

TAKEOVER PANORAMA

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Legal Update <ul style="list-style-type: none">- SAT order in the matter of OCL India Limited- WTM Order in the matter of Premier Limited- WTM Order in the matter of IAG Company Limited- WTM and Adjudicating Officer Orders- Takeover Panel order in the matter of IEC Education Limited- Takeover Panel order in the matter of Refex Refrigerants Limited- Consent order in the matter of Antique Investment Company Limited	3
Latest Open Offers	14
Hint of the Month	17
Regular Section <ul style="list-style-type: none">- Comparative Analysis of SEBI (SAST) Regulations, 1997 and TRAC Report with respect to the provisions related to Mandatory Open Offer	17
Case Study <ul style="list-style-type: none">- Bombay Rayon Fashions Limited Open Offer for STI India Limited	24
Market Update	27
Our Team	28

Legal Update

SAT order in the matter of OCL India Limited

Facts:

1. The Appellants are the promoters of OCL India Limited (Target Company). The Target Company came out with Buy Back offer on March 14, 2003 and declared that the promoters of the company would not participate in the offer. SEBI received a complaint from Jindal Securities Private Limited alleging that pursuant to the buy back offer the percentage of voting rights of the promoters got increased and they had violated the provision of Regulation 11 of the SEBI (SAST) Regulations, 1997.

SAT disposed off the appeal with a recommendation to make an application for exemption under Regulation 3(1)(I) read with Regulation 4 of the SEBI (SAST) Regulations, 1997 from the applicability of Regulation 11 of SEBI Takeover Regulations.

2. On examining the complaint, SEBI held that the promoters of the Target Company had violated the provision of Regulation 11 of the SEBI (SAST) Regulations, 1997, even though they did not actually acquire the shares. As per the Board, the mode of acquisition did not matter and since the promoters have acquired more than 5% of the voting rights, therefore, they should have made a Public Announcement.
3. Accordingly, an Adjudicating Officer was appointed. Pending the adjudication proceedings, the appeal was filed to SAT. While admitting the appeal, it was directed to the adjudicating officer to continue with the proceedings but not to pass any final order till the final disposal of the appeal.

Issues:

What course of action should the appellant follow where the increase in shareholding is pursuant to buy back by the Target Company and there is no active acquisition by the appellants?

Decision:

SAT stated that the appellants would have made an application for exemption under Regulation 3(1)(I) read with Regulation 4 of the SEBI (SAST) Regulations, 1997 seeking exemption from the

applicability of provision of Regulation 11 of SEBI (SAST) Regulations, 1997. However it was held that the Board has no objection to this course being adopted even at this stage of the proceedings. Therefore in view of the fact that the appellants shall now apply for exemption, SAT dispose of the appeal with a direction to the Board to consider their application for exemption in accordance with law without being influenced by any observation or finding recorded in the impugned order. Further in case the application for exemption was to be rejected by the Board, the appellants shall be at liberty to challenge the said order in accordance with law together with the order impugned in the present appeal. In the meantime, the adjudicating officer shall not pronounce his order till such time the application for exemption is finally disposed of by the Board and for a further period of four weeks thereafter.

WTM Order in the matter of Premier Limited

Facts:

1. PAL Peugeot Limited (Target Company) was a joint venture between Premier Limited (Entity) and Automobile Peugeot, France (Transferor) who were the promoters of the Target Company holding 8,40,25,000 (31.96%) shares each of the paid up capital of the Target Company. In 1999, the transferor withdrew itself from the joint venture and gifted its entire shareholding constituting 8,40,25,000 Equity Shares to the entity. Consequently the shareholding of the entity increased from 30.12% to 62.08% of the paid up capital of the Target Company.

WTM held that merely acquisition of shares even if exceeds the threshold as specified in the regulations would not attract the Open Offer obligation under SEBI (SAST) Regulations, 1997 unless the acquisition entitles the acquirer to exercise the voting rights in excess of the thresholds.

2. It was alleged that as the transfer was by way of gift and not as per pricing determined under Regulation 20 of the SEBI (SAST) Regulations, 1997, the entity could exercise more control than what it was entitled prior to the ceding of control and that the cessation of joint control to a single control has to be treated as change in control. It was further alleged that the said acquisition was made without making Public Announcement resulting into the violation of Regulation 11(1), 12 and 14(1) of

the SEBI (SAST) Regulations, 1997. Accordingly a show cause notice was issued to which the entity made the following contentions:

Contention:

1. Regulation 11(1) would not be applicable to it as it had not acquired any shares or voting rights in respect of the shares gifted to it and that the said shares are still in the name of the transferor. Mere execution of the share transfer deed by the transferor cannot amount to an acquisition or an agreement to acquire those shares unless such transfer deeds are signed by the transferee and lodged with the Company for registration of the transfer.
However, the entity has not even signed the said transfer deed or lodged them for transfer with the Target Company.
2. One of the clause in the AOA of the Target Company provides that any transfer of shares requires the affirmative vote of at least one of the directors designated by the transferor and the same is subject to the additional approvals of the shareholders of the Target Company. However, the said approvals could not be obtained as the transferor withdrew itself from the joint venture and no AGM could be held in respect of the said transfer.
3. Official Liquidator has been appointed by the High Court of Bombay for winding up of the Target Company. As the board of the Target Company could not function, no policy decision could be taken and there was no change in control as mentioned under Regulation 12.

