

# DEMYSTIFYING SEBI TAKEOVER CODE

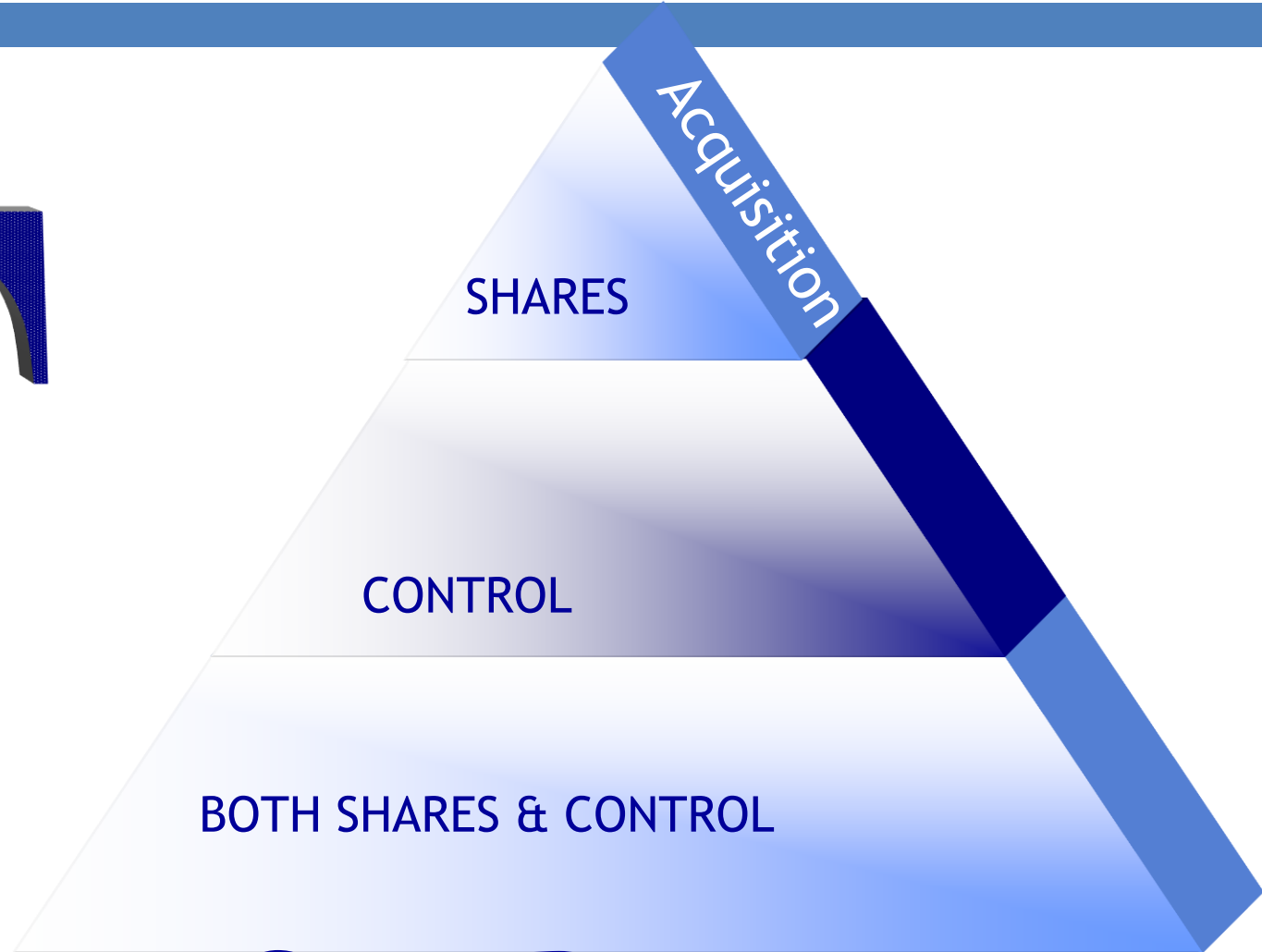


Pavan Kumar Vijay

# Lifting the veil

T

AKEOVER



# Understanding shares

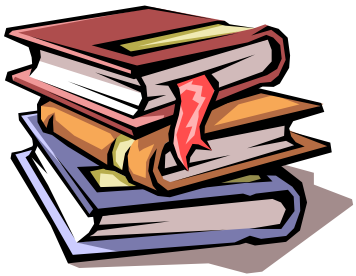
REG 2(k)

Shares carrying voting rights & any security which would entitle to receive shares with voting rights in future But shall not include **PREFERENCE SHARES**

ISSUE

What is the status of partly paid shares under SAST Regulations, 1997?

The partly paid up shares are also shares under Takeover Code as voting rights is embedded in partly paid up shares.



# Understanding control

REG 2(c)

Control is the right to

- ✓ Appoint majority of the directors
- ✓ To control the management
- ✓ Control the policy decisions

By virtue of Shareholding or Management rights or Shareholders Agreements or Voting Agreements or in any other manner.

