FAQs ON ACQUISITION OF INDIAN LISTED COMPANIES

Any direct or indirect acquisition of shares, voting rights or control of Indian companies listed on recognized stock exchanges in India (such as Bombay Stock Exchange and National Stock Exchange) is governed by Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**").

The objective of the Takeover Code is to regulate change in shareholding or control of listed companies as such companies have raised capital from public shareholders including retail investors. The Takeover Code seeks to ensure that material changes in shareholding or control of listed companies are undertaken in an equitable and transparent manner and in a manner which provides an exit opportunity to shareholders in case of change in the control and management of the listed company.

In this primer, we have discussed frequently asked questions on the Takeover Code from the perspective of potential acquirers and the target company.

1. **What are the types of takeovers which are regulated under the Takeover Code?**

   Direct or indirect acquisitions of shares, voting rights or control of Indian companies listed on recognized stock exchanges, other than those companies listed without a public issuance, ("**Target Company**") are regulated by the Takeover Code. The two main obligations under the Takeover Code with respect to such acquisitions are (i) obligation of acquirer to make an open offer in case the acquisition exceeds the thresholds specified under the Takeover Code and which are further detailed in question 2 below, and (ii) obligation of the promoters and shareholders to make disclosures related to the shareholding beyond certain thresholds as specified under the Takeover Code and further detailed in question 11 below.

2. **What are the obligations of an acquirer under the Takeover Code?**

2.1 Any person who, either by itself or with other persons acting in concert ("**PAC**"), seeks to acquire shares, voting rights or control in a Target Company above the thresholds mentioned below is required to mandatorily make an open offer to the public shareholders of the Target Company.

(a) If an acquirer proposes to undertake an acquisition which would entitle him to exercise 25% (twenty-five per cent) or more of the voting rights in the Target Company, then such acquirer will be required to make an open offer.

(b) If an acquirer who already has more than 25% (twenty-five per cent) of the voting rights in the Target Company, proposes to undertake a further acquisition of 5% (five per cent) or more of the shares or voting rights within a financial year, such acquirer will be required to make an open offer.

(c) If an acquirer proposes to undertake an acquisition of control in a Target Company, irrespective of whether the transaction involves a transfer of shares or voting rights, then such acquirer will be required to make an open offer. Control under the Takeover Code means the right to appoint a majority of the directors of the Target Company or having control over the management or policy decisions of the Target Company. Control may be exercised either individually or by a group of entities and it may be exercised either directly or indirectly. However, directors or officers of the Target Company will not be considered to exercise control merely by virtue of holding such a position.

(d) If any acquirer proposes to undertake an acquisition of a separate entity, and if such acquisition allows the acquirer to exercise control over the Target Company, then the acquirer will be required to make an open offer in relation to the shares of the Target Company.

2.2 The above does not apply in case of an acquisition by promoters or the shareholders in control of a Target Company, where the acquisition is through an exit offer provided to dissenting shareholders in case of a change in objects of the Target Company or a variation in the terms of contract referred to in the prospectus of the Target Company.

2.3 The open offer obligations are required to be satisfied by the acquirer and PAC together. For a person to be considered a PAC, there need not be a formal agreement in place with the acquirer as long as there is a common objective to acquire shares in the Target Company. Certain persons such as a holding or subsidiary company of the acquirer, promoters of the acquirer, or other associate entities are deemed as PACs.

3. **What is an 'open offer'?**

One of the primary obligations under the Takeover Code for acquiring shares or control of a public listed company is the requirement on the acquirer along with the PACs to make an open offer. An open offer is the process by which the acquirer and the PACs provide an exit option to the existing public shareholders of the Target Company.

4. **What is the minimum size of a mandatory open offer? Is there a minimum price at which the acquirer has to make the open offer?**

4.1. The open offer must be for at least 26% (twenty-six percent) of the shareholding of the Target Company. However, if pursuant to the open offer the non-public shareholding of the Target Company exceeds 75% (seventy-five percent) of the shareholding of the Target Company, then the same has to be brought back down to the permissible levels as per the provisions of the Securities Contract Regulations Rules of 1957.

