The Takeover Code, 2011

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I. INTRODUCTION

The Securities and Exchange Board of India (“SEBI”) introduced the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Code, 1997”) to regulate the acquisition of shares and voting rights in public listed companies in India. The Securities and Exchange Board of India (“SEBI”) had been considering reviewing and amending the Takeover Code, 1997 for quite some time now.

A Takeover Regulations Advisory Committee was constituted under the chairmanship of Mr. C. Achuthan (“Achuthan Committee”) in September, 2009 to review the Takeover Code, 1997 and give suggestions. The Achuthan Committee provided its suggestions in its report, which was submitted to the SEBI in July, 2010. After taking into account the suggestions of the Achuthan Committee and feedback from the interest groups and general public on such suggestions, the SEBI finally notified the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Code, 2011”) on 23 September 2011. The Takeover Code, 2011 will be effective from 22 October 2011. SEBI has, however, clarified that any open offer, for which a public announcement has already been made, would be governed by the Takeover Code, 1997.

The Takeover Code, 2011 adheres to the framework and principles of the Takeover Code, 1997 but the changes that it brings about are significant. This edition of the I-Witness Update provides an overview of the Takeover Code, 2011 and discusses some of the most important amendments that have been brought about.

II. ACQUISITION

The Takeover Code, 2011 explicitly states that it shall apply to direct or indirect acquisition of shares or voting rights in or control over any target company. Shares as defined under the Takeover Code, 2011 include depository receipts also. Further, the Takeover Code, 1997 excluded ‘preference shares’ from the definition of ‘shares’ vide an amendment of 2002. However, this exclusion has been removed in the Takeover Code, 2011 and therefore now ‘shares’ would include, without any restriction, any security which entitles the holder to voting rights.

The Takeover Code, 2011 defines acquisition as “directly or indirectly, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company” ("Acquisition"). Since target company has been defined in the Takeover Code, 2011 to mean a public listed company ("Target Company"); Acquisition for the purpose of the Takeover Code, 2011 can be broadly defined as the direct or indirect acquisition of shares or control or voting rights in a public listed company. An acquirer under the Takeover Code, 2011 is therefore any person who either directly or indirectly or with or through persons acting in concert engages in such Acquisition ("Acquirer").

It may be noted here that the definition of Acquirer has been modified in the Takeover Code, 2011 to include Acquisition by a person through persons acting in concert ("PAC") in addition to such “persons as may be acting in concert with him” as was previously provided for in the Takeover Code, 1997. Thus while previously, an Acquirer was required to be a party to the transaction of Acquisition, according to the new Takeover Code, 2011, a person acting through other persons, for example, a special purpose vehicle or through other controlling entities or entities acting in concert, shall also come within the ambit of the definition of Acquirer. PAC under the Takeover Code, 2011 can be either such persons who with the common objective of Acquisition as defined earlier, directly or indirectly, cooperate for acquisition of shares or voting rights in, or exercise of control over the Target Company or such persons as may be “deemed to be acting in concert” as defined in the new Takeover Code, 2011. Thus a company, its holding company, subsidiary company and any company under the same management or control are deemed to be PAC. Similarly, a company, its
directors, and any person entrusted with the management of the company would also be deemed to be PAC unless proven otherwise.

It is worth noting that the definition of PAC in the new Takeover Code, 2011 has been modified with the implication that the objective of the Acquisition need not be substantial acquisition of shares (as was under the Takeover Code, 1997), rather, sharing the common objective of acquisition of shares is enough for a person to be considered as acting in concert as long as the person directly or indirectly co-operates for acquisition of shares or voting rights in, or exercise of control over the Target Company.

Again, the definition of persons “deemed to be acting in concert” has been expanded in the Takeover Code, 2011. The previous definition under the Takeover Code, 1997 included a company with any of its directors, or any person entrusted with the “management of the funds” of the company. The new definition widens the scope to such persons as may be entrusted with the management of the company and not necessarily just the funds of the company. Trustee companies have been added to persons deemed to be acting in concert with respect to management of mutual funds.

The above changes in definitions of Acquirer and “persons acting in concert” and “persons deemed to be acting in concert” suggest the intention of the regulators to expand the scope of persons whose actions shall be subject to scrutiny under the new Takeover Code, 2011.

III. TRIGGERING OF THE OPEN OFFER

3.1. Initial Threshold Limit for Triggering of an Open Offer

Under the Takeover Code, 1997, an acquirer was mandated to make an open offer if he, alone or through persons acting in concert, were acquiring 15% or more of voting right in the target company. This threshold of 15% has been increased to 25% under the Takeover Code, 2011. This is a significant raise from the threshold prescribed in the old Takeover Code, 1997. It is perceived that the increase in the threshold will be beneficial to private equity funds and institutional investors who had to earlier restrict their stake to 14.99%. Now investors, including private equity funds and minority foreign investors, will be able to increase their shareholding in Target Companies up to 24.99% and will have greater say in the management of the Target Companies.

The promoters of listed companies with low shareholding (below 25%) and not having access to funds to increase their shareholding would be concerned about hostile acquirers who can acquire up to 24.99%. However, in the event an Acquirer along with PAC increases its shareholding to more than that of the promoters, it would be considered to be a ‘change of control’ and such Acquirer will need to make an open offer. An Acquirer holding 24.99% shares will also have a better chance to block any decision of the Target Company which requires a special resolution to be passed. The promoters, irrespective of their level of shareholding, will undoubtedly be concerned about any Acquirer mis-utilising the new provisions to assume greater control in decision making within the Target Company. However, at the same time, this will help listed companies to get in more investments without triggering the open offer requirement as early as 15%, therefore making the process more attractive and cost effective, which is projected to lead to an increase in mergers and acquisitions activity in the Indian economy.

