

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

 **ERNST & YOUNG**
Quality In Everything We Do

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.

Our offices

Ahmedabad

2nd Floor, Shivalik Ishaan
Near CN Vidhyalaya,
Ambawadi,
Ahmedabad - 380 015
Tel: +91 79 6608 3800
Fax: +91 79 6608 3900

Bengaluru

"UB City", Canberra Block
12th & 13th floor
No.24, Vittal Mallya Road
Bengaluru - 560 001
Tel: +91 80 4027 5000,
+91 80 6727 5000
Fax: +91 80 2210 6000
(12th Floor)
+91 80 2224 0695
(13th Floor)

Chennai

TPL House, 2nd floor
No 3, Cenotaph Road
Teynampet
Chennai - 600 018
Tel: +91 44 6632 8400
Fax: +91 44 2431 1450

Gurgaon

Golf View Corporate Tower - B
Near DLF Golf Course
Sector 42
Gurgaon - 122002
Tel: +91 124 464 4000
Fax: +91 124 464 4050

Hyderabad

205, 2nd floor
Ashoka Bhoopal Chambers
Sardar Patel Road
Secunderabad - 500 003
Tel: +91 40 6627 4000
Fax: +91 40 2789 8851

The Oval Office
18, iLabs Centre
Madhapur
Hyderabad - 500081
Tel: +91 40 6736 2000
Fax: +91 40 6736 2200

Kolkata

22, Camac Street
Block 'C', 3rd floor
Kolkata - 700 016
Tel: +91 33 6615 3400
Fax: +91 33 2281 7750

Kochi

9th Floor, Abad Nucleus
NH-49, Maradu PO
Kochi -682304
Tel: +91 484 3044000
Fax: +91 484 2705393

Mumbai

6th floor
Express Towers
Nariman Point
Mumbai - 400 021
Tel: +91 22 6657 9200
Fax: +91 22 22876401

14th Floor, The Ruby,
29, Senapati Bapat Marg
Dadar (West),
Mumbai - 400 028
Tel: +91 22 6192 0000
Fax: +91 22 6192 1000

5th floor, Block B-2,
Nirlon Knowledge Park,
Off Western Express Highway,
Goregaon (E)
Mumbai 400 063.
Tel: +91 22 6749 8000
Fax: +91 22 6749 8200

New Delhi

Golf View Corporate Tower B
Near DLF Golf Course Sector 42
Gurgaon - 122002
Tel: +91 124 464 4000
Fax: +91 124 464 4050

6th floor, HT House
18-20 Kasturba Gandhi Marg
New Delhi - 110 001
Tel: +91 11 4363 3000
Fax: +91 11 4363 3200

4th & 5th Floor, Plot No 2B,
Tower 2,
Sector 126, NOIDA 201 304
Gautam Budh Nagar, U.P. India
Tel: +91 120 671 7000
Fax: +91 120 671 7171

Pune

C-401, 4th floor
Panchshil Tech Park
Yerwada (Near Don Bosco
School)
Pune - 411 006
Tel: +91 20 6603 6000
Fax: +91 20 6601 5900

Ernst & Young Pvt. Ltd.

Assurance | Tax | Transactions | Advisory

About Ernst & Young

Ernst & Young is a global leader in assurance, tax, transaction and advisory services. Worldwide, our 141,000 people are united by our shared values and an unwavering commitment to quality. We make a difference by helping our people, our clients and our wider communities achieve their potential.

For more information, please visit

www.ey.com/india

Ernst & Young refers to the global organization of member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Ernst & Young Private Limited is one of the Indian client serving member firms of Ernst & Young Global Limited.

Ernst & Young Pvt. Ltd is a company registered under the Companies Act, 1956 having its registered office at 22, Camac Street, Block C, 3rd Floor, Kolkata- 700016

© 2011 Ernst & Young Pvt. Ltd.
All Rights Reserved.

Information in this publication is intended to provide only a general outline of the subjects covered. It should neither be regarded as comprehensive nor sufficient for making decisions, nor should it be used in place of professional advice. Ernst & Young Pvt. Ltd. accepts no responsibility for any loss arising from any action taken or not taken by anyone using this material.