4.2. The price at which the shares of the Target Company can be acquired by the acquirer under the open offer cannot be lower than the price determined as per the process laid down in the Takeover Code. Depending upon whether the shares of the Target Company are frequently traded or not, the Takeover Code prescribes the mechanism for calculation of the open offer price. The price paid by an acquirer in case the open offer is triggered under an acquisition (direct or indirect), control premium and / or the non-compete fees paid by the acquirer are also factored into the calculation of the open offer price.

5. **Under what circumstances is an acquirer exempt from making a mandatory open offer under the Takeover Code?**

The Takeover Code exempts an acquirer from making a mandatory open offer in case the acquisition is:

(a) pursuant to a transfer of shares between immediate relatives, or promoters of a company, or group companies, provided that the shares are transferred at prices which are below the thresholds mentioned in the Takeover Code and that the relevant disclosures as per the provisions of the Takeover Code, have been made by both the transferor and the transferee entities;

(b) undertaken in multiple stages, in which case an open offer is not required to be made for each stage, if the open offer has been made for the first stage and if the acquirer and the seller are the same at all stages of the acquisition;

(c) pursuant to a scheme of reconstitution under applicable laws such as Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, the SEBI (Delisting of Equity Shares) Regulations, 2009 and the Insolvency and Bankruptcy Code, 2016;

(d) by way of transmission, succession or inheritance;

(e) in relation to an increase in the voting rights of a shareholder pursuant to a conversion of equity shares with superior voting rights into ordinary equity shares, and even if the increase in voting rights exceeds the specified threshold, but does not result in a change in control; and

(f) exempt by the Securities and Exchange Board of India (“**SEBI**”) pursuant to an application made by the acquirer.

6. **What are the conditions in relation to making a voluntary open offer?**

Voluntary open offers may be made by any public shareholder of the Target Company. If the public shareholder along with the persons acting in concert hold more than 25% (twenty-five per cent) of the shareholding of the Target Company, then the size of the voluntary open offer must at least be 10% (ten per cent) of the shareholding of the Target Company, provided that the acquirer must not hold more than the maximum permissible non-public shareholding of the Target Company, either prior to or after the completion of the open offer. If the public shareholder intending to make the voluntary open offer holds less than 25% (twenty-five per cent) of the shares, then the size of the open offer has to be more than 26% (twenty-six per cent) of the shareholding of the Target

Company. There are certain restrictions on the public shareholders of a Target Company for making a voluntary open offer. These restrictions are as follows:

(a) Any public shareholder who has acquired shares in the Target Company in the preceding 52 (fifty-two) weeks without attracting the obligation to make an open offer, is not eligible to make a voluntary open offer.

(b) Any public shareholder making a voluntary open offer is not allowed to acquire any shares other than through the voluntary open offer during the subsistence of the open offer period.

(c) Any public shareholder who has made a voluntary open offer cannot acquire any shares of the Target Company for a period of 6 (six) months after the completion of the voluntary open offer, except through another voluntary open offer.

7. **What is a competing open offer? Who can make a competing open offer and when? What is the minimum offer size for a competing offer?**

7.1. Any public shareholder of a Target Company may make a competing open offer for the acquisition of shares of the Target Company, where another open offer has already been announced with respect to the shares of the Target Company. The intention to make a competing open offer must be announced within 15 (fifteen) working days from the date of the publication of the detailed public statement for the original open offer.

7.2. The competing open offer should be of such a size that would allow the public shareholder making the competing open offer to hold at least the number of shares as would be held by the shareholder making the original open offer. More than a single competing open offer may be made at the same time by different shareholders of the Target Company.

7.3. Once a competing open offer has been made, all open offers including the original open offer will be deemed to be competing open offers. The schedule of activities for the competing open offers will have to be identical as far as possible and the last date for tendering of shares for all competing open offers will be revised to a single date.

