



Discussion Paper on proposed amendments in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

1. Objective

1.1 The objective of this discussion paper is to seek comments / views from the public on the proposed amendments in Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Regulations”) in relation to:

- i. Completion of acquisition through bulk and block deals during the open offer period;
- ii. Depositing 100% escrow in case of open offers made pursuant to indirect acquisitions; and
- iii. Payment of interest in case of delay in open offers.

1.2 The aforementioned issues have been discussed in the meeting of Primary Market Advisory Committee, wherein it was decided to seek public comments before carrying out changes in the regulations.

2. Completion of acquisition through bulk and block deals during the open offer period

Background

2.1 The Takeover Regulations were notified based on recommendations made by the Takeover Regulations Advisory Committee (TRAC). The TRAC report had *inter alia* recommended the following relating to completion of transaction that triggered the open offer - “*The agreement that attracts an open offer obligation may be acted upon during the pendency of the open offer provided 100 % of the consideration payable under the open offer is placed in escrow.*” The provisions relating to completion of acquisition during the open offer period were accordingly provided in Regulation 22(1) and (2) of

Takeover Regulations in 2011.

2.2 Therefore, the Acquirer is not permitted to complete the transaction triggering the open offer until expiry of the open offer. The only exceptions were provided in Regulation 22(2) which provided that the acquirer may act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company, subject to meeting the following two conditions:

- a. Acquirer depositing 100% of the offer size in escrow in cash; and
- b. After expiry of 21 working days from the Detailed public statement (DPS).

FAQs on Takeover Regulations

2.3 Further, the FAQs on Takeover Regulations were also issued by SEBI in 2011. One of the FAQs provided that the acquisitions resulting from any agreement attracting the obligation to make an open offer cannot be completed by way of transactions settled on stock exchange such as bulk/block deals.

Amendments in Regulation 22 in 2013

2.4 The issue relating to completion of acquisition through stock exchanges were discussed in the Board meeting held on January 18, 2013. It was noted that Regulation 22(1) prohibits completion of the acquisition which triggered the open offer obligations till the offer formalities are complete. However, it specifically relates to an acquisition pursuant to an agreement and is not applicable in cases of transactions involving direct market purchases. The expression "such agreement" in regulation 22(2) endorses the above stated interpretation. Therefore, it was proposed to expressly state that acquisition made through stock exchange can be completed in accordance with the normal settlement process applicable to the stock exchange mechanism. However, the shares so acquired shall be kept in a separate escrow account and exercise of voting rights on such acquisitions would be subject to provisions of Regulation 22(2).

2.5 The following regulation 22(2A) was introduced in the Takeover Regulations, 2011 w.e.f. March 26, 2013:

2A) Notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, **other than through bulk deals or block deals**, subject to , -

(i) such shares being kept in an escrow account,

(ii) the acquirer not exercising any voting rights over such shares kept in the escrow account:

Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

Issue

2.6 It is noted that that there is still some confusion on whether the completion of acquisition through stock exchange settlement process is permitted for bulk deals and block deals.

Analysis

2.7 Regulation 22(2) and Regulation 22(2A) are non-obstante clauses and operating in different context. While Regulation 22(2) deals with completion of acquisition pursuant to an agreement, Regulation 22(2A) is relating to completion of acquisition through the stock exchange settlement process. The purpose of insertion of Regulation 22(2A) was to make it clear that the acquisition through stock exchange settlement can be completed during the open offer, subject to the conditions mentioned in this regulation. However, the amendment provided an exclusion to bulk deals and block deals.

2.8 The following are the various scenarios, -

- i. **Trigger of open offer pursuant to agreement (e.g. SPA):** The agreement can be executed through either on the stock exchanges by way of block deal or through off-market. In this regard, it is noted that the transaction executed through block deal on the stock exchange platform is more transparent than the off-market route.

While Regulation 22(2) of the Takeover Regulations allows the completion of acquisition pursuant to agreement, it appears that the prohibition on block deals

provided in Regulation 22(2A) has created some confusion in the market. In this regard, we may consider bringing in more clarity by deleting the exclusion of block deal provided in Regulation 22(2A).

- ii. **Trigger of open offer pursuant to placement of purchase orders on stock exchanges that are not pursuant to agreement:** The open offer might trigger due to placement of large purchase orders on the stock exchanges. Such transactions are not covered under Regulation 22(2) of Takeover Regulations.

Usually, such transactions would be of large purchase orders and might be either bulk deal or a negotiated transaction as block deal. However, completion of such transaction is currently prohibited in terms of Regulation 22(2A) of Takeover Regulations.