Issue:

1. Whether the Noticee can be considered as Acquirer as defined in Regulation 2(1)(b) of the SEBI (SAST) Regulations, 1997?
2. Whether the Noticee is required to make Public Announcement under Regulation 11(1) and 12 of the SEBI (SAST) Regulations, 1997?

Decision:

1. The term Acquirer as defined under Regulation 2(1)(b) of the SEBI (SAST) Regulations, 1997 means any person, directly or indirectly :
 - i. *Acquire or agrees to acquire shares or voting rights of the Target Company, or*
 - ii. *Acquires or agreed to acquire control over the Target Company.*

As the entity has accepted the gift of share certificates and transfer deeds, therefore it agreed to acquire shares and as per the definition the entity is an acquirer. Moreover it had also filed the exemption application under Regulation 4 seeking exemption from the applicability of the Regulation 11(1) thereof.

2. With respect to the violation of Regulation 11(1), WTM observed that in the matter of Shri CH Kiron Margadarsi Financers vs. A.O., A.O. held that “a plain acquisition of shares even if exceeds 10% of the paid up capital of the company would not attract Regulation 10, unless the acquisition entitle the Acquirer to exercise ten percent or more of the voting rights of the company.” In regard to the acquisition of the voting rights, Section 150 of the Companies Act, 1956, specifies that a person holding shares with voting rights are entitled to exercise that voting right only on entering his name in the company’s register of members. Therefore in view of the observations and the fact that the shares which has been gifted by the transferors still stand in its name, it can be concluded that the entity is not entitled to exercise voting rights in respect of the impugned shares and thus had not triggered Regulation 11(1) of SEBI (SAST) Regulations, 1997.
3. With respect to the non-compliance with the provisions of Regulation 12 of SEBI (SAST) Regulations, 1997, WTM held that as the Target Company is under the process of winding up and the official liquidator has been appointed by the High Court of Bombay, who is in charge of the assets and affairs of the Company and the entity is not entitled to exercise voting rights in respect of the shares gifted by the Transferor, accordingly, it can be concluded that the entity has not acquired more control on receipt of gifted shares from the transferor and therefore it is not required to comply with the provision of Regulation 12 of the SEBI (SAST) Regulations, 1997.

Thus the matter is disposed off accordingly.

WTM Order in the matter of IAG Company Limited

Facts:

1. On examination of the draft letter of offer filed by Anjaniputra Ispat Limited (Acquirer/Noticee) for the acquisition of 20% of the issued and paid up capital of IAG Company Limited (Target Company), SEBI Observed that the Acquirer has acquired 26,89,592 equity shares representing 41.77% of the current paid up and voting capital of the Target Company over a period of 8 months during the

financial years 2008-09 and 2009-10. The increase in the shareholding is made in the following manner:

- a. The Acquirer has acquired 17,19,692 shares (27.64%) on November 19, 2008, thereby, increasing its shareholding from 4.71% to 32.35% of the paid up capital of the Target Company.
- b. The Acquirer further consolidated its holdings from 32.35% to 41.77% by purchasing 6,06,600 shares (9.42%) i.e. 4.71% each on December 19, 2008 and April 3, 2009.

WTM direct the acquirer to disinvest the subsequent acquisition made by it where the first acquisition was in violation of regulation 10 of SEBI Takeover Regulations.

2. It was alleged that:
 - a. The Acquirer has acquired more than 15% shares on November 19, 2008 without making Public Announcement, thereby, violating the provision of Regulation 10 of the SEBI (SAST) Regulations, 1997.
 - b. As the previous acquisition of 27.64% stake was not in accordance with the law, therefore, the subsequent acquisition of 4.71% shares each on December 19, 2008 and April 3, 2009 were in violation of Regulation 11(1) of the SEBI (SAST) Regulations, 1997.
 - c. The Acquirer has acquired control over the Target Company on November 2008 without making Public Announcement and thus also violated the provision of Regulation 12 of the SEBI (SAST) Regulations, 1997.
 - d. It had also failed to comply with the disclosure requirements as mentioned in Regulation 7(1) of SEBI (SAST) Regulations, 1997.
3. Accordingly SEBI issued a notice to the Noticee to show cause as to why one or more or all actions in terms of regulation 44 read with regulation 45 (6) of SEBI (SAST) Regulations, 1997 including the directions to continue with the open offer and to disinvest 6,06,000 (9.42%) shares should not be taken against it to which the Noticee made the following submissions:
 - i. It was not aware of the applicability of the provisions of the SEBI (SAST) Regulations, 1997 and was under the impression that the regulations are applicable to listed and traded companies.
 - ii. Due to the non-compliance of various provisions of Listing Agreement, BSE had suspended the trading of the shares of Target Company from September 2006 to September 2009. The Acquirer has also taken steps to relist the shares of the Company.

- iii. The acquirer submitted that it had pumped Rs. 40 crore in the Target Company in the form of inter corporate deposits for its revival.
- iv. Further, by making the Public Announcement on July 11, 2009, it has cured the alleged violations of the provisions of the Takeover Regulations by taking November 19, 2008 as the relevant date for the calculation of offer price.

