

SECURITIES LAWS AND COMPLIANCES

PART A — SECURITIES LAWS

STUDY XII - BUY BACK OF SECURITIES

LEARNING OBJECTIVES

The study will enable the students to understand

- Concept & Objectives of buy-back of securities
- Relevant Sections of the Companies Act, 1956
- Overview of SEBI (Buy-back of Securities) Regulations, 1998
- Unlisted Public Company (Buy-Back of Securities) Rules, 1999
- Procedure for buy back of securities
- Modes of Buy-back of Securities

INTRODUCTION

Till the early nineties, the Indian economy functioned in an environment regimented by control and regulations. With the reforms initiated by the Government, the economy moved from controlled to market driven. The forces of globalisation and liberalisation compelled the corporates to restructure the business by adopting the tools, viz., mergers, amalgamations and takeovers. All these activities, in turn, impacted the functioning of the capital market, more particularly the movement of share prices. As the shares of companies are held by different segments of society, viz., entrepreneurs, institutional investors and individual shareholders including small investors, it is reasonable that there should be equality of treatment and opportunities to all shareholders, transparency, proper disclosure and above all protection of interests of small and minority shareholders. In order to ensure observance of these basic principles in takeover of companies, right from 1994 Takeover Regulations were introduced and amended from time to time to meet the fast changing market realities.

Similarly buy-back of securities is a corporate financial strategy which involves capital restructuring and is prevalent globally with the underlying objectives of increasing earnings per share, averting hostile takeovers, improving returns to the stakeholders and realigning the capital structure.

In India, while buy-back of securities is not permitted as a treasury option under which the securities may be reissued later, a company can resort to buy-back to reduce the number of shares issued and return surplus cash to the shareholders.

I. Concept – Buy-Back of Securities

The concept of buy-back of securities was proposed in the Companies Bill, 1997. The Companies (Amendment) Ordinance, 1998 (No.19 of 1998), promulgated on 31st October 1998, contained provisions for buy-back of securities. Subsequently, the Companies (Amendment) Bill, 1998 (Bill No.174 of 1998) was introduced in the Lok Sabha on 22nd November 1998 but was not passed. Consequently, a new Ordinance, the Companies (Amendment) Ordinance, 1999 (No.1 of 1999) was promulgated on 7th

January 1999. The concept of buy-back was introduced in the Companies Act, 1956 (the Act) by the Companies (Amendment) Act, 1999 by the insertion of Sections 77A, 77AA and 77B.

Consequent upon the promulgation of the Companies (Amendment) Ordinance in 1998, the Securities and Exchange Board of India issued the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 1998 which were published in the Official Gazette of India on 14th November 1998. These Regulations are applicable to the buy-back of securities of a company listed on a stock exchange. Buy-back of securities by any other company is governed by the Private Limited Company and Unlisted Public Limited Company (Buy-Back of Securities) Rules, 1999 issued by the Department of Company Affairs, Central Government, which were published in the Official Gazette of India on 6th July, 1999.

Prior to the enactment of the Companies (Amendment) Act, 1999, no company limited by shares and no company limited by guarantee and having a share capital could buy its own securities unless the consequent reduction of capital was effected and sanctioned pursuant to the provisions of Sections 100 to 104 or of Section 402 of the Act.

The Company Law Board*, pursuant to the provisions of Section 402 of the Act, may order a company to purchase the shares or any interest of its members in the company on an application made by members under Sections 397 or 398 of the Act to remedy oppression and mismanagement. The reduction of share capital as a consequence of such an order is not affected by nor will it be governed by the provisions of the Act relating to buy-back of securities.

The provisions of the Act relating to buy-back of securities are also not applicable to the extent of the sanction of a High Court to any scheme of compromise or arrangement pursuant to Sections 391 to 394 of the Act.

II. Objectives of buy-back

Buy-back is a process whereby a company purchases its own shares or other specified securities from the holders thereof for any of the following purposes:

- i. to improve earnings per share;
- ii. to improve return on capital, return on net worth and to enhance the long-term shareholder value;
- iii. to provide an additional exit route to shareholders when shares are under valued or are thinly traded;
- iv. to enhance consolidation of stake in the company;
- v. to prevent unwelcome takeover bids;
- vi. to return surplus cash to shareholders;
- vii. to achieve optimum capital structure;
- viii. to support share price during periods of sluggish market conditions;
- ix. to service the equity more efficiently.

The decision to buy-back is also influenced by various other factors relating to the company, such as growth opportunities, capital structure, sourcing of funds, cost of capital and optimum allocation of funds generated.

III. Some important definitions

“Buy-back” means the purchase of its own shares or other specified securities by a company.

“Control” includes the right to appoint a majority of the Board or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or voting agreements or in any other manner.

“Date of acceptance of offer” means the date of completion of verification of offers.

“Date of completion of buy-back” means the date when the last of the payments is made to the securityholders.

“Date of offer” means the date of signing of the letter of offer which should be the date of the Board resolution approving the letter of offer.

“Debt” means secured and unsecured debt but excludes current liabilities.

“Escrow Account” means an account opened by a company with a scheduled commercial bank by way of a security for discharging its obligation and shall consist either of cash or bank guarantee in favour of a merchant banker or deposit of acceptable securities with appropriate margin with a merchant banker or any combination thereof for the purpose of buy-back of securities.

“Free Reserves” means those reserves which as per the latest audited balance sheet of the company are free for distribution as dividend and shall include balance to the credit of securities premium account but shall not include share application money.

“Merchant Banker” means a merchant banker registered under Section 12 of the Securities and Exchange Board of India Act, 1992.

“Paid-up capital” or *“capital paid-up”* includes capital credited as paid-up.

“Securities” means equity shares, preference shares and any other securities as may be notified by the Central Government from time to time.

“Specified Date” means the date on which the names of the securityholders would be determined for the purpose of despatch of letter of offer to securityholders.

“Stock Exchange” means the stock exchange on which the securities of a company are listed.

“Tender Offer” means an offer by a company, through a letter of offer, to buy-back its securities from the holders of the securities.

Under the Section Buy-Back of Securities in this chapter, Reference herein to Sections, Regulations and Rules relate, respectively, to Sections of the Companies Act, 1956, the Regulations contained in the SEBI (Buy-Back of Securities) Regulations, 1998 and the Rules contained in the Private Limited Company and Unlisted Public Limited company (Buy-Back of Securities) Regulations, 1999, unless otherwise stated.

IV. Authority and quantum of buy-back of securities

1. Authority in the Articles

Buy-back of securities should be authorised by the Articles of Association of the company. [Section 77A(2)(a)]. In case the Articles do not contain such a provision, they should be amended appropriately authorizing the

buy-back of securities. Such an amendment should be made either at a meeting preceding the meeting wherein the resolution for buy-back is to be passed or at the same meeting wherein the resolution for buy-back is to be passed but the resolution for amendment of Articles should precede the resolution for buy-back of securities.

2. Board resolution and quantum of buy-back

By passing a resolution, the Board can authorize the buy-back of securities not exceeding 10% of the total paid-up equity capital and free reserves of the company. [Proviso to Section 77A(2)]. The aforesaid limit is to be applied not to the number of securities to be bought back but to the amount required for buy-back of such securities.

The resolution authorizing buy-back should be passed at a meeting of the Board [Section 292(1)(aa)]. Such a resolution should not be passed by circulation or at a meeting of a committee of the Board. However, the methodology, mode of buy-back and other procedural requirements for buy-back may be delegated by the Board.

3. Shareholders' resolution and quantum of buy-back

By passing a special resolution, the shareholders can authorize the buy-back of securities not exceeding 25% of the total paid-up capital and free reserves of the company in that financial year. [Section 77A(2)(b) and (c)].

Paid-up capital includes both equity and preference share capital.

Whereas unlisted companies should obtain shareholders' approval by passing the special resolution only at a duly convened general meeting, listed companies should obtain such approval by postal ballot.

The notice containing the special resolution proposed to be passed should be accompanied by an explanatory statement stating:

- a. all material facts, fully and completely disclosed;
- b. the necessity for buy-back;
- c. the class of security intended to be purchased under the buy-back;
- d. the amount to be invested under buy-back; and
- e. the time limit for completion of buy-back [Section 77A(3)].

4. Maximum quantum of buy-back

A company cannot buy-back more than 25% of its total paid-up capital and free reserves. [Section 77A(2)(c)]. The aforesaid limit is to be applied not to the number of securities to be bought back but to the amount required for buy-back of such securities.

Buy-back of equity shares in any financial year should not exceed 25% of the total paid-up equity capital of the company. [Proviso to Section 77A(2)(c)].

A company may buy-back its entire (i.e. 100%) securities other than equity shares, viz. preference shares and any other securities as may be notified by the Central Government from time to time, in a financial year, subject to the overall limit of 25% of the total paid-up capital and free reserves of the company.