3.2. Creeping Acquisition

The Takeover Code, 1997 recognized creeping acquisition at two levels – from 15% to 55% and from 55% to the maximum permissible limit of non-public shareholding, i.e., 75% (and 90% for some specific companies). Acquirers holding from 15% to 55% shares were allowed to purchase additional shares or voting rights of up to 5% in each financial year without making a public announcement of an open offer. Acquirers holding from 55% to 75% (or 90%) shares were required to make such public announcement for any additional purchase of
shares. However, in the latter case, up to 5% additional shares could be purchased without making a public announcement if the Acquisition was made through open market purchase on stock exchanges or due to buyback of shares by the Target Company.

The Takeover Code, 2011 makes the position simpler. Now, any Acquirer, holding 25% or more but less than the maximum permissible limit for non-public shareholding can purchase additional shares or voting rights of up to 5% every financial year, without requiring to make a public announcement for open offer. The Takeover Code, 2011 also lays down the manner of determination of the quantum of acquisition of such additional voting rights.

This would be beneficial for the investors as well as the promoters, and more so for the latter, who can increase their shareholding in the company without necessarily purchasing shares from the stock market.

Also, the Takeover Code, 2011 mandates that calculation of the 5% shares would be on the basis of gross acquisition and would not take into consideration any parallel dilution of shareholding. Earlier it could for instance have been argued that if someone acquires 10% and sells 5% shares in parallel transactions, the net increase in shareholding would be taken into consideration.

3.3. **Indirect Acquisition**

The Takeover Code, 2011 clearly lays down a structure to deal with indirect acquisitions, an issue which was not adequately dealt with in the earlier Takeover Code, 1997. Simplistically put, it states that any acquisition of shares or control over a company, business or entity that would enable a person and persons acting in concert with him to exercise such percentage of voting rights or control over the Target Company, which if directly acquired in the Target Company would have otherwise necessitated a public announcement for open offer, shall be considered an indirect acquisition of voting rights or control of the Target Company.

It also states that wherever:

a) the proportionate net asset value of the Target Company as a percentage of the consolidated net asset value of the entity or business being acquired; or

b) the proportionate sales turnover of the Target Company as a percentage of the consolidated sales turnover of the entity or business being acquired; or

c) the proportionate market capitalization of the Target Company as a percentage of the enterprise value for the entity or business being acquired;

is more than 80% on the basis of the latest audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the Target Company and all the obligations relating to timing, pricing and other compliance requirements for the open offer would be same as that of a direct acquisition ("Deemed Direct Acquisition").

3.4 **Triggering Thresholds Individually or Jointly with PAC**

Under the Takeover Code, 2011, an obligation to make an open offer would be triggered in case of acquisition of shares by any Acquirer such that the individual shareholding of such Acquirer acquiring shares exceeds stipulated thresholds irrespective of whether there is a change in the aggregate shareholding with the PAC.

3.5 **Change of Control**

As in the previous Takeover Code, 1997 the requirement of making an open offer arises under the new Takeover Code, 2011, irrespective of the acquisition or holding of shares or
voting rights in the Target Company, where the Acquirer intends to acquire, directly or indirectly, control over such Target Company. However, under the previous Takeover Code, 1997, Control includes “the right to appoint majority of the directors or to control the management or policy decisions of the target company. Under the new Takeover Code, 2011, the definition of ‘control’ includes not only the right but also the ability to appoint majority of the directors on the board of the Target Company.

3.6. Voluntary Offer

A concept of voluntary offer has been introduced in the Takeover Code, 2011, by which an Acquirer who holds more than 25% but less than the maximum permissible limit for non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring additional shares subject to the aggregate shareholding of such Acquirer along with PAC, after completion of the open offer, not exceeding the maximum permissible non-public shareholding.

Such voluntary offer would be for acquisition of a number of shares as would entitle the Acquirer to exercise a minimum additional 10% of the total shares of the Target Company. This would facilitate the substantial shareholders and promoters to consolidate their shareholding in a Target Company. Since no shareholder will be given preferential treatment, a lower offer size of 10% has been mentioned.

A voluntary offer cannot be made where an Acquirer or PAC has acquired shares of the Target Company in the preceding 52 weeks without attracting the obligation to make an open offer. Further, during the voluntary offer period such Acquirer shall not be entitled to acquire any shares otherwise than under the open offer. The Acquirer is restricted from acquiring any further shares in the Target Company for a period of six months after completion of the open offer by way of voluntary open offer or competing offer.

Two views are possible in interpreting the provisions relating to voluntary open offer under the Takeover Code, 2011. One view is that voluntary offers with a minimum offer size of 10% can be made only by persons who already hold at least 25% stake. The corollary is that there is no prohibition on voluntary offers by persons holding less than 25% so long as the minimum offer size is 26%. The second view is that a voluntary open offer by persons who hold less than 25 per cent (and who have not made a mandatory offer in past) is not permitted at all.

According to the latter view, the provisions relating to voluntary open offers have made acquisition attempts by outsiders difficult and time-consuming, by providing specific conditions, most significantly the requirement of prior holding of at least 25% and limits on market purchases. The provision seems to be inadvertent as the Achuthan Committee did not necessarily frown upon hostile acquisitions. The Takeover Code, 2011 does make provisions for competing offers (described subsequently) by Acquirers where an open offer has already been made by another Acquirer triggering the requirements.

