

Relaxation of certain provisions of Takeover Regulations due to COVID-19

- 1.0 The proposal seeking Board approval for temporarily relaxing the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Regulations”), in respect of (i) Creeping acquisition limit; and (ii) Voluntary open offers, was approved by the Board, by circulation, on June 03, 2020 **(Board Memorandum, Member’s comments and Replies sent to members are placed at Flag – A and B respectively).**
- 2.0 As per the decision of the Board, temporary relaxations have been approved:
- (i) increasing the creeping acquisition limit of 5% to 10%, for acquisitions by way of preferential issue of shares of the target company (for current financial year 2020-21) only to the promoters; and
 - (ii) allowing voluntary open offer, even if the acquirer or any person acting in concert with the acquirer has acquired shares (other than through open offer) in the preceding 52 (fifty-two weeks), applicable till March 31, 2021.
- 3.0 Amendments to the Takeover Regulations are being notified.

This is placed for information of the Board.

Relaxation of certain provisions of Takeover Regulations due to COVID-19

1. Objective

1.1. This memorandum seeks approval of the Board for temporarily relaxing the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Regulations”), in respect of:

- i. Creeping acquisition limit; and
- ii. Voluntary open offers.

2. Creeping Acquisition

Background

2.1. In terms of regulation 3(2) of Takeover Regulations, an acquirer along with persons acting in concert (PACs) holding 25 % or more shares/ voting rights in a target company is allowed to acquire additional voting rights in the target company up to 5 % within a financial year on gross basis, without making an open offer. The said regulation is meant to facilitate consolidation by persons already in control or holding substantial shares in the Target Company and is generally termed as creeping acquisition. However, the said acquisition should be within the maximum permissible non-public shareholding, except for acquisitions pursuant to resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016. The extract of regulation 3(2) is placed at **Annexure- I**.

2.2. Several requests have been received from market participants, law firms etc. to consider temporarily relaxing the creeping acquisition limit from 5% to 10%, particularly for acquisition of shares by way of preferential issue of shares by the company. It has been represented that a number of listed companies are likely to face financial difficulties during the pendency of the COVID 19 pandemic as well

as in its aftermath. In such circumstances, promoters should be provided with increased flexibility to provide capital to such companies. In this context it has been suggested that for a suitable period to be decided by SEBI, the limit of 5% per financial year for acquisitions of additional shares under Regulation 3(2) of the Takeover Regulations be increased to 10%, subject to the condition that the acquisition of shares in excess of 5% in a financial year would have to only be by way of a preferential issue of shares by the company, as opposed to acquisition of shares in the secondary markets. This will allow promoters to inject much needed capital into listed companies, without being subjected to the additional financial burden of making an open offer.

Analysis

- 2.3. The purpose of an open offer is to provide an opportunity for the existing shareholders to make an exit from the company, when a substantial acquisition of shares / voting rights, or change in control takes place.
- 2.4. The creeping acquisition limit of 5% is meant to facilitate consolidation by persons already in control or holding substantial number of shares. Therefore, any person (along with PACs) holding 25 % or more shares or voting rights in a target company is allowed to acquire additional voting rights in the target company up to 5% within a financial year, without making an open offer.
- 2.5. This is a difficult year for companies in the wake of developments relating to COVID-19. Capital infusion is critical for companies to meet their liquidity and solvency needs. Several relaxations in this regard have already been provided by SEBI in respect of rights issues, public issues etc.
- 2.6. One of the concerns is that in case of some companies, the promoters may have the ability to fund the company through preferential allotment but they may not be having sufficient capital to make open offer to the public shareholders. Currently, in such cases, the promoters would be constrained to contribute only upto 5%.
- 2.7. The proposed relaxation will enable promoters to bring in capital with their companies beyond the current threshold of 5%. Waiver of open offer will incentivize capital infusion by the promoters.

2.8.A comparison of creeping acquisition through primary markets vs. secondary markets has been brought out in the below table:

	Primary markets (Preferential Issue)	Secondary markets
Benefit to the company	Fund raising by listed companies	No direct benefit to the listed companies
Pricing	As per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018	-
Lock-in	Three years lock-in for allotment to promoters	No mandatory lock-in
Approval	Special Resolution	-
Exchanges	In principle approval by stock exchanges	-

Proposal

2.9. In view of the above, the temporary relaxation (for current financial year 2020-21) may be considered from the creeping acquisition limit of 5%, subject to the following additional checks:

- i. The said relaxation for acquisition upto 10% would be only for acquisitions by way of preferential issue of shares by the target company;
- ii. Such acquisitions shall continue to be within the maximum permissible non-public shareholding;
- iii. The said relaxation in regulation 3(2) of Takeover Regulations shall be made available only to promoters and not to other public shareholders. This is to ensure that the creeping acquisition is by entities that are already in control of the company.

Further, Section 62(1)(c) of the Companies Act 2013 requires authorization by a special resolution for an issue of further shares. The public shareholders would get an opportunity to have a say in whether raising of capital by way of preferential allotment to promoters is in the interest of the company and the shareholders.

2.10. The draft amendments in the Takeover Regulations have been brought out at **Annexure - II.**

3. Voluntary open offers

Background

3.1. In terms of regulation 6 of the Takeover Regulations, voluntary open offer can be made by an acquirer who along with PACs holds 25% or more, but less than the maximum permissible non-public shareholding, shares or voting rights in the target company. However, the proviso to regulation 6(1) of the Takeover Regulations provides that if an acquirer or any PAC with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to make a voluntary open offer. The relevant extract of regulation 6(1) of Takeover Regulations has been brought out at **Annexure – I.** Further, the offer size of such voluntary offers shall be at least such number of shares as would entitle the holder thereof to exercise an additional ten per cent of the voting rights in the target company, and shall be within the maximum permissible non- public shareholding applicable to such target company.