5. Further offer of buy-back

Once the buy-back has been made with the authorization of the Board

and not that of the shareholders, no further offer for buy-back of any securities can be made without the consent of shareholders accorded by a special resolution within 365 days reckoned from the date of the offer. [Second Proviso to Section 77A(2)].

However, the shareholders can make further offer within a period of 365 days, provided the aggregate of authorisation does not exceed the quantum specified above.

V. Available sources for buy-back of securities

A company may buy-back its securities out of :

- i. its free reserves; or
- ii. the securities premium account; or
- iii. the proceeds of issue of any shares or other specified securities.

Provided that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities. [Section 77A(1)]

1. Free reserves and securities premium account

While the surplus in the profit and loss account can be used for buy-back of securities, in case the profit and loss account shows a debit balance, such debit balance should first be deducted from free reserves.

Capital redemption reserve, revaluation reserve, investment allowance reserve, profit on re-issue of forfeited shares, profits earned prior to incorporation of the company and any other specific reserve are not available for distribution as dividend and hence do not form part of free reserves for the purpose of buy-back.

Even though Section 77A(1) provides that a company may buy-back its securities out of securities premium account, sub-section (2) of Section 78 does not mention buy-back of securities as one of the purposes for which the balance in the securities premium account may be utilised.

However, by virtue of the non obstante clause in Section 77A, namely 'Notwithstanding anything contained in this Act....', Section 77A prevails over Section 78. Therefore, the securities premium account can be utilized for buy-back of securities.

2. Proceeds of issue

Buy-back may be made out of the proceeds of an issue of securities other than the same kind of securities as are proposed to be bought back.

The proceeds of an earlier issue of one kind of securities may be used for the purpose of buy-back of any other kind of securities. The proceeds of an issue of preference shares may be used to buy-back equity shares and the proceeds of an issue of equity shares may be used to buy-back preference shares.

However, the proceeds of issue of preference shares carrying differential rights as to dividend, voting etc. cannot be utilized inter se for the purpose of buy-back. For instance, the proceeds of issue of 10% preference shares cannot be utilized for buy-back of 8% preference shares, as these are of the same kind, though of different classes of shares.

There should be no direct nexus between the proceeds of an issue and buy-back of securities of a company. For instance, if equity shares had been issued by a company in 1994 and the funds raised therefrom were deposited in a bank account, buy-back of equity shares by the company in 2003 will be permissible from the funds in that account, if there is evidence to prove that, over the years, the aforesaid bank account has functioned as common pool for deposit of all the funds raised and no direct nexus can be established between the proceeds of the issue in 1994 and the buy-back in 2003.

3. Borrowings from banks/financial institutions

Where a company has borrowed any money from banks/financial institutions for any purpose, it should not utilize such money for buy-back of securities. [Rule 8(e)]. Further, if any approval is required to be obtained from banks/financial institutions, such approval should be obtained before passing the Board resolution for buy-back of securities.

VI. Conditions to be fulfilled and obligations for buy-back of securities

1. Only fully paid-up securities qualify for buy-back. [Section 77A (2) (e)]

If some securityholders have not made the payment of calls or any sums due on the securities, it would not disentitle the company from buy-back. However, the securities on which the call money remains in arrears cannot be bought back.

Fully paid-up securities, even if quoted below par on the stock exchanges, qualify for buy-back.

If a security has been issued at a discount, the payment of the total amount due thereon should be considered as a sufficient qualification for its buy-back.

After buy-back, the company should have a debt-equity ratio not exceeding 2:1, i.e. all secured and unsecured debts of the company should not be more than twice the aggregate of its capital and free reserves. However, the Central Government has the power to prescribe a higher debt-equity ratio for a class or classes of companies. [Section 77A(2)(d)].

For the purpose of computing debt-equity ratio, 'debt' includes :

- i. long-term loans/deposits (repayable after 12 months) including interest bearing unsecured loans from government;
- ii. debentures including convertible debentures (except the part of debentures which are compulsorily convertible into equity), until they are converted, irrespective of the maturity period;
- iii. deferred payments;
- iv. redeemable preference shares due for redemption between 1 to 3 years.

'Equity' includes :

- i. paid-up equity share capital;
- ii. redeemable preference shares due for redemption after 3 years;
- iii. share premium;
- iv. free reserves less accumulated losses, arrears of unabsorbed

depreciation, all items of assets which are of intangible nature or expenditure not written off;

v. Government subsidies.

A housing finance company should have a post buy-back debt-equity ratio not exceeding the ratio specified by the National Housing Bank in consultation with the Central Government.

Buy-back should be completed within 12 months from the date of passing of the Board resolution or the special resolution or where the resolution is passed through postal ballot, the date of the declaration of result of the postal ballot, as the case may be. [Section 77A(4)].

Where buy-back of shares is made out of free reserves, the company should transfer to the capital redemption reserve account referred to in clause (d) of the proviso to sub-section (1) of Section 80, a sum equal to the nominal value of the shares so bought back and the details of such transfer should be disclosed in the balance sheet. [Section 77AA].

The reference to 'free reserves' in Section 77AA is to the 'free reserves' under Section 77A, which in Clause (b) of its Explanation provides that free reserves include securities premium account. Therefore, when a company purchases its own shares or other specified securities out of securities premium account also, in accordance with Section 77A, a sum equal to the nominal value of the shares so bought back should be transferred to capital redemption reserve account.

In any other case, the company is not required to transfer to the capital redemption reserve account a sum equal to the nominal value of the shares so bought back.

Such transfer to capital redemption reserve account will also not be required when buy-back is of securities other than shares (the Central Government may, from time to time, notify other securities as specified securities and such notified securities may not be shares).

No further issue of the same kind of securities should be made within a period of 6 months from the date of completion of buy-back of securities. [Section 77A(8)]. The date of further issue of securities, for this purpose, means the date of the resolution passed by the Board or shareholders, as the case may be.

Hence, an issue of preference shares may be made by a company within a period of 6 months from the date of completion of buy-back of equity shares and vice versa. However, further issue of the same kind of securities is allowed by way of bonus issue or in discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. [Section 77A(8)].

An issue of shares in pursuance of a scheme of amalgamation, being by virtue of a court order, is permissible. However, no buy-back of securities should be undertaken while a petition for amalgamation is pending.

No issue of any security including bonus shares should be made till the closure of offer of buy-back. [Regulation 19(1)(b) and Rule 8(1)(b)].

A company should not make any announcement in respect of buy-back of

securities from the date of approval by the Board of any scheme of compromise or arrangement pursuant to the provisions of the Act, upto the date of filing of the court order with the Registrar. [Regulation 19(2)]. No offer of buy-back of securities should be made if such offer would result in reducing the non-promoter holding below the limit of public shareholding specified under the SEBI (Disclosure and Investor Protection) Guidelines, 2000 as applicable at the time of initial listing. Convertible debentures can be bought back before the date of their conversion but such a purchase would amount to the company purchasing its own shares and all the provisions relating to buy-back shall become applicable.

Promoters or persons acting in concert should not deal in the securities of the company while the buy-back offer is open. [Regulation 19(1)(e)].

VII. Pricing for buy-back

The Board should either determine or recommend to the shareholders a fair price for buy-back based on all relevant parameters such as:

- a. Earnings per share;
- b. Prices of securities quoted on the stock exchange;
- c. Past performance;
- d. Book value per share;
- e. Previous buy-back undertaken, if any;
- f. Net worth of the company;
- g. Post buy-back scenario;
- h. Industry outlook.

VIII. Securities not available for buy-back

1. Securities in lock-in period

In the case of a listed company, securities issued to the promoters, to a group, or to employees, subject to lock-in period as per SEBI (Disclosure and Investor Protection) Guidelines, 2000 are not available for buy-back until the lock-in period expires. [Regulation 19(5)].

2. Non-transferable securities

Securities which are under lien or are pledged or restricted by any court for transfer or which otherwise statutorily cannot be transferred are not available for buy-back until such securities again become freely transferable. [Regulation 19(5)].

3. Disputed securities kept in abeyance

Securities which are under dispute and have been kept in abeyance under Section 206A, or in respect of which transfer or transmission has not been effected, are not available for buy-back.

Before undertaking any buy-back, the company should ensure that no transfer deed is pending for registration.

IX. Modes of buy-back

Buy-back of securities may be made :

- a. from the existing securityholders on a proportionate basis; or
- b. from the open market; or
- c. from odd lots, that is to say, where the lot of securities of a public company whose shares are listed on a recognized stock exchange is

smaller than such marketable lot as may be specified by the stock exchange; or

- d. by purchasing securities which had been issued to employees of the company pursuant to a scheme of stock option or sweat equity. [Section 77A(5)].