# Thresholds defined

## FOR COMPLIANCE



Acquisition of more than 5%, 10%, 14%, 54% & 74% [Regulation 7]

Persons, who are holding between 15% - 55%, acquisition/ sale aggregating more than 2% or more voting rights [Regulation 7(1A)]

# Compliance Chart – Regulation 7

<b><u>Regulation No.</u></b>	<b><u>By whom</u></b>	<b><u>To whom</u></b>	<b><u>Time limit</u></b>
<b>7(1)</b>	<b>Any person who acquires more than 5%, 10%, 14%, 54%, 74%</b>	<b>Company Stock Exchange</b>	<b>2 Days</b>
<b>7 (1A)</b>	<b>Any person who holds 15%-55% shares and purchases/sells more than 2% shares</b>	<b>Company Stock Exchange</b>	<b>2 Days</b>
<b>7 (3)</b>	<b>Target Company</b>	<b>Stock Exchange</b>	<b>7Days</b>

# Thresholds defined



## FOR OPEN OFFER

→ Acquisition more than 15% or more voting rights  
[Regulation 10]

→ Persons, who are holding between 15% - 55%,  
acquisition more than 5% or more voting rights in a  
financial year.[Regulation 11(1)]

→ Persons, who are holding more than 55%,  
acquisition of single share or voting right other than  
by way of open market acquisition or Buy-  
back[Regulation 11(2)]

# Exemptions under Takeover Code

## Exemptions

- **Regulation 3**
  - **Automatic Exemption**
- **Regulation 4**
  - **Exemption by SEBI on a Case to Case Basis**

# Key Exemptions

Allotment in Public Issue

**Allotment in Right Issue**

Allotment to the Underwriters

**Inter-se Transfer**

Acquisition of shares in exchange of shares received under Public offer

**Transfer of shares from State Level Financial Institutions**

Acquisition through transmission on succession or inheritance

**Acquisition by Government Company**

Acquisition of shares pursuant to the scheme of Arrangement or BIFR

# Exemptions



Whether exemption is available from SEBI Takeover Code?

No

Exemption is available only from the provisions of Regulation 10, 11 & 12.

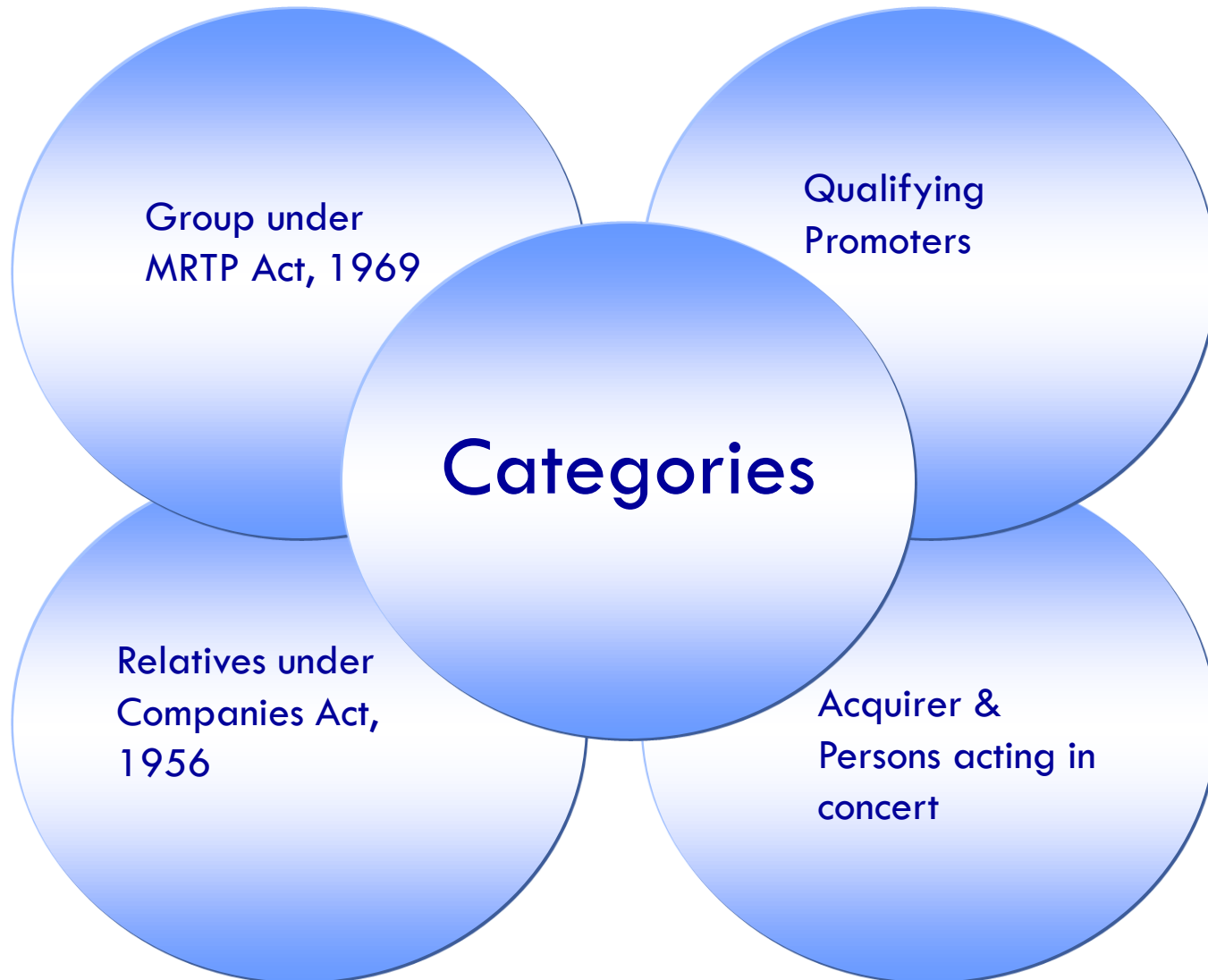
The provisions of regulation 7 are nevertheless required to be complied.

