Bombay Chamber of Commerce & Industry

PRESIDENT
BHARAT DOSHI
Chairman
Mahindra & Mahindra Financial Services Ltd.

BY EMAIL/COURIER

October 30, 2009

Ms. Neelam Bhardwaj
General Manager
Corporate Finance Department
The Securities and Exchange Board of India
Plot No.C4-A,'G' Block,Bandra Kurla Complex,
Bandra(East)
Mumbai 400051

Dear Ms. Bhardwaj,

Subject: Inputs/Suggestions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Code")

We write to you with reference to your Circular dated September 17, 2009 wherein you had invited suggestions from the members of the public for amendments to the Takeover Code.

At the outset, we would like to state that SEBI's initiative in constituting the Takeover Regulations Advisory Committee **("TRAC")** to review the Takeover Code and suggest suitable recommendations for amendments to the Takeover Code is indeed commendable. We also appreciate the fact that before amending such an important legislation SEBI has invited for suggestions from the public.

Considering the practical difficulties faced by the industry under the present Takeover Code, we take this opportunity to communicate to you our inputs/suggestions in the format provided by you. We request you to kindly consider our inputs/suggestions favourably before finalizing the amendments to the Takeover Code.

Thanking you,

Yours sincerely,

Bharat Doshi

Encl : As above.

BOMBAY CHAMBER
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Memorandum on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Code")

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Memorandum on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Code")

Our Inputs/Suggestions:

Sr. No	Issue	Suggestion	Rationale
1	**Definition of "Associate"** (Note to Regulation 2(1)(e))	• We propose that definition of "Associate" be restricted to a) Spouse and children – son(s) and unmarried daughter(s) – of a person; and b) Family Trusts and Members of Hindu undivided families • The list of relatives indicated in Schedule IA of the Companies Act should not be included within the definition of associate.	As per the current definition, the term "Associate" means – a) Any relative of the person within the meaning of Section 6 of the Companies Act, 1956; and b) Family trusts and members of Hindu undivided families ("HUF"). As per Section 6 of the Companies Act, 1956, a person shall be deemed to be a relative of another if: a) they are Members of Hindu Undivided Families; b) they are husband and wife; c) the one is related to the other in the manner indicated in Schedule IA. Schedule IA gives a very wide list of around 22 relatives. Considering the current social scenario, it is practically impossible for any person to know – and control – the shareholding of his/her relatives enumerated in Schedule IA which was envisaged when most of the Indian families were based on joint family system. This, however, has changed over the years, and therefore, the wide list in Schedule IA is no more relevant to the objectives of the definition in the Takeover Regulations. Thus, we suggest that such a list should not be included within the definition of associate and be only restricted to those as suggested in column 2 herein.

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2	**Concept of "Promoter"** [Explanation I to Regulation (2)(1)(h)]	We propose that – 1) The limit of 10 % provided in Explanation I (a) (ii) of the Takeover Code be revised to 20%. 2) The limit of 20% provided in Explanation I (a) (iii) of the Takeover Code be revised to over 25%.	The current definition of "promoter" provided in the Takeover Regulations includes any person belonging to the promoter group. If the promoter is a body corporate, the promoter group, inter alia, includes : 1) any company in which the promoter holds 10% or more of the equity capital or which holds 10% or more of the equity capital of the promoter 2) any company in which a group of individuals or companies or combinations thereof who holds 20% or more of the equity capital in that company also holds 20 % or more of the equity capital of the target company. In our view, the above limits of 10% and 20% are very low and need to be revised to 20% and 25% respectively since with 20% shareholding a person is deemed to have significant influence as per AS 18. Similarly, with over 25% a person attains a degree of control, as under the Companies Act, 1956 with such shareholding a person can block a special resolution.
3	**Exemptions** [Regulation 3]	Regulation 3 of the Takeover Code lays down a list of transactions to which Regulations 10, 11 and 12 do not apply. We propose that the following two items also be included in the list of exemptions after providing for adequate safeguards: 1) Preferential allotment to the promoters pursuant to Section 81 (1A) of the Companies Act, 1956. 2) Buy back of shares pursuant to Section 77A of the Companies Act, 1956.	<u>Preferential allotment to promoters</u> - Prior to 9th September 2002, the preferential allotment of shares was included in the list of exemptions under Regulation 3. The Bhagwati Committee, in its 2002 report had recommended that the exemption for preferential allotment needs to be continued. This was subject to the condition that any resolution for preferential allotment should be made by postal ballot to enable greater shareholder participation. This recommendation was not taken into consideration and instead the exemption on preferential allotment was deleted.