IV. EXCEEDING THE MAXIMUM PERMISSIBLE NON-PUBLIC SHAREHOLDING & DELISTING

In the event the shareholding of the Acquirer is between 75% to 100% (or 90% to 100% for some companies) after the open offer, the Acquirer would be required to either bring his holding down to ensure compliance with the listing agreement, or proportionately reduce both his acquisitions under the agreement that triggered the open offer and the acquisitions under the open offer. Where post open offer shareholding of the Acquirer and PAC is in excess of the maximum permissible non-public shareholding, it must be reduced within 1 year.

If an Acquisition causes the public shareholding in the Target Company to be reduced below the limits specified in the listing agreement entered into with the stock exchanges by the company at the time of listing, any further Acquisition of shares of such company must necessarily be in accordance with the SEBI (Delisting of Equity Shares) Regulations, 2009.
(“Delisting Regulations”). The Target Company shall not be eligible to make a voluntary delisting offer under the Delisting Regulations for 12 months from the date of the completion of the offer period.

The Achuthan Committee had recommended the introduction of the concept of a ‘delisting threshold’ to mean a shareholding entitling exercise of 90% of the voting rights in a Target Company, excluding voting rights on shares held by a custodian and against which depository receipts have been issued overseas. The delisting threshold was proposed to be calculated with reference to the shareholding pattern of the Target Company as of the last day of the tendering period.

The Achuthan Committee recommended that if the Acquirer crosses the delisting threshold through the open offer there should be no further requirement to make a separate delisting offer under the Delisting Regulations. However, SEBI has rejected this recommendation, and this provision is not included in the Takeover Code, 2011.

The following diagrams illustrate the key shareholding thresholds under the Takeover Code, 2011 and the erstwhile Takeover Code, 1997.

**Figure 1: Takeover Code 2011 - Shareholding Thresholds**

![Diagram showing shareholding thresholds under Takeover Code 2011](image-url)
V. THE OPEN OFFER

5.1. Offer Size

The Takeover Code, 1997 required an acquirer, obligated to make an open offer, to offer for a minimum of 20% of the ‘voting capital of the Target Company’ as on ‘expiration of 15 days after the closure of the public offer’. The Takeover Code, 2011 now mandates an acquirer to place an offer for at least 26% of the ‘total shares of the Target Company’, as on the ‘10th working day from the closure of the tendering period’. The total shares accounted for this purpose shall include all potential increases in the number of outstanding shares during the offer period contemplated as on the date of the public announcement (as discussed below).

The increase in the size of the open offer from 20% to 26%, along with increase in the initial threshold from 15% to 25%, creates a unique situation under the Takeover Code, 2011. An acquirer with 15% shareholding and increasing it by another 20% through an open offer would have only got a 35% shareholding in the Target Company under the Takeover Code of 1997. However, now an acquirer with a 25% shareholding and increasing it by another 26% through the open offer under the Takeover Code, 2011 can accrue 51% shareholding and thereby attain simple majority in the target company.

These well thought out figures clearly shows the intention of the regulator to incentivize investors acquiring stakes in a Target Company by giving them an opportunity of attaining simple majority in a Target Company. Those promoters holding between 25% and 50% would be able to acquire 5% a year under the creeping acquisition limit and would, thus, face substantially less threat of a competing hostile acquisition, closer they get to the 50% mark.
Given that under the Companies Act, 1956, the largest shareholder or a 50% shareholder controls not 50% of the board of directors, but the entire board of directors - assuming supporting independent directors - this clearly is a suitable number. The promoters holding between 50% and 75% are already secure against a hostile bid, which would be futile except having nuisance value, as an outsider with 25% could block special resolutions floated by the promoters. Such promoters may not seek an increased number of shares except in extreme cases or where they deliberately seek to consolidate their holdings.

5.2. Offer Period

The Takeover Code, 2011 provides that the offer period starts on the date of entering into an agreement to acquire shares, voting rights in, or control over a Target Company requiring a public announcement, or the date of the public announcement, whichever is earlier and ends on the date on which the payment of consideration to shareholders who have accepted the open offer is made. Thus, unlike in the case of the Takeover Code, 1997 this definition of offer period under the Takeover Code, 2011 is now more descriptive with the addition of an explanation of the events when the period will start and expire. The definition in the Takeover Code, 1997 was comparatively vague as it stated the offer period starts when the memorandum of understanding is signed or the public announcement is made and ends on the date of completion of all the formalities under the Takeover Code, 1997.

5.3. Offerees

Any open offer is required to be made to all shareholders of the Target Company, other than the Acquirer, PAC and the parties to any underlying agreement including persons deemed to be PAC with such parties, for the sale of shares of the Target Company.

5.4. Appointment of Merchant Banker

The Acquirer is required to appoint a Merchant Banker as the manager of the open offer (“Manager”) prior to making the public announcement in relation to same.

5.5. Minimum Open Offer Price

The Takeover Code, 2011 provides a different methodology for the computation of offer price as compared to the Takeover Code, 1997. A key deviation in this regard from the Takeover Code, 1997, is that the Takeover Code, 2011 provides that instead of the higher of the average of weekly high and low of closing prices for 26 weeks and average of daily high and low of last two weeks; the average market price of 60 trading days prior to the date of the public announcement will be taken. This is expected to make the market price more realistic.