A company can implement buy-back by any of the aforesaid methods but, for a single offer of buy-back, different modes of buy-back cannot be adopted.

It is desirable that the overall amount to be deployed for buy-back of securities and the details of estimated cost involved in the process of buy-back of securities are disclosed in the letter of offer.

In terms of the Regulations, a listed company may buy-back its securities by any one of the following methods :

- a. from existing securityholders on a proportionate basis through tender offer;
- b. from the open market through :
 - i. book-building process;
 - ii. stock exchange(s);
- c. from odd-lot holders [Regulation 4(1)].

Negotiated deals

A listed company should not buy-back its securities from any person through negotiated deals whether on or off the stock exchange or through spot transactions or through any private arrangement. [Regulation 4(2)].

The expression 'negotiated deals' refers to those deals where the shares are acquired through private and mutual negotiations. Such deals are only with a seller or group of sellers and the same offer is not available to other shareholders. As negotiated deals tend to lead to preferential treatment by the company, such deals are not permitted.

In terms of the Rules, private companies and unlisted public companies may buy-back their securities by either of the following methods:

- a. from the existing shareholders on a proportionate basis through private offers;
- b. by purchasing securities which had been issued to employees of the company pursuant to a scheme of stock option or sweat equity. [Rule 3].

X. Restrictions on buy-back of securities in certain circumstances

A company should not buy-back its securities if default subsists in repayment of deposits or interest payable thereon, or in redemption of debentures or preference shares or repayment of any term loan or interest payable thereon to any financial institution or bank. [Section 77B(1)(c)].

Deposits for this purpose include deposits under Section 58A read with Rule 2(b) of the Companies (Acceptance of Deposits) Rules, 1975.

Buy-back should not be made if a company has defaulted in relation to preparation and filing of its annual return. [Section 77B(2)].

However, such a company may buy-back its securities after the default has been rectified.

Buy-back should not be made in the event of any default in relation to payment of dividend to any equity or preference shareholder. [Section

77B(2)].

Where a dividend has been declared by a company but has not been paid in accordance with the provisions of the Act, the company may buy-back its securities only after payment of dividend and interest thereon as per the provisions of the Act.

Buy-back should not be made in the event of default in preparation of the annual accounts. [Section 77B(2)].

Where the report of the statutory auditors of the company contains a qualification that annual accounts are not prepared as per the accounting standards or otherwise are not in accordance with the provisions of Section 211, the company cannot proceed to buy-back its securities.

However, compounding of the aforementioned defaults or subsequent curing of the default may qualify as an enabling provision for buy-back.

Buy-back should not be made by a company :

- i. through any subsidiary company including its own subsidiary companies;
- ii. through any investment company or group of investment companies.

[Section 77B(1)(a) and (b)].

XI. Declaration of solvency

Where the Board or the shareholders of a listed company pass a resolution to buy-back shares, the company should, before making such buy-back, file with the Registrar and SEBI a declaration of solvency in the prescribed form. A private company and a public company whose shares are not listed on a stock exchange should file the declaration of solvency with the Registrar in the prescribed form.

The declaration of solvency should be verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which it has formed an opinion that the company is capable of meeting its liabilities and will not be rendered insolvent within a period of one year from the date of adoption of the declaration by the Board. The declaration of solvency should be signed by at least two directors of the company, one of whom shall be the managing director, if any. [Section 77A(6)].

XII. Extinguishment of security certificates

Where a company buys back its own securities it should extinguish and physically destroy the security certificates within 7 days of the date of completion of buy-back. [Section 77A(7)].

XIII. Return of buy-back

After the completion of buy back, a listed company should file with the Registrar and SEBI a return containing the prescribed particulars relating to the buy-back within 30 days of such completion. However, a private company and a public company whose shares are not listed on a stock exchange should file the return of buy-back only with the Registrar. [Section 77A(10)].

XIV. Rescinding of buy- back

The passing of the resolution by a company does not create any obligation on the company to buy-back its securities.

The Regulations provide that a company should not withdraw the offer to

buy-back its securities after the draft letter of offer is filed with SEBI or a public announcement of the offer to buy-back is made. [Regulation 19(1)(d)]. The Rules provide that the company should not withdraw the offer once the draft letter of offer is filed with the Registrar [Rule 8(1)(d)].

A company cannot rescind the offer of buy-back of securities on the ground that the option of buy-back has been exercised only by a few shareholders of the company.

Where the buy-back fails on account of the minimum number of securities not being tendered, notice of such failure should be given immediately to the Stock Exchange(s) on which the securities are listed.

XV. Stamp duty on buy-back

Transfer of shares attracts stamp duty vide Schedule I, entry 62 to the Indian Stamp Act, 1899. For completion of transfer of shares, a company is required to register the shares in the name of the transferee. In the case of buy-back, the shares bought back have to be statutorily extinguished within 7 days from the last date of completion of buy-back. Hence, no registration of such shares takes place in the name of the company. The names of the members/ holders of the shares have to be struck off from the register of members if the entire holding is bought back. Therefore, buy-back cannot be construed as transfer and stamp duty would not be payable in a case where buy-back of shares takes place in physical form even if the shares are accompanied by an application form for transfer of shares in favour of the company. Further, buy-back of shares will not be construed as “release” falling under Article 55 of the Indian Stamp Act attracting stamp duty. Shares received by the company for buy-back in electronic mode do not attract stamp duty in terms of the provisions contained in the Depositories Act, 1996.

XVI. Buy back of shares from non-resident (NR) shareholders-the foreign exchange management act, 1999 (FEMA) aspects

1. Permission to be obtained from Reserve Bank of India (RBI)

A company proposing to buy-back securities is required to obtain specific permission from RBI on a case to case basis for acquisition of securities from non-resident holders under FEMA. However, the company may seek in-principle approval from RBI.

Documents required for obtaining RBI permission

- i. A copy of the offer document;
- ii. Application in Form TS1 with requisite covering letter;
- iii. Copies of offer form duly accepted by NR holder, RBI approval, letter from authorised dealer, consent letter etc.
- iv. Copy of general permission/special permission obtained by the company while issuing shares to the NR holders;
- v. Letter from Registrar and Share Transfer Agents to RBI with a statement containing name, address, number of shares held/accepted, RBI approval Number and Date and confirming that the said cases have the requisite permission for repatriation of sale proceeds.

2. Special terms applicable to GDR/ADR holders

GDR/ADR holders who wish to tender their shares underlying the

receipts should cancel the same and withdraw the underlying equity shares. They should request the depository to instruct the Custodian to deliver the equity share certificates accompanied by an instrument executed in blank in respect of such share certificates to the registrar to the offer.

3. Documents required to be submitted by NR holders

- i. A copy of permission received from RBI to acquire the shares that are held by them;
- ii. A letter from authorised dealer/bank, in the case of permission with repatriation benefits, confirming that at the time of acquiring the said shares, payment was made from the appropriate account (e.g. NRE A/c) as specified by RBI in its approval.
If such a letter is not submitted, the shares would be deemed to have been acquired without repatriation benefits. In that case, the NR holder should submit a consent letter addressed to the company allowing payment on a non-repatriation basis.
- iii. A no objection certificate or tax clearance certificate (indicating the amount of tax to be deducted by the acquirer before remitting the consideration) obtained from the Income Tax authorities.
If any of the aforesaid documents are not enclosed along with the offer form, the shares tendered are liable to be rejected. The aforesaid requirements do not apply to Foreign Institutional Investors (FIIs).

4. Conditions attached to RBI permission

RBI permission for acquisition normally contains the following conditions:

- i. all expenses connected/incidental to sale/transfer of shares including stamp duty shall be borne by transferor/transferee as performance agreement between them or as per relevant stock exchange rules;
- ii. the approval shall be valid for 6 months from the date of receipt and all transfer formalities should be completed before the time limit;
- iii. the sale proceeds payable to FIIs shall be credited to their NR Special Rupee Account and shall be reported to RBI in Form LEC (FII); and
- iv. the sale consideration shall be subject to payment of applicable taxes.

5. Formalities for remittance of money for shares acquired

The following aspects should be taken into consideration for remitting consideration to the Non-resident holders:

- i. acquisition consideration payable;
- ii. tax to be deducted for capital gains;
- iii. interest for delayed payment to be paid;
- iv. tax to be deducted on interest payable.

XVII. Maintenance of records and registers

Where a company buys back its securities, it should maintain a register containing information of the securities so bought back, the consideration paid for the securities bought back, the date of cancellation of securities, the date of extinguishing and physically destroying the securities and such other particulars as may be prescribed. [Section 77A(9)].

The company should also maintain a record of names, folio numbers, type of securities, number of securities, date of issue/transfer of securities.

