

## AMENDMENT TO THE INSIDER TRADING REGULATION: EFFICACIOUS LAW VERSUS TOOTHLESS LAW?

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### Abstract

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A well-regulated Stock Exchange is the key element of a healthy capital market. Insider trading, the occurrence of which has been widespread in current times around the world as the name suggests in simple terms is one such act of trading dealing in securities of a company based on certain information, which is not available to the public at large by any person whether directly or indirectly, who may or may not be overseeing the affairs of the company which disturbs the functioning of capital markets. The liberalization of India's economy has made its way for stock market crash and scams in India. This situation has drawn attention to the questions of transparency and triggered the enforcement of insider trading regime to be regulated and supervised by SEBI.

The concept of Insider Trading in India has been through an extraordinary change when a new set of regulations were created which made simple possession of such price-sensitive information as a violation of insider trading norms. However, several changes have been recently made that have provided some incentives to the traders by introducing some more measures and exceptions as well as tightened the noose encouraging the individuals to come forward and inform SEBI about the violation of insider trading laws. This research paper will deal with insider trading regulation in detail in India with a gist on the US and UK along with paving a way for further research question by critically analysing the recent amendments especially focusing on the amendment on 31st December 2018 after the recommendations of the FMC committee and covering significant judicial pronouncements and precedents.

**Keywords:** Insider Trading, Price Sensitive Information, SEBI, Stock Exchange Capital Market.

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## INTRICACIES OF INSIDER TRADING

The presence of market abuse and unfair trade practices along with information deterrent to the flourishing of the securities market has made regulations and amendments fundamentally important in a capital market to create a stable and efficient working market. Insider trading regulation which came into force in 2015, has since then seen immense changes in this trading regime. The recent amendments brought in the PIT regulations 2015 have provided us with two sides of the regulations that are on one hand acting as an incentive to traders by providing them with defences and on the other side being stringent by increasing the compliance of disclosures and internal checks and controls.

Before analysing the Indian Insider Trading Regulations, it is pertinent to note that on comparing the Indian regulation with the regulation of the United States, it is indispensable to note that the two have undergone different growth stage while the regime of the United States has been substantial since eight decades or more being more aggressive, the Indian regulation on other hand is not more than two decades old or so and is still in its emerging state.<sup>1</sup>

The very first case in the Indian History of Insider Trading was of **Hindustan Lever Ltd. vs. SEBI**<sup>2</sup> which focused on Insider Trading

case of Hindustan Lever Ltd. As per the facts, the company was apprehended to purchase a total of eight lakh rupees shares of Brooke Bond Lipton India Ltd based on price-sensitive information regarding the merger of two mentioned companies. In this particular case, SEBI's order was reversed by Securities Appellate Tribunal giving relief to HLL and the entire reason bashing such a decision was the lacuna in the definition of unpublished versus published price-sensitive information.

Another milestone in the list of cases of Insider Trading is the case of **Rakesh Agrawal vs. SEBI**<sup>3</sup>. The case focuses on the Managing Director of ABS Industries Ltd, Mr. Rakesh Agrawal who was a prime suspect of doing insider trading while having price-sensitive information about the merger between his company and Bayer AG. However, after all, deliberations in courts, it was finally decided that the trading was done in faith to help the other company enter the market and there was no intention of personal gain in making Mr. Agarwal not guilty of the corporate crime.

Given these changing situations, evolving instances of corporate crime, SEBI decided to introduce to add various amendments in the regime to make it a more stringent and effective one. Thus, this research paper will focus on the research question that is whether the amendments introduced by SEBI subsequently after the initiation of the Prohibition of Insider Trading Regulations,

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<sup>1</sup>Sharma Vaibhav, *Prohibition on Insider Trading: A Toothless Law*, Law School Research Paper No. 996. (May 7, 2009), <https://ssrn.com/abstract=1400824>.

<sup>2</sup>[1998] 18 SCL 311 (SAT).

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<sup>3</sup> [2004] 49 SCL 351 (SAT).

2015 can be termed as an effective law to curb the problem of Insider Trading or are mere an ineffectual law along with analysing the impact of those amendments.

### **AMENDMENT: EFFICACIOUS LAW VERSUS TOOTHLESS LAW?**

The Securities and Exchange Board of India vide its notification dated 31st December 2018 issued an amendment to the SEBI (Prohibition of Insider Trading) Regulations, 2015<sup>4</sup>. These amendments were put forward based on the recommendations of the Fair Market Conduct Committee which was headed under the leadership of Mr. T.K. Viswanathan, Ex-Secretary General, Lok Sabha and ex-law Secretary.