Issue:

Whether the Acquirer has violated the provisions of Regulation 7(1), 10, 11(1) and 12 of the SEBI (SAST) Regulations, 1997?

Decision:

1. SEBI observed that it would be difficult to assume that the acquirer was not aware of the provisions of SEBI (SAST) Regulations, 1997 when it had initiated the steps towards the revival of the Target Company including the relisting of its shares at BSE after the rectification of its non compliance. Further, the fact that the acquirer has taken various steps in turning around the Target Company from its weak position would not absolve the Acquirer from not complying with the statutory mandates while acquiring substantial shares and control over the Target Company. The facts of the case would clearly indicate that the Acquirer was crystal clear in its intention of acquiring substantial shares and control over the Target Company while improving the conditions of the Target Company. The Acquirer did everything other than the compliance of SEBI (SAST) Regulations, 1997.
2. The acquirer has first triggered the SEBI (SAST) Regulations, 1997 on November 19, 2008 when it had acquired 27.64% shares in the Target Company. However, it has not complied with the provisions of regulation 10 read with regulation 14 of SEBI (SAST) Regulations, 1997 instead it continued to consolidate its shareholding in the Target Company. Further, the manner of acquisition of 4.71% each during two financial years would lead to an inference that the acquirer was well aware of the creeping acquisition limits as specified under regulation 11(1) as otherwise it would have acquired the entire stake in one trench.

In view of the above, SEBI directed that the Open Offer made by the acquirer is agreed to in terms of the provisions of SEBI (SAST) Regulations, 1997. Further, the acquirer shall appoint a merchant banker to disinvest 9.42% of the share capital within 30 day and transfer the profit, if any, to Investor Protection Fund of the concerned Stock Exchange.

SEBI also ordered that the Adjudicating proceedings should be initiated against the Acquirer under the provisions of SEBI Act, 1992 for the violation of Regulation 10, 11(1) and 12 of the SEBI (SAST) Regulations, 1997.

WTM and Adjudicating Officer Orders

Target Company	Noticee	Regulation of SEBI (SAST) Regulations,1997	Decision taken / Penalty Imposed
M/s Dhanalaxmi Roto Spinners Ltd.	Mr. Harmohan Singh Sabharwal	Regulation 10 of SEBI (SAST) Regulations, 1997	Make a Public Announcement to the shareholders of the Target Company and pay interest @ 10% per annum on the Offer price
M/s India Polyspin Limited	M/s Cavalier Securities Limited	Regulation 7(1), 7(2) and 10 of SEBI (SAST) Regulations, 1997, Regulation 13(1) and Regulation 13(3) read with Regulation 13(5) of the SEBI (PIT) Regulations, 1992 and Regulation 4(1), (2)(a)(b)(e) and (g) of the SEBI (PFUTP) Regulations, 2003	Rs. 5,00,000 under Section 15H(ii) and Rs. 1,00,000 under Section 15A(b) of the SEBI Act, 1992.
M/s India Polyspin Limited	M/s Right Finstock Private Limited	Regulation 7(1), 7(2) and 10 of SEBI (SAST) Regulations, 1997,	Rs. 5,00,000 under Section 15H(ii) and Rs. 1,00,000 under Section

		Regulation 13(1) and Regulation 13(3) read with Regulation 13(5) of the SEBI (PIT) Regulations, 1992 and Regulation 4(1), (2)(a)(b)(e) and (g) of the SEBI (PFUTP) Regulations, 2003	15A(b) of the SEBI Act, 1992.
M/s Adam Comsof Limited	Shri Nitin Sawant	Regulation 7 (1) & 7 (2) of SEBI (SAST) Regulations, 1997 and Regulation 3 (a), 3(c), 4 (1), 4(2)(a) and 4 (2) (e) of SEBI PFUTP Regulations, 2003	Rs. 1,00,000 under section 15HA of SEBI Act, 1992.

Takeover Panel order in the matter of IEC Education Limited

Facts:

1. Mrs. Sneh Lata Gupta and Mrs. Sonia Gupta (Acquirers) belongs to the promoter group of IEC Education Limited (Target Company) and holds 85,81,728 equity shares constituting 56.24% of the total share and voting capital of the Target Company together with the other promoters.
2. The Target Company has availed a loan of Rs. 183.75 lacs from Central Bank of India to meets its fund requirements for the expansion plans and consequently, the promoters namely Mr. S.L.Gupta, Mr. R.L.Gupta and some of their family members had pledged an aggregate of

SEBI granted exemption to the acquirers from complying with the requirements of Regulation 11(2) of the SEBI Takeover Regulations where increase in shareholding is pursuant to the release of shares pledge with the bank after the bank has invoked the pledge.

10,22,450 equity shares with the bank as security. Due to the accumulated losses in the Target Company on March 31, 2004, it failed to make the repayment of the loan amount.

Accordingly, the bank has invoked the pledge and transferred 10,22,450 equity shares in its own name.

