

# TRAC REPORT

**Insight of Draft Takeover Regulations, 2010**



**Corporate Professionals**  
WHERE EXCELLENCE IS LAW

# Key Recommendations in the **TRAC REPORT**



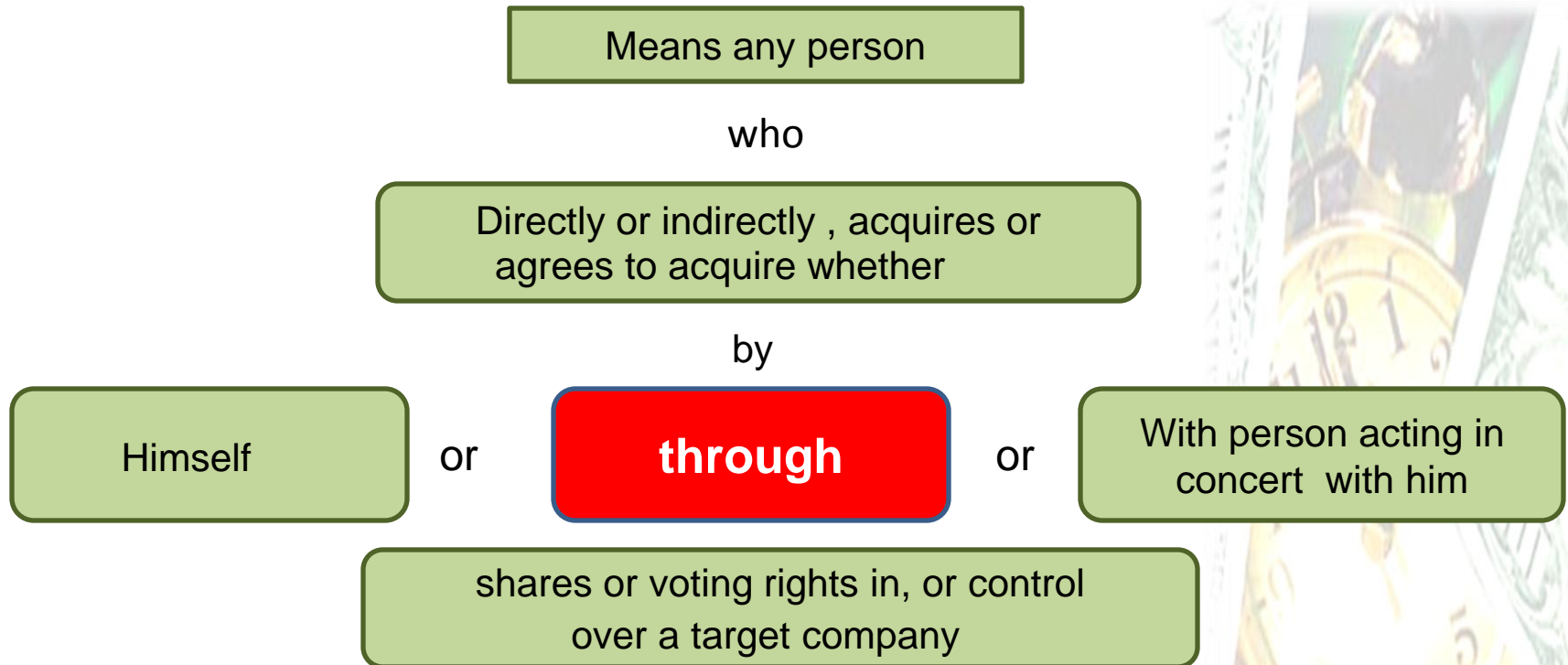
# Overview

- More clarity in the interpretation of various definition;
- Inclusion of various judicial decision in the regulations itself to remove the ambiguity and bring more transparency;
- Insertion of SEBI administrative views in the regulations;
- More protection for the small shareholders;
- More Opportunity for PE Investors;
- At par with Global Practices prevalent for M&As;
- Simplification in the provisions of regulation 11 (1) and 11(2) of the existing regulations;
- Scrub out of Non Compete Fees and consequent reduction in under table payment;
- Concern for the Acquirers triggering the open offer obligations.