# Inter – se transfer



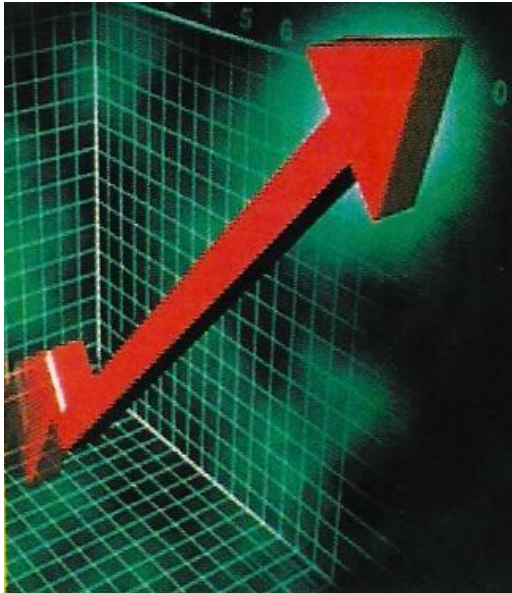
An Insight

# Categories for Inter-se transfer



# Category I – Inter-se Transfer amongst Group

## *Main Features*



- ❑ Group here is signifying the group as defined under MRTP Act, 1959.
- ❑ Where persons constituting such group have been shown as group in the last published Annual Report of the Target Company.

# Category II – Inter-se transfer amongst relatives

## *Main Features*

- ❑ Relatives under this regulation means the Relatives defined under Section 6 & Schedule 1A under Companies Act, 1956.
  
- ❑ The definition of relative u/s 6 includes
  - Spouse
  - Members of HUF
  - Relative mentioned in Schedule 1A.
  
- ❑ Schedule 1A gives a list of 22 persons.