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		The safeguards for the above exemptions may be provided in the form of the following anti-abuse conditions: Anti-abuse conditions for Preferential Allotment – The following safeguards may be applied while permitting preferential allotment to the promoters as an automatic exemption: 1) The preferential allotment should not result in a change in control over the target company; 2) The promoters should comply with the provisions for preferential allotment set out in SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009; 3) Necessary disclosures about price, etc should be made in the explanatory statement forming part of the notice to the EGM and such notice may also be required to include an explanation as to why a preferential allotment to promoters was adopted over a rights issue/public issue; 4) The special resolution under Section 81(1A) of the Companies Act approving the preferential allotment to the promoters should have been passed through postal ballot in accordance with the Postal Ballot Rules, 2001	We are of the view that such exemption should continue for all the preferential allotments made to the promoters since this will not lead to any change in control. The preferential allotment is always approved by the shareholders and thus there is no real benefit from the view point of Takeover Code in putting the same under the non-exempt category. At the same time, it cannot be disputed that there is a need to apply the provisions of the Takeover Code in case any preferential allotment is made to a third party, permitting such third party to acquire shares/voting rights beyond the thresholds prescribed under the Takeover Code. Thus, we propose to continue to apply the provisions of the Takeover Code to such allotments but grant exemptions to preferential allotments made to the promoters subject to certain safeguards. Buy-back- A majority of the exemptions granted by SEBI in the exercise of its discretionary powers under Regulation 4 of the Takeover Code have been for acquisitions pursuant to buy- back of shares of the target company. Buy-back is a process which is undertaken by the Company to restructure their capital as per their business requirements and also to improve the return on equity. The process of buy back enables the company to return the surplus cash to the owners i.e shareholders. Increase in shares/voting power after the buy back is just a consequence of buy back, and buy back is not done for increasing the shares/voting power. Further, a buy back is undertaken with the approval of the shareholders [except where such buyback is less than 10% of the total paid up equity capital and free reserves of the company].

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		Anti Abuse Conditions for buyback - The following safeguard may be applied while permitting buy back as an automatic exemption: 1) The acquirer should not transact in the shares of the target company till the closure of the buy back; 2) The number of shares held by the acquirer in the target company should not change after the proposed buy back and any change in the percentage of shareholding of the acquirer should be incidental to said buy-back; 3) The buy-back should not result in a change in control of the target company; 4) After the successful completion of the buy-back, the public shareholding in the target company should be at a level more than what is required for meeting the continuous listing requirements of minimum public shareholding as per the listing agreements; 5) The shares should be bought back at a price which is not less than a prescribed minimum price; and 6) The buy-back should be made in accordance with the provisions of the Companies Act and the SEBI Buyback Regulations.	

