A CRITICAL ANALYSIS OF THE IMPLICATION OF SEBI (PROHIBITION OF INSIDER TRADING) (AMENDMENT) REGULATIONS, 2018 ON CORPORATE GOVERNANCE IN INDIA

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Abstract — *Insider trading probes against several enterprises demonstrate prohibition of trading has become a challenging task. There are a number of orders issued by the SEBI concerning insider trading which prove that the legal restrictions on the securities trading by insider or tippee could not achieve the anticipated outcome. The uncertainty is attributable to the policy of keeping the scope of prohibited conduct as broad as possible, which results in the absence of any clear definition of prohibited conduct. Several settlement orders of insider trading with the accused person show that there is no deterrent effect of the insider trading regulation in India. Recently SEBI has amended insider trading regulation to meet the challenges posed in the past, but the problem is that insider trading in India has been declared a criminal offence and hence the evidence requires the rule of beyond reasonable doubt. This is one of the critical issues in India, which is coming in the way of effective enforcement of insider trading laws. It is vital to bring the civil elements into the regulation to make the laws more effective and enforceable. The present paper is an attempt to understand the corporate philosophy of insider trading regulation. Further, the paper will be identifying the problems with the approach towards the regulation of insider trading and how far the market forces in India have been taken into account.*

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I. INTRODUCTION

Dealing in the securities of a company by the insiders is regulated through a different mechanism. Common law imposed specific fiduciary duties upon the directors and other employees of a company, restraining them from misappropriation of the confidential price sensitive information for monetary gain. The corporate theory of regulating corporations is intended to serve the 'public good'.[1] Generally regulation of securities market emphasised on the enhancement of the shareholder's welfare. However, where the protection of shareholders interest is at the cost of the public good, then the regulation intends to find out if there is any indirect benefit to the public, which can outweigh its public cost. Common law system also considers the justifications, if any, for banning insider trading, which is based on the four pillars. The first rule says that insider trading is unfair as it allowed managers to abuse his position of trust and distort the distribution of profits in favour of insiders unfairly. The second rule of the regulation is derived from the notion of public confidence. It says that insider trading reduces public confidence in the securities market and consequently affects the investment activities and hence harmful to the whole economy. It benefits insiders at the cost of society at large. The public confidence claims are founded on three grounds i.e., Firstly, it is a general perception that insider trading is economically harmful and hence morally wrong. Secondly, the perception of insider trading drives the market participant out from those markets where insider trading is permitted. Thirdly, the consequences would lead to an adverse impact on the liquidity in the market and an increased cost of capital. The third rule examines losses to the outsiders as profit from the insider trading reflects in the share prices when it is disclosed to the public. The rule examines that investors would invest in those companies where managers and other insiders, in the possession of confidential price sensitive information, are under a duty to abstain from trading until disclosure of the information. If there is no such duty imposed, then these insiders will be benefiting at the cost of others which affects the transfer of wealth from outsiders to the insiders. The fourth rule says that 'insider trading' is detrimental to the efficiency of the operation of firms in the securities market due to the asymmetry of information that encourages manipulative activities by the insiders.[2]

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1 Todd A. Bauman, "Insider Trading at Common Law", 51 U. Chi. L. Rev. 838 (1984).

2 *Id.*, at 844.

On the other side 'insider trading' regulation in the U.S developed on three theories to justify restrictions on insider trading. Firstly, the classical theory, also referred to as abstain or disclose theory which says insiders are required to disclose the inside information (UPSI) if they want to trade in the securities or abstain from the dealing while having such information. The theory proposes that there exists a connection that give access to confidential information to be used for corporate purposes, and it is inherently unfair to take advantage of that connection for personal advantage. One another thought on which the regulation of insider trading in the U.S founded is the 'misappropriation theory'. The essence of this theory is that if a person has been entrusted with confidential price sensitive information, and he converts the information for personal use, he should be liable for the misappropriation.[3] There are two elements to create liability under this theory; first, there should be fiduciary relations between the insiders and source of information, and there should be a breach of fiduciary duty by misappropriating the information. If information is considered as property, insider trading is a theft of that property and hence a crime. The third theory which supports the regulation of insider trading in the U.S is possession/use theory. Under this theory, the person who has confidential information will be liable if the trade occurs.[4]