Subsequently, on 8<sup>th</sup> August, 2018, Committee Report was presented before SEBI highlighting several amendments, which was further placed on SEBI's website for public comments on 9<sup>th</sup> August, 2018.

Finally, on 31<sup>st</sup> December 2018, SEBI notified these Amendment Regulations, which came in effect from 1<sup>st</sup> April 2019. Subsequently, SEBI notified some further amendments on 21<sup>st</sup> January 2019 vide the SEBI (Prohibition of Insider Trading) Amendment Regulations, 2019 (Also called "Second Amendment Regulations which was in effect from 21<sup>st</sup> January 2019.

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<sup>4</sup>Securities Exchange Board of India, (April 20, 2020), <https://www.sebi.gov.in/legal/regulations/sep-2019/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-september-17-2019-41717.html>.

The series of amendments to Insider Trading Regulations continued when on 17<sup>th</sup> September 2019, the SEBI notified amendments to the regime vide Third Amendment Regulation, 2019 that became effective from 26<sup>th</sup> December 2019.

Subsequent chapters thus give out detailed information on what all were the key highlights of the amendments followed by an analysis of these amendments paving the way for the research question that whether the Amendments in this regime make it an Efficacious law or a toothless law.

### **Background of First and Second Amendment**

The amendments have been introduced with the aim of detailed version of the provisions of PIT regulations along with the effective implementation of this regime. SEBI, in line with amendments, has rationalised the Insider Trading Regime by setting apart the role and responsibilities of listed entities and the intermediaries.

The amendments, giving effect to the recommendation of the Fair market Conduct Committee, make certain basic changes to the regulation on the matters of determining the legitimate purposes regarding sharing of UPSI and trailing down such information flow; The conception of a database of persons with whom such UPSI is being shared; Introduction to framework for framing of Code of Conduct by entities; Creation of whistle-blower policy with a purpose of reporting the instances of the leak of UPSI etc. Several Prominent

Amendments as brought in by the SEBI through the notification are as follows:

**1) Insertion of an explanation in the definition of ‘Compliance Officer’**

Compliance Officer as per Regulation of the PIT Regulations means any senior officer, designated so and reporting to the board of directors or any head of the organisation in case the board of directors is not there, who is financially literate and also competent enough to recognize the legal requirements and regulatory compliance.<sup>5</sup> Explanation inserted to this regulation was inserted and states as follows that for any purpose relating to this particular regulation, the term „financially literate“ shall mean a person who can read and understand basic financial statements that are the balance sheet, profit and loss account, and statement of cash flows.<sup>6</sup>

**2) Insertion of the meaning of the phrase ‘Proposed to be listed’**

Regulation „hb“ was inserted in the regime describing out the meaning of „proposed to be listed“. The phrase as per the amendment includes the security of any unlisted company: i) if the offer or any specific document has been filed with SEBI or registrar of companies or stock exchange by the entity in respect of listing or ii) Subsequent to a merger or amalgamation, any company which on getting

listed has filed a copy of the respective scheme under companies act, 2013.<sup>7</sup>

**3) Amendment to the definition of ‘Unpublished Price Sensitive Information’**

The SEBI vide the notification amended and removed the term „Material Events in accordance with the listing agreement“<sup>8</sup> from UPSI“s definition as mentioned in the PIT Regulations.

**4) Amendment with respect to communication or procurement of unpublished price sensitive information**

**- Insertion of Regulation 3(2A)**

A new provision that is Regulation 3(2A)<sup>9</sup> was inserted by the First Amendment Regulation wherein, the BOD of a listed company is bound to make a policy for the determination of „Legitimate Purpose“ for which disclosures of UPSI may be made as a part of the Code of Fair Disclosure and Conduct. This regulation 2(A) further adds that „legitimate purpose“ shall include in the regular course of business, sharing by an insider of Unpublished Price Sensitive Information with partners, customers, merchant bankers, auditors, legal advisors etc. Keeping in mind that such kind of sharing should not have been conceded with

<sup>5</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015., Reg 2(c).

<sup>6</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015.

<sup>7</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 2(hb).

<sup>8</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg.2(hb).