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4	**Exemption for Inter se Transfer** [Regulation 3(1)(e)]	We propose that in order to avail of the exemption for inter se transfers in case of companies which have been in existence for less than 3 years, a clarification should be issued that the transferor and transferee should have been holding shares in the target company since the date of its incorporation.	Regulation 3(1)(e) of the Takeover Code inter alia provides that in order to avail of the exemption for inter se transfers, it is necessary for the transferor as well as the transferee to have been holding shares in the target for a minimum period of 3 years prior to such acquisition. Since, in case of companies which have not been in existence for minimum 3 years, compliance with the minimum 3 years holding period requirement would not be possible, it is recommended that in such cases it should be clarified that to avail the exemption of inter se transfers, the transferor and transferee should have been holding shares in the target company since the date of its incorporation.
5	**Definition of "group" for inter se transfer of shares** [Regulation 3(1)(e)(i)]	Since the MRTP Act, 1969 has now been repealed, we propose that the definition of the term 'group' for the purposes of inter se transfer of shares should make a reference to the definition of 'group' under the Competition Act, 2002. Further, we also propose that the requirement of disclosing the members of the group in the Annual Report should be done away with.	Regulation 3(1)(e)(i) of the Takeover Code lays down two conditions for a person to be included within the purview of the term "group". They are:- 1) Group as defined in the MRTP Act, 1969; and 2) the persons constituting such group should have been shown as group in the last published Annual Report of the Company. As regards the reference to MRTP Act, 1969, the same is no more relevant as the MRTP Act itself has been repealed and replaced by the Competition Act, 2002. Therefore, the reference should be made to the definition of 'group' under Section 5 of the Competition Act. As regards our second suggestion, we are of the view that such a condition may no longer be required as the term 'group' under the Competition Act, 2002 is very clearly defined, unlike the definition in the MRTP Act, 1969. Thus, the members of the group can be objectively identified.

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6	**Exemption to banks and public financial institutions** [Regulation 3(1)(f)(iv)]	Along with banks and public financial institutions, the exemption under this clause should also be extended to financial institutions as defined under Reserve Bank of India Act, 1934 ("RBI Act) (which includes Non Banking Financial Companies or NBFCs). The term "financial institution" should be defined as per the RBI Act.	Regulation 3(1)(iv) exempts "*acquisition of shares in the ordinary course of business by banks and public financial institutions as pledgees*", from the applicability of Regulations 10, 11 and 12 of the Takeover Code. The Justice P.N. Bhagwati Committee in its report dated January 18, 1997 on Takeovers had made the following recommendation: *"the requirement to make a public offer be exempted for …………., acquisition of shares by financial institutions in the ordinary course of their business in view of the special role in the Indian context or as pledgees".* The exemption under Regulation 3(1)(f)(iv) appears to have originated from the above recommendation of the Bhagwati Committee. The rationale for this exemption granted to banks and public financial institutions (PFIs) would be that lending of monies against pledge of shares of listed companies is a normal business activity of banks and PFIs. Therefore, in an enforcement event, if such banks or PFIs invoke the pledge and acquire shares of a listed company with a view to recover the amount lent by them, such acquisition does not fall under the acquisitions sought to be regulated by the Takeover Code since, in case of such acquisitions, there is no intention on the part of the banks/PFIs to create a strategic interest in the listed company or to control the listed company. While the above exemption is available in respect of acquisitions by banks and PFIs as pledgees, the same has not been extended to financial institutions, which term is defined in the RBI Act and includes Non-Banking Financial

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			Companies ("NBFCs") which too, like banks and PFIs, are engaged in the business of giving loans and advances and securing the same by creating a pledge over shares of listed companies. The above recommendation of the Bhagwati Committee, in fact, laid down that the exemption should be granted to acquisitions by financial institutions as pledgees. That the exemption under Regulation 3(1)(f)(iv) should have been applicable to financial institutions also and not just banks and PFIs is further bolstered by the fact that banks and financial institutions, as pledgees, are exempt from making disclosures under Regulation 7 (1A). This exemption from the disclosure requirement also seems to be based on a recommendation of the re-convened Bhagwati Committee in its report of 2002 to the effect that whenever shares were acquired by way of pledge by persons (other than banks and financial institutions) disclosures should be made by the pledgees to the company and the stock exchanges so as to keep the public adequately informed. In view of the above, we recommend that the exemption under Regulation 3(1)(f)(iv) of the SEBI Takeover Regulations should be extended to financial institutions also. **At the minimum, this exemption should be made available to NBFCs registered with the Reserve Bank of India.** Furthermore, the term "financial institution" which is currently not defined in the SEBI Takeover Regulations and is also not defined in the SEBI Act, 1992, the Securities Contracts (Regulation) Act, 1956 or the Companies Act, 1956, should be defined by reference to the RBI Act, 1934.