5.5.1. Offer Price in Case of Direct Acquisition and Deemed Direct Acquisition of Shares, Voting Rights or Control of the Target Company

The minimum open offer price shall be the highest of the following:

(i) Highest negotiated price per share of the Target Company under the agreement that attracted the open offer.

(ii) Volume-weighted average price paid or payable for acquisitions by the Acquirer or PAC during 52 weeks preceding the date of the public announcement.

(iii) Highest price paid or payable for any acquisition by the Acquirer or PAC during 26 weeks preceding the date of the public announcement.

(iv) Where shares are frequently traded - volume weighted average market price of the Target Company during 60 trading days immediately preceding the date of the public announcement.
Where shares are infrequently traded - the price determined by the Acquirer and Manager to the open offer taking into account valuation parameters, including, book value, comparable trading multiples and such other parameters as are customary for valuation of shares of such companies.

In case of Deemed Direct Acquisition where net assets value or sales turnover or market capitalization of the Target Company is more than 15% of the consolidated net asset or sales turnover or the enterprise value of the entity or business being acquired as per the latest audited annual financial statements, the per share value of the Target Company computed by the Acquirer.

5.5.2. Offer Price in Case of Indirect Acquisition of Shares, Voting Rights or Control of the Target Company

The minimum open offer price shall be the highest of the following:

(i) Highest negotiated price per share, if any, of the Target Company under the agreement that attracted the open offer.

(ii) Volume-weighted average price paid or payable for acquisitions by the Acquirer or PAC during 52 weeks preceding the earlier of: (a) the date on which the primary acquisition is contracted, and (b) the date on which intention or decision to make primary acquisition is announced in public domain.

(iii) Highest price paid or payable for any acquisition by the Acquirer or PAC during 26 weeks preceding the earlier of: (a) the date on which the primary acquisition is contracted, and (b) the date on which intention or decision to make primary acquisition is announced in public domain.

(iv) Where shares are frequently traded - volume weighted average market price of the Target Company during 60 trading days immediately preceding the earlier of: (a) the date on which the primary acquisition is contracted, and (b) the date on which intention or decision to make primary acquisition is announced in public domain.

(v) Where minimum offer price cannot be computed as per any of the parameters, it shall be fair price determined by the Acquirer and the Manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

(vi) Where net assets value or sales turnover or market capitalization of the Target Company is more than 15% of the consolidated net asset or sales turnover or the enterprise value of the entity or business being acquired as per the latest audited annual financial statements, the per share value of the Target Company computed by the Acquirer.

(vii) Highest price paid or payable for any acquisition by the Acquirer or PAC during the earlier of: (a) the date on which the primary acquisition is contracted; (b) the date on which intention or decision to make primary acquisition is announced in public domain; and (c) the date on which the public announcement is made under the Takeover Code, 2011.

5.5.3. Other Factors in Computation of Offer Price

(i) Conversion Rate for Convertible Instruments: Where the Acquirer or PAC has any outstanding convertible instruments convertible into shares of the Target Company
at a specific price, the price at which such instruments are to be converted shall be considered.

(ii) **Look Back Period:** Where the Acquirer or PAC has acquired any shares of the Target Company during the period of 26 weeks after the tendering period at a price higher than the offer price paid, the Acquirer and PAC shall pay the difference between the highest acquisition price and offer price, to all the shareholders whose shares were accepted in the open offer, within 60 days from the date of such acquisition except where acquisitions are pursuant to the Delisting Regulations or open market purchases made in the ordinary course on the stock exchanges which are not negotiated deals or bulk deals or block deals or in any other form.

(iii) **Non-Compete Fees and Controlling Premium:** In line with the spirit of equal treatment of all shareholders, the Takeover Code, 2011 provides for the omission of the separate non-compete fees to the promoters/sellers, which were previously under the Takeover Code, 1997 allowed to be paid to the controlling shareholders to an extent of 25% of the offer price. The Takeover Code, 2011 provides that any direct or indirect non-compete fees or control premium paid to the controlling shareholders would be added to the offer price. This change is targeted to benefit the public shareholders of a company who will get the same price as offered to the promoters/sellers.

(iv) **Adjustments to Minimum Offer Price:** The Takeover Code, 2011 provides for adjustment to the minimum open offer price in the following cases: (a) If during the offer period, the Acquirer directly or through PAC agrees or acquires any shares or voting rights in the Target Company in any manner at a price higher than the minimum offer price, the minimum offer price shall stand revised to such higher price. (b) Where the open offer is subject to minimum level of acceptances and the open offer does not receive the minimum acceptance, the Acquirer may indicate lower price for acquiring all the acceptances. (c) For corporate actions like rights issue/ bonus issue/ stock splits/ dividend/ de-mergers/ reduction of capital etc. where the record date for effecting the same falls 3 business days prior to the commencement of the tendering period.

(v) **Interest in Case of Delayed Public Statements:** In case of an indirect acquisition, the minimum offer price would stand increased by 10% p.a. for the period commencing on the earlier of: (a) the date on which primary transaction is contracted, or (b) the date on which the intention / decision to make primary acquisition is announced in public domain, and ending on the date of detailed public statement, provided such period is more than 5 working days.

5.6. **Open Offer Process**

5.6.1. **Public Announcement**

The date of public announcement depends on the nature of Acquisition. The following table summarizes the respective dates on which the public announcements are required to be made for different types of Acquisitions.

