Exemption from the applicability of Open Offer Obligations as envisaged under SEBI Takeover Regulations

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Regulation 3 and Regulation 4 of the SEBI Takeover Regulations deals with the provisions relating to the exemption from the applicability of regulation 10, 11 and 12 i.e. from the open offer obligations. Regulation 3 provides the automatic exemption to the acquirer from complying with provision of regulation 10, 11 and 12 of the SEBI Takeover Regulations. However, the exemption as provided under regulation 3 is subject to the compliance with the conditions as prescribed under the said regulation. It is noteworthy to mention here is that regulation3 provides the exemption only from the requirement of making the open offer as required under regulation 10, 11 and 12 and not the from the requirement of making the disclosure as requisite under regulation 6, 7 and 8.

On the other hand; cases which do not fall under regulation 3 are governed by regulation 4 for which the acquirer is required to make an application to the Takeover Panel. Further, the acquirer is required to make an application before the actual acquisition

Regulation 3	Regulation 4
No application to the takeover panel	Application to the takeover panel
Automatic exemption	Exemption subject to the discretion of the takeover panel
Compliance with the condition as may be prescribed under regulation 3.	Compliance with the condition as provided under the exemption order.
Post acquisition compliance to be made except the prior intimation under regulation 3(3)	Exemption to be sought before acquisition of shares.

In this article, we are covering Regulation 3(1) (e) of the SEBI Takeover Regulations i.e. Inter Se transfer of shares and Regulation 4 i.e. exemption from the Takeover Panel

Regulation 3(1) (e) of the SEBI Takeover Regulations provides the automatic exemption from the provisions of regulation 10, 11 and 12 where the acquisition of shares has been made through inter se transfer that is to say acquisition through inter se transfer is not subject to open offer if it complies with the conditions specified in the said sub regulation. The provision of regulation 3(1) (e) of the SEBI Takeover Regulations are interpreted below :

i. **Group coming within the definition of group as defined in the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) where persons constituting such group have been shown as group in the last published Annual Report of the target company;**

The transferor as well as transferee should come within the ambit of group as defined under MRTP Act and must have been shown as group in the last published Annual Report of the Target Company.

The exemption is available by complying with the following formalities:

- The benefit of exemption will be available subject to such transferor(s) and transferee(s) having complied with regulation 6, regulation 7 and regulation 8 of the SEBI Takeover Regulations.
- In case the proposed transaction exceeds 5% of the voting share capital of the company, the acquirers have to, for the intimation of public, notify the details of the proposed transaction at least 4 working days in advance of the date of the proposed transaction to the stock exchanges where the shares of the Company are listed. **[Regulation 3(3) of SEBI Takeover Regulations]**

Example : The companies M/s XYZ Ltd & M/s ABC Ltd are coming in the definition of group as defined in MRTP Act, 1969. The present paid up equity capital of a Company is 1,00,000 shares. M/s XYZ & M/s ABC Ltd both presently holds 25000 shares each amounting to 25% of the voting capital. M/s ABC intends to acquire further 15000 shares from M/s XYZ Ltd. Here the proposed transaction comes under the category of inter se transfer between groups. The shareholding of M/s ABC Ltd will increased from 25% to 40% i.e. (25000 shares to 40000 shares). This transaction requires the compliance of Regulation 3(3) as it is beyond the prescribed limit under the regulation. The acquirer has to give intimation to the stock exchange where the shares of the target company are listed at least 4 days before the proposed acquisition.

- The acquirer is further required to file a report within 21 days of the date of acquisition to the Securities & Exchange Board of India (SEBI) giving all details in respect of acquisitions. Though the regulation specifies a limit of 15% or more of the voting rights in a company but the limit is of no use as the exemption under the said regulation 3 is sought by the persons who have already crossed the limit of 15%. Further the compliance under regulation 3(4) is not a one-time compliance. The acquirer has to file a report within 21 days of the date of acquisition every time he claims exemption under this regulation. **[Regulation 3(4) of SEBI Takeover Regulations]**
- The acquirer has to along with the report under regulation 3(4) deposit fees of Rs 25,000/- to the Board either by a bankers cheque or demand draft in favour of Securities & Exchange Board of India. **[Regulation 3(5) of SEBI Takeover Regulations]**
- In case of warrants or any other security convertible into equity shares at a later date, Regulation 3(3) and 3(4) has to be complied with reference to the date of actual conversion into shares. In other words, the acquirer has to at least 4 working days in advance of the date of conversion of warrants/ any other security convertible into equity shares, notify the details to the stock exchanges as required under regulation 3(3).
- The acquirer and seller have to comply with Regulation 7 & 8 as the regulation does not relieve the acquirer from complying with disclosure requirements.