<sup>9</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 2(n).

an aim to dodge or avoid the prohibitions of the PIT regulations.<sup>10</sup>

- **Insertion of Regulation 3(2B)<sup>11</sup>**

The regime was further amended by adding this new regulation as per which any person who receives any UPSI pursuant to a "legitimate purpose" shall be deemed to be an "insider" for the Regulations and in such cases, due notice shall be given to such specific persons to maintain the confidentiality of the UPSI in compliance with the regime.<sup>12</sup>

**5) Insertion for the requirement of maintaining digital databases**

SEBI vide regulation 3(5) inserted that the BOD of any listed company should ensure that a fully structured digital database is to be maintained containing all the names of such entity or people with whom such information of UPSI is shared under the regulation, along with the Permanent Account Number. Such a described database, to ensure non-tampering has to comply with internal checks and control.

**6) Amendment in the provision of restricting trade while in possession of Unpublished Price Sensitive Information**

There has been an amendment in Regulation 4(1) of the PIT Regulation by incorporation of an explanation which states that when a person/insider, while he was in possession of Unpublished Price Sensitive Information and has traded in securities which are listed or proposed to be listed, then it would be presumed that his trade has been initiated by knowledge and awareness of the information on the basis of the UPSI available and while it was in his possession.<sup>13</sup>

**7) Amendments in provisions related to Trading Plans**

Amendment has been inserted in regulation 5 (3) related to the persons who are perpetually in the possession of the UPSI like Directors, Promoters etc. It has now been inserted that any trade-in compliance with trading plan, there is no pre-clearance of trades required, once the trading plan has already been approved by the officer and along with this, it has been amended that there is no application to trades of a trading window or the restrictions on contra trades which have been carried out in proper conformity with an already approved trading plan.<sup>14</sup>

**8) Amendments with respect to disclosure**

Before the amendment in Regulation 7<sup>15</sup> of the PIT regulation the continual disclosures were required to be made only by promoters,

<sup>10</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 3(2A).

<sup>11</sup> SEBI (Prohibition of Insider Training) Regulation, 2015, Reg. 3(2B).

<sup>12</sup>Id. at 11.

<sup>13</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg 4(1).

<sup>14</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 5(3).

<sup>15</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7.

directors, and employees. But Post amendment, the „employee“ word has been replaced by the word „designated persons“.

Subsequent to amendment, under Regulation 7(2)(a), every designated person including promoter, employee and director of the entity who is involved whether in one transaction or a series of transactions over any calendar quarter, will have to release in 2 trading days of any such transaction, the respective number of disposed or acquired securities if the traded value of the securities aggregates to a traded value in excess of Rs. 10,00,000 or such other value as may be mentioned but Earlier any such disclosure was required only and only from the promoters and directors of companies.<sup>16</sup>

#### **9) Amendments related to Code of Conduct**

Initially, both the entities which are listed and Market Intermediaries were mandatorily supposed to have separate code of conduct like mentioned in Schedule B of the Regulations. Post Amendment, there are two different code of conduct that have been created as separate entities which are listed and for all the market intermediaries like law firms, banks, insolvency professional entities etc. All such types of market intermediaries have been clubbed and used under a common catalogue called “fiduciary”.<sup>17</sup>

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<sup>16</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7(2)(a).

<sup>17</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 9.

#### **10) Insertion of Institutional Mechanism for Prevention of Insider Trading**

Market regulator vide amendment has inserted Regulation 9A<sup>18</sup> wherein specifically Regulation 9A(1)<sup>19</sup> talks about that CEO or any other equivalent person of either the companies which are listed or market intermediary etc should have an ample amount and efficient mechanism of internal checks and controls for the prevention of insider trading

Such internal control comprises of a) employee having access to UPSI to be termed as „designated employees“; b) identification of UPSI and maintenance of confidentiality; c) Restrictions related to procurement or communication of UPSI, d) Notice and execution of agreement served to all the employees with UPSI and maintenance of a list of such employees, and lastly e) Timely reviewing the effectiveness of Internal checks and control.

The BOD or heads should ensure that CEO or MD or any other equivalent person should ensure compliance with Regulation 9 and Regulation 9A along with Audit Committee or other such body must review compliance and adequacy and effectiveness of the system for internal checks and control at least once in every financial year.<sup>20</sup>

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<sup>18</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 9A.

<sup>19</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 9A(1).

<sup>20</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 9(4).