2.9 Our comments on block deals and bulk deals are as follows:

- i. **Block Deals:** Block deal is a separate trading window permitted by SEBI for execution of large size trades through a single transaction. SEBI vide circular MRD/DoP/SE/Cir-19/2005 dated September 02, 2005 prescribed guidelines for execution of large size trades through a separate trading window, termed as “block deal”. The block deal window mechanism has been reviewed by SEBI by way of circular dated October 26, 2017. The following has *inter alia* been specified in the said circular:
 - a) The minimum order size for execution of trades in the Block deal window shall be Rs.10 Crore;
 - b) There will be two block deal windows (morning block deal window between 08:45 AM to 09:00 AM with reference price being the closing price of the previous day; and afternoon block deal window between 02:05 PM to 02:20 PM with reference price being volume weighted average market price (VWAP) of the trades executed in the stock in the cash segment between 01:45 PM to 02:00 PM);
 - c) The orders placed shall be within $\pm 1\%$ of the applicable reference price in the respective windows;

- d) Every trade executed in the block deal windows must result in delivery and shall not be squared off or reversed.
 - e) The stock exchanges shall disseminate the information on block deals such as the name of the scrip, name of the client, quantity of shares bought/sold, traded price, etc. to the general public on the same day, after the market hours;
- ii. **Bulk Deals:** A “bulk” deal constitutes of “all transactions in a scrip (on an exchange) where total quantity of shares bought/sold is more than 0.5% of the number of equity shares of the company listed on the exchange. SEBI has issued a circular (reference no. SEBI/MRD/SE/Cir-7/2004) on January 14, 2004 on disclosures of details of “bulk” deals with a view to impart greater transparency to the market on such transactions executed on the stock exchanges. The following has *inter alia* been specified in the said circulars:
- a) The disclosure shall be made with respect to all transactions in a scrip where total quantity of shares bought/sold is more than 0.5% of the number of equity shares of the company listed on the stock exchange;
 - b) The brokers shall disclose to the stock exchange the name of the scrip, name of the client, quantity of shares bought/sold and the traded price;
 - c) The stock exchanges shall disseminate the aforesaid information on the same day after market hours to the general public.

2.10 Therefore, it may be noted that block deals and bulk deals are regulated, settled through stock exchanges and there are reporting requirements applicable for such transactions on a daily basis.

2.11 While completion of acquisition through stock exchanges was permitted in 2013, it appears that there was not adequate rationale provided for exclusion of block deals and bulk deals. The exclusion provided in the amendment in 2013 may possibly be because of the FAQ that has been in place since 2011.

2.12 Considering that the market purchases are permitted, and block deals and bulk deals are regulated and transparent compared to off-market transactions, we may consider allowing completion of acquisitions through bulk and block deals, during the offer period.

2.13 Further, the following would be the benefits to the Acquirer, by permitting completion of acquisition through block deals and bulk deals during the offer period:

- i. The Acquirer will be able to directly acquire significant stake in the target company through stock exchanges instead of negotiating through the off-market route; and
- ii. The Acquirer will be able to complete the acquisition quickly instead of placing small orders for a longer period of time, with appropriate checks and balances as prescribed under Regulation 22(2A) such as shares being kept in an escrow demat account and the acquirer not exercising any voting rights over such shares, unless 100% cash is deposited in the account.

Proposal

2.14 The following is proposed:

- i. We may allow completion of acquisition through stock exchange settlement process for all types of transactions including bulk deals and block deals.
- ii. The existing FAQ in this regard may also be deleted.

3. Depositing 100% escrow in case of open offers made pursuant to indirect acquisitions

Background

3.1 The provisions of Regulation 17 of Takeover Regulations stipulates the requirement of creation of an escrow account towards security for performance of obligations by Acquirers. It further stipulates that such account shall be created and requisite amount be deposited within 2 working days prior to the date of the Detailed Public Statement (DPS).

3.2 The provisions of above Regulation is applicable for all open offers whether triggered on account of direct acquisition/deemed direct acquisition or indirect acquisition.

3.3 Regulation 22 of Takeover Regulations states that the Acquirer shall not complete the acquisition of shares or voting rights in or control over the target company whether by

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

3.4 Regulation 22(2), however, allows parties to an agreement to act on the agreement and the acquirer may complete the acquisition of shares or voting rights in or control over the target company during the offer period after expiry of 21 working days from the date of DPS if the acquirer deposits 100% of the consideration payable under the open offer in cash.