ii. **Inter se transfer of shares amongst relatives within the meaning of section 6 of the Companies Act, 1956 (1 of 1956);**

The inter se transfer of shares between relatives as mentioned in Schedule IA provided in the companies Act is also exempted from the open offer obligations. However, the acquirers have to comply with the following :

The exemption is available by complying with the following formalities -

- The benefit of exemption will be available subject to such transferor(s) and transferee(s) having complied with regulation 6, regulation 7 and regulation 8 of **SEBI Takeover Regulations.**
- In case the proposed transaction exceeds 5% of the voting share capital of the company, the acquirers have to, for the intimation of public, notify the details of the proposed transaction at least 4 working days in advance of the date of the proposed transaction to the stock exchanges where the shares of the Company are listed. [Regulation 3(3) of SEBI Takeover Regulations]
- The acquirer is further required to file a report within 21 days of the date of acquisition to the Securities & Exchange Board of India (SEBI) giving all details in respect of acquisitions where the shareholding of the acquirer taken together with shares or voting rights, if any, held by him or by persons acting in concert with him would entitle such person to exercise 15% or more of the voting rights in a company. **[Regulation 3(4) of SEBI Takeover Regulations]**
- The acquirer has to along with the report under regulation 3(4) deposit fees of Rs 25,000/- to the Board either by a bankers cheque or demand draft in favour of Securities & Exchange Board of India. [**Regulation 3(5) of SEBI Takeover Regulations]**
- In case of warrants or any other security convertible into equity shares at a later date, Regulation 3(3) and 3(4) has to be complied with reference to the date of actual conversion into shares. In other words, the acquirer has to at least 4 working days in advance of the date of conversion of warrants/any other security convertible into equity shares, notify the details to the stock exchanges as required under regulation 3(3).
- The acquirer and seller have to comply with Regulation 7 & 8 as the regulation does not relieve the acquirer from complying with disclosure requirements.

iii. **Inter se transfer of shares amongst**

a) Qualifying Indian promoters and foreign collaborators who are shareholders

b) Qualifying Promoters

The exemption is available by complying with the following formalities :

- The transferor(s) as well as the transferee(s) have been holding shares in the target company for a period of at least three years prior to the proposed acquisition. It would be sufficient that parties to the transactions are holding shares as shareholders and not as promoters.

Further, in the interpretative letter issued by the SEBI in the matter of acquisition of shares of **Pudumjee Agro Industries Limited,** it has been substantiated that the prior three years holding criteria shall be checked collectively and not individually. Therefore, if the transferors collectively as well as the acquirers collectively holds the shares in the target company for 3 years or more prior to the proposed acquisition, the transfer of shares from the transferors to the acquirers would be eligible for exemption under regulation 3(1) (e) (iii)(b) irrespective of the fact that some of the acquirer does not hold any shares in the target company.

- The benefit of exemption will be available subject to such transferor(s) and transferee(s) having complied with regulation 6, regulation 7 and regulation 8.
- In case the proposed transaction exceeds 5% of the voting share capital of the company, the acquirers have to, for the intimation of public, notify the details of the proposed transaction at least 4 working days in advance of the date of the proposed transaction to the stock exchanges where the shares of the Company are listed. **[Regulation 3(3) of SEBI Takeover Regulations]**
- The acquirer is further required to file a report within 21 days of the date of acquisition to the Securities & Exchange Board of India (SEBI) giving all details in respect of acquisitions where the shareholding of the acquirer taken together with shares or voting rights, if any, held by him or by persons acting in concert with him would entitle such person to exercise 15% or more of the voting rights in a company. **[Regulation 3(4) of SEBI Takeover Regulations]**
- The acquirer has to along with the report under regulation 3(4) deposit fees of Rs 25,000/- to the Board either by a bankers cheque or demand draft in favour of Securities & Exchange Board of India. **[Regulation 3(5) of SEBI Takeover Regulations]**
- In case of warrants or any other security convertible into equity shares at a later date, Regulation 3(3) and 3(4) has to be complied with reference to the date of actual conversion into shares. In other words, the acquirer has to at least 4 working days in advance of the date of conversion of warrants/ any other security convertible into equity shares, notify the details to the stock exchanges as required under regulation 3(3) of SEBI Takeover Regulations.
- The acquirer and seller have to comply with Regulation 7 & 8 as the regulation does not relieve the acquirer from complying with disclosure requirements.
- The additional condition for the purpose of inter se transfer between promoters is that the price for executing transaction is not exceeding 25% of the price determined under Regulation 20(4) & (5). The exemption will not be available if the price at which the inter -se transfer has been executed, is greater than 25% of the price as determined u/r regulation 20(4) and (5) of the SEBI Takeover Regulations.

iv. **The acquirer and persons acting in concert with him, where such transfer of shares takes place three years after the date of closure of the public offer made by them under these regulations.**

This exemption is from inter se transfer between the acquirer and persons acting in concert, but this exemption are available only after three years of the date of closure of public offer made by them. However, if there had been no public offer then the acquirer & persons acting in concert cannot transfer the shares between them.