Such particulars should be entered in the register of buy-back of securities within 7 days of the date of completion of buy-back of securities. Completion, in this context, refers to the date when securities are cancelled or destroyed. The provisions of Section 163 shall not apply to this register and therefore it need not be kept at the registered office nor made available for inspection. The particulars regarding members and the certificates cancelled or destroyed should be entered in the register of members and register of share certificates.

The company should keep all the documents relating to buy-back of securities for a minimum period of 8 years.

XVIII. Disclosure in board's report

Where a company fails to complete the buy-back of securities within 12 months from the date of passing of the resolution by the Board or the shareholders, as the case may be, authorizing the buy-back of securities, the Board's report should specify the reasons for such failure. Disclosure should also be made in the Board's report, in case buy-back has not been completed but is in process. [Section 217(2B)]. It is desirable that completion of buy-back of securities is also disclosed in the Board's report.

XIX. Shareholding or voting rights

As a consequence of buy-back of securities by a company, a person may not be aware that his shareholding or voting rights have increased. Therefore, it is desirable that immediately after completion of buy-back, a communication is sent by the company to the shareholders whose shareholding and/or voting rights have increased consequent to the change in capital structure due to buy-back of securities, to enable such shareholders to make an official communication/ announcement.

XX. Procedure for buy-back of securities by a listed company

1. Amendment of Articles of Association

Where Articles do not contain a provision authorizing buy-back, they should be first amended.

2. Filing of Board resolution

A copy of the Board resolution authorizing buy-back should be filed by the company with SEBI and the stock exchange(s) where the shares or other specified securities of the company are listed, within 2 days of the date of passing of the resolution. [Regulation 5A(2)].

3. Approval of shareholders by postal ballot

The company should seek the approval of shareholders for buy-back only by postal ballot.

The company should file a certified true copy of the special resolution authorizing the buy-back with the Registrar, the stock exchange(s) where the shares or other specified securities of the company are listed and SEBI within 7 days of passing of such resolution. [Regulation 5(2)].

4. Explanatory statement

An explanatory statement containing full and complete disclosure of all the material facts and the disclosures prescribed in Schedule I of the Regulations should be annexed to the notice where the buy-back is pursuant to shareholders' approval.

The explanatory statement should include the following [Regulation 5(1)]:

- i. the date of the Board meeting at which the proposal for buy-back was approved by the Board;
- ii. the necessity for the buy-back;
- iii. an indication that the shareholders at the general meeting may authorise the Board to adopt at the appropriate time one of the methods referred to in sub-regulation (1) of Regulation 4;
- iv. the maximum amount required under the buy-back and the sources of funds from which the buy-back would be financed;
- v. the basis of arriving at the buy-back price;
- vi. the number of securities that the company proposes to buy-back;
- vii. (a) the aggregate shareholding of the promoter and of the directors of the promoter company, where the promoter is a company, and of persons who are in control of the company as on the date of the notice convening the general meeting or the meeting of the Board;
b. the aggregate number of equity shares purchased or sold by persons including persons mentioned in (a) above during a period of 6 months preceding the date of the Board meeting at which the buy-back was approved till the date of notice convening the general meeting;
c. the maximum and minimum price at which purchases and sales referred to in (b) above were made along with the relevant dates;
- viii. intention of the promoters and persons in control of the company to tender their specified securities for buy-back indicating the number of specified securities, details of acquisition, with dates and price;
If the promoters and persons in control of the company do not intend to tender their securities for buy-back, it is desirable that the reasons thereof are given in the explanatory statement.
- ix. a confirmation that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institution or bank;
- x. a confirmation that the Board has made a full enquiry into the affairs and prospects of the company and that it has formed the opinion :
 - a. that immediately following the date on which the general meeting or the meeting of the Board is convened there will be no grounds on which the company could be found unable to pay its debts;
 - b. as regards its prospects for the year immediately following that date that, having regard to the intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in the view of the Board be available to the company during that year, the company will be able to meet its liabilities as and when they fall due and will not be rendered insolvent within a period of one year from that date; and
 - c. in forming their opinion for the above purposes, the directors have taken into account the liabilities as if the company were being wound up under the provisions of the Act (including prospective

- and contingent liabilities).
- xi. a report addressed to the Board by the company's auditors stating that :
- i. they have inquired into the company's state of affairs;
 - ii. the amount of the permissible capital payment for the securities in question is in their view properly determined; and
 - iii. the Board has formed the opinion as specified in clause (x) on reasonable grounds that the company will not, having regard to its state of affairs, be rendered insolvent within a period of one year from that date.

5. Nomination of compliance officer

The company should nominate a compliance officer for ensuring compliance of the provisions of the Act, the Regulations, listing agreement and any other applicable laws relating to buy-back of securities and to redress the grievances of the investors. [Regulation 19(3)].

For this purpose, a Board resolution should be passed and Form 1AA and Form 1AB of the Companies (Central Government's) General Rules and Forms, 1956 should be filed with the Registrar by the person designated as compliance officer.

The name, telephone no., fax no. and e-mail ID of the compliance officer should be given in the public announcement and letter of offer.

6. Investor service centre

The company should have at least one investor service center. It is desirable that such centers are opened in all such cities where the securityholders holding 10% or more of voting rights reside. [Regulation 19(3)].

7. Appointment of merchant banker

The company should appoint a merchant banker registered with SEBI, for buy-back of securities through any of the modes specified. Such appointment should be made before the public announcement for buy-back of securities.

The merchant banker should ensure that the company is able to implement the offer, escrow account has been opened, firm arrangements for payment to fulfill the obligations have been made, public announcement is made in accordance with the terms of the Regulations, the contents of public announcement are true, fair and correct and the letter of offer is duly filed [Regulation 20(a) to (e)]. He should also ensure compliance of Sections 77A and 77B and any other clause or rules as may be applicable in this regard [Regulation 20(h)]. He should submit a due diligence certificate to SEBI which should accompany the draft letter of offer. [Regulation 20(f)].

The merchant banker, upon ensuring fulfillment of all obligations by the company, is required to inform the bank with whom the escrow account or special account has been opened and funds have been deposited, to release the balance amount to the company. [Regulation 20(i)].

The merchant banker should submit a final report to SEBI in the specified

form within 15 days from the date of closure of the buy-back offer.

[Regulation 20(j)].

SEBI may take action against the merchant banker for non-compliance of any of his obligations. [Regulation 21].

8. Buy-back through tender offer

A listed company may buy-back its securities from existing securityholders on a proportionate basis through the tender offer.

[Regulation 6].

The tender offer should be made in accordance with the provisions of the Regulations and should be at a price fixed through the resolution of the Board or of the shareholders, as the case may be. It is desirable that pricing for buy-back is done after considering all relevant parameters, market trends, and perception of future performance and post buy-back scenario.

In the case of buy-back through tender offer, the following additional disclosures are required to be made in the explanatory statement:

- i. the maximum price at which the buy-back of securities shall be made;
- ii. whether the Board is being authorised at the general meeting to determine subsequently the specific price at which the buy-back may be made at the appropriate time;
- iii. in case the promoters intend to offer their securities:
 - a. the quantum of securities proposed to be tendered by promoters; and
 - b. the details of their transactions and their holdings for the last 6 months prior to the passing of the special resolution for buy-back including information on number of securities acquired, the price and the date of acquisition. [Regulation 7]

Promoters are permitted to offer their securities for buy-back provided adequate disclosure is made in the offer document.

Public Notice

A company authorised to buy-back its securities by way of a Board resolution should, before making the public announcement for buy-back, give a public notice in at least one English National daily, one Hindi National daily and a regional language daily, having wide circulation at the place where the registered office of the company is situated.

[Regulation 5A(1)(a)]. It is desirable that the selected newspapers also have a wide circulation within such States of India where more than 1,000 or 10% of the total members reside.

