A)

- ▶ Inserted by Notification, 2013
 - In case of proposal for acquisition of shares /voting rights/control over target company through combination of:
 - Agreement and modes of acquisition in Regulation 13(2) *OR*
 - Any one or more modes of acquisition in clause (a) to (i) of Regulation 13(2)
 - The public announcement has to be done on the date of the first acquisition.
 - The public announcement shall also mention details of all proposed acquisitions in future.



Contents of the PA and the Public statement

PA

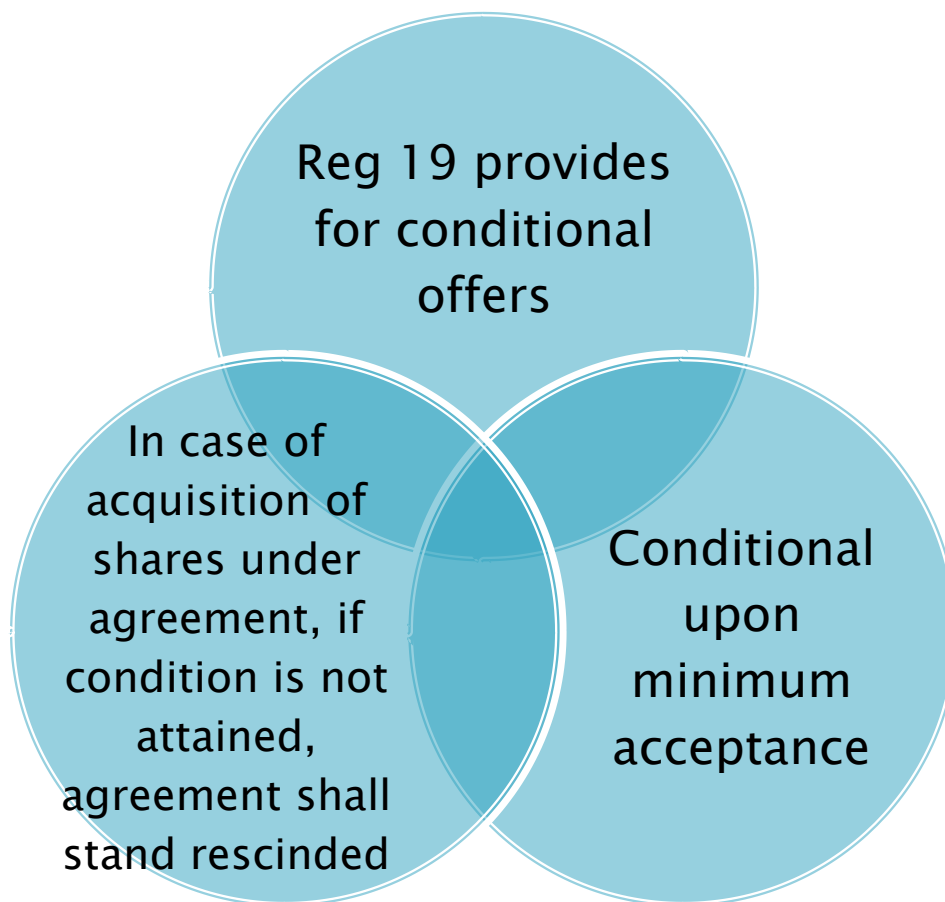
- Identity of acquirer
- Identity of sellers
- Nature of acquisition
- Consideration
- Offer price
- Offer size with minimum level of acceptance

Contents of detailed public statement

- To be laid by rules



Conditional offers





Completion of acquisition – Regulation 22

- ▶ Acquirer to not complete the acquisition of shares or voting rights in, or control over, the target company, until the completion of the offer period
 - Regulation 22(2) allows acquirer to complete acquisition if:
 - 100% of consideration payable under open offer is deposited in escrow account
 - 21 days have elapsed from the date of DPS
 - With Notification in March, 2013, acquirer may acquire shares under preferential issue or through stock exchange settlement process *if* the shares are kept in escrow account and acquirer does not exercise voting rights on such shares.
 - These shares may be transferred to the account of the acquirer if Regulation 22(2) is followed.



Withdrawal of open offer – Regulation 23

- ▶ Acquirer being a natural person has died
- ▶ Refusal of Statutory approvals required for making an offer, subject to such requirements been disclosed in detailed public statement and the letter of offer.
- ▶ Condition attracting obligation to make an offer is not met for reasons beyond control
- ▶ With Notification in March, 2013 Regulation 23(1)(d) has been introduced:
 - Acquirer shall not withdraw an offer pursuant to a public offer, even if the proposed acquisition through preferential issue is not successful.



Restraints during the offer period

- ▶ No acquirer's nominee to be appointed on the board of the target – reg 24
 - Directors representing the acquirer, if already on board, shall not vote on matters relating to the offer
- ▶ Obligations of acquirer – reg 25
 - Not to sell or alienate assets of the target company within 2 years from end of offer period
 - Not to sell shares of the target company during offer period – reg 25 (4)
 - Acquirer and PACs shall be jointly and severally responsible



Restraints on the target company – Regulation 26

- ▶ Except with special resolution by postal ballot, not to do the following
 - Alienate material assets
 - Effect borrowings outside ordinary course of business
 - Issue or allot any unissued securities
 - Implement any buyback or make changes to capital structure
 - Enter, amend or terminate material contracts
 - Accelerate any contingent vesting of a right
- ▶ Upon receipt of DPS, the independent directors of the target company shall prepare and publish reasoned recommendations of the board on the offer
- ▶ The BoD of the target shall facilitate the acquirer's verification of offerors tendering shares



Disclosure of acquisition and disposal – Regulation 29

- ▶ For disclosure purpose, acquisition and holding of any convertible security shall also be regarded as shares
- ▶ Shares taken by way of encumbrance shall also be treated as an acquisition, and release of encumbrance shall be treated as a disposal.

Disclosure to be made by acquirer within 2 working days when

An acquisition aggregating to 5% or more voting rights or control in target company

Acquisition or disposal of 2% or more if the acquirer's existing holding is 5% or more

Encumbrance of shares to be treated as acquisition and release as disposal of shares

Disclosure to be made even if change results in shareholding falling below 5% –
Notification dated March, 2013

Pertains to an acquisition, not all shares in a financial year



Disclosure formats under Reg 29 specified on 20th Oct, 11

- ▶ New formats for disclosures required under Reg 29(1) and 29(2) introduced vide SEBI Circular No. SEBI/CFD/DCR/SAST/ 2/2011/10/20 dated 20th October, 2011
- ▶ The new format for Reg 29(1) is more clear, transparent and requires pre and post acquisition details also as compared to the earlier format
- ▶ Disclosure on total diluted share/voting capital of the target company after the acquisition/disposal is also required
 - Here Diluted share/voting capital means the total number of shares in the TC assuming full conversion of the outstanding convertible securities/warrants into equity shares of the TC



Continual Disclosure – Regulation 30

Disclosure within 7 days
of end of FY i.e. 31st
March of every year by

Every person
(together with
PAC) holding
25% or more of
shares, voting
rights or control

Promoter
(together with
PAC) of every
target company of
his aggregate
shareholding and
voting rights



Disclosures of encumbered shares – Regulation 31

Disclosure within 7 days
of creation or invocation
or release of
encumbrance by

Promoters
together with
PAC whose
shares are
encumbered

Promoter together
with PAC whose
shares have been
released or
encumbrance
invocated