3.2. In this regard, representations have been received from several market participants, law firms etc. that given the market scenario, it would be beneficial to the minority shareholders of listed companies if the promoters were to provide an exit offer to them. It has been suggested that this requirement should be dispensed with, for a suitable period of time to be decided by SEBI, to allow more liquidity to minority shareholders.

Analysis

3.3. Considering the present market conditions due to COVID pandemic, we may consider allowing voluntary open offer, even if there has been creeping acquisition/ inter-se transfer by promoters in the last 52 weeks.

3.4. The voluntary open offer would provide exit to public shareholders at the price determined in terms of Takeover Regulations. The same would therefore be in the interest of investors. This may also give a positive buoyancy to the scrip apart from an opportunity to existing promoters to consolidate their holdings.

Proposal

3.5. In view of the above, it is proposed that the proviso to regulation 6(1) of the Takeover Regulations may be relaxed till December 31, 2020.

3.6. The draft amendments in the Takeover Regulations have been brought out at **Annexure – II.**

Proposals

3.7. The Board is requested to consider and approve the above proposals and the draft amendments in the Takeover Regulations and authorize the Chairman to take consequential and incidental steps to give effect to the decisions of the Board.

A. Regulation 3(2) of Takeover Regulations

3 (2) 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, 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 acquire or 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 above the maximum permissible non-public shareholding.

Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to the sub-regulation (2) of regulation 3.

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 or where the target company has made an issue of new shares in any given financial year, the difference between the pre- allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition .

B. Regulation 6(1) of Takeover Regulations

6. (1) An acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise twenty-five per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations, subject to their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding:

Provided that where an acquirer or any person acting in concert with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation:

Provided further that during the offer period such acquirer shall not be entitled to acquire any shares otherwise than under the open offer.

**THE GAZETTE OF INDIA
EXTRAORDINARY
PART – III – SECTION 4
PUBLISHED BY AUTHORITY
SECURITIES AND EXCHANGE BOARD OF INDIA
NOTIFICATION**

Mumbai, the....., 2020

**SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION
OF SHARES AND TAKEOVERS) (SECOND AMENDMENT) REGULATIONS, 2020**

No..... — In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following Regulations to further amend the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, namely:-

1. These regulations may be called the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2020.
2. They shall come into force on the date of their publication in the Official Gazette.
3. In the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011,-
 - i. In regulation 3, in sub-regulation (2), the following new proviso shall be inserted before the existing provisos, namely –

“Provided that the acquisition beyond five per cent but upto ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a

promoter pursuant to preferential issue of equity shares by the target company.”

- II. In regulation 6, in sub-regulation (1), the following shall be inserted after the first proviso, namely,-

“The relaxation from the first proviso is granted till December 31, 2020.”

AJAY TYAGI
CHAIRMAN
SECURITIES AND EXCHANGE BOARD OF INDIA

Footnotes:

1. The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 were published in the Gazette of India on 23rd September, 2011 vide No. LAD-NRO/GN/2011 12/24/30181.
2. The Principal Regulations were subsequently amended on:
 - a. March 26, 2013 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2013 vide No. LAD-NRO/GN/2012 13/36/7368.
 - b. October 8, 2013 by the SEBI (Listing of Specified Securities on Institutional Trading Platform) Regulations, 2013 vide No. LAD-NRO/GN/2013-14/28/6720.
 - c. May 23, 2014 by the SEBI (Payment of Fees) (Amendment) Regulations, 2014 vide Notification No. LAD-NRO/GN/2014-15/03/1089.

- d. March 24, 2015 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2015 vide No. LAD-NRO/GN/2014-15/28/542.
- e. May 5, 2015 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2015 vide No. SEBI/LAD-NRO/OIAE/GN/2015-16/004.
- f. August 14, 2015 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2015 vide No. SEBI/LAD NRO/GN/2015-16/009.
- g. December 22, 2015 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Fourth Amendment) Regulations, 2015 vide No. SEBI/LAD-NRO/GN/2015-16/026.
- h. February 17, 2016 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2016 vide No. SEBI/LAD-NRO/GN/2015-16/035.
- i. May 25, 2016 by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2016 vide No. SEBI/ LAD-NRO/GN/2016-17/002.
- j. March 6, 2017 by SEBI (Payment of Fees and Mode of Payment) (Amendment) Regulations, 2017 vide No. SEBI/LAD/NRO/GN/2016-17/037 read with notification dated March 29, 2017 vide No. SEBI/LAD/NRO/GN/2016-17/38.
- k. August 14, 2017 by SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2017 No. SEBI/LAD-NRO/GN/2017-18/015.

- i. June 01, 2018 by SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2018 No. SEBI/LAD-NRO/GN/2018/20.
- m. September 11, 2018 by SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2018 No. SEBI/LAD-NRO/GN/2018/33.
- n. December 31, 2018 by SEBI (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2018 No. SEBI/LAD-NRO /GN/ 2018/55.
- o. March 29, 2019 by SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2019 No. SEBI/LAD-NRO /GN/ 2019/06.
- p. July 29, 2019 by SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2019 No. SEBI/LAD-NRO /GN/ 2019/27.

(This has been excised for reason of confidentiality)