Indian perspective to regulate insider trading follow common law corporate philosophy that insider trading is bad for the capital market. It is unfair on the part of the investors who do not have access to 'unpublished price sensitive information'. In a fair market there is symmetry of information as all the investors are in the same footing. But when one who has access to such information is allowed to trade it will hamper the market as the insiders will be benefiting at the cost of other innocent investors. Therefore, it will discourage the investment activities and hence, harmful to the economy as a whole. In India, a person will be liable for insider trading if his trade is motivated by UPSI irrespective of the fact that he is not connected with the company. Hence the 'misappropriation theory is not the only basis of the regulation.[5] A person will be liable under the regulation if his act is motivated by the unpublished price sensitive information. In India, trading in the shares of a company by the insiders itself is not a violation. Insider trading by the directors, officers, and other employees in their own companies are a positive feature that should be encouraged, which is the best way of integration of companies with these insiders. There should not be a blanket prohibition on the insiders from acquiring or alienating in the stocks of the company. Such a prohibition will prevent

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[3] Jeffrey E. Livingston and Didier Salavert, "An Overview of the US Law of Insider Trading", 1990 Int'l Bus. L.J. 149 (1990).

[4] Barbara Ann Banoff, "The Regulation of Insider Trading in the United States, United Kingdom, and Japan", 9 Michi. J. of Int.l L., 149-153 (1988). *See also* Douglas W. Hawes, "A Development In Insider Trading Law in the United States: A Case Note on Chiarella v. United States", J. of Comp. Corp. L. and Sec. Reg. 3 193-197 (1981)

[5] Sandeep Parekh, "Prevention of Insider Trading and Corporate Good Governance in India", 32 I'nt'l Bus. L. 132 (2004).

the promoters of a company from dealing in their stocks. Nevertheless, when insiders of the companies do so in breach of a trust conferred on them and utilised confidential information to gain profits to the exclusion of others, then it becomes a problem.[6]

II. HISTORICAL DEVELOPMENT OF THE INSIDER TRADING LAW IN INDIA

The history of insider trading regulation in India can be traced back in 1948 with the constitution of the Thomason committee to review the global practices for the regulation of Insider trading. The committee recommended for the mandatory disclosure of transactions by the directors and managers which was incorporated under section 307 and 308 of the Companies Act, 1956.[7] In 1992, a separate regulation was made with the promulgation of SEBI (Prohibition of Insider Trading) Regulations, 1992 which was replaced by the SEBI (Prohibition of Insider Trading) Regulations, 2015 to make the enforcement of regulation fast and effective. Recently, in 2017 Securities and Exchange Board of India established a committee headed by T.K. Vishwanathan to study Indian Securities Market. The committee recommended several changes in the (Prohibition of Insider Trading) Regulations, 2015. In response, SEBI amended the existing insider trading regulation by implementing SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 to segregate the responsibilities of intermediaries, listed entities and fiduciaries. The amendment also seeks to establish strict accountability on the companies to prevent insider trading.[8]

Insider trading in India is declared an offence under Section 12A and 15G of the SEBI Act, 1992. Insider trading is when one while having access to non-public price-sensitive information about the securities of a company buys, sells, or deals, subscribes, or agrees to do so or counsels another to do so as principal or agent. Information that materially affects the value of the securities can be referred to as price-sensitive information. It is clarified in the amendment that all the material information is not UPSI. The penalty for insider trading is minimum 10 lakh to 25 crore rupees or three times the profit[9] made, whichever is higher and prescribed imprisonment up to 10 years.[10] In an article named "Why It is Hard to Catch India's Insider Trading"

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6 Nishith Desai Associates, "Insider Trading Regulations - A Primer", (2013) www.nishithdesai.com, (October 5th, 2019).

7 P.J. Thomas, Report on the Regulation of the Stock Exchanges in India (1948), <http://www.sebi.gov.in/History/HistoryReport1948.pdf>, (October 14th, 2018).