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Event Triggering Obligation to Make a Public Announcement</th>
<th>Time of Making Public Announcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Acquisition of shares through market purchases.</td>
<td>Prior to placement of purchase order with the stock broker to acquire shares.</td>
</tr>
<tr>
<td>Sl. No.</td>
<td>Event Triggering Obligation to Make a Public Announcement</td>
<td>Time of Making Public Announcement</td>
</tr>
<tr>
<td>--------</td>
<td>----------------------------------------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>2.</td>
<td>Acquiring shares or voting rights or control upon conversion of convertible securities (without fixed date of conversion) or upon conversion of depository receipts for the underlying shares</td>
<td>On the date of exercise of the option to convert such securities</td>
</tr>
<tr>
<td>3.</td>
<td>Acquiring shares or voting rights or control upon conversion of convertible securities (with a fixed date of conversion)</td>
<td>On the 2nd working day preceding the scheduled date of conversion of such securities.</td>
</tr>
<tr>
<td>4.</td>
<td>Acquisition pursuant to disinvestment.</td>
<td>On the date of executing the agreement for acquisition.</td>
</tr>
<tr>
<td>5.</td>
<td>In case of an indirect acquisition which is not a Deemed Direct Acquisition.</td>
<td>Any time within 4 working days from the earlier of: (a) the date on which primary acquisition is contracted, or (b) date on which intention or decision to make primary acquisition is made public.</td>
</tr>
<tr>
<td>6.</td>
<td>In case of Deemed Direct Acquisition</td>
<td>Earlier of: (a) the date on which primary acquisition is contracted, or (b) date on which intention or decision to make primary acquisition is made public.</td>
</tr>
<tr>
<td>7.</td>
<td>Acquisition under preferential issue.</td>
<td>On the date of passing special resolution under section 81 (1A) of Companies Act, 1956.</td>
</tr>
<tr>
<td>8.</td>
<td>Increase in voting rights pursuant to buy back not qualifying for an exemption.</td>
<td>Not later than 90th day from the date of increase in voting right beyond the stipulated threshold.</td>
</tr>
<tr>
<td>9.</td>
<td>Acquisition wherein the specific date of acquisition of title of shares, voting right or control is beyond the control of the Acquirer.</td>
<td>Not later than 2 working days from the date of receipt of intimation of having acquired such title.</td>
</tr>
</tbody>
</table>

Such public announcement shall be made to all such stock exchanges on which the shares of the Target Company are listed so that these stock exchanges disseminate the information to the public. Within one day of the public announcement, a copy of the same shall be sent to SEBI and to the Target Company. Some of the details that have to be provided in the public announcement are as follows:

(i) Name and identity of the Acquirer and the PAC  
(ii) Name and identity of the sellers, if any
(iii) Nature of the proposed Acquisition, such as purchase of shares or allotment of shares
(iv) The consideration for the proposed Acquisition that attracted the obligation to make an open offer for acquiring shares, and the price per share, if any
(v) The offer price and mode of payment of consideration
(vi) Offer size and conditions as to minimum levels of acceptance, if any.

5.6.2. Creation of Escrow Account

Under the Takeover Code, 2011, the Acquirer is required to deposit an amount to secure performance of the Acquirer’s obligations, in an escrow account in the form of cash deposited with a scheduled commercial bank or bank guarantee in favour of the Manager or deposit of acceptable securities with appropriate margin with the Manager. The escrow amount is required to be placed in escrow no later than two days prior to the detailed public statement (described below). The amount required to be placed in escrow is to be calculated in accordance with the following table:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Consideration Payable under the Open Offer</th>
<th>Escrow Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>On the first INR 500 Crores.</td>
<td>25% of the consideration.</td>
</tr>
<tr>
<td>2.</td>
<td>On the balance consideration.</td>
<td>An additional 10% of the balance consideration.</td>
</tr>
</tbody>
</table>

Where an open offer is made conditional upon minimum level of acceptance, 100% of the consideration payable in respect of minimum level of acceptance or 50% of the consideration payable under the open offer, whichever is higher, is required to be deposited in cash in the escrow account.

The Manager to the open offer shall not release the escrow account until the expiry of 30 days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer. In case, the Acquirer fails to fulfil his obligations under the Takeover Code, 2011, SEBI may direct the Manager to forfeit the escrow account and distribute the proceeds in the following way.

(a) 1/3 of amount to target company
(b) 1/3 to the Investor Protection and Education Fund established under the SEBI (Investor Protection and Education Fund) Regulations, 2009; and
(c) 1/3 to be distributed on pro rata basis among the shareholders who have accepted the offer.

Besides forfeiture of escrow account, SEBI can initiate separate action against the Acquirer which may include prosecution/ barring the acquirer from entering the capital market for a specified period etc.

5.6.3. Public Statement

The Acquirer shall publish a detailed public statement within 5 working days of the public announcement through the Manager of the open offer in all editions of at least one each of an English national daily, Hindi national daily and a regional daily with wide circulation, at the place where the registered office of the Target Company is situated and one regional daily where the stock exchange where the maximum volume of trading in the shares of the Target Company are recorded during the 60 days preceding the public announcement.
Simultaneously, a copy of the said public statement shall be:

(a) submitted to the SEBI through the Manager;
(b) sent to all the stock exchanges on, which the shares of the company are listed for being notified to the general public; and
(c) sent to the Target Company at its registered office for being placed before the Board of Directors of such company.