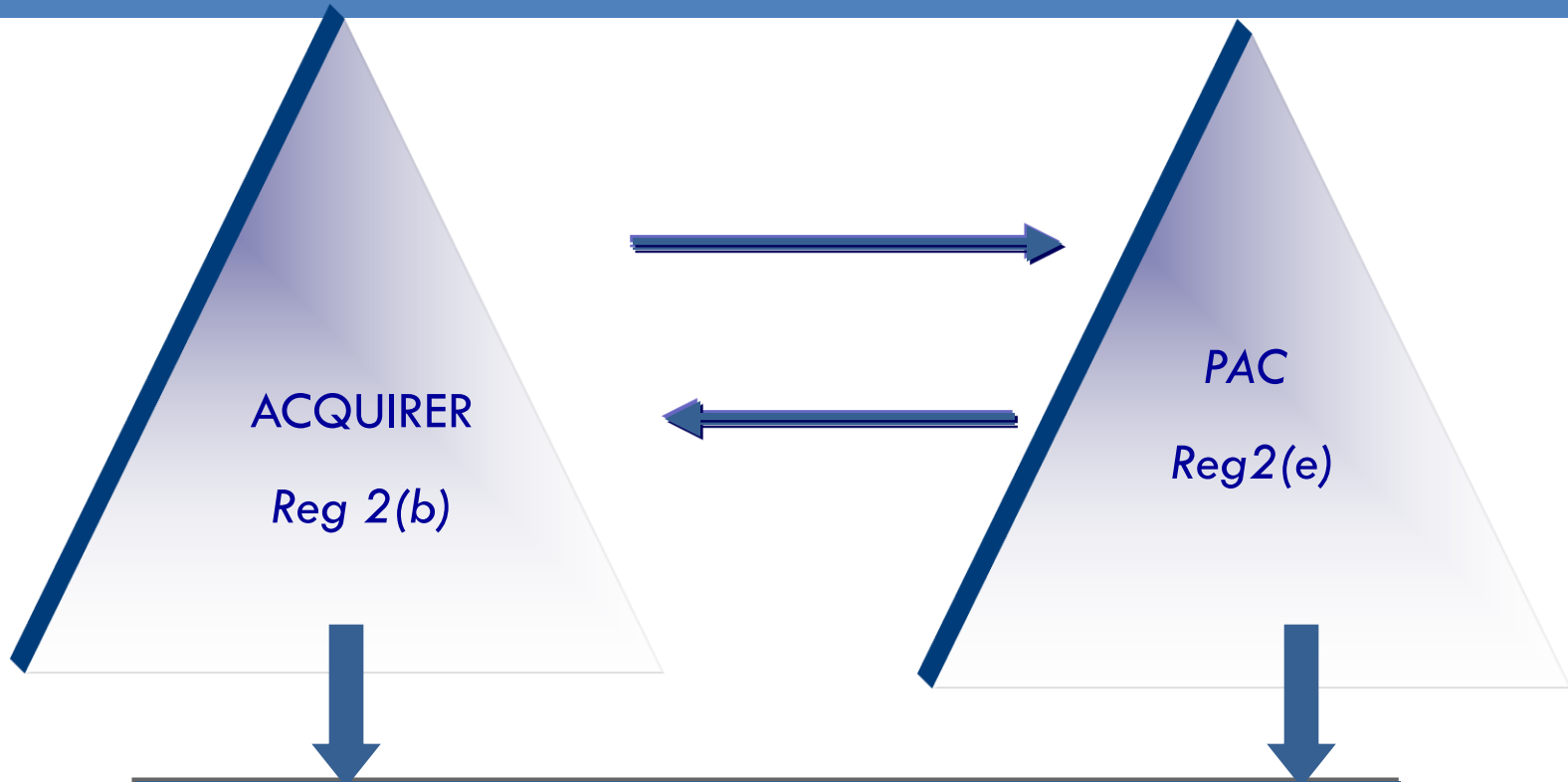
## Category III – Inter-se transfer for Qualifying Promoters

*Qualifying  
Indian  
Promoter &  
Foreign  
Collaborators,  
who are  
shareholders.*



*Qualifying  
Promoters*

# Category IV – Acquirer and Persons acting in concert



*Exemption available only after 3 years from the date of closure of open offer made under these Regulations.*



# Pre- Conditions for availing Inter- se transfer

Conditions	Category I (Group)	Category II (Relative)	Category III (Qualifying Promoter)	Category IV (Acquirer & PAC)
i. Transfer is at a price > 25% of the price determined in terms of Reg 20(4) & 20(5) of SEBI (SAST) Regs, 1997.	N	N	Y	Y
ii. 3 yrs holding of shares by transferee & transferor.	N	N	Y	N
iii. Compliance of Regulation 6, 7 & 8.	Y	Y	Y	Y

# Checks & Balances under Regulation 3



*Advance Intimation  
(4 days in Advance)*

Reg 3(3)

*Report  
(21 days of acquisition)*

Reg 3(4)



*Fees to be accompanied with Report  
(Rs 25000)*

Reg 3(5)



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# Concluding Remarks



Inter-se transfer is a good tool for consolidation of holdings.....

However, the exemption is available subject to strict compliance of Regulation 3(3),3(4) & 3(5).

# Recent Changes in Takeover Regulations

## □ Recent Amendments

- SEBI allowed extra creeping acquisition limit of 5%
- Requirement of disclosure of pledge shares
- Relaxation from provisions of Open Offer

## □ Recent Judicial Pronouncements

- SEBI Orders
  - SEBI Informal Guidance
  - Takeover Panel Exemptions
- ## □ Takeover Battle of Orissa Sponge and Iron Steel Limited

# An Analysis of Recent Regulatory Changes

30<sup>th</sup> October  
2008

- Extra Creeping Acquisition limit of 5% for shareholders holding 55%-75% shares, by way of buy-back and open market purchase in normal segment. - *Proviso to Regulation 11 (2)*

28 January  
2009

- Requirement of disclosure on Pledge of Shares - *Regulation 8A*

13 February  
2009

- Relaxation from provisions of Chapter III (Substantial acquisition of shares or voting rights in and acquisition of control over a listed company) in certain cases. - *Regulation 29A*



Extra Creeping Acquisition Limit of 5%  
Under regulation 11 (2)

Background



# Extra Creeping Acquisition Limit of 5%

Failure of US investment banks

Loss of Investors' confidence in the stock market

Fis and public shareholders started selling their shares and promoters who were holding more than 55% shares were not allowed to take the benefit.

Stock Prices fell to all time lows.

SEBI took step to promote the buy transactions to boost capital market.