8 Umakanth Varottil, "The Long and Short of Insider Trading Regulation in India", National Stock Exchange Centre for Excellence in Corporate Governance, 1 (2016), <https://www1.nseindia.com/research/content/res_QB13.pdf>, (October 24th, 2019).

9 S. 15-G of the Securities and Exchange Board of India Act, 1992 as amended by the Securities Laws (Amendment) Act, 2014.

10 S. 24 of the Securities and Exchange Board of India Act, 1992 as amended by the Securities Laws (Amendment) Act, 2002.

published by the Wall Street Journal in 2014, it was observed that though insider trading frequently happens in India, there are few cases where the offender has been prosecuted successfully. It was observed that in India there is no proper mechanism with market regulator SEBI to address the problem of insider trading. Even though the regulation is drafted properly to some extent, but enforcement of the provisions is the big issue.[11]

III. CONCEPT OF 'INSIDER TRADING'

'Insider trading refers to trading in the securities of listed companies by the one with '*unpublished price sensitive information'*. The term is not defined under the SEBI Regulation, 2015 and hence it has no specific definition. But a reading of the Insider Trading Regulation as a whole will lead to the following activities as insider trading-

- Obtaining and utilizing unpublished price sensitive information by dealing in securities for one's benefit or a third party.
- Breach of a duty of trust by disclosing of any unpublished price sensitive information to outsiders or misappropriating the same for one's benefit

Hence, anyone trading in the securities of a company while having unpublished price sensitive information will be liable under the regulation even if is not an insider or connected person.

IV. WHO IS AN INSIDER?

The phrase '*insider*' is defined in regulation 2(g) of the Insider Trading Regulations, 2015 as any person who,

"*Insider"* means any person who is:

i. a connected person; or

ii. in possession of or having access to unpublished price sensitive information

The definition of 'insiders contemplates two types of the person as insiders, i.e. those who are connected with the company and as such, they are deemed to have access to unpublished price sensitive information and the other who have access to such information. Consequently, a person will be an insider, even if he may not be connected with the company, if it is proved that such person has received or has had access to any UPSI.[12] Now, the amended regu-

[11] Kenan Machado, "Why its Hard to Catch India's Insider Trading", The Wall Street Law Journal, <https://www.wsj.com/>, (October 9th, 2019).

[12] In Rajiv B. Gandhi v. SEBI, 2008 SCC OnLine SAT 78 and Anjali Beke v. SEBI, 2006 SCC OnLine SAT 254, Securities Appellate Tribunal (SAT) tried to plug this loophole in

lation clarify that all the material information is not necessarily price-sensitive information. The amendment also states the clear position on the vague but crucial concept of 'legitimate purpose'.[13]

V. CONNECTED PERSON

As per regulation 2(d) of the Insider Trading Regulations *'connected person'* is

(i) any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access. The second clause gives a list of the persons who are considered to be connected with the company for the purpose of the regulation.[14] Recently SEBI has passed an interim order finding two persons to be 'connected' relying on their friendship status on Facebook.[15] The SEBI support their finding upon friendship status and like history between the accused and their wives.

VI. WHAT IS UNPUBLISHED PRICE SENSITIVE INFORMATION?

The definition of UPSI is given under regulation 2 (n) as-

'*unpublished price sensitive information*' means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to affect the price of the securities materially and shall, ordinarily including but not restricted to, information relating to the following: –

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matters by clarifying that, "a person who has received UPSI or who has had access to such information, becomes an insider". He need not be a person connected with the company. Subsequently, SEBI amended Regn. 2(e) to the present position to avoid any ambiguity in the definition.

[13] In Regn. 3 after sub-regn. (2-A), an explanation has been inserted to interpret the phrase "legitimate purpose" by the SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

[14] *See* Regn. 2(d) of the SEBI (Prohibition of Insider Trading) Regulations, 2015.

[15] SEBI Order in the matter of Deep Industries Ltd., <https://www.sebi.gov.in/enforcement/orders/apr-2018/order-in-the-matter-of-insider-trading-in-thescrip-of-deep-industries-limited_38713.html>.