The public notice should be given within 2 days of passing of the resolution by the Board. [Regulation 5A(1)(b)]. This is required to be given since, where buy-back is with the authorization of the Board, no explanatory statement is required to be given unlike in case where the buy-back is made with the authorization of shareholders. Such public notice should contain the particulars specified in Schedule I to the Regulations [Regulation 5A(1)(c)] as given below (which are the same as are given in the explanatory statement to the special resolution) :

- i. the date of the Board meeting at which the proposal for buy-back was

- approved by the Board;
- ii. the necessity for the buy-back;
 - iii. an indication that the shareholders at the general meeting may authorise the Board of the company to adopt one of the methods referred to in sub-regulation (1) of Regulation 4 at the appropriate time;
 - iv. the maximum amount required under the buy-back and the sources of funds from which the buy-back would be financed;
 - v. the basis of arriving at the buy-back price;
 - vi. the number of securities that the company proposes to buy-back;
 - vii. (a) the aggregate shareholding of the promoter and of the directors of the promoter company, where the promoter is a company, and of persons who are in control of the company as on the date of the notice convening the general meeting or the meeting of the Board;
b. aggregate number of equity shares purchased or sold by persons including persons mentioned in (a) above during a period of 6 months preceding the date of the Board meeting at which the buy-back was approved till the date of notice convening the general meeting;
c. the maximum and minimum price at which purchases and sales referred to in (b) above were made along with the relevant dates;
 - viii. intention of the promoters and persons in control of the company to tender specified securities for buy-back indicating the number of specified securities, details of acquisition, with dates and price;
 - ix. a confirmation that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institution or bank;
 - x. a confirmation that the Board has made a full enquiry into the affairs and prospects of the company and that it has formed the opinion :
 - a. that immediately following the date on which the general meeting or the meeting of the Board is convened there will be no grounds on which the company could be found unable to pay its debts;
 - b. as regards its prospects for the year immediately following that date that, having regard to the intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in the view of the Board be available to the company during that year, the company will be able to meet its liabilities as and when they fall due and will not be rendered insolvent within a period of one year from that date; and
 - c. in forming their opinion for the above purposes, the directors have taken into account the liabilities as if the company were being wound up under the provisions of the Act (including prospective and contingent liabilities);
 - xi. a report addressed to the Board by the company's auditors stating that :
 - i. they have inquired into the company's state of affairs;

- ii. the amount of the permissible capital payment for the securities in question is in their view properly determined; and
- iii. the Board has formed the opinion as specified in clause (x) on reasonable grounds and that the company will not, having regard to its state of affairs, be rendered insolvent within a period of one year from that date.

If the promoters and persons in control of the company do not intend to tender their securities for buy-back, it is desirable that the reasons thereof are given in the public notice.

Public Announcement

A listed company, after being authorised to buy-back its securities, but before buy-back, should make a public announcement in this regard at least in one English national daily, one Hindi national daily and a regional language daily, having a wide circulation at a place where the registered office of the company is situated. [Regulation 8(1)]. It is desirable that the selected newspapers also have a wide circulation within such States of India where more than 1,000 or 10% of the total members reside.

The public announcement should contain all the material information specified in Schedule II of the Regulations and should be made by the company on the authorization of its Board or shareholders, as the case may be. [Regulation 8(1)]

Though, as per the Regulations, the requirement of at least 7 days prior public announcement is applicable when buy-back is made through stock exchange or book building, it is desirable that in case of tender offer also, public announcement is made 7 days prior to commencement of buy-back of securities.

In terms of Schedule II of the Regulations, the public announcement should include the following :

1. details of the offer including the total number and percentage of the total paid-up capital and free reserves proposed to be bought back and price of offer;
2. the proposed time table from opening of the offer till the extinguishment of the certificates;
3. the specified date;
4. authority for the offer of buy-back;
5. a full and complete disclosure of all material facts including the contents of the explanatory statement annexed to the notice for the general meeting at which the special resolution approving the buy-back was passed or the contents of public notice issued after the passing of the resolution by the Board authorising the buy-back;
6. the necessity for the buy-back;
7. the process and methodology to be adopted for the buy-back;
8. the maximum amount to be invested under the buy-back;
9. the minimum and the maximum number of securities that the company proposes to buy-back, sources of funds from which the buy-back would be made and the cost of financing the buy-back;
10. brief information about the company;

11. audited financial information for the last 3 years. The lead manager shall ensure that the particulars (audited statement and un-audited statement) contained therein shall not be more than 6 months old from the date of the public announcement together with financial ratios as may be specified by SEBI;
12. details of escrow account opened and the amount deposited therein;
13. listing details and stock market data :
 - a. high, low and average market prices of the securities of the company proposed to be bought-back, during the preceding 3 years;
 - b. monthly high and low prices for the 6 months preceding the date of the public announcement;
 - c. the number of securities traded on the days when the high and low prices were recorded on the relevant stock exchanges during the periods stated at (a) and (b) above;
 - d. the stock market data referred to above shall be shown separately for periods marked by a change in capital structure, with such period commencing from the date the concerned stock exchange recognises the change in the capital structure (e.g. when the securities have become ex-rights or ex-bonus);
 - e. the market price immediately after the date of the resolution of the Board approving the buy-back; and
 - f. the volume of securities traded in each month during the 6 months preceding the date of the public announcement. Along with high, low and average prices of securities of the company, details relating to volume of business transacted should also be stated for the respective periods.
14. present capital structure (including the number of fully paid and partly paid securities) and shareholding pattern;
15. the capital structure including details of outstanding convertible instruments, if any, post buy-back;
16. the aggregate shareholding of the promoter group and of the directors of the promoter company, where the promoter is a company and of persons who are in control of the company;
17. the aggregate number of equity shares purchased or sold by persons mentioned in clause (16) above during a period of 12 months preceding the date of the public announcement; the maximum and minimum price at which purchases and sales referred to above were made along with the relevant dates;
18. management discussion and analysis on the likely impact of buy-back on the company's earnings, public holdings, holdings of NRIs/FIIs etc., promoters holdings and any change in management structure;
19. the details of statutory approvals obtained;
20. collection and bidding centers;
21. name of the compliance officer and details of investor service centers;
22. such other disclosures as may be specified by SEBI from time to time by way of guidelines.

The public announcement should be dated and signed the Board.

Specified Date

In case of tender offer route, the Board should determine a particular date as the specified date and mention the same in the public announcement for the purpose of despatch of letter of offer to the securityholders.

[Regulation 8(2)]. Such specified date should not be later than 30 days from the date of the public announcement. [Regulation 8(3)]. For instance, if the public announcement is made on 30th September 2003, the specified date can be any date between 31st October 2003 and 11th November 2003.

The shareholders whose names appear in the Register of Members on the specified date should be given tender offer by the company.

However, unregistered shareholders may be allowed to tender their shares on receipt of an application from them signed by all the shareholders, stating folio number, address, number of shares held, share certificate number, number of shares tendered for buy-back, bank account details and accompanied by original share certificates, duly executed transfer deeds and other relevant documents as may be required by the company.

Letter of Offer

A draft letter of offer, alongwith the fees prescribed in Schedule IV of the Regulations, should be filed with SEBI, within 7 working days of the public announcement, through a merchant banker not associated with the company. The date of the public announcement is to be excluded while calculating the 7 working days. The draft letter of offer should include the following particulars mentioned in Schedule III of the Regulations [Regulation 8(4) and 8(5)]:

1. disclaimer clause as may be prescribed by SEBI;
2. details of the offer including the total number of shares and percentage of the total paid-up capital and free reserves proposed to be bought back and price;
3. the proposed time table from opening of the offer till the extinguishment of the certificates.
4. the specified date;
5. authority for the offer of buy-back;
6. a full and complete disclosure of all material* facts including the contents of the explanatory statement annexed to the notice for the general meeting at which the special resolution approving the buy-back was passed or the contents of the public notice issued after the passing of the resolution by the Board authorising the buy-back;
7. the necessity for the buy-back;
8. the process to be adopted for the buy-back;
9. the maximum amount to be invested under the buy-back;
10. the minimum and the maximum number of securities that the company proposes to buy-back, sources of funds from which the buy-back would be made and the cost of financing the buy-back;
11. brief information about the company;

12. audited financial information for the last 3 years. The lead manager should ensure that the particulars (audited statement and un-audited statement) contained therein shall not be more than 6 months old from the date of the offer document, together with financial ratios as may be specified by SEBI;
13. details of escrow account opened and the amount deposited therein;
14. listing details and stock market data :
 - a. high, low and average market prices of the securities of the company proposed to be bought-back, during the preceding 3 years;
 - b. monthly high and low prices for the 6 months preceding the date of filing the draft letter of offer with SEBI, which shall be updated till the date of the letter of offer;
 - c. the number of securities traded on the days when the high and low prices were recorded on the relevant stock exchanges during the periods stated at (a) and (b) above;
 - d. the stock market data referred to above shall be shown separately for periods marked by a change in capital structure, with such period commencing from the date the concerned stock exchange recognises the change in the capital structure (e.g. when the securities have become ex-rights or ex-bonus);
 - e. the market price immediately after the date of the resolution of the Board approving the buy-back; and
 - f. the volume of securities traded in each month during the 6 months preceding the date of the offer document. Along with high, low and average prices of securities of the company, details relating to volume of business transacted should also be stated for the respective periods;
15. present capital structure (including the number of fully paid and partly paid securities) and shareholding pattern;
16. the capital structure including details of outstanding convertible instruments, if any, post buy-back;
17. the aggregate shareholding of the promoter group and of the directors of the promoter company, where the promoter is a company and of persons who are in control of the company;
18. the aggregate number of equity shares purchased or sold by persons mentioned in clause (17) above during a period of 12 months preceding the date of the public announcement and from the date of public announcement to the date of the letter of offer; the maximum and minimum price at which purchases and sales referred to above were made along with the relevant dates;
19. management discussion and analysis on the likely impact of buy-back on the company's earnings, public holdings, holdings of NRIs/FIIs etc., promoters holdings and any change in management structure;
20. the details of statutory approvals obtained;
21. collection and bidding centers;
22. name of compliance officer and details of investor service centers;