Every listed entity should form policies and procedures for inquiry on cases related to leaking or suspected leaking of UPSI along with the formulation of whistle-blowers policy to enable employees to report the situations involving the leaking of UPSI.<sup>21</sup>

### 11) Amendment related to Due Diligence

Regulation 3(3) of PIT Regulations after the amendment now clearly specifies that the BOD of listed companies is required in entailing an obligation in respect of assessing whether the UPSI's sharing will be in the best and suitable interests of the entity or not for considering for the process of due diligence.<sup>22</sup>

### 12) Insertion of definition of 'Promoter Group'

The change brought in through the Second Amendment Regulations, have resulted in the insertion of the definition of „promoter group“ into the Insider Trading regulations.

### 13) Amendment of defences when trading in possession of UPSI

In order to impute accountability, it is required to provide certain essential and rational defences to the insiders. The developments as thus provided with some of the defences like:

(a) Insiders having the same UPSI and carrying out Off Market Transactions; (b) trades done as a result of regulatory

obligations; (c) block trades between insiders who have the same UPSI.<sup>23</sup>

### Background of the Third Amendment

In general, availability of direct evidence in instances of insider trading are usually not easily detected and those which are detected are often circumstantial, and thus in such cases, any information received from a person who has inside knowledge of this corporate crime is always helpful in initiating an action against the insider at right time. SEBI held its board meeting on 21<sup>st</sup> August 2019 and after the release of the discussion paper on 10<sup>th</sup> June, 2019 for review and recommendations and subsequently on 17<sup>th</sup> September, 2019 the SEBI via notification brought the amendments, popularly called as Third Amendment Regulations, 2019<sup>24</sup> effectively operating from 26<sup>th</sup> December, 2019.

SEBI in line with this notification brought in Chapter III-A relating to provisions about a mechanism for early detection of fraud and better enforceability and system of providing information by the informant along with confidentiality of informant and the reward.

SEBI has come forward with this to motivate and promote people so that they come forward and inform SEBI in respect of activities that are prohibited and violative of regulations

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<sup>23</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg (4).

<sup>24</sup>Securities Exchange Board of India, (April 20, 2020), [https://www.sebi.gov.in/legal/regulations/sep-2019/securities-and-exchange-board-of-india-prohibition-of-insider-trading-third-amendment-regulations-2019\\_44341.html](https://www.sebi.gov.in/legal/regulations/sep-2019/securities-and-exchange-board-of-india-prohibition-of-insider-trading-third-amendment-regulations-2019_44341.html).

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<sup>21</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg, 9(5) & 9(6).

<sup>22</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 3(3).

which might have already happened or must have been happening or may happen over some time. Some of the key highlights of the amendments are as follows:

### 1) Definition of Informant

As defined under Regulation 7(A)(b) of the regulation, „Informant“ is a person who voluntarily submits a form describing in detail the information which is credible, complete and original relating to any instance of insider trading.<sup>25</sup> Along with this definition, the term „original information“ has been described as any information which is relevant, sufficiently specific and credible and is not known to the BOD through any source and is derived from an independent knowledge, is termed out as original information.<sup>26</sup>

### 2) Amendment related to Confidentiality

Amendment in PTI Regulation specifies that an informant when discloses information related to instances of insider trading, the person does not require to disclose his identity during the submission of Original Information to SEBI. However, the informant disclosing the information may have to disclose the identity, if the same cannot be ruled out or expunged while the submission of the original information is done.<sup>27</sup>

### 3) Sanctity of Information

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<sup>25</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg 7A(b).

<sup>26</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7A(h).

<sup>27</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7H.

SEBI vide amendment specified that the Informant has the duty and must keep in mind and certify that the information“s sanctity has been taken care of and submitted to SEBI. All such information put forward by the informant should be original and should adequately comply with all the tests as mentioned in the definition of Original Information. The information should in any case not be frivolous or irrelevant or vexatious but if the informant, in any case, misleads or misinforms or tries to do so, SEBI may issue any penalty or direction on such informant.<sup>28</sup>

### 4) Protection against Victimization and retaliation

Every entity has been mandated via amendment to adopt a separate code of conduct in order to keep a check that effective and sufficient protection is provided against any illegitimate termination, harassment, threat, demotion etc faced directly or indirectly by any employee or individual who has provided the original information to SEBI.<sup>29</sup> If any retaliation or victimization is faced by the informant subsequently, the informant is allowed to have an access to any of the legal remedy to penalise the employer or any such person.