5.6.4. **Draft Letter of Offer**

Within 5 days of the publication of the detailed public statement, the Manager shall also furnish to SEBI a due diligence certificate along with the draft letter of offer. Simultaneously with the filing of the draft letter of offer with SEBI, the Acquirer shall send a draft letter of offer to the Target Company. Within 15 days of the submission of the draft letter of offer to SEBI, in the event SEBI does not give comments, it shall be assumed that SEBI does not have any comments to offer.

5.6.5. **Letter of Offer**

The letter of offer is required to be sent to all the shareholders of the Target Company whose names appear on the register of members of Target on the “Identified Date” so as to reach them within 7 working days from the receipt of comments from SEBI. The purpose of Identified Date is to determine the names of the shareholders to whom the letter of offer would be sent and an exit opportunity would be provided. The Identified Date has been fixed as the date falling on the 10th business day prior to the commencement of the tendering period on the basis of the TRAC argument that the same should not be too long before the approval of letter of offer and initiation of the offer period for tendering the shares. The purpose of this recommendation is to curb the effect of transfer of shares by public shareholders after the date of public announcement but before the opening of the offer period. The definition of Identified Date replaces the “Specified Date” which according to the old Takeover Code, 1997 referred to a date not later than the thirtieth day from the date of the public announcement.

Simultaneously, the Acquirer is also required to send the letter of offer to the custodian of shares underlying depository receipts. A copy of the letter of offer is required to be sent to warrant holders, whose period of exercise of option or conversion falls within the offer period.

The public announcement, letter of offer, circular, brochure or any other advertising or publicity material issued to the shareholders of the Target Company in connection with the public offer must not contain any misleading information and must state that the directors of Acquirer accept responsibility for the information contained therein.

5.6.6. **Tendering Period**

The tendering period shall start within 12 working days from the date of receipt of comments from SEBI and shall remain open for 10 working days. The Acquirer shall within 10 working days from the last date of the tendering period complete all requirements under the Takeover Code, 2011.

5.6.7. **Post Offer Advertisement**

The Acquirer is required to issue a post offer advertisement within 5 working days after the offer period, giving details including aggregate number of shares tendered, accepted and date of payment of consideration.
5.6.8. **Withdrawal of shares tendered in Open Offer**

The Takeover Code, 2011 has withdrawn the option of withdrawing shares tendered in an open offer, which was earlier available to shareholders under the Takeover Code, 1997. This has been done with the rationale that shareholders are provided with all the necessary particulars for them to make an informed decision about the shares tendered and hence they should not be permitted to withdraw the shares, once they are tendered.

5.6.9. **Completion of the Acquisition**

The Takeover Code, 2011 provides that an Acquirer is allowed to complete an Acquisition under any agreement (for instance share purchase agreement) which has resulted in the triggering the Open Offer obligations after a period of 21 days from the date of public announcement. The same was allowed under the Takeover Code, 1997 but only after the completion of all the offer formalities. The completion of the Acquisition will be subject to the Acquirer depositing 100% of the consideration payable under the open offer in an escrow account. The Takeover Code, 2011 further provides that in cases where the Acquisition is not completed before the expiry of the offer period, the Acquirer is allowed to do so after the expiry of the offer period but not later than 26 weeks from the expiry of such period. This provision will allow the Acquirer to have a representation in the Target Company and exercise control over it even before the completion of the open offer.

VI. **POST OPEN OFFER OBLIGATIONS**

6.1. **Disposal of Assets**

Previously under the Takeover Code, 1997, the Acquirer was debarred from disposing of assets of the Target Company other than in ordinary course of business for a period of 2 years from the closure of the open offer, unless such intention to dispose assets was mentioned upfront in public announcement. Under the Takeover Code, 2011, the Acquirer can dispose of assets of the Target Company in spite of not stating such intention in public announcement, if approval of shareholders of the Target Company is obtained through a special resolution.

6.2. **Post Offer Obligations of the Manager**

The Manager is required to file a report on the open offer with SEBI within 15 business days from the expiry of tendering period. Previously under the Takeover Code, 1997 the Manager was free to deal with the shares of the Target Company only after 15 days from the closure of offer period. Under the Takeover Code, 2011, the Manager is free to deal with the shares of the Target Company immediately after the closure of offer period.

VII. **COMPETING OFFER**

Upon public announcement of an open offer, any person other than the Acquirer can make a public announcement for an open offer within 15 working days of the date of the detailed public statement made by the Acquirer who has made the first public announcement. Every such offer along with the first made offer, are known as competing offers. No such competing offer is to be regarded as a voluntary open offer for the purpose of the Takeover Code, 2011. No such public announcement can be made or transactions which may attract an obligation of making a public announcement can be entered into between the period commencing on the said 15th day and until the completion of the offer period.

The competing offer shall be for such number of shares which, when taken together with shares held by such Acquirer along with PAC, shall be at least equal to the holding of the first offering Acquirer, including the number of shares proposed to be acquired by him under the offer and any underlying agreement for the sale of shares of the Target Company pursuant to which the open offer is made.
Upon the public announcement of a competing offer, an Acquirer who had made a preceding competing offer shall be entitled to revise the terms of his open offer provided the revised terms are more favourable to the shareholders of the Target Company. The competing Acquirers can also make further upward revisions of the offer price at any time up to 3 working days prior to the commencement of the tendering period.