8. **Can an open offer be withdrawn or be made subject to certain conditions?**

8.1. Once an open offer has been made, it can be withdrawn only in the following circumstances:

(a) if the statutory approvals required for completing the open offer or the underlying transaction are refused;

(b) if the acquirer, being a natural person, has died;

(c) if the pre-conditions of the underlying transaction have not been met for reasons outside the control of the acquirer; or

(d) if the withdrawal of the open offer is permitted by SEBI.

8.2. The acquirer may also specify that the open offer has been made subject to certain conditions or subject to a minimum level of acceptance. In such circumstances, the open offer shall be deemed to have failed, if the minimum number of shares as conditioned, are not tendered by the public shareholders. In such a case, the acquirer will not be required to accept any of the tendered shares.

9. **When can an acquirer complete the acquisition as per the underlying transaction which triggers the open offer requirement?**

9.1. An acquirer can undertake the underlying acquisition once the open offer process is complete, and the consideration has been paid to all eligible shareholders who had tendered their shares. Such acquisition is required to be completed within 26 (twenty-six) weeks from the expiry of the offer period.

9.2. An acquirer may complete the acquisition prior to completion of the open offer process if it deposits 100% of the open offer consideration in an escrow account at any time after 21 (twenty-one) days of the publication of the detailed public statement.

9.3. The offer period is the period starting from the date of entering into the agreement which triggers the open offer or the date of the public announcement and which ends on the date of payment of consideration to shareholders for the open offer or the date on which the open offer is withdrawn.

10. **What are the obligations on the Target Company in case an open offer is made with respect to the shares of the Target Company?**

In case an open offer is made in respect of the shares of a Target Company, then the Target Company has the following obligations under the Takeover Code:

(a) The Target Company must ensure that during an open offer, its business is conducted in the ordinary course with no deviations from past practice.

(b) The Target Company cannot perform certain actions without a special resolution of its shareholders such as disposal of material assets, undertaking material borrowings, changing capital structure, varying material contracts or accelerating the vesting of a third person's right in respect of the Target Company.

(c) The shareholders of a subsidiary of the Target Company must vote as per the resolutions passed by the shareholders of the Target Company in respect of any of the matters as discussed in point (b) above.

(d) The Target Company must constitute a committee of independent directors. This committee is required to provide its recommendations on the open offer to the public shareholders.

(e) The Target Company must provide a list of all the public shareholders as per its register of members to the acquirer.

(f) The Target Company and its board of directors must assist the acquirer in verification of the shares tendered by the shareholders and register the transfer of shares pursuant to the open offer and underlying agreement, if any.

11. **What are the disclosure requirements applicable to promoters and shareholders of a public listed company under the Takeover Code?**

Under the Takeover Code certain disclosures are required to be made by shareholders and promoters of a public listed company to the stock exchanges where the shares of the company are listed. The disclosures are elaborated below:

(a) Any acquisition of more than 5% (five percent) of the shares of the public listed company must be disclosed by the acquirer within 2 (two) days from such acquisition.

(b) If a shareholder who already has 5% (five percent) of the shares in the public listed company, affects any change in his shareholding in excess of 2% (two percent), such change in shareholding must be disclosed within 2 (two) days.

(c) All shareholders holding more than 25% (twenty-five percent) of the shares in a public listed company as on 31st March of a particular year must disclose their shareholding within 7 (seven) days from such date.

(d) All promoters of a public listed company must disclose their shareholding as on 31st March of a particular year within 7 (seven) days from such date.

(e) If the promoters of a public listed company create an encumbrance on their shares, such encumbrance must be disclosed within 7 (seven) days from the date of its creation.

(f) If any shareholder acquires any shares in a public listed company pursuant to the invocation or release of pledge or encumbrance on the shares of a public listed company, the shareholder must disclose the details of such acquisition within 7 (seven) days from the creation, invocation, or release of the pledge or encumbrance.

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