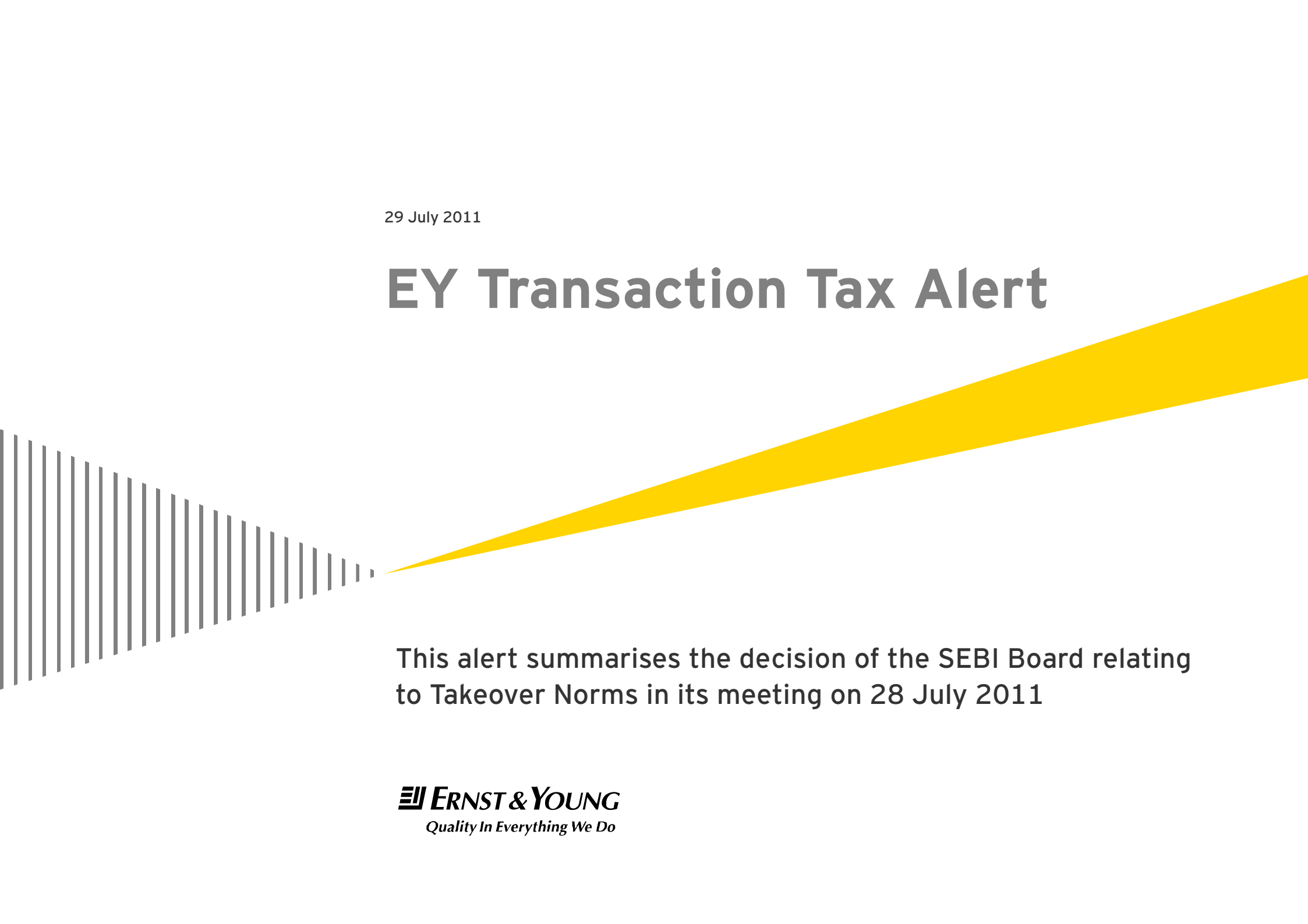


29 July 2011

EY Transaction Tax Alert



This alert summarises the decision of the SEBI Board relating to Takeover Norms in its meeting on 28 July 2011

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Executive Summary

This alert summarizes the key decisions taken by the SEBI Board in its meeting held on 28 July 2011 on Takeover norms pursuant to the recommendations given by the Takeover Regulatory Advisory Committee.

Background

Around same time last year the Takeover Regulatory Advisory Committee ('the Committee'), headed by Mr C Achuthan, had introduced the new draft of the Takeover Regulations ('TRAC'), proposing to replace the extant Substantial Acquisition of Shares and Takeovers, Regulations 1997 ('TOC').

The said draft was pending with SEBI Board for approval since then, which the SEBI Board discussed in its meeting on 28 July 2011. The SEBI Board has approved most of the recommendations of the Committee proposed in the TRAC ('NEW TOC'). Given below are the key issues decided by the SEBI Board, issued vide press release No 119/2011 dated 28 July 2011. However, the fine print of the NEW TOC is awaited.