3. Pursuant to the full payment of the loan amount, the bank then released 3,26,850 (4.67%) equity shares and 1,81,000 (2.58%) to the respective holders during the financial year ended March 31, 2007 and March 31, 2008, which is within the limits of SEBI (SAST) Regulations, 1997.
4. Now the remaining 5,14,600 (3.37%) equity shares have to be released to the account of acquirers. The aforesaid proposed acquisition will collectively increase the voting rights of the promoter group of the Target Company from 56.24% to 59.61%, which will result into triggering Regulation 11(2) of the SEBI (SAST) Regulations, 1997. Hence the application is made by the Acquirers for seeking exemptions from the applicability of making the open offer as required under Regulation 11(2) on the following grounds:

Grounds for exemption:

1. The proposed acquisition is merely a return of shares pledged by the promoters with the Bank as a security for the loan availed.
2. No consideration will be paid by the Acquirers for the return of shares.
3. No change in control.
4. Even after the invocation of pledge, the shares were retained by the Bank as a security towards the loan amount and had not sold even a single share in the market.
5. The loan amount has been paid off but the shares transferred in their name are still standing to their credit.
6. The acquisition will not be prejudicial to the investors of the company
7. The minimum public shareholding would be maintained in terms of Clause 40A as per the Listing Agreement.

Decision:

On the basis of above facts and circumstances of the case, SEBI granted the exemption to the acquirers from complying with the requirements of Regulation 11(2) of the SEBI (SAST) Regulations, 1997 in respect of the proposed acquisition of 5,14,600 equity shares representing 3.37% of the capital of the Target Company through the release of shares pledge with the bank, on the basis that

the facts and statements given by the acquirers are true and the acquirers will comply with the other provisions of SEBI Takeover Regulations, Buy Back Regulations, Listing Agreement or any other law as may be applicable.

Takeover Panel order in the matter of Refex Refrigerants Limited

Facts:

1. Mr. Anil T. Jain, Mr. Jagdish Jain, Mr. A. Tarachand Jain, Mrs, Seema Jain, Sherisha Technologies Private Limited and Refex Energy Private Limited (Acquirers) belong to the promoter group of Refex Refrigerants Limited (Target Company) and holds 57.12% of the voting capital of the Target Company.
2. Mr. Anil T. Jain has filed the application on behalf of other acquirers seeking exemption from the applicability of the provisions of Regulation 11(2) of the SEBI (SAST) Regulations, 1997 in respect of proposed acquisition of 4,00,000 equity shares at a price of Rs. 200 per share (including premium of Rs. 190) by way of preferential allotment. The allotment would be made by way of converting the existing secured loans already extended by the promoters to the Target Company. Pursuant to the proposed allotment, the shareholding of the Acquirers would increase from 57.12% to 58.19% of the voting capital of the Target Company and that of the promoter group from 57.65% to 58.71%.

SEBI granted exemption to the acquirers from complying with the requirements of Regulation 11(2) of the SEBI (SAST) Regulations, 1997 where the increase in shareholding is due to the allotment of shares pursuant to the conversion of loans to meet the stipulation imposed by SBI.

Grounds for exemption:

1. Due to global recessionary trends, the Target Company recorded a Net loss of Rs. 95 Lakhs for the year 2009-10.
2. During the year 2008, the Target Company secured a fund based limit of Rs 40 crores based on turnover and Maximum Permissible Bank Finance (MPBF) from State Bank of India (SBI). During 2008-09 and 2009-10, SBI reworked its MPBF and stated that due to falling liquidity, the promoters have to infuse equity in the Target Company by converting the existing secured loans given by promoters to the company.

3. Non adherence to the requirements of SBI for infusion of equity by the promoters may result in Bank reducing its exposure to the Target Company, thereby, impairing its ability to improve the performance of the Target Company which will affect the interest of the shareholders at large.
4. FPO may not be suitable considering the time involved and current market situation.

Decision:

The Takeover Panel rejected the application as the panel did not find any justification in granting the exemption to the acquirers from the applicability of regulation 11(2) of SEBI (SAST) Regulations, 1997. Further, the Panel observed that the financial position of the Target Company is fairly good. The recommendation of the Takeover Panel was forwarded to SEBI.

SEBI observed that pursuant to the abovementioned preferential allotment, there will not be any change in control and the proposed preferential allotment is mainly to comply with the stipulation imposed by the SBI. Further, after the proposed preferential allotment, minimum shareholding as envisaged under the Listing Agreement will be maintained. Thus, considering these facts, SEBI granted the exemption to the acquirers from the requirement of making open offer under Regulation 11(2) of the SEBI (SAST) Regulations, 1997.

Consent order in the matter of Antique Investment Company Limited

Antique Investment Company Limited (Applicant) failed to comply with the provisions of Regulation 8(3) of the SEBI (SAST) Regulations, 1997 for the year 2006. Therefore, vide letter dated June 9, 2010, the applicant has filed the consent application and proposed to pay a sum of Rs. 50,000 as settlement charges for the aforesaid violation. The terms as proposed by the applicant were placed before High Power Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non compliance of the applicant.