### 5) Monetary reward

The SEBI vide notification has approved that a particular informant is supposed to be entitled

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<sup>28</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7D.

<sup>29</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7I.



to and can claim a particular interim incentive or reward which is payable out of total reward or a complete a reward. Such reward may extend up to 10% of all monetary authorizations or sanctions either collected or recovered but shall not exceed Rs. 1 Crore. However, an interim reward can be only extended up to 10 Lakhs.

This reward is however subjected to either complete recovery or substantial recovery of monetary authorizations. In cases, whether the recovered monetary sanction is substantial or not is always an exclusive discretion of SEBI.<sup>30</sup>

#### 6) Office of Informant Protection

As per the amendment, an Office of Information Protection (OIP) shall be established which will act as an independent office segregated from any of the investigation department or the operational department and shall embark on tasks like serving as the link between informant and board, keeping a check that the confidentiality of informant is maintained, ensuring the working of helpline to guide people to file the report in cases of instances of Insider trading , transfer of information to the operational department after processing the information etc.<sup>31</sup>

#### IMPACT & ANALYSIS OF THE AMENDMENTS

In order to remove all kinds of ambiguity, on one side the amendment bestows a novel set of

stringent compliances and regulatory norms whereas, on the other side, it also provides us with a bunch of novel defences and various relaxations to the traders. A gist of analysis of such blend as to whether the following amendments introduced have whether made the strap of insider trading more stringent or whether they have laid down incentives for the traders is as follows:

- 1) In order to endow clarity on the definition of „Compliance Officer“, the definition of „Financially Literate“ was added and specified by SEBI as Indian Jurisprudence when talks about Corporate Crimes like Insider Trading is still emerging and thus, broader terms like these tend to be misused and always leads to a hindrance in interpretation.

The addition of the term financially literate in the definition of compliance officer has been adopted from the LODR regulations itself.<sup>32</sup>

- 2) Over the years, the phrase of legitimate purpose has been subjected to fair amount of debates. The PIT Amendment Regulation explicitly cleared this ambiguity by providing some insights as to what all instances are included as per this regime for unpublished price sensitive information. As onus has been placed on the board of directors of listed companies or intermediaries of describing what would comprise of „legitimate purpose“, the development was a critical and essential as

<sup>30</sup>Supra note 28.

<sup>31</sup>SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 7B.

<sup>32</sup>SEBI (Listing obligations and disclosure requirements), 2015, Reg 18.

it makes companies use their abilities to determine how the companies will share and disclose information.

This amendment on one side allows the listed entity with the independence to constitute what would comprise „legitimate purpose“ for them based on their business aspects and on the other side, it also keeps a note by entrusting responsibility on the directors to justify such policies or definitions. Thus, this is a much-needed change that was required in the system of Insider trading to make it more deterrent.<sup>33</sup>

3) The term „proposed to be listed“ was added in the regime due to the absence of any clarity as the phrase can be interpreted in different ways and may also include the securities of a company from the time commencing of various dates such as the board’s approval of IPO/ filing the draft red herring prospectus or red herring prospectus with SEBI/ or any other event. Hence, to avoid any ambiguity, the FMC Committee found it applicable to add the meaning of the particular phrase.<sup>34</sup>

4) The FMC Committee observed that Material Events may or may not be price

sensitive according to Regulation 30 of SEBI Listing Regulations.<sup>35</sup> However, keeping in mind that definition of UPSI as per PIT regulation is inclusive, therefore, the term „material events“ has no specific requirement or valid reason to essentially be included in the definition of UPSI. This will, in addition, provides clarity as to some situations require no disclosure as they have no price bearing effect under PIT Regulations. Thereby, it narrows down the extent of all the information which can be bought under the head of UPSI under LODR ad PIT Regulations.<sup>36</sup>

5) The entity under this regulation has a requirement to maintain a digital record in respect of the name of the person to whom UPSI is shared along with the nature of UPSI along with a notice to make sure that compliance of the particular regulation has been done while being in possession of UPSI. Thus, it is required to have such kind of database to have time stamping and audit trail.

6) The amendment in order to increase the sanctity of regulation specified the ambit of a person who will be treated as an insider while trading in securities at the

<sup>33</sup>Ishita Agarwal, *Amendment to Insider Trading Regulation*, (April 17, 2020), <http://thelawbrigade.com/wp-content/uploads/2019/07/Ishita-Agarwal.pdf>.