Major Recommendations

1. Initial threshold for trigger of open offer

- ▶ **TOC:** Presently, threshold for trigger of a mandatory open offer is kept at 15% of the voting capital of the target company.
- ▶ **TRAC:** Proposal to increase the threshold for trigger of a mandatory open offer to 25% of the voting capital of the target company.
- ▶ **NEW TOC:** Recommendation of the TRAC has been accepted.

2. Payment of non-compete fees

- ▶ **TOC:** Presently, payment of non-compete fees to the extent of 25% of open offer price is not added to the open offer price.
- ▶ **TRAC:** The consideration paid for the shares in any form to the selling shareholders and his affiliates, concurrent with the purchase of shares, whether termed as 'control premium' or 'non-compete fees' or otherwise must be added to the negotiated price per share for the purpose of determining open offer pricing.
- ▶ **NEW TOC:** Recommendation of TRAC has been accepted. No separate provision for non-compete fees and all the shareholders now shall be given exit at the same price.

3. Offer size

- ▶ **TOC:** Minimum offer size is 20% of the total issued capital.
- ▶ **TRAC:** The open offer size has been proposed to be raised from present minimum 20% to 100%.
- ▶ **NEW TOC:** The minimum offer size has been increased from the existing 20% of the total issued capital to 26% of the total issued capital.

4. Control

- ▶ **TOC:** Control has been defined to include right to appoint majority of the directors or control the management or policy decisions.
- ▶ **TRAC:** Control has been defined to include 'ability' in addition to 'right' to appoint majority of the directors or to control the management or policy decisions.
- ▶ **NEW TOC:** The definition in the extant TOC has been retained and the recommendation of TRAC has not been accepted.

5. Voluntary open offer

- ▶ **TOC: Under the existing provisions:**
 - ▶ Acquirer can make a voluntary open offer for minimum 20% irrespective of his shareholding before such an offer.

- ▶ Voluntary consolidation of holdings through open offer for less than 20% (upto listing applicable limit) permissible.
- ▶ **TRAC:** It was proposed that an Acquirer holding shares entitling them to exercise 25% or more voting rights in the Target Company may voluntarily make an open offer to consolidate their shareholding with a minimum offer size of 10% of voting rights subject to the total shareholding post open offer not exceeding the maximum permissible non-public shareholding.
- ▶ **NEW TOC:** Voluntary offers have been introduced subject to certain conditions. **These conditions would be known once the NEW TOC is notified**

6. Recommendation of Board of Directors on the offer

- ▶ **TOC:** Optional for the board of directors to give their unbiased comments and recommendations on the offer(s) to the shareholders.
- ▶ **TRAC:** The independent directors on the board of directors of the Target Company ought to make a reasoned recommendation on the open offer.
- ▶ **NEW TOC:** Mandatory for the board of directors to give their recommendations to the shareholders on the open offer.

7. Competing offers

- ▶ **TOC:** Competitive offer can be made within 21 days of public announcement. There is currently no provision for acquisition of shares held by one bidder to another bidder.
- ▶ **TRAC:** A competing Acquirer can acquire the shares tendered in favour of the other competing Acquirer within 21 business days from expiry of the offer period at the same price that was offered by him to the public without attracting an obligation to make a public announcement.
- ▶ **NEW TOC:** The successful bidder can acquire shares of other bidder(s) after the offer period without attracting open offer obligations. The press release refers to the term 'successful bidder' which has neither been defined nor referred in TRAC.

8. Delisting pursuant to open offer

- ▶ **TOC:** The minimum public shareholding is required to be maintained post-offer, and there is no provision for a single shot delisting of Target Company, pursuant to the statutory open offer. Any delisting has to be separately undertaken in compliance with Delisting Regulations, which have been notified by SEBI.
- ▶ **TRAC:** In the event the holding of the Acquirer, along with persons acting in concert pursuant to completion of the open offer would entitle them to exercise voting rights in

the Target Company in excess of the delisting threshold, the Target Company shall stand delisted, provided the delisting intentions are specified upfront in the detailed public statement

- ▶ Otherwise, the Acquirer would be required to:
 - ▶ Bring his shareholding down to ensure Compliance by the Target Company with the listing agreement; or
 - ▶ Proportionately reduce both his acquisitions under the agreement that triggered the open offer and acquisitions under the open offer.
- ▶ **NEW TOC:** Since the minimum offer size has been reduced from 100% to 26%, the recommendations of TRAC on delisting pursuant to an open offer have not been accepted as delisting is not likely to be generally triggered by virtue of this threshold limit.

Our Comments

- ▶ **NEW TOC** seems to be a good calibrated approach between the three constituents of any takeover viz Acquirer, Target Company and Minority Shareholders.
 - ▶ In the context of Acquirer - The raising of minimum offer limit from 20% to 26% would achieve in not making an

acquisition expensive especially with funding constraints within India.

- ▶ In the context of Target Company - increasing the limit from 15% to 25% which could assist the target company in raising capital finance in a more robust manner
- ▶ In the context of Minority Shareholders: Removal of the non compete fees and assuring uniform pricing for all the shareholders
- ▶ As we all await for the fine print of the new Takeover Regulations, the changes proposed by SEBI signals a new step in the arena of Mergers & Acquisitions.

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