VIII. ACQUISITION FROM OTHER COMPETING ACQUIRER

The Takeover Code, 2011 makes provisions allowing a competing Acquirer to acquire shares (as the successful bidder) acquired by another competing Acquirer in the open offer, either by himself or through or with PACs. The same will not attract the obligation to make another Open Offer provided that:

(a) The Acquisition has been made at a price not exceeding the offer price governing the competing offer made by the acquire acquiring the shares.

(b) The Acquisition has been made within 21 days from the expiry of the offer period of such competing offer.

IX. DISCLOSURES

9.1. Disclosure of Acquisition or Disposal

An Acquirer making an Acquisition under the Takeover Code, 2011 in a Target Company where the acquired shares and voting rights together with any existing shares or voting rights of the Acquirer and PAC amount to 5% or more of the shareholding of the Target Company, shall make disclosures of their aggregate shareholding and voting rights in such Target Company and every Acquisition or disposal of shares of such Target Company representing 2% or more of the shares or voting rights in such Target Company.

The disclosure required under the Takeover Code, 2011 shall be made within 2 working days of the receipt of intimation of allotment of shares, or the Acquisition of shares or voting rights in the Target Company to:

(i) every stock exchange where the shares of the Target Company are listed; and
(ii) the Target Company at its registered office.

The Takeover Code, 2011 provides for more frequent and stringent disclosures on the part of the Acquirer. There has been a significant amendment in the previous Regulation 7 of the Takeover Code, 1997 which dealt with the Acquisition of 5% and more shares or voting rights of a company. Erstwhile Regulation 7 stipulated that disclosures of shareholding have to be made on the Acquisition of more than 5% 10%, 14%, 54% and 74% shares in the Target Company. The Takeover Code, 2011 removes the disclosure in 5 stages. Regulation 28 of the Takeover Code, 2011 states that a disclosure will be made at the time of the Acquisition of 5% of the shares or voting rights in the company.

Under the Takeover Code, 1997 disclosure was required when there is a prior holding by the Acquirer of shares / voting rights between 15 to 55% in the Target Company.

9.2. Continual Disclosures

The limit for continual disclosures has been increased in the Takeover Code, 2011 from 15% to 25% wherein every person who holds shares or voting rights entitling him to exercise more than 25% voting rights will make disclosure of the aggregate shareholding of such Acquirer and PAC every financial year as of 31 March. The promoter of every Target Company
together with PAC shall have the same obligation. In both circumstances, the disclosure has to be made within 7 working days from the end of each financial year to:

(a) every stock exchange where the shares of the Target Company are listed; and
(b) the Target Company at its registered office.

In cases of encumbrances on shares of Target Company, the promoters are required to make disclosures regarding the same along with details of invocation or release of such encumbrances within 7 days of the creation, invocation or release of the encumbrance, as the case may be to abovementioned parties.

Indian promoters, several of whom had previously managed to circumvent rules which make it mandatory for them to disclose details of shares pledged by them, will now find it difficult to sidestep such norms, with SEBI insisting on greater disclosures under the Takeover Code, 2011. The Takeover Code, 2011 has widened the scope of disclosures by replacing the term ‘pledge’ with ‘encumbrance’, which includes pledge. The Takeover Code, 2011 makes it mandatory for all shares encumbered by promoters or by their PAC to be disclosed. This was not the case under the Takeover Code, 1997 when the requirement of disclosure of pledged shares was incorporated in 2009 after the scam involving Hyderabad-based Information Technology firm Satyam Computer Services Limited. Under regulation 28(3) of the Takeover Code, 2011 it has been explicitly clarified that an encumbrance shall include a pledge, a lien or any such transactions by whatever name called.

X. EXEMPTION FROM MAKING OPEN OFFER

Exemptions under the Takeover Code, 2011 have been made under the following categories:

1. Transactions, which trigger a statutory open offer due to substantial acquisition of shares/ voting rights, or due to change in control
2. Transactions, which trigger a statutory open offer due to acquisition of shares/ voting rights exceeding prescribed thresholds, provided that there is no change in control

10.1. Acquisition Pursuant to Rights Issue

Acquisition of shares by the shareholder of a Target Company up to his entitlement upon a rights issue is exempt from the open offer requirement. Even acquisition of shares by such a shareholder beyond his entitlement, pursuant to a rights issue is permitted if the Acquirer has not renounced any of his entitlement under the rights issue and the price at which the rights issue has been made does not exceed the price of the shares of the Target Company prior to the rights issue calculated in the manner provided in Regulation 10(4) of the Takeover Code, 2011.

10.2. Inter-se Transfers

The Takeover Code, 1997 used to recognize inter-se transfer of shares amongst the following groups –

a) Group coming within the definition of group as defined in the Monopolies and Restrictive Trade Practices Act, 1969.
b) Relatives within the meaning of section 6 of the Companies Act, 1956.
c) Qualifying Indian promoters and foreign collaborators who are shareholders, etc.

The categorization of such groups has been amended in the Takeover Code, 2011 and transfer between the following qualifying persons has been termed as inter-se transfer:

a) Immediate relatives.
b) Promoters, as evidenced by the shareholding pattern filed by the target company not less than 3 years prior to the proposed acquisition.
c) A company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than 50% of the equity shares of such company, etc.
d) Persons acting in concert for not less than 3 years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement.

To avail exemption from the requirements of open offer under the Takeover Code, 2011, the following conditions will have to be fulfilled with respect to an inter-se transfer:

(a) If the shares of the target company are frequently traded – the acquisition price per share shall not be higher by more than 25% of the volume-weighted average market price for a period of 60 trading days preceding the date of issuance of notice for such inter-se transfer.