1. Financial results;
2. Dividends;
3. Change in capital structure;
4. Mergers, de-mergers, acquisitions, delisting, disposals and expansion of business and such other transactions;
5. Changes in key managerial personnel; and
6. Material events in accordance with the listing agreement.[16]

It is intended that information relating to a company or securities, that is not generally available would be unpublished price sensitive information if it is likely to affect the price upon coming into the public domain materially. The types of matters that would ordinarily give rise to unpublished price sensitive information have been listed above to give illustrative guidance of unpublished price sensitive information.[17]

The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 is more précised and transparent in terms of various concepts such as financial literate[18], proposed to be listed[19] etc. generally theses terms has been interpreted by the court in the particular context. Now the amended regulation clarify that all the material information is not necessarily price-sensitive information. The amendment also states the precise position on the vague but crucial concept of 'legitimate purpose' and puts an obligation on board to make policy to determine the concept of legitimate purpose.[20] It has amended the regulation 3 recognising legitimate purpose in addition to the discharge of legal obligations as a valid ground for the communication of UPSI.[21] In deciding whether the particular material information constitutes '*unpublished price sensitive information'* ('UPSI'), SEBI can rely on the value of the information and actions concerning UPSI for the relevant period. The amended regulation 4, (a) in sub-regulation (1), before the proviso, following explanation has been inserted, Explanation-When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be

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16 *See* Regn. 2(n) of the SEBI (Prohibition of Insider Trading) Regulations, 2015.

17 Nishith Desai Associates, Supra note 7 at 9.

18 The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 amend the Regn. 2, sub-regn. (1), cl. (c) by adding an explanation to define the term "financially literate".

19 The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 amend the Regn. 2, sub-regn. (1), cl. (h) by inserting cl. (ha) to explain the term proposed to be listed in the context of the SEBI (Prohibition of Insider Trading) Regulations, 2015.

20 The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 amend the Regn. 3(2) by adding (2-A) which put an obligation on the board to make policy for determining legitimate purpose.

21 Regn. 3— Explanation, SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

presumed to have been motivated by the knowledge and awareness of such information in his possession.[22]

VII. THE NEED TO KEEP THE PRICE-SENSITIVE INFORMATION UNDISCLOSED

In the course of business, firms are required to make several decisions which may move the prices of the securities. Sometimes a company is required not to take any actions to implement the decisions if the delay serves a legitimate interest of the company. The term '*legitimate interest*' is understood to mean-

- If the disclosure might affect the outcome or normal processing of current negotiations, or
- If decisions are taken by the board yet to be approved by any supervisory board

In the presence of the situation mentioned above the company can delay in implementing the decisions which are price sensitive. If a company decides to take time in acting upon the decisions, the company has to ensure that delay must not cause a risk of deception to the public. For example, if the company deliberately withholds the information to misrepresent the state of affairs, then the company will not be permitted to use the defence of legitimate interest. Withholding the price-sensitive information also puts a condition on the company to ensure guaranteed confidentiality of the price-sensitive information.[23]

VIII. INSIDER TRADING CASES WHICH SHOW FAILURE OF INSIDER TRADING REGULATION IN INDIA

There are number of insider trading cases in India where SEBI has either taken *suo moto* action or on the complaint filed by the affected person. Some of the few cases can be cited to prove that despite the several amendments in the insider trading laws and steps taken by SEBI, the cases keep occurring. In *Utsav Pathak* v. *SEBI*[24] Securities Appellate Tribunal confirmed the SEBI's order against the appellant. There was an allegation of insider trading by the appellant who was appointed by the Morgan Stanley to purchase shares of CRISIL a credit rating agency. The allegation was based on the access of the appellant to 'unpublished price sensitive information' to the open offer made

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[22] As per explanation to Regn. 4(1) of the SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

[23] Jill E. Fisch, Start Making Sense: An Analysis and Proposal for Insider Trading Regulation, 26 (179) Geor L. Rev, 185-200 (1991).