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7	**Prior notice for inter se transfer of shares** [Regulation 3(3)]	We propose that the requirement of prior notice be done away with where the inter se transfer is done within a range of 25% of the closing price.	Regulation 3(3) of the Takeover Code requires an acquirer to give 4 days prior notice to the stock exchanges giving details of the proposed transaction prior to undertaking a transaction. If such a transaction is intended to be carried out in the block deal window on the floor of the exchange, it will have to be in the range of +1%/-1% of the closing price of the previous day. However, there may be fluctuations in the price of the shares of the target company in the intervening period between i.e. the date of notice and the day when the transaction is proposed to be carried on account of such notice or otherwise. As a result, the acquirer may not be able to carry out the transaction in the manner stipulated in the notice. In such cases, it will be necessary to withdraw such transaction, which is not the intent of the Takeover Code. Thus, such a pre-condition needs to be quashed for cases where the transfer is done within 25% of the closing price.
8	**Power to exempt acquisitions** [Regulation 4**]**	As per Regulation 4 read with Regulation 3(1)(l) of the Takeover Code, SEBI and the Takeover Panel are empowered to exempt other acquisitions on a case to case basis as they deem fit. We propose that SEBI and the Takeover Panel should also be empowered to relax conditions, strict compliance of which, permits the transaction to be under the automatic exemption route under Regulation 3 of the Takeover Code if they believe that the said transaction is not detrimental to the interests of the minority shareholders or against the spirit of the Takeover Code.	Regulation 3 of the Takeover Code lays down certain conditions which need to be complied with in order to claim exemption from open offer requirements. These conditions no doubt ensure that the interests of the shareholders are adequately preserved, but we are of the view that adequate exemptions should be granted from compliance of such conditions where the transaction proposed to be entered is a genuine commercial transaction and is not prejudicial to the spirit of the Regulations. Thus, we suggest that SEBI and the Takeover Panel be empowered to relax compliance of such conditions, where they are satisfied that the transaction is genuine and is not detrimental to the interests of the minority shareholders or against the spirit of the Takeover Code.

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9	**Thresholds for disclosures** [Regulation 7]	Regulation 7 of the Takeover Code necessitates disclosures to be made at certain prescribed percentages of acquisition (i.e 5%, 10%, 14%, 54% and 74%). If our above-mentioned proposal to increase the threshold limit under Regulation 10 is accepted by TRAC, we suggest that consequential amendments be carried out in Regulation 7 as to make disclosures mandatory at 5%, 10%, 14%, **19%, 24%,** 54% and 74%.	Disclosures under Regulation 7 make the promoters aware about the acquisitions made by third parties. Pursuant to our proposal, if TRAC increases the threshold limit, then it becomes a necessary corollary that suitable amendments are also made in Regulation 7 so as to mandate additional disclosures with a gap of 5% at each level up to the revised threshold limit to keep the promoters aware of these purchases. Thus, in addition to the present disclosures, disclosure upon acquisition of **19% and 24%** should also be mandated.
10	**Disclosures** [Regulation 7(1A)]	As per Regulation 7(1A), an acquirer who has acquired shares or voting rights under Regulation 11(1) i.e who holds shares/voting rights more than 15% but less than 55, and sells or purchases 2% or more shares or voting rights in the target company, is required to make disclosures of such purchase or sale to the target company and the stock exchange. However, there is no clarity as to from which date the aggregate sales/ purchases are to be considered. We suggest that SEBI clarifies this position in the revised Regulations. We suggest that the 2% limit may be calculated <u>from the date of the last disclosure</u> made under Regulation 8 of the Takeover Code. We also suggest that SEBI may consider re-introducing an Amnesty Scheme, as was done some years ago, to provide an opportunity to the investors and listed companies to make	Regulation 13 of the Insider Trading Regulations, 1992 requires any person who holds more than 5% shares or voting rights in the company to make such disclosures to the company within 2 days of the receipt of intimation of allotment of shares or acquisition of shares or voting rights. This is the initial disclosure which is required to be made and thereafter continual disclosures are required when there is change in the shareholding exceeding 2% of the total shareholding or voting rights in the company from the last disclosure made. Thus, there are clear provisions as to when the continual disclosures are to be made. Since the Takeover Code does not specify the date from which the 2% limit in Regulation 7(1A) is to be calculated, clarity in this regard is necessary. In the absence of such clarity, it leaves the scope for different interpretations to the acquirer. One view is that all purchases/sales after April 1 of the relevant year should be considered since Regulation 7(1A) refers to Regulation 11(1) which permits acquisition of 5% in a financial year.