Latest Open Offers

Name of the Target Company	Name of the Acquirer and PAC	Details of the offer	Reason of the offer	Concerned Parties
<p>Surya Roshni Limited</p> <p>Regd. Office Haryana</p> <p>Paid up capital Rs. 43.83 Crore</p> <p>Listed At BSE & NSE</p>	<p>Mr. Jai Prakash Agarwal and M/s Lustre Merchants Private Limited along with PACs</p>	<p>Offer to acquire 87,66,250 (20%) Equity Shares at a price of Rs. 111 per share payable in cash.</p>	<p>Regulation 11(1)</p> <p>Conversion of warrants into equity shares thereby increasing the shareholding of total promoter group from 81,00,543 Equity Shares (29.11%) to 2,41,00,543 (54.98%) Equity Shares of the Target Company.</p>	<p>Merchant Banker Corporate Professionals Capital Private Limited</p> <p>Registrar to the Offer Alankit Assignments Limited</p>
<p>Mipco Seamless Rings (Gujarat) Ltd.</p> <p>Regd. Office Gujarat</p> <p>Paid up capital Rs. 358.48 Lacs</p> <p>Listed At BSE</p>	<p>Sachendra Tummala</p>	<p>Offer to acquire 7,16,960 (20.01%) Equity Shares at a price of Rs. 3 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 13,23,968 (36.93%) equity shares at a price of Rs.3 per share.</p>	<p>Merchant Banker Intensive Fiscal Services Private Limited</p> <p>Registrar to the Offer Sharex Dynamic (India) Private Limited</p>

<p>Lifeline Drugs & Pharma Limited</p> <p>Regd. Office Mumbai</p> <p>Paid up capital Rs. 24 Lacs</p> <p>Listed At BSE</p>	<p>Ivory Consultants Private Limited</p>	<p>Offer to acquire 48,000 (20%) Equity Shares at a price of Rs. 58 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 1,01,210 (42.17%) equity shares at a price of Rs. 45 per share.</p>	<p>Merchant Banker Ashika Capital Limited</p> <p>Registrar to the Offer Purva Sharegistry India Private Limited</p>
<p>JMC Projects (India) Limited</p> <p>Regd. Office Ahmedabad</p> <p>Paid up capital Rs. 26.40 Crores</p> <p>Listed At BSE & NSE</p>	<p>Kalpataru Power Transmission Limited</p>	<p>Offer to acquire 52,80,687 (20%) Equity Shares at a price of Rs. 207 per share payable in cash.</p>	<p>Regulation 11(2)</p> <p>Preferential allotment of 43,50,000 (16.65%) equity shares at a price of Rs. 207 per share, thereby, increasing the shareholding of the acquirer from 53.01% to 60.84%.</p>	<p>Merchant Banker Collins Stewart Inga Private Limited</p> <p>Registrar to the Offer Link Intime India Private Limited</p>
<p>Mudra Lifestyle Limited</p> <p>Regd. Office Mumbai</p> <p>Paid up capital Rs. 35.99 Crores</p>	<p>E-Land Fashion China Holdings Limited</p>	<p>Offer to acquire 9,598,094 (20%) Equity Shares at a price of Rs. 60 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SSA to acquire 1,20,00,000 (25.005%) equity shares of the Target at a price of Rs. 60 per share on preferential basis and SPA with promoters</p>	<p>Merchant Banker SBI Capital Markets Limited</p> <p>Registrar to the Offer Bigshare Services Private</p>

Listed At BSE & NSE			of Target Company.	Limited
Schlafhorst Engineering (India) Limited Regd. Office Gujarat Paid up capital Rs. 19.39 Crores Listed At BSE	INTEGRA Holding AG	Offer to acquire 38,79,040 (20%) Equity Shares at a price of Rs. 9.65 per share payable in cash.	Regulation 10 & 12 SPA to acquire 1,05,51,248 (54.40%) equity shares and 12,400,000 (100%) preference shares of the Target Company	Merchant Banker Collins Stewart Inga Private Limited Registrar to the Offer Mondkar Computers Private Limited
Radix Industries (India) Limited Regd. Office Andhra Pradesh Paid up capital Rs. 354.78 Lacs Listed At BSE & MSE	Gokaraju Raghu Rama Raju and Gokraju Ganapathi Rama Prabhakara Raju	Offer to acquire 7,09,560 (20%) Equity Shares at a price of Rs. 2 per share payable in cash.	Regulation 10 & 12 SPA to acquire 18,87,800 (53.21%) equity shares of the Target Price at a price of Re.1 per share	Merchant Banker Fedex Securities Limited Registrar to the Offer Bigshare Services Private Limited
Lloyds Steel Industries Limited Regd. Office Mumbai	Shree Global Tradefin Limited (Acquirer) along with Trump Investments Limited (PAC)	Offer to acquire 7,82,67,650 (20%) Equity Shares at a price of Rs. 13.95 per share payable in	Regulation 10 & 11(1) Conversion of warrants into equity shares thereby increasing the	Merchant Banker Centrum Capital Limited

Paid up capital Rs.224.16 Crores Listed At BSE & NSE		cash.	shareholding of Acquirers from 9.09% to 48.23% of the Target Company	Registrar to the Offer Bigshare Services Private Limited
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Hint of the Month

