



# Open Offer Exemptions for acquisition of Listed Companies with Stressed Assets - SEBI amends Takeover Code and ICDR Regulations

June 23, 2020

For acquisition of listed companies with stressed assets including exemptions from open offer for such acquisitions, SEBI has issued the much-awaited amendments after issuing the consultation paper titled "Pricing of Preferential Issues and exemption from open offer for acquisitions in Companies having Stressed Assets", dated April 22, 2020 (**Consultation Paper**) ([available here](#)).

On June 22, 2020, SEBI has issued amendments to the (i) Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Code**) and (ii) Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**), to crystallize the understanding proposed under the Consultation Paper.

SEBI has exempted the acquirers from making an open offer for acquisition of listed companies with stressed assets, under a preferential issue, where pricing will be determined for (i) frequently trade shares as per newly inserted Regulation 164A of the ICDR Regulations, and (ii) infrequently traded shares as per already existing Regulation 165 of the ICDR Regulations.

Following are the changes introduced, with effect from June 22, 2020:

Sr. No.	Relevant Provision	Summarized Change
<b>Under Takeover Code (Newly inserted Regulation 10(2B))</b>		
1.	<b>Open Offer Exemptions under Regulation 3(1) and 4</b>	<p><b><u>For Frequently Traded Shares:</u></b></p> <p>Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the ICDR Regulations has been exempted from the obligation to make an open offer under regulation 3(1) and regulation 4 of the Takeover Code.</p> <p><b><u>For Infrequently Traded Shares:</u></b></p> <p>The above exemption from open offer will also apply to the target company with infrequently traded shares (pricing in which case will be as per regulation 165 of the ICDR Regulations) which is compliant with the provisions of sub-regulations (2) to (8) of regulation 164A of the ICDR Regulations.</p>
<b>Under ICDR Regulations (Newly inserted Regulation 164A)</b>		
2.	<b>What are listed companies with stressed assets?</b>	<p>An issuer company has to meet any two of the following conditions:</p> <ul style="list-style-type: none"> <li>▪ the issuer has disclosed all the defaults relating to the payment of interest/repayment of principal amount on loans from banks /financial institutions/ Systemically Important Non-Deposit taking Non-banking financial companies/Deposit taking Non-banking financial companies and /or listed or unlisted debt securities in terms of SEBI Circular dated November 21, 2019 and such payment default is continuing for a period of at least 90 calendar days after the occurrence of such default;</li> <li>▪ there is an Inter-creditor agreement in terms of Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 dated June 07, 2019;</li> <li>▪ the credit rating of the financial instruments (listed or unlisted), credit instruments / borrowings (listed or unlisted) of the listed company has been downgraded to "D".</li> </ul>
3.	<b>What is the pricing for preferential issue?</b>	In case of frequently traded shares, the price of the equity shares to be allotted pursuant to the preferential issue shall not be less than the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on a recognized stock exchange during the two weeks preceding the relevant date.
4.	<b>Lock-in?</b>	3 years from the last date of trading approval.

Sr. No.	Relevant Provision	Summarized Change
5.	Red flags?	<ul style="list-style-type: none"> <li>▪ <b>Promoter/Promoter Group cannot participate:</b> The preference issue shall be made to a person not part of the promoter or promoter group as on the date of the board meeting to consider the preferential issue;</li> <li>▪ The preferential issue shall not be made to the following entities: <ul style="list-style-type: none"> <li>– undischarged insolvent in terms of the Insolvency and Bankruptcy Code, 2016;</li> <li>– “wilful defaulter” as per the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;</li> <li>– a person disqualified to act as a director under the Companies Act, 2013;</li> <li>– a person debarred from trading in securities or accessing the securities market by SEBI. This restriction will not apply to the persons or entities mentioned therein who were debarred in the past by SEBI and the period of debarment is already over as on the date of the board meeting considering the preferential issue.</li> <li>– a person declared as a fugitive economic offender;</li> <li>– a person who has been convicted for any offence punishable with imprisonment - for two years or more under any statute specified under the Twelfth Schedule of the Insolvency and Bankruptcy Code, 2016 or for seven years or more under any law for the time being in force: Provided that such restriction shall not be applicable to a person after the expiry of a period two years from the date of his release from imprisonment.</li> <li>– a person who has executed a guarantee in favor of a lender of the issuer and such guarantee has been invoked by the lender and remains unpaid in full or part.</li> </ul> </li> </ul>
6.	Voting Requirements?	<p><b>Majority of Minority:</b> The votes cast by the shareholders in the “public” category in favor of the proposal shall be more than the number of votes cast against it. The proposed allottee(s) in the preferential issue that already hold specified securities shall not be included in the category of “public” for this purpose. Where the company does not have an identifiable promoter; the resolution shall be deemed to have been passed if the votes cast in favor are not less than 3 times the number of the votes, if any, cast against it.</p>
7.	Restrictions on objects of the issue / use of proceeds?	<p>The proceeds of such preferential issue shall not be used for any repayment of loans taken from promoters/ promoter group/ group companies. The proposed use of proceeds shall be disclosed in the explanatory statement sent for the purpose of the shareholder resolution.</p>
8.	Monitoring of use of proceeds?	<ul style="list-style-type: none"> <li>▪ <b>Appointment of Monitoring Agency:</b> The issuer shall make arrangements for monitoring the use of proceeds of the issue by a public financial institution or by a scheduled commercial bank, which is not a related party to the issuer. <ul style="list-style-type: none"> <li>– The monitoring agency shall submit its report to the issuer in the format specified in terms of Schedule XI (with fields as applicable) on a quarterly basis until at least 95% of the proceeds of the issue have been utilized.</li> <li>– The board of directors and the management of the issuer shall provide their comments on the findings of the monitoring agency as specified in Schedule XI.</li> <li>– The issuer shall, within 45 days from the end of each quarter, publicly disseminate the report of the monitoring agency by uploading the same on its website as well as submit the same to the stock exchange(s) on which the equity shares of the issuer are listed.</li> </ul> </li> <li>▪ <b>Monitoring by Audit Committee:</b> The proceeds of the issue shall also be monitored by the Audit Committee till utilization of the proceeds.</li> </ul>
9.	Certification from Statutory Auditor and Audit Committee?	<p>The statutory auditor and the audit committee are required to certify that all conditions related to pricing, whether or not stressed company, red flags, voting requirements, objects of the issue / use of proceeds, as provided under Regulation 164A(1), (2), (3), (4) and (5) are met at the time of dispatch of notice for general meeting proposed for passing the special resolution and at the time of allotment.</p>