**Global  
Economic  
Fallout**



# Extra Creeping Acquisition Limit of 5%

Old Provision

Existing Holding – 55%-75%



No Acquisition Allowed



Without Public Announcement



New Provision

Existing Holding – 55%-75%



**Acquisition Allowed upto 5%**



Without Public Announcement



**Only through  
Open Market Purchase  
or Buy-Back**

No acquisition is allowed through Bulk Deal/ Block Deal/ Negotiated Deal

# Queries and Answers

- Whether acquisition of 5% is allowed for one time acquisition or it is allowed during one financial year?

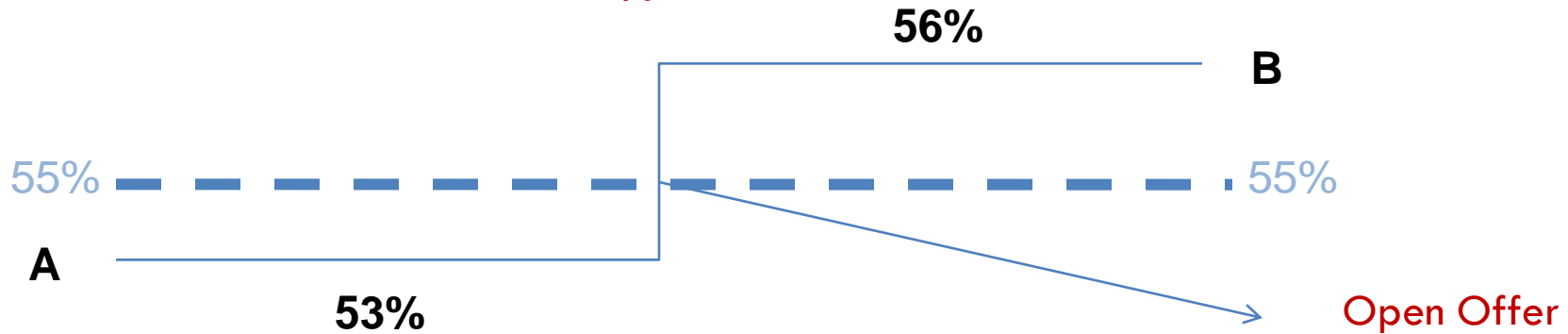
*During one financial year and not for one time acquisition.*



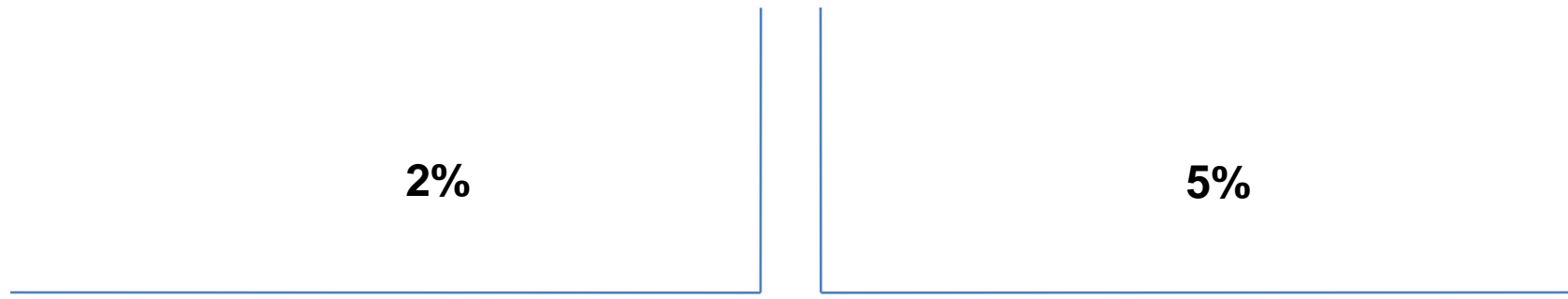


# Queries and Answers

**Creeping acquisition limit for shareholders holding less than 55% and more than 55% shares.**



**What is maximum number of shares that can be acquired?**



# Queries and Answers

- Whether disclosure under regulation 7 (1A) is required to be made in case of acquisition of 5% shares by a person holding more than 55% shares but less than 75% shares?

*As per the strict interpretation of law, there is no legal requirement, however as per the intent of law, disclosure under regulation 7 (1A) should be made.*





# Requirement of Disclosure of Pledged Shares & Relaxation from provisions of Chapter III

Background

# The SATYAM fiasco brings amendment

R. Raju pledged its entire stake in the company to Banks and FIs

R. Raju issued letter that the accounts have been fudged for years, whereupon banks and FIs sold the pledged shares

Investors' and employees' interest came at stake.

Govt. appointed its own directors.

New directors envisaged plan for acquisition of controlling stake in the company



Now, the question is

Is pledge of shares bad???