23. (i) a declaration to be signed by at least two whole-time directors or by any two directors authorized by the Board that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institutions or banks;
- ii. a declaration to be signed by at least two whole-time directors, one of whom shall be the managing director, or by any two directors authorized by the Board stating that the Board has made a full enquiry into the affairs and prospects of the company and has formed the opinion:
- a. as regards the company's prospects for the year immediately following the date of the letter of offer that, having regard to the intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in the view of the Board be available to the company during that year, the company will be able to meet its liabilities and will not be rendered insolvent within a period of one year from that date;
- b. in forming their opinion for the above purposes, the directors shall take into account the liabilities as if the company were being wound up under the provisions of the Act (including prospective and contingent liabilities);
24. the declaration must in addition have annexed to it a report addressed to the directors by the company's auditors stating that:
- i. they have inquired into the company's state of affairs; and
- ii. the amount of permissible capital payment for the securities in question is in their view properly determined; and
- iii. they are not aware of anything to indicate that the opinion expressed by the directors in the declaration as to any of the matters mentioned in the declaration is unreasonable in all the circumstances;
25. such other disclosures as may be specified by SEBI from time to time by way of guidelines.

The offer document should be dated and signed by the Board.

The company cannot withdraw the offer to buy-back securities after the draft letter of offer is filed with SEBI or the public announcement of the offer is made. [Regulation 19(1)(d)].

The company should ensure that the public announcement of the offer or any other advertisement, circular, brochure, or publicity material contains true, factual and material information and that it does not contain any misleading information. Any such announcement or disclosure must state that the directors of the company accept the responsibility for the information contained in such documents.

[Regulation 19(1)(a)].

It is desirable that the letter of offer is also placed on the website of the company.

Declaration of Solvency

The company should file, along with the draft letter of offer, a declaration of solvency in Form 4A of the Companies (Central Government's) General Rules and Forms, 1956 with the Registrar and SEBI, within 7 working days of public announcement, in the manner prescribed in Section 77A(6). [Regulation 8(7)].

Opening and closing of offer

A company opting for buy-back of securities through tender offer should despatch the letter of offer to the securityholders only after 21 days from submission of the draft letter of offer to SEBI and it should reach the securityholders before the offer opens. For the purpose, the company should ensure that all the letters of offer are despatched at least 48 hours before the offer opens. If the letter of offer is despatched through post, such service shall be deemed to be effected at the expiration of 48 hours after posting.

If SEBI specifies any modification in the draft letter of offer within 21 days from the date of submission, the merchant banker and the company should carry out such modification before the letter of offer is despatched to the securityholders [Regulation 8(6)]. Further, if any clarification or document related thereto has to be furnished to SEBI, the period of 21 days shall be counted from the date of such submission to SEBI.

Non-receipt of letter of offer by, or accidental omission to despatch the letter of offer to any person who is otherwise eligible to receive the offer, shall not invalidate the offer of buy-back.

The offer should remain open for a period of not less than 15 days and not more than 30 days from the date of despatch of the letter of offer to the securityholders. [Regulation 9(1)].

The date of opening of the offer should not be earlier than 7 days nor later than 30 days from the specified date [Regulation 9(2)]. Specified date shall not be later than 30 days from the date of public announcement.

Submission of tender offer

A shareholder should submit separate tender/offer forms for each of his folios or each of the depository accounts.

In case of companies submitting tender offer forms, the necessary certified corporate authorizations (i.e. Board/general meeting resolutions) should be sent alongwith the letter of offer.

In case shares are held in physical form, it is desirable that the shareholder sends an application either in the form prescribed by the company or if no such format is prescribed, on a plain paper furnishing the details of name, address, folio number, number of shares held, certificate number, number of shares tendered for buy-back and distinctive numbers thereof, bank account particulars for payment of consideration, original share certificates, etc. The application should reach the collection centers before the close of business hours on the date of closure of buy-back. In case of unregistered shareholders, the application and other documents should also be accompanied by valid share transfer form(s), original equity share certificate(s) and the original

broker contract note of a registered broker of a recognised stock exchange. If shares are held by jointholders, the transfer form should be signed by all shareholders.

In case the shares are in dematerialized form, it is desirable that the shareholder sends an application in the prescribed form or if no such format is prescribed or letter of offer is not received, on a plain paper. The application should contain details of name, address, DP Name/ID, beneficiary account number, number of shares tendered for buy-back, bank account particulars for the payment of consideration and enclosing therewith a photocopy of the delivery instruction in 'off-market' mode, duly acknowledged by the Depository participant in favour of depository account. The application should reach the collection centre before the close of business hours on the date of closure of buy-back.

In case one or more of the joint holders is deceased, the form must be signed by all the surviving holder/s and submitted along with the certified or attested true copy of the death certificate/s, with necessary direction for deleting the name of the deceased shareholder(s) from the register of members. If the sole holder is deceased, the form must be signed by the legal representative/s of the deceased and submitted along with the certified or attested true copy of probate/letter of administration/succession certificate while tendering the equity shares for buy-back.

Where a joint holder is deceased, the shares tendered will be consolidated with the shares, if any, held and tendered by the surviving shareholder/s for the purpose of reckoning the aggregate number of shares to be bought back from the surviving shareholder/s.

Duly attested power of attorney should also be attached if any person other than the shareholder has signed the relevant form. In case the form is signed under power of attorney or by authorised signatory/ies on behalf of a company, the power of attorney must be registered with the company. The registration serial number of such document should be mentioned below the relevant signatures. Where the relevant document is not so registered, a copy thereof, duly certified by a notary/gazetted officer, should be enclosed with the form.

Non-resident shareholders should also enclose a copy of the permission received from RBI for acquiring the shares held by them and the no objection certificate/tax clearance certificate from the Income Tax authorities, indicating the amount of tax to be deducted by the company before remitting the consideration. In case the aforesaid no objection certificate/tax clearance certificate is not submitted, the company should arrange to deduct tax at the maximum marginal rate as may be applicable to the category of the shareholder on the entire consideration amount payable to such shareholder/s.

Verification of offers

The company should complete the verification of the offers received within 15 days of the closure of the offer.

The offer may be rejected on account of any lacunae and/or defect,

incomplete information, late receipt or modifications in the letter of offer or other documents submitted.

Where no communication of rejection of offer is made by the company within 15 days of closure of the offer, the securities lodged for the purpose of buy-back shall be deemed to be accepted. [Regulation 9(5)].

Acceptance of securities on proportionate basis

Where the number of securities offered by the holders is more than the total number of securities to be bought back by the company, the acceptance should be on a proportionate basis, related to the number of shares offered per securityholder. [Regulation 9(4)].

Acceptances tendered by the securityholders should be divided by total acceptances received and multiplied by the total number of securities to be bought back i.e.

$$\begin{array}{lcl} \text{Proportional} & = & \text{Number of shares to be bought back X} \\ \text{acceptance} & & \\ \text{per shareholder} & & \text{Number of shares offered / acceptances} \\ & & \text{received} \end{array}$$

Acceptance of securities in full

Where the number of securities offered is less than or equal to the total number of securities to be bought back by the company, the offer of each securityholder should be accepted in full.

Opening of Special Depository Account

For shares tendered in dematerialised mode, a “Special Depository Account” should be opened through the Registrars to the offer. The following are the salient features of the account :

1. The account should be opened by the Registrars to the offer jointly with the company by executing the requisite agreements with a Depository Participant of NSDL/CDSL.
2. The Registrars should have powers to receive shares into the account.
3. The special depository account should be open only during the period of offer and should be kept only in “Receipt Mode”, i.e. with powers only to receive shares.
4. The Registrars should verify the electronic receipt of shares into the account with the confirmation received by post in the form of offer-cum-acknowledgement form received and verify the contents as in the form and as received in the special depository account.
5. The transfer of shares from the special depository account into the company’s account and/or reference-transfer of unaccepted/rejected shares to the investors should be executed jointly by the Registrars and the company upon confirmation by the managers to the offer that all formalities including remittance of consideration for the shares acquired have been completed.
6. The account should be closed upon completion of all formalities and upon transfer of all shares held in the account of the company/investors as the case may be.
7. The company should reimburse/pay all expenses related to the

- opening, operating and closing of the account to the Registrars.
8. The company should also pay the depository participant the applicable fee charged by the depository (on performance transaction basis) for the transfer of shares from special depository account to the company and the investors.
 9. Shares tendered by Non-resident holders should be transferred into the company's account only upon receipt by the Registrars of RBI's permission for acquisition of shares. However, return of unaccepted/rejected shares should be effected immediately upon closure of the offer period/upon receipt of authorization by the company.