[24] 2020 SCC OnLine SAT 63, <http://www.sat.gov.in/english/pdf/E2020_JO2019430_2.PDF>.

on 3rd June, 2013 to acquire the shares of the CRISIL by McGraw Hill Asian Holdings along with other person acting in concert. The appellant passed this information to his relatives who traded in the shares of the CRISIL and made a huge profit as after the announcement, there was 20% rise in the prices of the CRISIL. The trading pattern and other circumstances showed that the purchase was motivated by confidential information. In another recent case, SEBI ordered to ban non-executive director of Indiabulls Venture Limited (VIL) from trading in securities for one year. There was an allegation that non-executive director of the IVL had traded in the shares of the company along with her husband, while having access to 'unpublished price sensitive information' i.e. offer to purchase the shares of India Land & Properties Ltd (ILPL) by Indiabulls Infrastructure Ltd (IIL) which is owned by IVL.[25] In JM Financial Limited[26] case, SEBI conducted an investigation against the former vice president of the company. It was found that he traded in shares of the said company during 2013 to 2016 while having access to the 'unpublished price sensitive information' without any prior approval or disclosure of the trading. In *Religare Enterprises Ltd., In re*[27] SEBI passed an order against the Religare Enterprises Ltd. (REL) under Section 11 of the Securities and Exchange Board of India Act, 1992. The order is under challenge by the Religare Finvest Ltd. which is a subsidiary of REL. An investigation of the matter shows that the promotors of Fortis Healthcare Ltd. (FHL) were involved in siphoning off the funds of the said company. It was found that the promotors of the Fortis hospital entered into several planned arrangement from 2016 to 2017. The whole purpose of these fake transactions was to receive the funds of the FHL which was detrimental to the interest of the shareholders of the said company. SEBI found that the promoters were the ultimate beneficiary of the diversion of the fund and hence passed an order to return the 403 crores along with the interest. There are several such insider trading cases in India but due to the defect in the enforcement system only few cases reach to the final stage.

In the backdrop of the several incidents of the violation of Insider Trading norms and the increasing role of technology[28] SEBI constituted a committee on the fair market dealing to bring out a suitable amendment to meet the challenges. The committee recommended several changes in the securities market regulation and an amendment in the (Prohibition of Insider Trading) Regulations, 2015. In response, SEBI amended the existing insider

[25] <https://www.sebi.gov.in/enforcement/orders/may-2019/order-in-the-matter-of-indiabulls-ventures-limited_43104.html>.

[26] <https://www.sebi.gov.in/enforcement/orders/may-2019/adjudication-order-in-the-matter-of-jm-financial-limited_42958.html>.

[27] 2019 SCC OnLine SEBI 27, <https://www.sebi.gov.in/enforcement/orders/mar-2019/order-in-the-matter-of-religare-enterprises-limited_42363.html>.

[28] In 2017, Reuters documented 12 cases of prescient messages about Indian companies being posted on WhatsApp groups. In response, SEBI tried to take cognizance of these cases to deal with this issue, which attributable to the rise of new technology, <https://in.reuters.com/article/india-whatsapp/exclusive-prescient-messages-about-indian-companies-circulate-in-whatsapp-groups-idINKBN1DG0IQ> (November 2nd, 2019).

trading regulation by introducing a new chapter lllA (Amendment) in SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

IX. SCRUTINY AND IMPACT OF SEBI (PREVENTION OF INSIDER TRADING) AMENDMENT REGULATIONS, 2018

The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 is more précised and transparent in terms of various concepts such as financial literate, proposed to be listed etc. generally theses terms are interpreted by the court in the particular context. Now the amended regulation clarifies that all the material information is not necessarily price-sensitive information. It has amended the Regulation 3 recognising legitimate purpose in addition to the discharge of legal obligations as a valid ground for the communication of UPSI.[29] However, all these phrases were not defined earlier, which created disputes on the interpretation of these expressions. Now the said amendment brings out clarity on the definition of these phrases by illustrating that communication of UPSI with partners, collaborators, lenders, major customers, major suppliers, investment bankers, legal advisors, auditors, insolvency professionals or other advisors or consultants, shall be deemed to be for "legitimate purpose", provided such sharing is not being carried out to escape or dodge the prohibitions of insider trading regulations.[30] The said regulation puts the onus of circumscribing what constitutes legitimate purpose on the boards of listed companies and intermediaries.[31] It will help the companies to find out the mode and contours within which the communication of UPSI is allowed. The amendment also clarified that the person to whom UPSI has been shared would be considered an 'insider', and as such, there is a mandate on the listed companies and intermediaries to maintain electronic record of the nature of UPSI, the name of the person to whom the UPSI has been communicated with the adequate internal control.[32] The companies and intermediaries are also under an obligation to serve a notice or sign a confidentiality agreement to the person with whom the UPSI has been shared and take an undertaking from them that they will comply the insider trading regulation while in possession of UPSI.[33]