The exemption is available by complying with the following formalities :

- The benefit of exemption will be available subject to such transferor(s) and transferee(s) having complied with regulation 6, regulation 7 and regulation 8 of SEBI Takeover Regulations.
- In case the proposed transaction exceeds 5% of the voting share capital of the company, the acquirers have to, for the intimation of public, notify the details of the proposed transaction at least 4 working days in advance of the date of the proposed transaction to the stock exchanges where the shares of the Company are listed. **[Regulation 3(3) of SEBI Takeover Regulations]**
- The acquirer is further required to file a report within 21 days of the date of acquisition to the Securities & Exchange Board of India (SEBI) giving all details in respect of acquisitions where the shareholding of the acquirer taken together with shares or voting rights, if any, held by him or by persons acting in concert with him would entitle such person to exercise 15% or more of the voting rights in a company. **[Regulation 3(4) of SEBI Takeover Regulations]**
- The acquirer has to along with the report under regulation 3(4) deposit fees of Rs 25,000/- to the Board either by a bankers cheque or demand draft in favour of Securities & Exchange Board of India. **[Regulation 3(5) of SEBI Takeover Regulations]**
- Further, the price for executing transaction is not exceeding 25% of the price determined under Regulation 20(4) & (5). The exemption will not be available if the price at which the inter-se transfer has been executed, is greater than 25% of the price as determined u/r regulation 20(4) and (5) of the SEBI Takeover Regulations.
- In case of warrants or any other security convertible into equity shares at a later date, Regulation 3(3) and 3(4) of SEBI Takeover Regulations has to be complied with reference to the date of actual conversion into shares. In other words, the acquirer has to at least 4 working days in advance of the date of conversion of warrants/ any other security convertible into equity shares, notify the details to the stock exchanges as required under regulation 3(3).
- The acquirer and seller have to comply with Regulation 7 & 8 as the regulation does not relieve the acquirer from complying with disclosure requirements.

A brief study of the inter se transfer of shares

Particulars	Inter se transfer among MRTP group	Inter se transfer among relatives	Inter se transfer among Qualifying promoters	Inter se transfer between Acquirer and PACs
Compliance with the regulation 6, 7 and 8	✓	✓	✓	✓
Advance Intimation under regulation 3(3)	✓	✓	✓	✓
Report to SEBI under regulation 3(4)	✓	✓	✓	✓
Pricing Norms i.e. Inter se transfer cannot be at a price exceeding 25% of the price determined under regulation 20(4) or 20(5)	X	X	✓	✓
Prior holding of three years	X	X	✓	X

Exemption from Takeover Panel under Regulation 4

Under Regulation 4 the exemption is not automatically available to the Acquirer. For getting the exemption, the acquirer is required to file an application supported by a duly sworn affidavit giving the details of the proposed acquisition and the grounds on which the exemption is sought along with the fees of Rs.50,000 to the Board. The panel after considering the facts & circumstances of the case, the submissions made by the acquirer and the recommendations of the Takeover Panel may grant the exemption to the acquirer.

Takeover Panel Procedure

File an application with the Board supported by duly sworn affidavit giving the details of the proposed acquisition and the grounds on which the exemption has been sought along with the fees of Rs. 50000.

Within 5 days Board shall forward the application to the panel

Panel shall made recommendation on the application to the Board within 15 days of receipts of application

After considering the recommendation of the panel and after giving the reasonable opportunity of being heard to the concerned parties, Board shall pass an order giving the reason on which the order is based within 30 days thereof.

Board shall publish the order passed by it.

Types of cases filed under Regulation 4

There are various cases under which the acquirer has filed an application to the takeover panel seeking the exemption from making an open offer in terms of Regulation 10, 11 & 12 of SEBI Takeover Regulations where the increase in the shareholding is pursuant to the buyback by the target company and not because of the actual acquisition or where the acquisition is made to comply with the condition imposed by the Financial institution or any other lending institution or pursuant to the Corporate Debt Restructuring scheme. In some cases the panel has granted the exemption whereas in some cases panel has given the negative decision.

