



# An Analysis of Provisions relating to Mode of Payment of Offer Consideration under SEBI Takeover Regulations

– Contributed by CS Arun Gupta, CP Associates, New Delhi

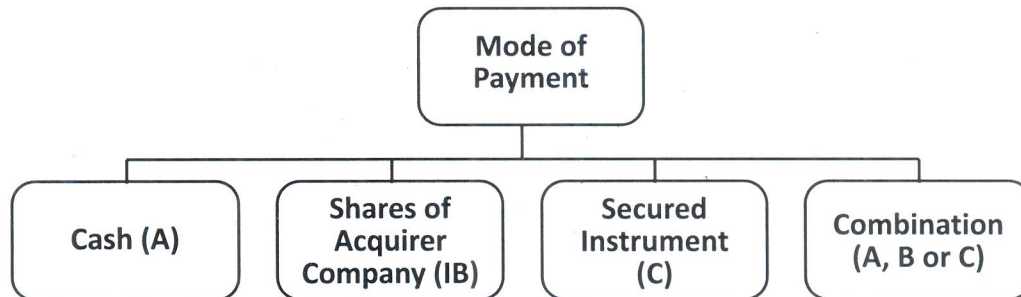
E-mail : arun@indiacp.com

When an acquirer has made the open offer under the SEBI (SAST) Regulations, 1997, the acquirer is required to pay the consideration for the shares tendered in the open offer. For payment of consideration to the shareholders for the shares tendered by them, he has been given an option under the regulations with regard

to the mode of payment of offer consideration. It is noteworthy to mention here is that SEBI (SAST) Regulations, 1997 have separately prescribed the provision relating to the mode of payment of offer consideration and the method of deposit of payment consideration in the escrow account. The method of deposit in escrow

account may be different from the mode of payment of offer consideration to the shareholders. A brief analysis of provisions relating to the mode of payment and Deposit of offer consideration to the shareholders is detailed below :

## I. Mode of Payment :



Regulation 20(2) of the SEBI (SAST) Regulations, 1997 dealt with the mode of payment of offer Consideration and provides that offer price shall be payable -

- (a) in cash;
- (b) by issue, exchange and, or transfer of shares (other than preference shares) of acquirer Company, if the person seeking to acquire the shares is a listed body corporate; or
- (c) by issue, exchange and, or transfer of secured instruments of acquirer company with a minimum "A" grade rating from a credit rating agency registered with the Board;
- (d) a combination of clause (a),(b)or (c).

Thus, in terms of regulation 20(2), the acquirer is free to make the payment to the shareholders of the Target Company in any mode as he desires.

### Points to be taken into consideration :

However, the following points are relevant to determine the mode of payment of consideration to the shareholders for shares tendered by them in the open offer:

1. Where the acquirer has purchased any shares from the existing shareholders of the Target Company during the preceding 12 months under any agreement

### Amount of deposit in Escrow Account

Consideration payable under public offer (Assuming full acceptance)	Amount of %	Example
Upto and including Rs.100 crores	25%	Consideration = Rs.90 Crores Amount to be deposited in escrow : 25% of Rs.90 Crores = Rs.22.50 Crores
Above Rs.100 Crores	25% upto Rs.100 Crores and 10% thereafter	Consideration = Rs.120 Crores Amount to be deposited in escrow account : (25% of Rs.100 Crores) + (10% of Rs.20 Crores) = Rs.25 Crores + Rs.2 Crores = Rs.27 Crores

or pursuant to the acquisition in the open market or in any other manner and has made the payment in cash, then he is required to give an option to the shareholders of Target Company to accept payment either in cash or by exchange of shares or other secured instruments.

2. The mode of payment of offer consideration may also be altered by the acquirer in case of revision in the offer price or offer size provided that the amount to be paid in cash as provided in the public announcement or letter of offer is not reduced.

3. In case the offer price consists of consideration payable in the form of securities issuance of which requires approval of the shareholders, then such approval shall be obtained by the acquirer within seven days from the date of closure of the offer.

Provided that in case the requisite approval is not obtained, then the acquirer shall pay the entire consideration in cash.

4. Where an option has been given by the acquirer to the shareholders of the Target Company to accept payment either in cash or by way of exchange of security, then in that case pricing for the cash offer could be different from that of a share exchange offer or offer for exchange with secured instruments provided that the disclosures in the letter of offer contains suitable justification for such differential

pricing and the pricing is subject to other provisions of this regulation as may be applicable.

5. The determination of price of shares of Acquirer company shall be determine in the same manner as provided under the regulations for the determination of offer price for the shares of Target Company and shall be duly certified by independent Merchant Banker other than the Manager to the offer or an independent chartered accountant of minimum 10 years standing or a Public Financial Institution.

## II. Deposit of Offer Consideration (Escrow Account)

As per Regulation 22 (10) of SEBI (SAST) Regulations, 1997, the acquirer is required to open an escrow account on or before the date of issue of public announcement of offer as provided under regulation 28 and deposit therein a specified minimum amount. The purpose of these provisions is to ensure that the acquirer has sufficient funds to pay the consideration under the offer and he has secured sufficient financial arrangement.