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[29] Regn. 3 – Explanation, SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

[30] Even though the Regulations allowed listed companies to communicate UPSI in furtherance of "legitimate purposes," the precise meaning of this phrase was unclear. Consequently listed companies were not able to clearly ascertain the advisors with whom such information could be shared.

[31] Regn. 3(2-A), the SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018.

[32] The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 amend the Regn. 3 by adding sub-regn. (5) which put an obligation on the Board to ensure that a structured digital database is maintained containing all the details of the person with whom UPSI has been shared.

[33] The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 insert new Regn. 9-A named as Institutional Mechanism for Prevention of Insider Trading under sub-regn. (d).

The amendment under regulation 3(3) also takes into account the 'due diligence' exercises by the listed companies and intermediaries and clarifies that the boards of listed companies are put under an obligation to ensure that the procurement and communication of UPSI is shared in the best interest of the company. Earlier boards were bound to evaluate and assess the impact of sharing of UPSI at an earlier stage such as triggering an open offer which was difficult for them to assess.

The amendment not only takes step to prevent insider trading but also provides for the justification available to the aggrieved person. The amendment reiterates that trade by a person while in possession of UPSI shall be presumed to be triggered by UPSI, but it has been made rebuttable by the inclusion of additional defences. The safe harbour rule has been extended to off-market trades between the same insiders with the same UPSI[34] which was earlier limited to promoters only. Trading on the block trade window, between the same person with the same UPSI[35] and transaction pursuant to use of stock options at a pre-determine price such as employee using stock options and facilitate big boy transaction[36] are outside the purview of insider trading.

The said amendment not only aimed to alter substantive features of the insider trading regulation but also take into account the compliance obligations of the listed companies and intermediaries. The crucial change from the compliance perspective is the provision of separate code for the listed companies and intermediaries.[37] The reason behind this was the bitter experience under the 2015 regulation which provided for the uniform code of conduct for all.[38] The said amendment stipulates separate code of conduct for the listed companies and intermediaries and extended the applicability of the code to designated person through an outline of the qualification for them. Members of promoter group along with the designated person are under obligation to comply with periodic shareholding disclosure under the insider trading

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[34] Regn. 4(1), proviso, cl. (i), after the proviso following proviso has been inserted, namely:– "Provided further that such off-market trades shall be reported by the insiders to the company within two working days. Every company shall notify the particulars of such trades to the stock exchange on which the securities are listed within two trading days from receipt of the disclosure or from becoming aware of such information."

[35] Regn. 4(1), proviso, after cl. (i), following clauses has been inserted, (ii) the transaction was carried out through the block deal window mechanism between persons who were in possession of the unpublished price sensitive information without being in breach of Regn. 3 and both parties had made a conscious and informed trade decision: Provided that such unpublished price sensitive information was not obtained by either person under sub-regn. (3) of Regn. 3 of these Regulations.

[36] "Big Boy" Letters and the Enforcement Implications of SEC v. Barclays, Washington, Cleary Gottlieb Steen & Hamilton LLP (2007) 1 <https://www.law.columbia.edu/sites/default/files/document-library/clsbsbdl_document/files/big_boy_letters_1.pdf> (Nov. 1st, 2019).

[37] All Market Entities are required to formulate a revised model code of conduct as specified under Sch. B and Sch. C of the Regulations.