<sup>34</sup>Vinod Kothari, *SEBI rationalises Insider Trading Regulations*, (April 18, 2020) <http://vinodkothari.com/wp-content/uploads/2019/01/Sebi-rationalises-Insider-Trading-Regulations.pdf>

<sup>35</sup> SEBI (Listing obligations and disclosure requirements), 2015, Reg. 30.

<sup>36</sup>Kajal Gupta, *Analysis of SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018*, (April 14, 2020) <https://taxguru.in/sebi/analysis-sebi-prohibition-insider-trading-amendment-regulations-2018.html>.

time of being in the possession of UPSI and is presumed to be motivated by such information. Thus, by this inclusive ambit, the legislators increased the burden of proof on the insider to prove his innocence. The insertion of a new clause has widened the scope of transactions.<sup>37</sup>

- 7) Despite of practical complications faced in implementation of trading plan, the committee amended that applicability to trading window rules and restrictions on contra trade or pre clearance of trade are not relevant for trading if the trading plan has been filed and approved. As on one side, main reason behind individual not declaring any trading plan remains unattended and on the other side, relaxation to individuals while declaring the trading plan has been provided.<sup>38</sup> It is important note that now whether these amendments focusing on relaxations in practical scenario will motivate the individual to declare their trading plan or not.
- 8) The restriction of making disclosure applicable only to designated person and not all employees, act as a relaxation in these PIT Regulations.
- 9) Having a common code of conduct for both listed entity and intermediaries,

made the legislators look towards the practical point of view and hence, the amendment in order to bring clarity in regulations brought into force two separate and different Codes of Conduct which prescribes minimum required standard for entities which are listed and for other intermediaries who are supposed to take care of UPSI in their regular course of business.

Code of conduct was subject to confusion with respect to coverage of the same as the conduct itself states that only employees and connected persons who are designated on the basis of their practical role in the entity are to be governed by the Code of Conduct. Thus, there was an amendment in the conduct to make it applicable to designated person(s) and immediate relatives of the designated person(s) only.<sup>39</sup>

This new amendment has added a spur for whistle-blowers that come forward and disclose the crime and has also taken care in lessening penalties for those who come forward with full disclosure.<sup>40</sup> In order to have a check on violations, with respect to listed entities the amended PIT Regulations provided

<sup>37</sup>Naman Mehta, *Amendments to SEBI*, (April 15, 2020) <https://taxguru.in/sebi/amendments-sebi-prohibition-insider-trading-regulations-2015.html>.

<sup>38</sup>*Amendments to SEBI*, (April 17, 2020), <https://www.azbpartners.com/bank/amendments-to-sebi-prohibition-of-insider-trading-regulations-2015-key-highlights/>.

<sup>39</sup>Bharat Vasani, ShrutiRajan & Rohan, *A new Year Usher in the Insider trading regulations, 2015 version*

2.0 <https://corporate.cyrilamarchandblogs.com/2019/01/prohibition-of-insider-trading-regulations-new-amendments/>.

<sup>40</sup>Aakash Choubey, Akshay Bhargav and Julie Roy, *The "Inside" Tale of Enhanced Accountability, Compliances And Defences*, (April 19, 2020), <https://www.khaitanco.com/thought-leadership/the-Inside-tale-of-enhanced-accountability-compliances-and-defences>.

that they should have a proper method for conduction of all inquiry and investigation in relation to cases involving leak of the price sensitive information. Thus, such kind of necessary stringent mechanism and code of conduct are often essential as insider trading has mostly comprised of an indirect link between the entities and the information which is often difficult to investigate and it is ultimately called as a back-door method crime.

10) The amendment has introduced the mechanism for imposing responsibilities on the board of directors or such equivalent person of any listed entity to make sure in implementing the provisions of the Insider Trading Regulations. The regime ensures that the analogous persons of the entity should formulate the code of conduct and put in place an ample and effective system of internal checks and control to certify proper execution of various requirements given under the Regulations to prevent insider trading.

However, requirement to send a notice to an insider under this amendment to keep the UPSI absolutely confidential is totally ambiguous in nature. It has not specified clearly as to who is the person who is actually responsible to send such notices.<sup>41</sup> This is creating confusion as to whether the analogous person like director, company or compliance

<sup>41</sup>GirijaGadre&Arti Bhargava, Off market transactions: All you want to know (April 15, 2020) <https://economictimes.indiatimes.com/analysis/off-market-transactions-all-you-want-to-know/articleshow/23209723.cms?from=mdr>.

officer is supposed to send the notice which may lead to the insider taking plea that he has not received any such document. Such situations can also put an insider under the ambit of such regime and may end up in getting him penalised unnecessarily as mere possession of UPSI is also treated as a violation under the PIT Regulation.