# Requirement of Disclosure of Pledged Shares

## Legal Requirements

- Prior to Jan 2009
  - ▣ Regulation 7 of SEBI Takeover Code requires the pledgee of shares to make disclosures as any other acquirer.



# Requirement of Disclosure of Pledged Shares

## Legal Requirements

- After January 2009
  - ▣ SEBI (Substantial Acquisition of Shares)
  - ▣ Listing Agreement



# Compliances under SEBI (SAST) Regulations

Regulation No.	Particulars	By whom	To whom	Time line
8A(1)	Information about all the shares pledged by the promoters of the company before the notification of the amendment.	Promoter or every person forming part of the promoter group	Company	Within 7 working Days of notification of the amendment upto February 06.2009.
8A(2)	On pledge of shares	Promoter or every person forming part of the promoter group	Company	Within 7 working days from the date of creation of pledge of shares.

# Compliances under SEBI (SAST) Regulations

Regulation No.	Particulars	By whom	To whom	Time line
8A(3)	On invocation of pledge	Promoter or every person forming part of the promoter group	Company	Within 7 working days from the date of invocation of pledge on shares.
8A(4)	Information received under regulation 8A (1), (2) and (3) if the total number of shares pledged during the quarter along with the shares already pledged exceeds 25000 or 1% of the total paid up capital of the company whichever is lower.	Company	Stock Exchange	Within 7 working days of receipt of information under regulation 8A (1), (2) and (3).

# Compliances under Listing Agreement

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- Clause 35 – Change in format of **Shareholding Pattern** by including the column for details of shares pledged by the promoters.
- Clause 41 – Change in format of **Unaudited Financial results** for inclusion of details of shares pledged by the promoters.

# Queries and Answers

- Whether Disclosure under 8A (4) is required?
  - i. Pledge of 25000 shares or 1% shares in a quarter      Yes
  - ii. Pledge of 10,000 (0.50%) shares in the previous quarter, and 16,000 (0.80%) shares in this quarter      Yes



# Queries and Answers



□ Whether Disclosure under 8A (4) is required?

- i. Pledge of 25000 shares or 1% shares in a quarter      Yes
- ii. Pledge of 10,000 (0.50%) shares in the previous quarter, and 16,000 (0.80%) shares in this quarter      Yes
- iii. Pledge of 25000 shares or 1% shares in the previous quarter, but no pledge in this quarter      No

# Queries and Answers



- When disclosures under 8A(4) required?
  - i. within 7 days of the receipt of information under regulation 8A(2) and 8A(3)
  - or
  - li. at the end of the quarter

*Within 7 days of Receipt of information*

# Queries and Answers

- Whether Banks and FIs are required to make disclosures when they sell the pledged shares?

*No, regulation 7 contains an exception for the Banks and FIs to make disclosures.*



# Queries and Answers

- Whether Banks and FIs are required to make disclosures when they transfer physical shares in their own name?

*Yes, transfer of shares in their own name will amount to acquisition and banks will require to make disclosures.*



# Relaxation from provisions of Chapter III

## Key Provisions of Chapter III

Regulation 10

Regulation 11

Regulation 12



Provisions triggering requirement of Open Offer

Regulation 20



Determination of Price of Open Offer

Regulation 13 – 29



Provision relating to process of Open offer

# Pre-Conditions for Relaxation

- Government has appointed its own BOD due to mismanagement.
- New directors have devised a competitive plan requiring bids from prospective acquirers.
- The plan is reasonable and fair.
- It provides the requisite details of process.
- As per the New BOD, the provisions of this chapter are likely to act as impediment to implementation of the plan

# Queries and Answers

- Whether in order to avail the exemption under regulation 29A, all the conditions should be satisfied?

Yes



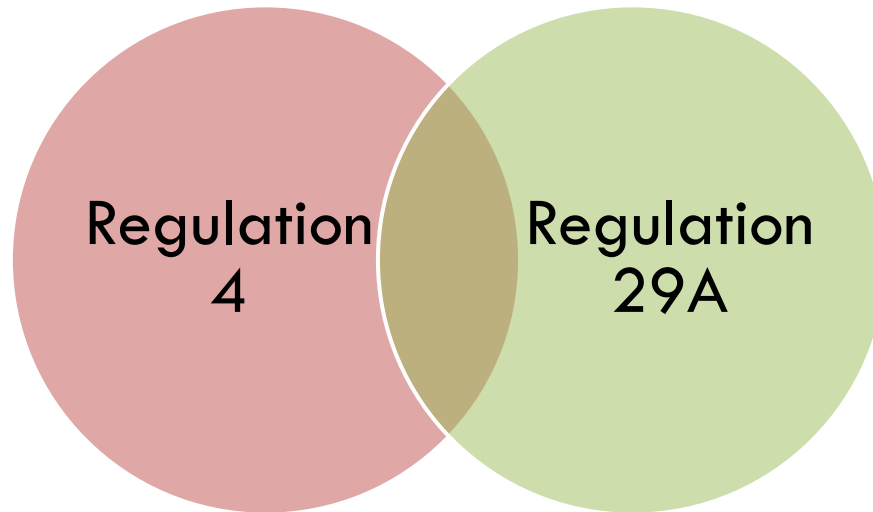
# Queries and Answers

- Whether the exemption under regulation 29A is automatic, if all the conditions are satisfied?