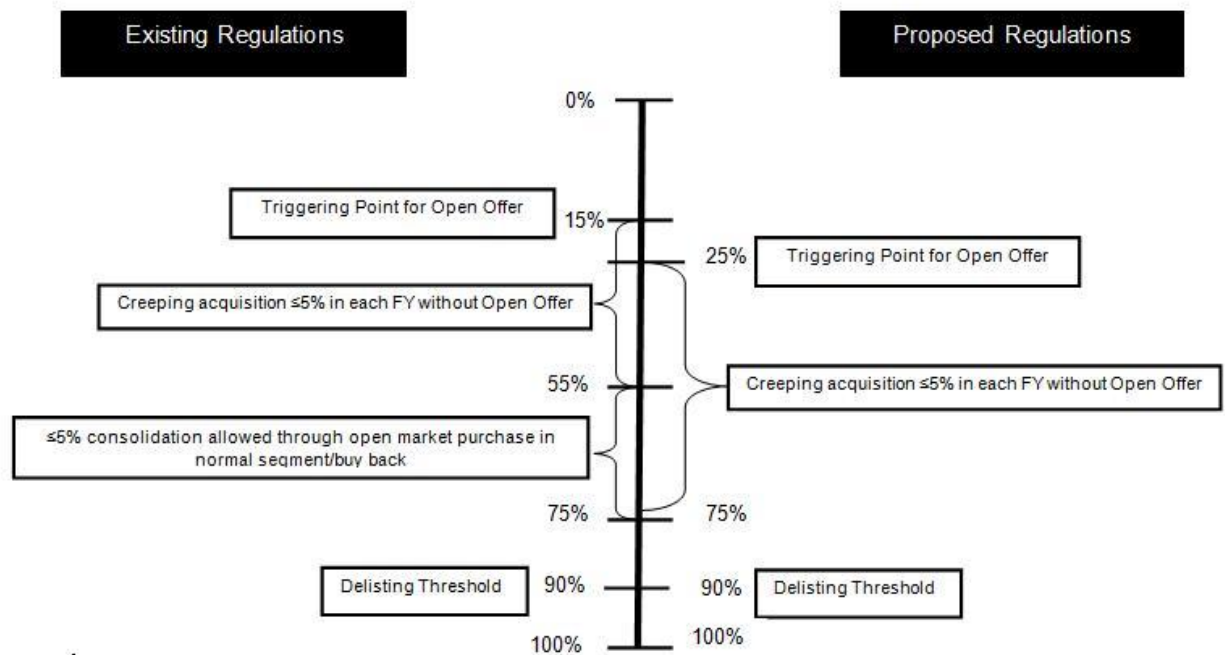
“Frequently Traded Shares” means shares in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is made, is at least ten per cent of the total number of shares of such class of target company:

*{As substantiated from Regulation 2(1)(k) of SEBI (SAST) Regulations, 2010-
 TRAC Report }*

Regular Section

A Comparative Analysis of SEBI (SAST) Regulations, 1997 and TRAC Report with respect to the provisions related to Mandatory Open Offer

Regulation 10, 11 and 12 of SEBI (SAST) Regulations, 1997 provides the threshold for giving the mandatory Open Offer to the shareholders of the Target Company. In the TRAC Report, these thresholds have been proposed to be modified and incorporated as regulation 3 and 4. A comparison of thresholds as given in SEBI (SAST) Regulations, 1997 and TRAC Report is diagrammatic below:



Initial Acquisition threshold

Regulation 10 of the SEBI (SAST) Regulations, 1997 provides that “No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations”:

The existing SEBI (SAST) Regulations, 1997 necessitate the acquirer to give an open offer to the shareholders of Target Company on the acquisition of shares or voting rights entitling the Acquirer along with the persons acting in concert with him to exercise 15% or more voting rights in the Target Company.

Regulation 3(1) of the TRAC Report provides that No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more

of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

The Committee has proposed to revise the initial acquisition threshold limit of 15% to 25% of the voting capital of the Company for the purpose of making mandatory Public Announcement to the shareholders of the Target Company. This recommendation has been made considering the average promoters shareholding prevalent in the Listed Companies and the international practices. The recommendation seems to be beneficial from the point of Private Equity and Institutional investors who had to restrict themselves to 14.99% stake in every listed company in terms of Existing Regulations as otherwise it would necessitates the Open Offer to the shareholders of the Target Company for which they are in no way interested to do as their objective is not to acquire the control over the company. However, it is apprehended that the increase in threshold would reduce the number of open offers and hence might be viewed negatively from the point of view of small shareholders.

Creeping Acquisition

Regulation 11 (1) of the SEBI (SAST) Regulations, 1997 provides that “No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, with post acquisition shareholding or voting rights not exceeding fifty five per cent., in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.”

The existing SEBI (SAST) Regulations, 1997 provides that if an acquirer along with Person acting in Concert already holds more than **15 % but less than 55 %** of the shares or voting rights in the Company, then he may acquire additional shares carrying **not more than 5%** of voting rights within a **financial year** without making an Open Offer. The allowable acquisition limit of 5% is popularly known as Creeping Acquisition. Thus, the acquirer is permitted to acquire additional shares and consolidate his holdings within the aforesaid limits. Further if the Acquirer wants to acquire beyond 5% of the shares or voting rights then he is required to make public Announcement as per the relevant provisions of the Regulations.

Regulation 11(2) of the SEBI (SAST) Regulations, 1997 provides that “No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through or with persons acting in concert with him any additional shares entitling him to exercise voting rights or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations:

Provided that in a case where the target company had obtained listing of its shares of making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures ‘seventy five per cent (75%)’, the words and figures ‘ninety per cent (90%)’ were substituted.