11) In the initial emerging and challenging time, for board of directors, it is difficult to figure out whether all the transactions in respect of the listed entity are in the best interest or not.<sup>42</sup> Thus, these changes were brought into picture; in order to make the board of directors a bit relieved as the amendments realigns the basic criteria on which communication of UPSI may be permitted.<sup>43</sup>

12) The foremost development that has been provided is in respect of some new defences that have been introduced in the amended PIT Regulations. In order to impute accountability, it is essential to provide some indispensable and rational defences to the insiders. Some of them are off market transactions, obligatory trades

<sup>42</sup>Karngupta, *Insider trading in capital market: An overview*, (April, 18, 2020)

<http://www.manupatrafast.com/articles/popopenarticle.aspx?id=275878d3-e9c8-4de4-9bd0-3f30b34db853&txtsearch=subject:%20capital%20market>.

<sup>43</sup> Vijay Bhutada&ManishaTejwani, *New insider trading norms: Tightening the noose!* (April 15, 2020)

<http://lawstreetindia.com/experts/column?sid=288>.

under regulation, employee stock option and block trades.<sup>44</sup>

Trading plan, on other hand as noted by the committee do create some problems in practical scenarios but they could not reach any specific implementation. These plans are mostly untouched or unpopular as they are irrevocable and usually require a 6 months gap in between the disclosure and the actual trading. These trading plans are thus, proving to be misnomers as disclosure of such type of trading plan have a bitter impact as the investors start becoming acquainted with the price sensitive information and usually affects the prices of the securities. Thus, trading plan as a defence to the mechanism of insider trading is still doubted.

However, amendment to Insider Trading now provides that preclearance of trades, trading window rules and norms, any restrictions on contra trading will not be required or necessary for the transactions done according to the trading plans that have already been approved.<sup>45</sup>

Generally, the off-market trades are on a mutually consensus basis between the involved parties and the entity or stock

exchanges are barely involved.<sup>46</sup> Earlier, this particular defence was available only to promoters but now it has been extended to others also. These kinds of transactions are not regulated by SEBI and are completely based on the mutually agreed terms and conditions of the parties involved.

However, such kind of transaction require strong internal checks and control and a great surveillance, thus this particular change with respect to defence has turned out to be unsuccessful in matter where details were required and to be disclosed by an insider. An insider in such cases thus is at leverage and is having an option to choose to reveal only some part of the information related to transaction and can easily miss the red alert from SEBI.

**13)** Section 12A<sup>47</sup> of the SEBI Act, 1992 read with PIT Regulations, 2015 always focuses on curbing the problem of insider trading to protect the interest of investors at large. However, SEBI has been invariably facing challenges in detection and prosecution of insider trading as maximum are not direct one but indirect or circumstantial ones, it makes the investigation system and legal processes a bit long. Thus, in order to provide a robust structure and with a view that individuals can come forward for disclosure without fear of retaliation, the Amendment of PIT Regulation focuses on providing efficient enforcement of the

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<sup>44</sup>BhavinGada, *Amendment to Insider Trading Regulations: An incentive for insiders?* (April 17, 2020) <https://elplaw.in/leadership/amendment-to-insider-trading-regulations-an-incentive-for-insiders/>.

<sup>45</sup>Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading Regulations 1992), (April 16, 2020), [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1386758945803.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1386758945803.pdf).

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<sup>46</sup>Supra note. 41.