# DEFINITIONS



# Acquirer



The proposed regulations recognize a person as acquirer even where the acquisition whether of shares or voting rights or control has been made by him **through person acting in concert with him i.e. through Special Purpose Vehicle or through the controlling entities.**

# Control

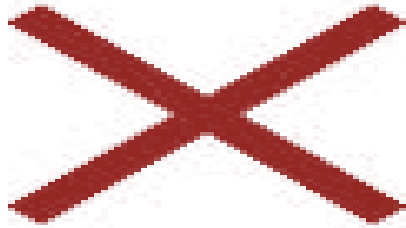
**“Control”** includes the right or the ability to appoint

- majority of the directors or
  - to control the management or
  - policy decisions of the target company,
- exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner

**The scope of term Control has been widen to include not only the right but also the situations where the persons have the ability to appoint majority of the directors or to exercise control in any other manner.**

# Change in Control

Regulation 12(1)  
change in control  
approval



regulations allows for the  
offer provided that the  
need by way of special  
stat.

Now the only Route available for  
Change in Control is way of Open Offer to the  
shareholders of Target Company.

In other words, now only the monetary power will help in the  
acquisition of control i.e. through open offer to the 100% public  
shareholders of the Target Company.

# Frequently traded shares

- Replaced with the definition of Infrequently traded shares.
- Trading turnover during the **12 months** preceding the month in which PA is made to be considered **instead of 6 months** as provided in the existing Regulations.
- The trading turnover has been increased from **5% to 10%** to consider the shares as frequently traded shares.



# Shares

- The scope of definition has been Broadened;
- **Inclusion of Depository Receipts** within the ambit of term shares.
- **Holder of the depository receipts** is treated at par with the one who acquired the **Equity Shares carrying voting rights.**

# Identified Date

## Specified Date

Means a date which shall not be later than the **thirtieth day** from the date of the **public announcement**.



## Identified Date

Means the date falling on the **tenth business day** prior to the commencement of the **tendering period**.

The concept of identified date will help curbing the effect of transfer of shares by the public shareholders after the date PA but before the Opening of offer period/ tendering period.

# OPEN OFFER AND RELATED CONCEPTS

# Increase in Threshold

- Increase in Threshold limit from 15% to 25%.
- This recommendation is made considering the average promoters shareholding prevalent in the Listed Companies and the international practices.

## IMPACT

- Beneficial for Private Equity and Institutional investors.
- Will reduce the number of open offers.
- Lesser number of exit opportunity to the public shareholders.

# Creeping Acquisition

## Existing Regulations

- Pre Holding 15-55%-5% in each FY.
- Pre Holding 55-75%-Not allowed except under second proviso to reg. 11(2)

## Proposed Regulations

- Pre Holding 25-75%-5% in each FY.

It will help the promoters in the consolidation of holdings upto to the level of 75% by making the acquisition 5% in each FY without triggering the open offer obligations.

# Increase in Offer Size

## Mandatory Offer

Increase in offer size from 20% to 100%.

## Voluntary Open Offer

Minimum 10% and maximum upto the permissible non-public shareholding

## Impact

- Exit opportunity to all the public shareholders.
- Costlier affairs for the acquirer;
- Reduce the number of open offers;
- Large amount of open offer consideration will be blocked in the escrow account.

# Voluntary Open Offer

## Eligibility

- Acquirer along with the PAC should be **holding at least 25% or more** shares in the Target Company.
- Acquirer or PACs **has not acquired any shares** of the Target Company in the **preceding fifty-two weeks without attracting** the obligation to make a **public announcement**.

## Condition

- Their aggregate shareholding after completion of the open offer does **not exceeds the maximum permissible non-public shareholding**.