Provided further that such acquirer may, notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the following:-

- i. the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the Shareholding or voting rights of the acquirer is pursuant to a buy back of shares by the target company;
- ii. the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five per cent.(75%).”

Regulation 11(2) specifies that where the Acquirer together with the person acting in concert with him holds 55% or more but less than 75% shares, then he cannot acquire even a single share without making public Announcement to the shareholders of the Target Company. However, the second proviso of the sub Regulation gives one-time allowance to the Acquirer with PACs to increase their shareholding by 5 % through market purchases in normal segment or pursuant to a Buy back by the target company, without having to make an open offer provided that post acquisition holding of acquirer does not go beyond 75 %.

Further, it is to be noted that irrespective of the level of minimum public shareholding required to be maintained in terms of Clause 40A of the listing agreement, the total shareholding of acquirer along with the PAC consequent to the creeping acquisition as allowed under second proviso to sub-regulation 2 of regulation 11 should not increase beyond 75%.

Regulation 3(2) of the TRAC Report specifies that “No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, subject to their aggregate post-acquisition shareholding not exceeding the maximum permissible non-public shareholding, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition under the agreement to above the maximum permissible non-public shareholding.

Explanation:- For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition .

In the TRAC Report, the provisions of Regulation 11(1) and 11(2) of SEBI (SAST) Regulations, 1997 have been merged and incorporated in regulation 3(2) with some modifications. The TRAC Report has recommended that promoters who own more than 25% of voting rights may **buy up to 5%** of the company’s shares every year, through a creeping acquisition, up to a maximum of 75%, without making a Public Announcement.

Further, the sub regulation provides that the Acquirer shall not enter into an agreement to acquire any shares which will increase his shareholding beyond the maximum non-public shareholding limit i.e. 75%. Thus Clause 40A of the listing agreement should not be breached by the Acquirer. Such acquisition can be made in any manner by the Acquirer (including through open market purchases, negotiated deals, bulk or block deals, preferential allotment, etc).

Further, in the Proposed Regulations, two most debatable issues with respect to the calculation of threshold for the purpose of open offer have been clarified i.e.

a) No Netting off allowed:

The Proposed Regulations specifically provide that for the purpose of determining the quantum of acquisition of additional voting rights, the gross acquisitions without considering the disposal of shares or dilution of voting rights owing to fresh issue of shares by the target company shall be taken into account.

b) Incremental voting rights in case of fresh issue on expanded capital

In the case of acquisition of shares by way of issue of new shares by the target company, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

Acquisition of Control

Regulation 12 of the SEBI (SAST) Regulations, 1997 provides that *Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations:*

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a special resolution passed by the shareholders in a general meeting:

Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided.

The regulation states that if any acquirer including person acting in concert acquires control over the target company irrespective of the fact whether there has been any acquisition of shares or not, he has to give public announcement to acquire shares from shareholders of the Target Company. However, the requirement of public offer is not applicable if the shareholders of the company approve the change in control by way of a Special Resolution. Furthermore the Regulation also provides the facility of voting through postal ballot to the shareholders of the Company for passing of the special resolution.

It is appreciable that the acquisition of control also includes both direct & indirect acquisition of control over target company by virtue of acquisitions of companies whether listed or unlisted and whether in India or abroad.

Regulation 4 of the TRAC Report provides that *“Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.”*

Regulation 4 of the TRAC Report specifies that if any acquirer including person acting in concert acquires control over the target company irrespective of the fact whether there has been any acquisition of shares or not, he has to give public announcement to acquire shares from shareholders of the Target Company.

However, it is to be noted that in the TRAC Report, the exemption from open offer available in case of change in control without acquisition of substantial shares, through a special resolution by postal ballot process, has been withdrawn and now the only route available for change in management and control is through the Open Offer to the shareholders of the Target Company. This is in contrast with the Regulation 12 of the existing SEBI Takeover Regulations which provides for the change in control through the special resolution passed by way of postal ballot.



Case Study

Bombay Rayon Fashions Limited Open Offer for STI India Limited

About STI India Limited (Target Company)

Incorporated in 1984, STI India Limited is an established manufacturer of cotton yarn and cotton knitted fabrics. The main products of the Target Company are 100% cotton yarns, both super combed and super carded and knitted fabrics. The registered office of the Target Company as well as the manufacturing plant is located at Indore, Madhya Pradesh. The shares of the Company are listed at BSE and NSE.

About Bombay Rayon Fashions Limited (Acquirer)

Located in Mumbai, Bombay Rayon Fashion Limited (Acquirer) started off as a 100 percent fabric company and has since then moved up the value chain into high-margin garment business. It is the flag-ship company of the BRFL Group and is amongst India's largest, vertically integrated textile group, engaged in the manufacture of fabrics and garments and export of high-end garments business predominantly designer shirts & tops for men, women and children. It owns 32 manufacturing facilities across several locations in India.

Financial intricacies faced by the Target Company

The Target Company was experiencing financial difficulties over the past few years due to high cost of old borrowings, absence of working capital support and adverse economic conditions prevailing in the past. Due to foregoing reasons, the Target Company was unable to service its debt repayment obligations. Consequently, the Target Company has been driven to restructure its outstanding debt. Therefore, the Target Company has been referred to the Board for Industrial and Financial Reconstruction ("BIFR") and was declared as a sick company in terms of section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985. The proceedings before the BIFR are ongoing.