<sup>47</sup>Securities and Exchange Board of India Act, 1992, Sec 32.

regime along with timely detection and reporting of instances of insider trading.<sup>48</sup>

Thus, an effective implementation or execution of this informant amendment of PIT Regulations will depend on adoption of rules and procedure not only by the employee but public at large as well. SEBI has undertaken a progressive step -towards prevention of insider trading but the efficiency of the framework and its effectiveness will significantly be depended on the effectiveness of the Office of Informant Protection.<sup>49</sup>

### POSSIBLE SOLUTIONS AHEAD

As most of the cases of insider trading are either not even solved or not even reported, the success rate of SEBI in investigating and regulating these transactions is quite low.<sup>50</sup> Popularly termed as the unwinnable war<sup>51</sup>, no matter how much stringent mechanism has been framed at this level to curb the issue, it has to still cover a long way ahead through development of jurisprudence for effective

implementation. Some key suggestions in this respect are as follows:

- 1) Recommendation put forth by the FMC Committee was about SEBI's power to seize calls and electronic communication for the purpose of collecting valid evidences and to wipe out the violations of insider trading relating to electronic communication through platforms like WhatsApp.<sup>52</sup>
- 2) In comparison, the regulations in India regarding insider trading fail to provide on the necessary criteria and factors in order to figure out what is the exact loss that has been caused to the entity and compensation that can be given in such case.
- 3) Better tip & bounty system procedures are required in order to encourage individual to come forward and help in disclose of the corporate crime.
- 4) Better and instantly available anticipatory, pre – emptive, injunctions and other such options should be provided for speedy justice instead of waiting for the final judgement or conviction.

<sup>48</sup> Pallavi Kankagiri & Nabrun Chandra Ray, Changes to Insider Trading Law: New Informant Policy, (April 115, 2020), <https://mondaq.com/india/CorporateCommercial-Law/857340/Changes-To-Insider-Trading-Law-New-Informant-Policy>

<sup>49</sup> Henil Shah, *SEBI empowers Informants to quash any Insider Trading attempts*, (April 18, 2020) <http://vinodkothari.com/wp-content/uploads/2019/08/SEBI-empowers-Informants-to-quash-any-Insider-Trading-attempts.pdf>.

<sup>50</sup> Roopanshi Sachar & Afzal Wani, Regulation of insider trading in India: Dissecting the difficulties and solutions ahead, *JCIL*, 2, 11.

<sup>51</sup> Arthur M. Louis, "The Unwinnable War on Insider Trading", 72 (1981).

<sup>52</sup> Issuance of directions to TATA motors ltd. in respect of leakage of UPSI relating to its financials through social media application, WTM/MPB/ISD/147/2018, Issuance of directions to Bata India ltd. in respect of leakage of UPSI relating to its financials through social media application, WTM/MPB/ISD/149/2018, Issue of directions to Axis Bank Ltd., (2017) SCC Online SEBI 138.

- 5) Over the year, the issue of requirement of mens rea has always been subjected to debate. In other jurisdiction, mens rea is a vital component to prove insider trading. However, after the amendment, the new PIT regulations now consider mere possession of UPSI as an offence. Also, in this crime of insider trading, there are huge penalties and punishments involved along with major consequences. Thus, it is becoming extremely important to understand the meaning of intention and bad motive separately.<sup>53</sup>
- 6) Being a challenging corporate crime, it is important to make the Board of directors aware of the nature of crime and its consequences and should be made aware of the mechanism of code of conduct and internal checks and controls that they should be aware of.<sup>54</sup>

## CONCLUSION

SEBI has constantly focused on bringing various amendments in order to modernize and revise the insider trading regime. Undoubtedly, the amendments have brought new changes in the regime but also have caused a swirl to deal with

After introduction of system of maintain database and compliances through amendments, no matter how many more defences have been initiated, the system of trading plan is still ambiguous due to less effective execution and are yet to be addressed and fulfilled.

Since all the responsibilities, starting from accumulation of database to deciding what would constitute sharing of the UPSI as a legitimate purpose for best and effective interest of the company to introducing whistle-blower policies etc have been bestowed on key managerial person making them more accountable towards the entity.

The three recent amendments in the PIT regulations have focused on not only establishing a stringent accountability regulation but also on the side of incentives and defences. The focus was on good corporate governance by way of introducing stringent norms and effective internal checks and control for all key managerial and equivalent person.

In the light of the aforesaid references, this amendment is an optimistic approach towards a system of transparency and making a structure of efficient and adequate accountability.

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<sup>53</sup>SCC Online Blog, *SEBI's Scheme to tackle Insider Trading*, (April, 17, 2020) <https://www.scconline.com/blog/post/tag/sebi-prohibition-of-insider-trading-regulations/>.

<sup>54</sup>Nishitha Desai Associates, *Insider Trading Regulations – A primer*, (April 19, 2020) [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Insider\\_Trading\\_Regulations\\_-\\_A\\_Primer.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Insider_Trading_Regulations_-_A_Primer.pdf).