*No, Relaxation is subject to the Approval of Securities and Exchange Board of India (SEBI)*



# Comparison of Regulation 4 and 29A



Exemption from SEBI Takeover  
Panel

Relaxation from Compliances  
of Open Offer

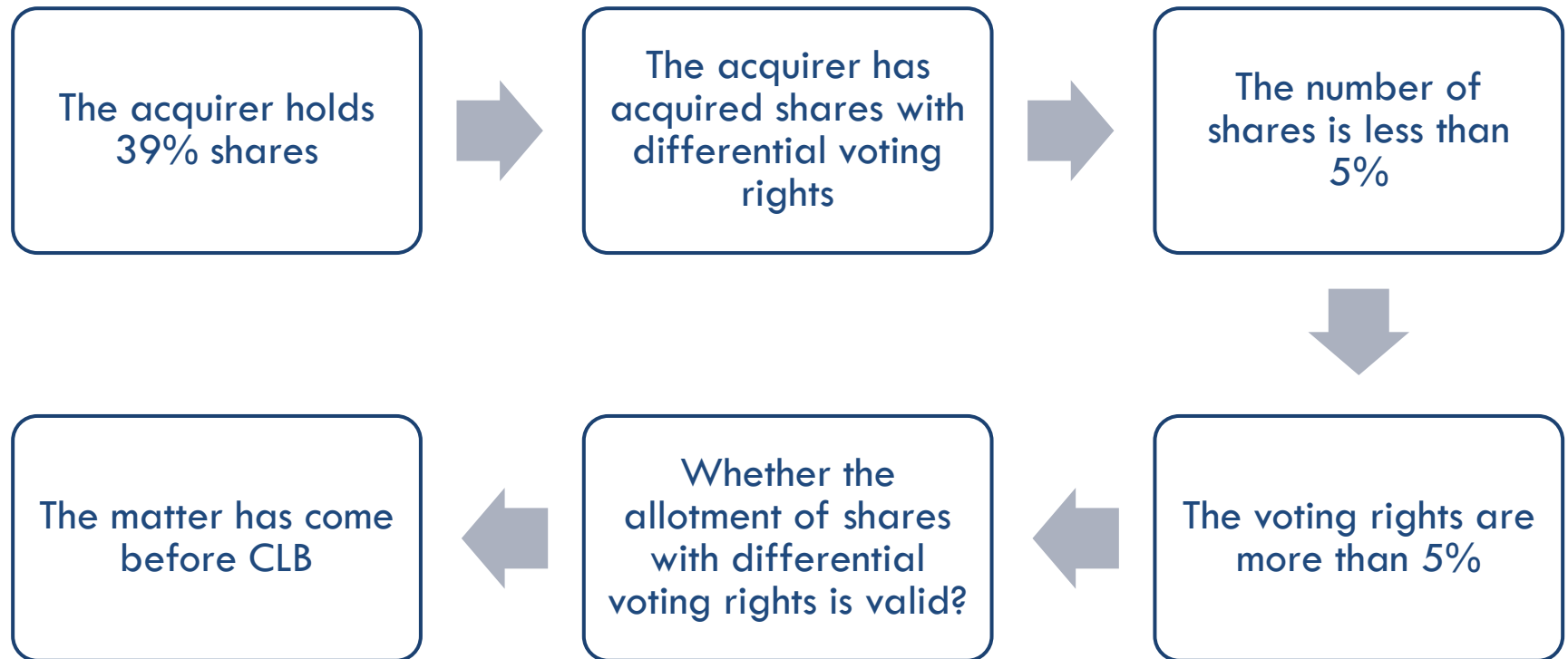
# Comparison of Regulation 4 and 29A

<b>Criteria</b>	<b>Regulation 4</b>	<b>Regulation 29A</b>
Purpose	Exemption from Open Offer	Relaxation from Open Offer
Scope	Applicable to Regulation 10, 11 and 12 only	Applicable to all the provisions of Chapter III
Pre-Conditions	No	Yes
Competitive Bid	Not Applicable	Not Allowed
Time Line	Prescribed	Not Prescribed

# An Analysis of Recent Judicial Pronouncements



# Issue of shares with differential voting rights



# Issue of shares with differential voting rights

CLB has held that Issue of Equity Shares with differential voting rights is valid under law.



Whether the acquirer is required to give open offer?



Yes

# An Analysis of Recent Judicial Pronouncements

Whether the professional director will be deemed as persons having control over the company?