The Registrars to the issue should carry out the following functions in respect of shares tendered physically under the offer:

1. Upon receipt of shares tendered, they should put a stamp of "Surrendered under buy-back offer" on the certificates.
2. The Registrars may also receive all items sent to them by post upto 48 hours from the close of the offer.
3. The shares tendered should be checked with the shareholders' master data for verification of details/contents of the shares tendered and the signature of the person tendering the shares.
4. If the acceptance is only pro rata, in accordance with the permission given by the investor in the offer-cum-acknowledgement form, the shares should be split and split certificates to the extent of shares accepted should be transferred in favour of the company and shares unaccepted/rejected (through new share certificates issued) should be returned to the investor.

Escrow Account

The company should deposit in an escrow account opened with a scheduled commercial bank on or before the opening of the offer for buy-back of securities, such sum as is specified below:

- i. Where the (estimated) consideration payable for buy-back does not exceed Rs. 100 crores, 25% of the consideration payable;
- ii. In case the consideration payable for buy-back exceeds Rs. 100 crores, 25% upto Rs. 100 crores and 10% of the balance. [Regulation 10(1) and (2)].

Where a company opts to deposit cash in an escrow account, it should empower the merchant banker to instruct the bank to issue a banker's cheque or demand draft for the amount lying to the credit of the escrow account in his favour. [Regulation 10(4)].

Apart from cash, the escrow account may consist of bank guarantee in favour of the merchant banker or deposit of acceptable securities with the appropriate margin, with the merchant banker. The escrow account can also be maintained as a combination of the above. [Regulation 10(3)].

The discretion in respect of 'acceptable' securities and 'appropriate' margin shall be exercised by the merchant banker.

Where the escrow account opened by the company consists of bank guarantee, it should be in favour of the merchant banker and should

remain valid for 30 days after the closure of the offer. [Regulation 10(5)]. The bank guarantee should not be returned by the merchant banker till the completion of all obligations under the Regulations. [Regulation 10(7)].

At the time of opening of the account, the company should deposit with the bank, in cash, a sum of at least 1% of the total consideration payable as security for fulfillment of obligations under the Regulations. [Regulation 10(8)].

Deposit of acceptable securities

Where a company deposits the acceptable securities for the purpose of escrow account, such securities should be deposited with appropriate margin as decided by the merchant banker and should not be returned to the company till the fulfillment of all the obligations under the Regulations. [Regulation 10(7)].

The company should also empower the merchant banker to realize the value of such securities. In case of any deficit on realization of the value of the securities, the merchant banker is liable to make good the deficit. [Regulation 10 (6)].

Forfeiture

In case of non-fulfillment of obligations under the Regulations by the company, SEBI may forfeit the amount in the escrow account either in full or part and distribute the amount pro rata amongst the securityholders who accepted the offer and utilize the balance, if any, for investors' protection. [Regulation 10(10) and 10(11)].

Opening of a special bank account for payment to securityholders

The company should open a special bank account with a Banker to the Issue registered with SEBI.

The special account should be opened immediately after the date of closure of the offer. Such amount as would together with 90% of the amount lying in escrow account make up the entire sum due and payable as consideration for buy-back of securities should be deposited in such account at the time of opening of the account. For the purpose of deposit in such account, the amount lying in the escrow account may be transferred to such special bank account. [Regulation 11(1)].

Payment towards consideration of buy-back

Payment for buy-back of securities should be made within 7 days from the date of completion of verification of offers as mentioned in the letter of offer. [Regulation 11(2)].

The requirement for the completion of verification is 15 days from the date of closure of the offer. In case the verification is completed before the time specified, the payment should be made within 7 days from the date of completion of verification.

The payment for buy-back of securities should be made to those securityholders whose offers have not been rejected in part or in full by the company, and may be made in cash or through bank draft or pay order or cheque payable, in the case of jointholders, to the first named person.

Immediately after the date of completion of verification of offers, the company should return by registered post and within 7 days, the security certificates to those securityholders whose offers have been rejected. [Regulation 11(2)]. Where the rejection is in respect of part of the shares offered, the certificates should be split and returned in respect of shares not accepted.

Extinguishment of security certificates and reduction in the number of beneficial owners

The company should extinguish and physically destroy the security certificates so bought back in the presence of the Registrars or merchant banker and statutory auditor within 15 days of the date of acceptance of the shares or other specified securities. The company shall ensure that all the securities brought back are extinguished within seven days of the last date of completion of buy-back [Regulation 12(1)]. Merely stamping “cancelled” on the certificate is not sufficient and the process of complete physical destruction should be resorted to.

The shares or other specified securities offered for buy-back, if already dematerialized, should be extinguished and destroyed in the manner specified under SEBI (Depositories and Participants) Regulations, 1996 and the bye-laws framed thereunder. [Regulation 12(2)].

Certificate of extinguishment

The company should furnish a certificate to SEBI, certifying the compliance of the Regulations relating to extinguishment of certificates on a monthly basis by the seventh day of the month succeeding the month in which the securities certificates are the extinguished and destroyed.

Such certificate should be duly verified by:

- a. the Registrar and whenever there is no such Registrar by the merchant banker;
- b. two directors of the company one of whom shall be managing director where there is one, and
- c. the statutory auditor of the company [Regulation 12(3)].

The company should also furnish the particulars of the securities extinguished and destroyed to the stock exchanges where the securities of the company are listed on a monthly basis by the seventh day of the month succeeding the month in which the Securities Certificates are extinguished and destroyed, within 7 days of such extinguishment and destruction. [Regulation 12(4) and 19(4)].

Public advertisement – post buy-back

Within 2 days of completion of buy-back, the company should issue a public advertisement in a national daily. [Regulation 19(7)]. It is desirable that the advertisement is issued in at least one English national daily, one Hindi national daily and a regional language daily, all with wide circulation at the place where the registered office of the company is situated.

Such public advertisement should contain the following particulars :

- i. number of securities bought back;
- ii. price at which the securities were bought back;

- iii. total amount invested in the buy-back;
- iv. details of the securityholders from whom securities exceeding 1% of total securities were bought back; and
- v. the consequent changes in the capital structure and the shareholding pattern after and before the buy-back.

Return of buy-back

The company should file a return containing the particulars prescribed by the Central Government relating to buy-back of securities with the Registrar and SEBI within 30 days of completion of buy-back. [Section 77A(10)].

Maintenance of records and registers

Where a company buys back its securities, it shall maintain a register of the securities so bought back, the consideration paid for the securities bought back, the date of cancellation of securities, the date of extinguishing and physically destroying securities and such other particulars as may be prescribed. [Section 77A(9) and Regulation 12(5)].

Preservation of records and registers

The company should keep all documents relating to buy-back of securities for a minimum period of 8 years.

Transfer to Investor Education and Protection Fund

The unpaid or unclaimed money lying in the special bank account need not be transferred to the Investor Education and Protection Fund after 7 years.

XXI. Buy-back through Stock Exchange

A company can buy back its securities from the open market through stock exchanges. [Regulation 14(2)(a)].

In the special resolution or Board resolution passed for buy-back through stock exchange, the maximum price at which the buy-back shall be made should be specified. [Regulation 15(a)].

Buy-back should be made only through stock exchanges which have electronic trading facility. [Regulation 15(g)]. The electronic screen of such stock exchanges should show the identity of that listed company as a purchaser of securities to be bought back. The company should appoint a merchant banker and make a public announcement as provided in the case of a buy-back through tender offer [Regulation 15(c)]. The public announcement should be made at least 7 days prior to the commencement of buy-back. [Regulation 15(d)]. A copy of the public announcement should be filed with SEBI within 2 days of such announcement along with the fees as specified in Schedule IV. [Regulation 15(e)]. The public announcement should also contain disclosures regarding details of the brokers and the stock exchanges through which the buy-back of securities would be made. [Regulation 15(f)].

The buy-back shall be made only on stock exchanges having nationwide trading terminals.

The buy-back of shares or other specified securities shall be made only through the order matching mechanism except 'all or none' order matching system. [Regulation 15(h)]

The company and the merchant banker is required to submit the information regarding the shares or other specified securities bought- back to the stock exchange on a daily basis and publish the said information in a national daily on a fortnightly basis and every time when an additional five per cent of the buy back has been completed [Regulation 15(i)]. However where there is no buy back during a particular period the company and the Merchant Banker is not required to publish the details in a national daily.