3.5 Thus, provisions of Regulation 22 allow Acquirers to take control over the target company during the offer period itself subject to expiry of 21 working days after date of DPS and 100% escrow in cash.

3.6 In case of an open offer which gets triggered on account of indirect acquisition of voting rights in or control over the target company and where none of the parameters as set out in Regulation 5(2) of Takeover Regulations are met, public announcement (PA) to the offer is required to be made within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain. A relaxation, however, with respect to date of publication of DPS has been provided in proviso to Regulation 13(4). The proviso to Regulation 13(4) states that such DPS shall be made not later than 5 working days after the completion of primary acquisition and the Acquirer acquires indirect control over the Target Company.

3.7 From the proviso to Regulation 13(4) it is clear that the primary acquisition, which would result in indirect acquisition of the target company, can be completed before the publication of DPS. This is further clarified in the explanation to the said proviso which states that in the event the acquirer does not succeed in acquiring the ability to exercise or direct the exercise of voting rights in or control over the Target Company, the acquirer is not obliged to make a DPS for the open offer for acquiring shares.

3.8 Thus, in case of open offers which get triggered on account of indirect acquisitions where PA is made in terms of Regulation 13(2)(e) of Takeover Regulations, the Acquirer acquires control over the Target Company before the date of DPS and is not required to deposit 100% of the consideration payable under the open offer in the escrow account.

3.9 It is observed that the Takeover Regulations have stricter compliances with respect to deposit of money in escrow account for direct and deemed direct acquisitions in case the acquirer wishes to complete the underlying transaction during the offer period itself compared to open offers which get triggered on account of indirect acquisitions where only amount as stipulated under Regulation 17 has to be deposited in the escrow account.

3.10 While the Regulations provide a leeway with respect to the timing of DPS in cases of open offers triggered on account of indirect acquisitions where the target company is not a significant part of the primary transaction, it is felt that there should be no leeway with respect to the amount of money to be deposited in escrow account as a security once the control over the target company is acquired on the completion of primary acquisition.

3.11 Since the Acquirer acquires indirect control over the Target Company by virtue of completing the primary acquisition and enjoys the benefits arising out of being in control over the Target Company, an amount equal to 100% of the consideration payable under an open offer must be set aside as a security for the performance of obligations under an open offer similar to direct acquisitions.

Issue

3.12 The current framework of Takeover Regulations does not stipulate mandatory requirement of deposit in an escrow account a sum equivalent to 100% of the consideration payable under an open offer in case of indirect acquisition of shares/ voting right in, or control over the target company where PA of the offer has been made under Regulation 13(2)(e).

3.13 It is felt that Takeover Regulations should not differentiate between direct acquisitions and indirect acquisitions when providing safeguards for shareholders who wish to avail the exit opportunity provided by an open offer.

Proposal

3.14 In view of the above, it is proposed that in case of indirect acquisitions PA of an open offer is made in terms of Regulation 13(2)(e) of Takeover Regulations, an amount of

100% of the consideration payable under the open offer must be deposited 2 working days before the date of DPS.

3.15 Further, such escrow account may be in the form of cash and/or bank guarantee.

4. Payment of interest in case of delay in open offers

Background

4.1 Takeover Regulations was notified in 2011, pursuant to repeal of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, based on the report of the TRAC dated July 19, 2010. The main objectives of the Takeover Regulations are *inter alia* to protect the interests of investors in securities markets and to ensure a fair, equitable and transparent framework for protecting their interests.

4.2 The Takeover Regulations provide detailed and specific timelines for completion of open offer, starting from the date of event triggering the open offer requirements. The Takeover Regulations provide certain flexibilities in terms of timelines as indicated below:

4.2.1 **Indirect Acquisitions:** In cases of indirect acquisitions where the target company is not a significant part of the primary transaction, the timeline for making detailed public statement (DPS) has been extended till 5 working days of the completion of the primary transaction (in terms of Regulation 13(4) of Takeover Regulations). However, it has been clearly mentioned in the Takeover Regulations that the offer price has to be enhanced after including interest at the rate of 10% per annum for this period (in terms of Regulation 8(12) of Takeover Regulations). The same was also mentioned in the report of TRAC. The relevant extract is reproduced below:

“However, as the acquirer would be fixing the price payable for the offer as on the date of the primary acquisition, and would have the benefit of delaying payment to the shareholders (due to time lag in completing the primary acquisition), all the shareholders tendering shares in the open offer would need to be compensated by way of an increase in the offer price at the rate of [10 %] per annum for the period between the announcement of primary acquisition and date on which the detailed public statement is actually made if such period is more than five business days.”