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		disclosures under Regulations 7 & 8 of the Takeover Code, which disclosures may have inadvertently not been made by them due to which they could not take benefit of the earlier scheme.	Other view is that all transactions since last disclosure should be considered. We suggest that the 2% limit may be calculated from the date of the last disclosure made under Regulation 8 of the Takeover Code.
11	**Threshold for open offer** [Regulation 10]	We propose that the current threshold limit triggering the mandatory public announcement under Regulation 10 be increased from 15% to **25% or more**.	Regulation 10 of the Takeover Code currently requires an acquirer to make a mandatory open offer if he acquires or agrees to acquire shares which equal to 15% or more of the shares or voting rights of any company. In our view, this threshold limit should be revised. This threshold limit is very low compared to other countries. For example, in Hong Kong it is 35%, in UK and many other European countries it is 30%, and in Malaysia it is 33%. When the Takeover Code was enacted in 1997, the initial threshold limit was set at 10%. This was subsequently raised to presently existing 15% in 1998. However, over the years, the economic scenario in India has undergone a sea change. Great investor participation – both retail and institutional – has led to greater shareholder participation. The role of financial or private equity investors has also increased manifold, who are investing in the shares of listed companies without any intention to control or otherwise takeover the company. The 15% trigger has, therefore, lost any real basis in today's context. Even under the Companies Act, 1956, a person has the ability to block a special resolution and thereby block major decisions of the company, only if he holds more than 25% of the shares in the company.

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			Thus, there appears to be no objective rationale why the threshold limit should be as low as 15%. If the objective of the Takeover Code is to safeguard shareholders' interests in the event of *'substantial acquisition'* of shares, the level of such '*substantial acquisition*' must be linked to the consequence that such an acquisition would have on the target company, its management and its minority shareholders. The acquisition of **more than 25%** of shares or voting rights may be considered as '*substantial acquisition*' since it results in the acquisition of a certain degree of control over the target company.
12	**Creeping Acquisition** [Regulation 11]	Regulation 11(1) permits creeping acquisition of up to 5% of the voting rights in any financial year without making a public announcement. However, there is no clarity on how this limit of 5 % is to be calculated. We propose that the Takeover Code should clearly state that for the purpose of calculation of 5% limit, the difference is to be calculated on percentage terms i.e original holding to original share capital as on April 1 and the revised holding to revised share capital at each stage of acquisition till March 31. If such difference is less than 5%, then it would be within the scope of limits prescribed for creeping acquisition.	On April 2, 2009, SEBI issued an interpretative letter under SEBI (Informal Guidance) Scheme, 2003 to one company wherein SEBI clarified the principle for calculation of the 5% limit for creeping acquisition under Regulation 11(1). However, since it is an issue of common concern, it is desirable that SEBI sets out the principle in the Takeover Code itself. This will obviate the possibility of ambiguities in the future.