[38] Such as maintenance of a restricted/grey list by listed companies, and the applicability of the trading window to intermediaries, etc.

regulation. The said amendment emphasises more on institutional responsibility for the implementation of insider trading regulation. Listed companies are under obligation to formulate written policies to detect leakage of UPSI and whistle-blower. The amended regulation mandates all listed and proposed to be listed companies to keep digital database of the details of that person who have access to companies' UPSI and hence all those who deal with the listed companies are bound to share their details. In case of dealing with non-residents it may be difficult to implement considering the data privacy laws of other countries. An additional responsibility has been placed at the boards and audit committees to ensure compliance and to supervise internal controls system carried out through the entity. The SEBI has created a chain of accountability through delegation of the responsibility of ensuring compliance with the regulations to the market entities. The time will let us know how the market entities have enforced the amendment.[39]

The said amendment also puts a great responsibility on the designated person to share all the details with whom he enters into any 'material financial relationship'.[40] Prevention of insider trading transactions is possible if there is an effective device to track the flow of UPSI effectively. To address this issue, the amended Regulations require "*designated persons*" to be selected by the board of directors or other equivalent body of every listed company, fiduciary and intermediary as per the role, function and the access to UPSI of the persons that shall include promoters, senior-level officers, employees, employees of material subsidiaries of listed companies, and support staff to disclose all the information with whom UPSI has been shared in any capacity. Through the amendment SEBI has introduced the concept of 'designated person' which extend the scope of disclosure obligations way beyond the erstwhile category of '*connected persons'* and employees. There are many practical difficulties that may come in the way of implementation of the said amendment. Intermediaries ('market entity') are required to track record of every change to update their database. The broad disclosure requirement under the said amendment puts an increase compliance burden on all the market entities. Listed companies have been empowered to formulate policies for the internal control, and as per the said regulation, they can make rules concerning leakage of UPSI and its inquiry.

T.K. Vishwanathan committee on fair market dealing also recommended to amend in the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 to extend the scope of dealing in securities to include any acts that are knowingly designed to affect the

[39] Aman Mourya, "Understanding Sense behind Introducing Amendments in SEBI Insider Trading Regulations", <https://taxguru.in/sebi/amendments-introduced-sebi-insider-trading-regulations.html> (Nov. 1st, 2019).

[40] The SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2018 insert new Cl. 14 in Sch. B of the SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2015 whereby an explanation defining "material financial relationship" has been added.

trading decision and make clear the scope of measures which are presumed to be fraudulent or manipulative under Regulation 4 (2) of the FUTP Regulations. Since the inception of Insider Trading Regulation in 1992, several attempts were made to administer insider trading regulation properly, but still there are number of cases which slipped through the SEBI's radar. One of the reasons can be that it is difficult to establish the relationship between the insiders who have access to UPSI and the person whose action is motivated by such UPSI.[41]

The said amendment also brought significant changes by shifting the burden of proof from SEBI to the insiders. Therefore, an insider who has access to unpublished price sensitive information transact in the shares of the company will be presumed to be motivated by the knowledge and awareness of the same. Consequently, the burden of proof that trades were not motivated by the UPSI is on the insider and SEBI is not bound to prove his action beyond doubt. This is one of the crucial steps taken by the SEBI to move from the rule reasonable doubt by bringing elements of strict liability.

X. POTENTIAL DRAWBACKS

The step taken by the SEBI to address the challenges through amendment is well thought off. But still, some of the challenges are not addressed in the present amendment. The provision of trading plan under regulation 5 needs reconsideration which was introduced in 2015 to provide the top management like promoters and other perpetual insiders an opportunity to legitimately trade, without violating insider trading regulations. The several restrictions in the SEBI guidelines to execute this plan made it unpopular. The Amendment fails to address such concerns of corporate India. Nevertheless, it is settled by the Amendment through the insertion of a proviso clause in the regulation 5 (3) which provides for the pre-clearance of trade and adherence to trading window norms and restrictions on contra trade may not be applicable for trading done in as per the approved trading plan.