Background of the Offer

- I. On October 27, 2010, the Acquirer has acquired 86,47,336 equity shares of Rs. 10 each of the Target Company representing 29.82% of the voting rights of the Target Company through four **Block Deals** on the floor of the National Stock Exchange of India Limited at a price of Rs. 29.00 per equity share, from (i) Eight Capital Master Fund Limited, (ii) Spinnaker Global Emerging Market Fund Limited, (iii) Spinnaker Global Opportunity Fund Limited and (iv) Spinnaker Global Strategic Fund Limited (collectively referred to as “Sellers”) for a total consideration of Rs. 25.07 crore.
- II. Further on the same day, the Acquirer and Sellers have entered into **Purchase Agreement**, wherein the Sellers have agreed to sell 3,21,80,000 optionally convertible debentures (“OCD’s”) of the Target Company and the Acquirer has agreed to purchase the OCDs for an aggregate transaction consideration of Rs. 44.92 crore.
- III. The existing promoters and other shareholders of the Target Company had earlier pledged 1,18,14,114 equity shares of the Target Company with IDBI Trusteeship Services Limited (“ITSL”) as collateral for securing payment of amounts due in respect of the OCDs. The Target Company defaulted in the repayment of principal and interest on the OCDs and accordingly ITSL pursuant to instructions of the OCD holders had invoked the pledge and since then have held the said equity shares on behalf of and for the benefit of the OCD holders. The option to convert the OCDs into equity shares of the Target Company lapsed in the financial year 2008-09 and the OCDs are now in the nature of secured redeemable debentures.

The Sellers and the Acquirer have also entered into an agreement whereby the Acquirer has also acquired the ownership of those 1,18,14,114 equity shares of the Target Company representing 40.74% of the voting rights of the Target Company held by the IDBI Trusteeship Services Limited (“ITSL”) as security trustee on behalf of the OCD holders. These 1,18,14,114 equity shares of the Target Company have been transferred by ITSL to the Acquirer on October 28, 2010.

The offer

Pursuant to the above acquisition of Equity Shares, the Acquirer in compliance with Regulation 10 and 12 of the SEBI (SAST) Regulations, 1997 have made an open offer to the shareholders of the Target Company to acquire 58,00,000 equity shares of the Target Company representing 20% of the issued and paid up capital of the Target Company at a price of Rs. 29 payable in cash.

Compliance of Listing Agreement

As on the date of P.A. the Acquirer holds 2,04,61,450 equity shares representing 70.56% of the issued and paid up equity share capital and voting rights of the Target Company. Pursuant to the completion of all the Offer formalities (assuming full acceptance in the Offer) the Acquirer would hold a maximum of 90.56% of the issued and paid up equity share capital and voting rights of the Target Company and the public shareholding would fall below the minimum public shareholding as required under Clause 40(A)(i) of the Listing Agreement. Since the Target Company has been referred to the BIFR, thus in terms of clause 40A(x) of the Listing Agreement it is presently exempted from the strict compliance of maintaining a minimum public shareholding under clause 40(A)(i) of the Listing Agreement required for continuous listing of its equity shares on the stock exchanges. Post this Offer and in the eventuality, the Target Company ceases to be a sick company or the aforesaid exemption is not available to the Target Company the Acquirer shall take necessary steps to facilitate compliance by the Target Company of the relevant provisions of the applicable law pertaining to maintenance of the minimum level of public shareholding.

Benefits and Future Plans of the Acquirer

The Target Company is a synergic fit for the Acquirer as the Acquirer is present in the manufacturing and selling of fabrics and garments. On the other hand the Target Company is predominantly into manufacturing of cotton yarn. The control over the Target Company will allow the Acquirer to establish itself as a fully integrated player in the Textile sector.



Market Update

Sumitomo Metal will Acquire 40% Stake in Bhushan Steel's

Sumitomo Metal Industries, Japan's steelmaker will acquire 40% stake in Bhushan Steels' SPV of 6 MT steel plant project in West Bengal. The MoU with the West Bengal government was originally for a 2 MT plant, but once discussions started with Sumitomo, Bhushan Steel scaled up to 6 MT.

Singh Brothers may buy Piramal's 10% stake in SRL

Malvinder Singh and Shivinder Singh, the promoters of Super Religare Laboratories (SRL) may buy out Piramal Healthcare's 10% stake in SRL, the country's largest diagnostic chain, which could be worth around Rs. 250 crore.

Yatra Online Acquires Stake in TSI

Yatra Online has entered into a strategic tie up by acquiring a stake in Ticket Consolidator Company, TSI - Travel Services International Pvt. Ltd. which would support the foray of Yatra in the B2B consolidation space and will help TSI to influence Yatra's complementary strengths by adding new locations, markets and travel products to its existing portfolio.

Opto Circuits to buy US-Based Cardiac Science Corp

Opto Circuits is in the process to acquire Cardiac Science Corporation, a US-based cardiology device maker for about \$54.77 Mn. The acquisition will help Opto Circuits' to increase its product offering and presence in the US market.

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