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13	**Proviso to Regulation 11(2) and 11(2A)**	The provisos to Regulation 11(2) and 11(2A) provide that where the target company has obtained listing by making an offer of at least 10% of the issue size to the public, the Regulations would apply as if the words and figures **'seventy five percent (75%)'** were substituted with words and figures **'ninety percent (90%)'.** While the proviso substitutes reference to 75% with 90% for the purposes of Reg. 11(2) and (2A), it should also correspondingly increase 55% appearing in those sub-regulations to, 70% permitting consolidation in such companies upto 70% without complying with open offer requirements.	Rule 19(2)(b) of the Securities Contracts (Regulation) Rules, 1957 lays down certain conditions with regard to minimum securities, offer size etc, which if complied with, permit a company to be listed with at least 10% public shareholding. Thus, the minimum public shareholding in case of such companies is 10% as against 25% of the companies, who do not comply with Rule 19(2)(b) conditions. Where a company has a minimum public shareholding of 10%, the figure 75% is substituted with 90% for the purposes of Regulation 11(1) and 11(2A). We suggest that along with substitution of 75%, the words and figures of 55% should also be changed to 70%. In the absence of this change, the companies having a minimum public shareholding of 10% would be denied the benefit of consolidation of 5% every year up to 70% and acquisition of 5% between 70% to 90%.
14	**Indirect change in control** [Regulation 12]	We propose that the open offer obligations for indirect acquisitions be triggered only when acquisition of the intermediate company results in the acquirer being able to control the shares of the target company. Further, the acquirer should be liable to make an open offer pursuant to indirect acquisition of control only if certain materiality conditions are met, such as: a) the resultant shareholding in the underlying listed company constitutes a substantial part of the assets of the intermediate company; or	In the past, a mathematical test has been applied by the SEBI wherein the indirect shareholding of the acquirer is determined on the basis of a pro rata calculation of the shareholding of the intermediate company in the target company. However, an indirect acquisition should only have occurred where the acquirer acquires control over shares of the target company through the acquisition of overall positive control over the intermediate company. The Bhagwati Committee, while recommending open offer requirement in case of indirect change in control, had suggested that such open offer would be necessary only if the conditions mentioned in Column 2 herein were satisfied. This principle was reiterated by the Supreme Court in its judgment in the

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		b) one of the main purposes of acquiring control of the intermediate company was to secure control of the underlying listed company.	case of *Technip S.A vs SMS Holding (Pvt) Ltd and Ors.* We are of the view that the above principles ought to be incorporated in the revised Code to ensure there is clarity on the issue.
15	**Offer Price** [Regulation 20]	The offer price under the existing Takeover Code is the highest of: 1) Negotiated price; 2) Price paid by the acquirer or persons acting in concert with him during the 26 week period prior to the date of public announcement; or 3) The average of the weekly high and low of the closing price of the shares as quoted on the stock exchange where the shares are most frequently traded during the 26 weeks or 2 weeks preceding the date of public announcement whichever is higher. We propose that the above basis for calculation of offer price be changed to be the highest of – • Negotiated price; • Highest Price paid by the acquirer or persons acting in concert with him during the 26 weeks prior to the date of public announcement; or • **Average of 26 weeks weighted average price**. Additionally, we also propose that there should be a clarification to the effect that 'a week' should be calculated from the day immediately preceding the date of public announcement. For example, If public announcement is made on	Regulation 20 of the Code lays down certain parameters for offer price determination, one of them being - *weekly high and low of the closing price during the 26 weeks or two weeks preceding the date of public announcement, whichever is higher*. In our view, this parameter for calculation of offer price does not reflect the correct price. It may so happen that due to temporary market fluctuations, the share prices may artificially go on increasing. As a result, the two week price may work out to be the highest and the acquirer will be unnecessarily bound to pay a price which is quite higher than the fair market price which he would have envisaged. To avoid a situation where market fluctuations affect the open offer process, we propose that the offer price should be based on, inter alia, the **weighted average price** during preceding 26 weeks and not on the weekly high and low of the closing price. This method of calculation would be more appropriate and objective as: 1) it would avoid the risk caused due to market fluctuations; and 2) the weighted average price would take into account the volume as well as all the prices (opening, high, low, closing) and would reduce the scope of manipulation. 3) 26 weeks period would reflect an adequate and fair description of the