Alok Jain

Merely because the management of the Company vests in the Board of Directors comprising professionals, it does not mean that there is no individual in control of the company, the directors will fall in the category of 'persons having control over the company'

SEBI Order

# An Analysis of Recent Judicial Pronouncements – Contd...

Compliance of regulation 6, 7 & 8 – A pre-condition for exemption?

K  
Koteswara  
Rao

Compliance of regulation 6, 7 and 8 of the SEBI Takeover Code is a precondition for availing the exemption under regulation 3(1) (e) of the SEBI Takeover Code, therefore, failure to make public announcement in such a case will be violation of regulation 10, 11 and 12.

SEBI Order

# An Analysis of Recent Judicial Pronouncements – Contd...

Failure of make PA vs. Failure to make PA in time

Kemkar  
Poddar  
and  
Mayur  
Leather  
Products

Failure to make the public announcement also includes failure to make the public announcement within the prescribed time period in terms of Section 15H(ii) of the SEBI Act.

SEBI Order

# An Analysis of Recent Judicial Pronouncements – Contd...

Acquisition of shares by Broker – Business or investment?

Angel  
Broking  
Ltd.

Where the Broker has acquired the shares in the ordinary course of business on behalf of the client, then, no disclosure in terms of the SEBI Takeover Code is required. But, in such cases, the shares should be transferred in respective Beneficiary accounts without any delay so as to unhide the identity of actual acquirers.

SEBI Order

# An Analysis of Recent Judicial Pronouncements – Contd...

Violation of regulations vs. intention – which is important  
for penalty

Sukumar  
Nandlal  
Shah

once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation irrespective of the fact that the company is a sick company.

SEBI Order

# An Analysis of Recent Judicial Pronouncements

## – Contd...

Whether consent of promoter is necessary to treat him as a promoter?

Rajendra  
Kumar  
Banthia

To treat a person as a promoter of the Company, the consent of that person is not required if he is otherwise in control and management of the Company

SEBI Order

# An Analysis of Recent Judicial Pronouncements

## – Contd...

How Prior holding of 3 years will be calculated in case of demerged company for claiming exemption?

Forbes &  
Company  
Limited

For computing the period of 3 yrs holding in regulation 3(1) (e), where the shares acquired in the resultant company are sought to be traded, the date on which the shares were acquired in the demerged company would be taken as the date of acquisition and the period of three years will be calculated from that date only.

SEBI Informal Guidance

# An Analysis of Recent Judicial Pronouncements

## – Contd...

What the relevant date for calculating 4 working days for PA in case of indirect acquisition?

DISA India  
Ltd.

For the purpose of regulation 14(4), the date of the conclusion of the sale will be taken as the date of consummation of acquisition for making the public announcement and not the date of obtaining final clearance from the competition authorities.

SEBI Informal Guidance

# An Analysis of Recent Judicial Pronouncements

## – Contd...

Whether the violation of Open offer can be settled on Consent Terms from SEBI?

California  
Software  
Company  
Limited

The acquirer had violated regulation 11 (1) in the year 1997. The violation has been settled on consent terms for a sum of Rs. 5,25,000.

SEBI Consent Order

K G Denim  
Limited

The acquirer had violated regulation 11 (1) in the year 2004 and also additional non-compliance of regulation 7 (1A). The violation has been settled on Consent terms for a sum of Rs. 2,25,000.

SEBI Consent Order

# Takeover Battle of Orissa Sponge Iron and Steel Limited



# Facts of the Case

Dec 2008

- Unitech announced selling of 12% stake in OSISL

February 07,  
2009

- The first Offer (Bhushan Power & Steel Limited)

February 25,  
2009

- The Second Offer (Mount Everest Trading and Investment Ltd. )

February 28,  
2009

- The Third offer (Bhushan Energy Limited – Neeraj Singhal Group)

# Analysis of the Case

Open offer	Name of Acquirer	Total Number of Shares which can be acquired under the Open Offer	Offer Price	Market price (as on 09.03.09)
Original Offer	Bhushan Power and Steel Limited	52,00,000	Rs. 300	Rs. 416.55
First Competitive Bid	Mounteverest Trading & Investment Ltd.	61,00,000	Rs. 310	Rs. 416.55
Second Competitive Bid	Bhushan Energy Limited	61,00,000	Rs. 330	Rs. 416.55

# Unique features of the Case

- First case of Competitive Bid in the history of Indian Takeovers
- Market Price increased from Rs. 92 to Rs. 437 (Approx. 4 times) in 3 months.
- Investors are leading beneficiaries



# Queries and Issues

- Whether an independent open offer can be made during the continuance of an existing open offer, pursuant to acquisition of shares beyond the specified thresholds?
- Whether the warrants can be converted during the pendency of open offer if such conversion results into triggering of open offer, other than by acquirer?
- Whether a person who has made an open offer can sell his existing stake if another offer is attractive enough to renounce the control?

*Thank You . . .*

*THANK YOU . . .*