Insider trading activities can be easily caught through the trading window, but there are much more complex and exploitative trading behaviour of insider trading that cannot be sorted out by this provision. To investigate an insider trading case where intermediaries are involved and the employees of an investment bank or broker want to escalate the details of trade of complex nature due to his perception of insider trading risk, outside the scope of institutional view on the legality of the overall structure. The other point of review of the regulation is the approach to a cooperating offender willing to assist in adducing evidence as an informant. A person who satisfies the conditions mentioned

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[41] Manoj Pant & Manoranjan Pattanayak, "Insider Ownership and Firm Value: Evidence from Indian Corporate Sector", 42 EPW, 1459-1467 (Apr. 21-27, 2007), <https://www.jstor.org/stable/4419499>.

under the Regulation 5 can settle their matter confidentially.[42] This provision is bound to seed another round of ardent discourse around the ethical dilemma that such actions pose. The regulation does not provide official pardon or immunity but provides culpable parties a chance to convert their offence into trade-off with the SEBI. SEBI needs to formulate specific guidelines to handle cases objectively and in a manner that incentivises and elicits genuine cooperation by abettors while at the same time, not granting them unjustifiable clemency. The cooperating whistle-blower should not treat the settlement mechanism as a golden parachute, to fly. This is an uphill task for the SEBI, which can pay rich dividends if they can adopt a mechanism that is predictable and objective.[43]

XI. CONCLUSION AND SUGGESTIONS

Economic offence in India is not easily traceable, which is evident from the actual conviction cases of insider trading. There are few cases in India where an offence has been proved, and the offender has been successfully prosecuted. The number of insider trading cases reported indicates that there is some lacuna in the enforcement mechanism. Astringent insider trading regulation requires effective enforcement mechanism. Our securities market regulator SEBI is trying its level best to implement the law. SEBI's concern over the battle against insider trading is evident from the action taken towards the recent amendment of the Insider Trading Regulation and aggressive litigation on the issue. SEBI has made several changes in Insider Trading Regulation, 2018 to ensure good corporate governance. Good corporate governance can be ensured by the strict norms for insider trading regulation. The detrimental impact of insider trading on corporate governance necessitates changes in the existing laws to overcome the problem reflected through several cases. There is a direct relationship between good corporate governance and the prohibition of insider trading. If companies ensure the strict norms of corporate governance, it will result in reduced cases of insider trading. Asymmetry of information is the main reason behind insider trading which puts the insiders of a company in an advantageous position. When these insiders take unfair advantage of their position, it results in the failure of corporate governance.

The Prohibition of Insider Trading (Amendment) Regulations, 2018 emphasise on compliance obligations by the listed companies and intermediaries. The approach of the SEBI towards the insider trading regulation shows zero tolerance and focusses on imposing strict accountability on the higher official to adopt suitable measures to curb the violation of laws. Nevertheless, the amendment can be seen from a different angle. The amendment implies delegation of enforcement power from SEBI to listed companies and other market entity. It

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[42] As per Regn. 5 of the SEBI (Settlement Proceedings) Regulations, 2018.

[43] Tarun Kumar et al., "Impact of Insider Trading on Securities Market in India: A Critical Analysis", 5 Intl. J. Hum. Res. & Soc. Sci. (2018).

has the potential of causing normal business communication to be misused and can also increase the cost of compliance. Consequently, there is uncertainty concerning circulars issued by stock exchanges in consultation with SEBI. Stock exchanges do not have any regulatory power under any statutes henceforth, without an enabling provision the amendment on this aspect deemed to be confusing.

The amendment proposes to provide a format to the informants to submit confidential information which is not known to SEBI from any other sources. The information should be credible and should be submitted to SEBI division as an office of information protection. The informant will be rewarded up to 1 crore from the investor protection and education fund. Anyone who gets any credible information in their official capacity will not be eligible to get the reward. This is a practical approach which will help the SEBI to enforce the insider trading regulation effectively.

The said amendment also takes into account technological changes. Several incidents of sharing UPSI on WhatsApp by the big companies like TATA Motors Limited, BATA India Limited, HDFC Bank Limited etc. before the public announcement was reported to SEBI which violate parity of information. SEBI needs to be vigilant and take immediate action on these kinds of incidents.