Sr. No	Issue	Suggestion	Rationale
		Thursday, the week should be calculated from Wednesday to preceding Thursday and not preceding Friday to Monday.	fair market price of shares of the target company by adequately capturing market cycles and thereby providing a more realistic price in both rising and falling markets. Further, since the weighted average prices are now easily available, the suggested method to calculate the offer price would not only be convenient but also more appropriate in arriving at a fair price. As regards our other suggestion on calculation of the `week', there appears to be divergence of opinion between BSE and NSE and therefore it needs to be clarified.
16	**Offer price for indirect acquisitions** [Regulation 20(12)]	In cases of indirect acquisitions, SEBI has taken a view that negotiated price paid by the acquirer for the intermediate company (**Acquired Company)** be attributed to the minimum open offer price payable for the target company. We propose that the negotiated price paid by the acquirer for the Acquired Company should be attributed to the minimum open offer price payable for the target company only *where a specific value has been attributed to the shares of target company in the negotiations at the indirect level* or *where the shares of the target company constitute more than 50% of the assets of the intermediate company.* In all other cases, the *"weighted average price mechanism*", as discussed above, should be followed.	In our view, the extant provision for calculating the offer price for indirect acquisitions is too onerous on the acquirer making such indirect acquisitions. In case of global acquisitions, the value paid for the Acquired Company may be significantly higher than the price or value of the Indian target company. There are cases where the acquisition of the Indian target company is an insignificant and merely incidental part of the global transaction. Under the current practice of price attribution, the acquirer will be forced to pay the higher price even if there is no material connection between the valuation of the Acquired Company and that of the Indian target company. Therefore, it would be appropriate that the Takeover Code incorporates certain materiality tests, as suggested in Column 2 herein, and only when those tests are satisfied, the price attribution approach should be adopted. In all other situations, the *weighted average price mechanism*, as discussed above, should be followed.

Sr. No	Issue	Suggestion	Rationale
17	**Payment of Interest** [Regulation 22(12)]	Regulation 22(12) requires payment of interest by the acquirer for failure to complete all procedures relating to the offer within 15 days from the date of closure of the offer. We propose that such payment of interest should not be applicable where the acquirer has not received the requisite statutory approvals, and the board is satisfied that such non-receipt was not due to any willful default or neglect of the acquirer. Thus, interest should be charged only if the delay is caused due to deliberate and intentional omission on the part of the acquirer.	In our view, the provision relating to charging on interest where the acquirer has not received statutory approvals is not justified. There may be instances where the acquirer may fail to get requisite approvals within the stipulated time. Thus, penalizing him under such circumstances would be unfair. To give an example, Sections 5 & 6 of the Competition Act, 2002, which deal with "Regulation of Combinations," lay down a time period of 210 days within which the Competition Commission of India would grant its approval to any proposed combination (acquisition, merger or amalgamation). These sections are not yet notified, but once notified, any acquisition would require an acquirer to get approval of the Competition Commission of India, if his transaction falls within the definition of 'combination' under the Competition Act. In such cases, the provision under the Takeover Code for payment of interest for failure to complete all formalities would be very harsh on the acquirer. Such a provision should be made applicable only when the delay is due to any willful default or neglect on the part of the acquirer.
18	**Recommendations of the Target's Board** [Regulation 23(4)]	Under regulation 23(4) of the Takeover Code, the Board of Directors may, if they so desire, send their unbiased comments/ recommendations on the open offer to the shareholders. We propose that the word 'may' under regulation 23(4) be substituted with **'shall'**, thereby making a mandatory obligation for the Board of the target to make their recommendation.	Regulation 23(4) of the Takeover Code gives an option to the Board of Directors of the target company to send their unbiased comments/ recommendations on the open offer to the shareholders. Since the Board of Directors of any company has a fiduciary responsibility towards the shareholders, we are of the view that such an act must be made mandatory and the Board of Directors of the target company must not be given an option in this regard, particularly as there is no requirement under the existing Companies Act, 1956 to require a shareholders' approval for a takeover.

October 31, 2009