4.2.2 **Statutory Approvals:** In terms of Regulation 18(11) of the Takeover Regulations, the open offers can be delayed subject to extension of time granted by SEBI, if the delay is due to non-receipt of statutory approvals. However, in such cases, the proviso to Regulation 18(11) of Takeover Regulations clearly provides that the acquirer has to pay interest to the shareholders for the delay. In this regard, it may be noted that the requirement to pay interest is applicable even if the delay is not attributable to any willful default, failure or neglect on the part of the acquirer.

4.3 Further, it is noted that there are instances wherein delayed open offer has been made. In such cases of delayed open offer, SEBI while processing the draft letter of offer ensures that the open offer price is enhanced after adding of interest at the rate of 10% per annum for the period of delay.

4.4 However, there are several instances wherein open offer gets delayed by the acquirer on account of several other reasons, including but not limited to (i) inter-se dispute among parties to the agreement; (ii) valuation disputes; (iii) investor complaints; (iv) delay in commencing the tendering process; (v) delay in making payment by acquirer upon tendering the shares under open offer; (vi) various stages of litigations etc.

Issues

4.5 In view of the above, the following are the issues for consideration:

- a) Payment of interest to shareholders
- b) Rate of interest;
- c) Shareholders entitled for interest.

Issue (a): Payment of interest to shareholders

4.6 It may be noted that the Takeover Regulations do not envisage delays in open offers other than on account of non-receipt of statutory approvals as mentioned in regulation 18(11). However, the open offers are delayed on account of other reasons as enumerated at paragraph no. 4.4 above, which are presently not envisaged in the Takeover Regulations.

4.7 While in some cases, the acquirer voluntarily agrees to compensate the shareholders by paying interest for the delay, the issue of payment of interest for such delays is not expressly mentioned in the Takeover Regulations, other than by way of order/ directions under Regulation 32 of Takeover Regulations on a case to case basis.

Proposal

4.8 It is proposed that in case of delay in the open offer due to the reasons outlined at para 4.4, the acquirer may be required to pay interest.

Issue (b): Rate of interest

4.9 The rate of 10% per annum has been indicated as interest in respect of indirect acquisitions (Regulation 8(12) of Takeover Regulations).

4.10 In case of delayed open offer the market practice has been 10%. Further, SEBI has also been considering interest rate of 10% for the delayed open offers, and also for extension of time granted to open offers on account of non-receipt of statutory approvals in terms of Regulation 18(11) of Takeover Regulations.

Proposal

4.11 It is proposed that we may consider the rate of interest as 10 % per annum.

Issue (c): Shareholders entitled for interest

4.12 In respect to interest payment, a question also arises, as to whom the interest payment should be payable. In this regard there are two approaches:

- i. It may be noted that pursuant to Supreme court order in the matter of *Clariant International Limited and another vs. SEBI [Appeal (Civil) No. 3183/2003]* acquirers have been making interest payment only to the original shareholders (shareholders as on triggering date of the open offer and continuing as on the date of tendering) with regard to delay due to litigations etc.
- ii. In case of indirect acquisitions and delays on account of non-receipt of statutory approval, the offer price is enhanced after addition of interest. Therefore, the revised offer price, after addition of interest for the entire period, is paid to all the

shareholders who have tendered their shares in the open offer (irrespective of date of purchase of shares).

Proposal

4.13 Considering the above, it is proposed that the revised open offer price may be calculated after addition of interest (10%) and the revised offer price is paid to all the shareholders (in line with the approach currently followed for indirect acquisitions and delays on account of non-receipt of statutory approvals).

5. Public Comments

5.1 Public comments are invited on the aforesaid proposals in the following format:

Name of entity/ person/ intermediary:			
Name of organization (if applicable):			
Contact details: Address, Mobile No. etc.			
Sr. No.	Proposals	Proposed/ suggested changes	Rationale
	Page No. Para No.		

5.2 Comments may be forwarded by e-mail to sastreview2020@sebi.gov.in or sent by post at the following address latest by **March 02, 2020**.

*Sh. Rajesh Gujjar
General Manager
Corporation Finance Department
Securities and Exchange Board of India
SEBI Bhavan
Plot No. C4-A, "G" Block
Bandra Kurla Complex
Bandra (East), Mumbai - 400 051*