Escrow Account means a bank account which is required to be opened by an acquirer who proposes to make public announcement of offer in pursuance of regulation 10, 11 & 12 of SEBI (SAST) Regulations, 1997. The Regulations embraces detailed provisions regarding the Escrow Account. These provisions are contained in regulation 28 of SEBI (SAST) Regulations, 1997.



**Escrow amount in different cases**

1. In case of Open Offer which is subject to minimum level of acceptance, then the acquirer shall deposit a minimum of 50% consideration payable under the offer in the Escrow Account in cash.
2. As per regulation 20, the consideration for offer can be paid either in cash or in securities. Where the shareholders have been given an option to

accept the consideration in cash or in securities, the price payable in cash can be different from that payable in the form of securities. In case of such differential pricing (in case the consideration is paid in cash and in securities) the acquirer is required to deposit the highest price in the escrow account as arrived under differential pricing.

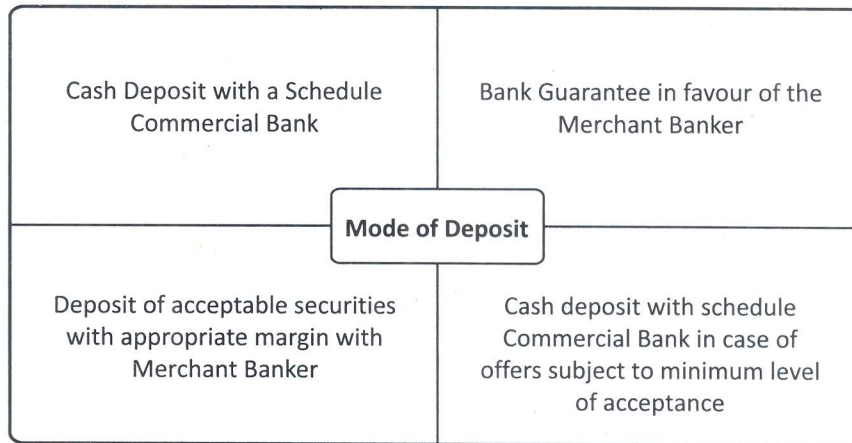
3. In case of upward revision of offer, the acquirer is required to increase the escrow value to equal

to 10% of the consideration payable upon such revision.

4. If the acquirer proposes to appoint himself or any other person on his behalf on the Board of Target Company within 21 days of public announcement, then he can do so provided he has deposited 100% of consideration payable in the Open Offer in Escrow Account.

**Escrow amount in different cases**

The escrow account can consist of the following :



**1. Deposit in the form of Cash Deposited with scheduled commercial bank.**

The acquirer in such a case is required to empower the appointed merchant banker to instruct the bank to issue banker's cheque or demand draft for the amount lying to the credit of the escrow account.

**2. Deposit in the form Bank Guarantee**

- 2.1. Such bank guarantee shall be in favor of merchant banker.
- 2.2. The bank guarantee is valid for the period of 20 days from the closure of public announcement.
- 2.3. The bank guarantee shall not be returned to the acquirer by merchant banker till the completion of all obligations under the regulations.
- 2.4. The acquirer is further required to deposit as security for fulfillment of the obligations 1% of the total consideration payable under the offer.

**3. Deposit in the form Securities**

- 3.1. The acquirer shall empower the Merchant Banker

to realize the value of such escrow account by sale of such securities. Also, if there being any deficit in the value so realized, the merchant banker has to fulfill such deficit.

- 3.2. The securities so deposited shall not be returned to the acquirer by merchant banker till the completion of all obligations under the regulations.
- 3.3. The acquirer is further required to deposit as security for fulfillment of the obligations 1% of the total consideration payable under the offer.

**Forfeiture of Escrow Account**

The escrow account is forfeited in the following cases:-

1. In case of non-fulfillment of obligations under the Regulations.
2. In case the acquirer fails to obtain shareholders approval, which is required, in case of payment of consideration by way of exchange of securities.

**Release of amount from Escrow Account**

The amount lying in escrow account can be released

in the following cases only :-

1. In case of withdrawal of offer, the entire amount can be released only after certification by the merchant banker.
2. The amount deposited in escrow account is transferred to special bank account opened with the Bankers to an issue; however the amount so transferred shall not exceed 90% of the cash deposit. The balance 10% is released to the acquirer on completion of all obligations under the offer.
3. In the event of forfeiture of amount, the entire amount is distributed in the following manner :-
  - 3.1. One third of the amount to Target Company;
  - 3.2. One-third to the amount to regional stock exchange for credit of investor protection fund or any such fund prescribed by SEBI;
  - 3.3. Residual one third is to be distributed to the shareholders who have tendered their shares in the offer.

**DISCLAIMER**

The views and opinions express or implied by way of articles in the ICSI-EIRC News Letter are those of the authors and do not reflect those of the Institute. The EIRC of ICSI will not accept any responsibility for the contents of the articles published.

The Cover page has been designed to reflect the specific theme of the newsletter and the pictures shown is purely coincidental and is by no means intended to promote or commercially relate to any brand or characters in the picture.

The articles have been published in alphabetical order of the first name of the authors concerned.