## Restriction

- Acquirer **will not acquire further shares** in the Target Company for a period of **six months** after completion of the open offer **except** by way of another **voluntary open offer or competing offer**.



# Freedom to complete acquisition under SPA

| Existing Regulations   | Proposed Regulations   |
|--|--|
| <b>Not allowed to complete the acquisition</b> of shares or voting rights in, or control over, the target company <b>under any agreement attracting the obligation to make an open offer for acquiring shares until the completion of offer formalities.</b> | <b>Completion of acquisition</b> under any agreement attracting the obligation to make an open offer for acquiring shares allowed <b>after a period of 21 days subject to acquirer depositing 100% consideration payable under the open offer.</b> |

**This provision will allow the acquire to have the representation in the Target Company even before the completion of open offer and to exercise the control over it.**



# Acquisition from other competing acquirer

The competing acquirer can acquire either himself or through or with PACs with him



The shares acquired by the other competing acquirer in the open offer without attracting the obligation to make another Open Offer



Provided that

The acquisition has been made at the price not exceeding the offer price;  
and

Acquisition has been made within 21 business days from the expiry of the offer period

The new provision will help in removing the obstacle which arise in the matter of battle for Great Offshore Limited when ABG Shipyard wants to sell the shares receive in the offer to Bharati Shipyard.

# Non Compete Fees

## Existing



Upto 25% of the offer price can be paid as Non Compete Fees

## Proposed



Any direct or indirect non-compete fees or control premium paid to the controlling shareholders would be added or made part of the offer price

More beneficial for the shareholders as they will be entitled to get the same price as have been received by the promoters/sellers from the acquirer.

# Option to Withdraw shares

The **option available to the shareholders to withdraw the shares tendered in the Open Offer has been taken back** considering the point that in the proposed regulations, the last of upward revision by the acquirer is prior to the opening of Offer Period.

# No Induction on Board

**Prohibition on the Induction of new director on the board of the Target Company during the pendency of the competing offer**

**Regardless of the fact**

**Whether the proposed person to be appointed on the Board belongs to the acquirer or not**

**Except in the event of vacancy arising from death or incapacity of any director subject to the approval of shareholders by way of postal ballot.**

# Obligation on Board of Target Company

- To Constitute a **committee of Independent Directors**.
- The committee to provide **written reasoned recommendations** on the **open offer** to the shareholders of the Target Company.
- Such **recommendations shall be published** at least two business days before the commencement of the tendering period in the same newspapers where the public announcement of the open offer was published.

# Reduction in Time Line

The timeline for  
completion of the open offer  
has been reduced from  
95 calendar days  
To  
**57 Business Days**



# Exemptions





# Withdrawal of Exemption

## The following exemptions have been withdrawn from automatic exemption category

- Allotment of shares pursuant to an application made under a Public Issue;
- Acquisition of shares in the ordinary course of business by a market maker;
- Acquisition of shares in the ordinary course of business by Public Financial Institutions on their own account.



# New Exemptions Introduced

## Increase in shareholding pursuant to Buy Back

### Pre Holding less 25%

- Exemption subject to the acquirer reducing its shareholding below the threshold within a period of ninety days from the date of such increase.

### Pre Holding between 25-75%

- In case of shareholder resolution, approval of shareholders by way of postal ballot.
- In case of Board Resolution, such shareholder as a director has not voted.
- No change in control.

# New Exemptions Introduced

## **Increase in shareholding pursuant to CDR Scheme**

- Approval of the scheme by shareholders by way of Special Resolution passed by Postal Ballot; and
- Increase in shareholding has not resulted in change in control.

# Reporting of Exemption Availed to SEBI

The **ambiguity involved in regulation 3(4)** of the existing regulations with respect to the fact whether it's a one time on the acquisition of 15% compliance or not has been **removed** by deleting % shares from the regulation and requiring the reporting in every event whenever the exemption is sought under the sub clauses as mentioned under it.