Some of cases where exemption has been granted are illustrated below :

Abbott India Ltd. : Acquirer is the promoter of the target company and collectively holds 65.14% in the target company. Target Company has announced the buyback of its shares as a result of which the holding of the acquirer increased from 65.14% to 68.94%. However, the acquirer has not acquired even a single share. Exemption is granted.

Samtel Color Limited : Acquirer belongs to the promoter group & holds 11.18% in Target Company. To comply with the condition as prescribed under CDR Scheme, the acquirer made the acquisition in the target company which increases the shareholding of the acquirer from 11.18% to 22.75%. Exemption is granted.

Jain Studios Ltd. : Acquirer belongs to the promoter group & holds 54.79% in the target company along with the other promoter. As a part of the settlement with the Industrial Development Bank of India (IDBI) through "Stressed Assets Stabilization Fund" (SASF), the acquirer proposes to acquire 1,15,94,203 equity shares by way of preferential allotment. Takeover panel granted the exemption.

Some of cases where exemption has been rejected are illustrated below:

AksharChem (India) Ltd. : Acquirer belongs to the promoter group of the target company & collectively holds 54.99% of the Target Company. Target Company has announced buy-back of its shares as a result of which the holding of the acquirer increased from 54.99% to 63.47%. Acquirer has not acquired even a single share in the Target Company. However the takeover panel rejected the application as the buy-back price is Rs.40 which is very high as compared to the market price of Rs.16 per share. The panel held that such a high price might result in the artificial price rise and help in appreciating the value of promoters' shareholding.

Ganesh Polytex Ltd. : Acquirer belongs to the promoter group & holds 22.95% (individually) & 35.23% (Collectively) in the Target Company. To meet the condition stipulated by term loan provider bank, Target Company proposes to allot 34 lakh equity shares to the acquirer as result of which the holding of the acquirer increases from 22.95% to 43.47%.Takeover panel rejected the application because the statement made by the acquirer regarding the dismal performance of Target Company cannot be accepted as the company is profit making as per the audited accounts.

CULTURAL PROGRAMME

COMPANY SECRETARIES BENEVOLENT FUND (CSBF) CULTURAL EVENING ON 06.05.2010 AT ROTARY SADAN

Eastern India Regional Council is the first regional council to have taken up the initiative of raising funds through corporate sponsorships towards contributing to the CSBF Fund in order to further augment and strengthen the existing corpus of the Fund.

The interactive meeting was followed by a CSBF cultural evening organised for the noble cause of Company Secretaries Benevolent Fund. Rotary Sadan was brimming with happy members and invitees and the intricately designed cultural show stole everybody's heart. There was the perfect blend of music and dance. The programme started with a tribute to Lord by a student of EIRC, **Ms. Ankita Chakraborty,** who danced very gracefully on the dedicated well sung song by **Ms. Chirashree Banerjee** and thereafter the songs sung by **Ms. Vidushi Agarwal,** very talented daughter of one of our member, **Shri Dinesh Mundhra** and **Shri Om Mundhra,** amateur artists, simply left the audience craving for more. The choice of old melodies coupled with splash of new hits was very well received. Towards the end, a student of EIRC, **Ms. Arpita Roy** performed a beautiful, exhilarating dance, paying tribute to Mother Earth. The whole programme was extremely well steered by **Ms. Arnabi,** the very popular RJ, known for her wits and intelligence. The star performance of the evening was when the President-ICSI and the Secretary & Treasurer-EIRC sang a song.

The event was jeweled by the distinguished and revered presence of **almost all Past Chairmen of EIRC, Past President Shri Gangopadhyay, Past President Shri H M Choraria, Past President Shri Mahesh Shah, Past Vice President Shri Amit Kr. Sen**. Their presence gave lot of encouragement to the Council.

Eastern India Regional Council shall ever remain grateful to **Shri Harish K. Vaid, Central Council Member** for his support in extending his helping hand in organizing a **decent sponsorship of Rs. 2.00 Lacs from Jaypee Infratech Limited towards CSBF**.

It is also thankful to **United Stock Exchange Limited for a sponsorship of Rs. 0.50 Lacs towards CSBF**. **Shri Pradip Khandelwal,** a member of our Institute from Northern Region was very helpful to organize this. EIRC expresses its gratitude to him.

The EIRC handed over the cheques totaling to Rs. 2.50 Lacs to the President of the Institute as their contribution from the CSBF evening.

At the end, fellowship Get-together and Dinner was organised for the members, their spouses, students and invitees. Everybody present enjoyed the event. The cause of CSBF was further widespread with the help of this programme.

ACKNOWLEDGEMENT

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In 1940 Oxford University arranged a special ceremony in Santiniketan and awarded Sri Rabindranath Tagore with Doctorate Of Literature.