(b) If the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than 25% of the price determined by taking into account valuation parameters including, book value, comparable trading multiples, etc.

10.3. Acquisition under a Scheme

The Takeover Code, 2011 provides that Acquisition of shares or voting rights pursuant to a scheme made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or under a scheme of arrangement involving the Target Company as a transferor company or as a transferee company, or reconstruction of the Target Company, including amalgamation, merger or demerger, pursuant to an order of a court or a competent authority under any law or regulation, Indian or foreign, shall be exempted from the open offer requirements. As regards a scheme of arrangement, not directly involving the Target Company as a transferor company or as a transferee company, or reconstruction of the Target Company, including amalgamation, merger or demerger, exemption would be available only if such scheme satisfies the following conditions:

(a) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

(b) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent (33%) of the voting rights in the Target Company are the same as the persons who held the entire voting rights before the implementation of the scheme.

It may be noted here that under the Takeover Code, 1997, Acquisition of shares or voting rights pursuant to any scheme of arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, Indian or foreign, had a blanket exemption from the open offer requirements, irrespective of the nature of the scheme.

The Acquisition of shares of a Target Company, not involving a change of control over such Target Company, pursuant to a scheme of corporate debt restructuring in terms of the Corporate Debt Restructuring Scheme notified by the Reserve Bank of India is exempt from the requirement of making an open offer, if the same has been authorised by shareholders by way of a special resolution passed by postal ballot.

10.4. Buy-Back of Shares

The Takeover Code, 1997 did not provide for any exemption for increase in voting rights of a shareholder due to buybacks. The Takeover Code, 2011 however provides for exemption for such increase.
In a situation where the Acquirer’s initial shareholding was less than 25% and exceeded the 25% threshold, thereby necessitating an open offer, as a consequence of the buyback, the Takeover Code, 2011 provides a period of 90 days during which the Acquirer may dilute his stake below 25% without requiring an open offer. Where an Acquirer’s initial shareholding was more than 25% and the increase in shareholding due to buyback is beyond the permissible creeping acquisition limit of 5% per financial year, the Acquirer can still get an exemption from making an open offer, subject to the following:

(a) such Acquirer had not voted in favour of the resolution authorising the buy-back of securities under section 77A of the Companies Act, 1956;
(b) in the case of a shareholder resolution, voting was by way of postal ballot; and
(c) the increase in voting rights did not result in an acquisition of control by such Acquirer over the Target Company.

In case the above conditions are not fulfilled, the Acquirer may, within 90 days from the date of increase, dilute his stake so that his voting rights fall below the threshold which would require an open offer.

10.5. Acquisition under Operation of Law

Acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Delisting Regulations are exempted from the open offer requirement.

10.6. Disinvestment

Acquisitions at subsequent stages, by an Acquirer who has made a public announcement of an open offer for acquiring shares pursuant to an agreement of disinvestment in a public sector undertaking is also exempt under certain conditions provided for in the Takeover Code, 2011.

10.7. Acquisition in the Ordinary Course of Business

Acquisition of shares in the ordinary course of business by stock brokers acting on behalf of their clients, merchant bankers or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue in terms of Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, scheduled commercial banks acting as an escrow agent, person acquiring shares pursuant to a scheme of safety net in terms of regulation 44 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, a merchant banker registered with SEBI acting as a stabilizing agent, amongst others, have also been exempted from the open offer requirement.

10.8. Voting Rights of Preference Shareholders

When voting rights accrete to preference shareholders on account of non-payment of dividend, the same is exempt from requirement of making an open offer.

10.9. Acquisition from State-level Financial Institutions

Acquisition of shares in a Target Company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the Target Company pursuant to an agreement between such transferors and such promoter are exempt from open offer requirements.
10.10. Exchange of Shares

Acquisition of shares in a Target Company by any person in exchange for shares of another Target Company tendered pursuant to an open offer for acquiring shares under the Takeover Code, 2011 is exempted.

10.11. Acquisition from Venture Capital Fund

Acquisition of shares in a Target Company from a venture capital fund or a foreign venture capital investor registered with SEBI, by promoters of the Target Company pursuant to an agreement is also exempt from the requirements of the open offer.

10.12. Case-Specific Exemption granted by SEBI

SEBI may exempt an Acquirer from making an open offer or grant relaxation from meeting certain procedural requirements under the Takeover Code, 2011 on the basis of reasons which have to be recorded in writing in the interest of investors in securities or the securities market.

XI. RESPONSIBILITY OF DIRECTORS AND INDEPENDENT DIRECTORS OF THE TARGET COMPANY

There is a significant change in the general obligations of the Board of Directors of a Target Company under the Takeover Code, 1997 and the Takeover Code, 2011. The Takeover Code, 1997 had given a discretionary option to the board of directors to send their recommendations on the open offer to the shareholders and for the purpose the Board could seek the opinion of an independent merchant banker or a committee of independent directors.

The Takeover Code, 2011, however, makes it mandatory for the board of directors of the Target Company to constitute a committee of independent directors (who are entitled to seek external professional advice on the same) to provide written reasoned recommendations on such open offer, which the Target Company is required to publish.

XII. CONCLUSION

The Takeover Code of 2011 is a timely and progressive regulation that would facilitate investments and attract investors. Even though SEBI has not implemented all the suggestions of the Achuthan Committee, it has still taken into consideration some of the major issues that had been plaguing the industry till now. It has tried to maintain a balance between the concerns of the investors as well as that of the promoters.