# Exemption From SEBI (Approval Route)

## Existing Regulations

- Compulsory reference to Takeover Panel of the application received seeking the exemption.

## Proposed Regulations

- Optional Reference to Takeover Panel.

# Disclosures



# Disclosure of acquisition and disposal

| Existing Regulation |  | Proposed Regulation                                     |  |
|---------------------|--|---|--|
| Reg. No.            | Particulars  | Reg No.   | Particular   |
| 7(1)                | Disclosure on the acquisition of >5%, 10%, 14%, 54% and 74%  | 28(1)   | Disclosure on the acquisition of >5%.  |
| 7(1A)               | Pre holding between 15-55% and change in shareholding 2% or more                                       | 28(2)   | Pre holding >5% and change in shareholding 2% or more.   |
| 7(2)                | Disclosure is to be given within 2 days of acquisition or receipt of intimation of allotment           | 28(3)   | Disclosure is to be made within 2 business days of acquisition or receipt of intimation of allotment |
| 7(3)                | Target Company to give disclosure to the stock exchange on receipt of disclosure under 7(1) and 7(1A). | No obligation on the Target Company to give disclosure. |  |

# Continual Disclosures

| Existing Regulation |   | Proposed Regulation                                     |  |
|---------------------|---|---|--|
| Reg. No.            | Particulars   | Reg No.   | Particular   |
| 8(1)                | Disclosure by person holding more than 15% to Target Company with 21 days from the March 31.  | 29(1)   | Disclosure by person holding more than 25% to Target Company as well as to stock exchange with 15 business days from the March 31.                           |
| 8(2)                | Disclosure by promoter or every person in control to Target Company within 21 days from the March 31 as well record date for dividend of his own shareholding as well as that of PACs.          | 29(2)   | Disclosure by promoter to Target Company as well as to stock exchange within 15 business days from March 31 of his own shareholding as well as that of PACs. |
| 8(3)                | Target Company to give disclosure to the stock exchange on receipt of disclosure under 8(1) and 8(2) with 30days from the March 31 as well record date for dividend .                           | No obligation on the Target Company to give disclosure. |  |
| 8(4)                | Target Company to maintain the register to record the information received under sub-regulation (3) of regulation 6, sub-regulation (1) of regulation 7 and sub-regulation (2) of regulation 8. | No requirement to maintain register.                    |  |



# Important Aspects Related to Disclosure

- For the purpose of making disclosures, the aggregated shareholding and voting rights of the acquirer and every person acting in concert with him.
- The **acquisition and holding of any security or instrument** that would entitle the acquirer to receive shares in the target company, including **warrants and convertible debentures**, shall also be **regarded as shares** and disclosures of such acquisitions and holdings shall be made.
- Stock Exchange shall disseminate the information with respect to the disclosure including the continual disclosure.



# Issues Unresolved

- I. The concept of Negative Control has not been adhered to in the proposed regulations;
- II. The situation where the promoters have exit from the company by selling the entire shareholding needs to be considered.
- III. More clarity in the provisions relating to voluntary open offer is required with respect to the situation where the person holding less than 25% shares desires to consolidate his shareholding through open offer

# Impact-Negative

- **Loss to the shareholders because of the Reduction in Number of Open Offer on two accounts:**
  - Increase in threshold limit from 15% to 25%
  - Increase in offer size from 20% to 100%.
- **Costlier affair for the acquirers.**
- **Offer to all public shareholders without bank funding will not possible.**
- **Lesser Number of Hostile Takeover Attempts.**
- **Complicated Offer Price Determination.**

# Impact-Positive

- **Beneficial for the small public shareholder due to:**

- Increase in the Offer size which means exit opportunity to all the shareholders;
- More Stringent and frequent disclosure requirement on the part of the acquirer.

- **More Investment in the shares of listed Indian Company on account of increase in threshold.**

- **More clarity in the provisions.**

# Thank You

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