Though the Regulations do not stipulate the opening date of offer, in the case of buy-back through stock exchange, the offer may be opened from the specified date.

No letter of offer is required in the case of buy-back of securities through stock exchanges.

A listed company should buy back its securities only through the order matching mechanism except 'all or none' order matching system [Regulation 15(h)].

The company should purchase all the securities offered by the holders thereof at the price stipulated by the company without attaching any condition to their offer. If the seller has attached a condition to the effect that he is prepared to sell only if all the securities offered by him are accepted, the securities should not be purchased.

Promoters or persons in control are not permitted to offer their securities when buy-back is made through stock exchanges. [Regulation 15(b)].

Beneficial owners who desire to sell their shares under the buy-back offer should do so through a broker informing him the details of shares they intend to sell when the company has placed a "Buy" order for buy-back of shares. The trade may be executed at the price at which the order matches and that price would be the price for that seller.

The execution of the order, the issuance of contract note, delivery of securities to the member and receipt of payment from the member may be carried out in accordance with the requirements of the stock exchange and SEBI.

The shares bought back by the company may not be at a uniform price.

Further, the company is under no obligation to place a "Buy" order on daily basis or to place an order on both the odd lots as well as the normal trading segment of the stock exchanges, as applicable.

Shareholders whose shares are in physical form can sell their shares at the odd lot trading segment if and when the company places an order in that segment.

The company should pay the consideration to the brokers on every settlement date, as applicable to the respective stock exchanges.

The company should complete the verification of acceptances within 15 days from the date of payment. [Regulation 16(2)]. On completion of the buy-back through stock exchanges, share certificates should be extinguished within 7 days from the date of completion of buy-back.

The procedure for the extinguishment of certificates and filing of compliance certificate should be followed in the same manner as in buy-back through tender offer.

XXII. Buy-back through book building

A listed company may buy-back its securities from the open market through book building. This is a process by which a supply of the securities proposed to be bought back by a listed company is elicited and built up and the price for buy-back of such securities is assessed for the determination of the quantum of such securities to be bought back.

In the special resolution/Board resolution passed for buy-back through book building, the maximum price at which the buy-back shall be made should be specified. [Regulation 17(1)(a)]. The explanatory statement to be attached thereto/public notice should contain disclosures as specified in Schedule I to the Regulations.

The following additional disclosures should also be made in the explanatory statement where the buy-back of securities is made through book building :

- i. the maximum price at which the buy-back of securities shall be made;
- ii. whether the Board is being authorised at the general meeting to determine subsequently the specific price at which the buy-back may be made at the appropriate time;
- iii. in case the promoters intend to offer their securities, the following disclosures shall also be made in the explanatory statement:
 - a. the quantum of securities proposed to be tendered by promoters; and
 - b. the details of their transactions and their holdings for the last 6 months prior to the passing of the special resolution for buy-back including information of number of securities acquired, the price and the date of acquisition. [Regulation 7].

The book building process should be conducted through an electronically linked transparent facility and all bidding centers, the number of which should not be less than 30, should have at least one electronically linked computer terminal. [Regulation 17(g) and (h)].

The company should appoint a merchant banker and make a public announcement as in the case of a buy-back through tender offer. [Regulation 17(1)(b)].

The public announcement should be made at least 7 days prior to the commencement of buy-back. [Regulation 17(1)(c)]. Besides the disclosures mentioned in tender offer, the public announcement should also contain disclosures relating to the detailed methodology of the book building process, the manner of acceptance, the format of acceptance to be sent by the securityholders pursuant to the public announcement and the details of bidding centers. [Regulation 17(1)(f)]. A copy of the public announcement should be filed with SEBI within 2 days of such announcement along with the fees as specified in Schedule IV of the Regulations. [Regulation 17(1)(e)]. The company should open an escrow account as in the manner prescribed for buy-back through tender offer. However, the amount to be deposited in the escrow account should be determined with reference to the maximum price specified in the public announcement. The deposit in the escrow account should be made before the date of the public announcement. [Regulation 17(1)(d)].

Though the Regulations do not stipulate the opening date of offer, in case of

buy-back through book building, the offer may be opened from the specified date.

The offer for buy-back should remain open to securityholders for not less than 15 days and not more than 30 days . [Regulation 17(1)(i)].

The price of securities to be bought back should be decided by the merchant banker and the company on the basis of quotations received from the securityholders [Regulation 17(1)(j)]. The highest accepted price should be final and it should be paid to all holders whose securities have been accepted for buy-back. [Regulation 17(1)(k)].

No letter of offer is required in the case of buy-back of securities through book building process.

In this mode of buy-back, the promoters and persons in control are permitted to offer their securities for buy-back as in the case of tender offer.

Shareholders may indicate the number of shares that they are willing to tender at specified period(s) given in the tender/offer form and the number of shares they would like to tender at the “cut-off price” which may be determined by the Board.

Shareholders should submit separate tender/offer form per folio.

In case one or more of the joint holders is/are deceased, the tender/offer form must be signed by all the surviving holder(s) and submitted alongwith the certified or attested true copy of death certificate(s). If the sole holder is deceased, the tender/offer form must be signed by the legal representative(s) of the deceased and submitted along with the certified or attested true copy of probate/letter of administration /succession certificate, while tendering the shares for buy-back.

Photocopies of approval(s) from RBI for acquiring and holding shares in the company should be submitted in case of NRIs/FIIs.

The receipt of the tender/offer form may be acknowledged by the bidding centers. Shareholders should preserve the receipt, as it may be required in case of revision of bids.

The revision of bids should be on separate revision form, which should be made available at all the bidding centers. The shareholders should enclose original acknowledgement receipt of the earlier tender/offer form alongwith the duly filled in revised bid form. In case a revised bid is submitted, the previous bid submitted would stand automatically cancelled. Revised bids should be submitted at the same bidding centre where the original bids were submitted.

In arriving at the “final buy-back price”, the book position is built up from the valid bids received at the minimum of the offer price range. The “final buy-back price” should be determined by the company, in consultation with the manager to the offer, which should not be lower than the minimum of the range.

The “final buy-back price” will be the price applicable to all the shareholders whose bids have been accepted.

If the shares tendered by the shareholders at the price at which the “final buy-back price” has been arrived at exceeds the total number of shares offered to be bought back by the company, the bids should be accepted by

the company in consultation with the manager to the offer keeping in view the following:

- a. the shareholders who have quoted at “cut-off price as determined in the minimum offer price range” or have quoted the price below the “final buy-back price” should be given priority;
- b. the remaining bids should be accepted on pro-rata basis. To facilitate small shareholders and to control odd lots, all odd lots should be accepted initially and thereafter bids should be accepted on pro rata basis in such a way that all valid bids should be accepted in multiples of particular number of shares;
- c. the shares submitted in physical form to the extent not accepted or rejected should be returned to the shareholders, by registered post, at the registered address of the shareholders;
- d. shares held in demat form to the extent not accepted for buy-back should be released to the beneficial owner’s Depository Account with the respective Depository Participant as per details furnished by the beneficial owner in the tender/offer form. An intimation to that effect should be sent to the beneficial owner by ordinary post.

The procedure of verification of acceptances, opening of a special account, payment of consideration and extinguishment of security certificates should be followed in the same manner as is prescribed in the case of buy-back through tender offer. [Regulation 17(2)].

LESSON ROUND-UP

- “*Buy-back*” means the purchase of its own shares or other specified securities by a company.
- Buy-back of securities is a corporate financial strategy which involves capital restructuring and is prevalent globally with the underlying objectives of increasing earnings per share, averting hostile takeovers, improving returns to the stakeholders and realigning the capital structure.
- Buy-back of shares is regulated by Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 1998 in case of listed companies and Unlisted Public Limited Company (Buy-Back of Securities) Rules, 1999 and the Companies Act, 1956 in case of unlisted companies.
- The main objective of buy-back may be to improve earnings per share; to improve return on capital, return on net worth and to enhance the long-term shareholder value; to provide an additional exit route to shareholders when shares are under valued or are thinly traded; to enhance consolidation of stake in the company; to prevent unwelcome takeover bids; to return surplus cash to shareholders; to achieve optimum capital structure; to support share price during periods of sluggish market conditions and to service the equity more efficiently.
- Buy-back of securities may be made :
 - a. from the existing security holders on a proportionate basis; or
 - b. from the open market; or
 - c. from odd lots, that is to say, where the lot of securities of a public company whose shares are listed on a recognized stock exchange is

- smaller than such marketable lot as may be specified by the stock exchange; or
- d. by purchasing securities which had been issued to employees of the company pursuant to a scheme of stock option or sweat equity.

* The Companies (Second Amendment) Act, 2002 has substituted National Company Law Tribunal for CLB.