

Analysis of SEBI (Prohibition of Insider Trading) Regulations, 2015

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On 15th January, 2015, the Securities and Exchange Board of India notified Prohibition of Insider Trading Regulations, 2015 ('2015 Regulation'/Regulations') to replace two-decade old Prohibition of Insider Trading Regulations, 1992. The author has analysed the provisions of 2015 Regulations, in the light of newly introduced definitions/expansion of scope of existing definitions, along with substantial changes in initial disclosures and continual disclosures to be made by promoters/directors.

Analysis of definitions

1. Definitions of the following terms are worth noting.

1.1 Definition of "compliance officer" has been introduced for the first time in the Regulations. Clause (c) of sub-regulation (1) of regulation 2 defines "compliance officer" as any senior officer, designated so and reporting to the Board of directors, who is financially literate and is capable of appreciating requirements for legal and regulatory compliance under the Regulations. He shall be responsible for compliance of policies, procedures, maintenance of records, monitoring adherence to the rules for preservation of unpublished price sensitive information ('UPSI'), monitoring of trades and the implementation of codes specified in the Regulations, under the overall supervision of the Board of directors.

1.2 "Connected person" has been defined in clause (d) of sub-regulation (1) of regulation 2 as any person who is / has during 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/by being in any contractual, fiduciary or employment relationship/by being a director, officer / an employee of company / holds any position including a professional / business relationship between himself and the company whether temporary / permanent, that allows such person, directly/indirectly, access to UPSI / is reasonably expected to allow such access. This definition has been completely overhauled. Under the 1992 Regulations, connected persons included director/person occupying position of employee/officer. There is no reference of director in the definition of "connected person" in the 2015 Regulations. Also, immediate relative, holding company, associate company, subsidiary company, etc., are deemed to be connected persons under the 2015 Regulations, unless otherwise is established. Definition intends to bring into its ambit those persons who may not seemingly occupy any position in a company but are in regular touch with the company and its officers and are involved in the know of company's operations. It is intended to bring within its ambit those who would have access to/could access UPSI about any company/class of companies by virtue of any connection that would put them in possession of UPSI.

1.3 "Generally available information" is defined in clause (e) of sub-regulation (1) of regulation 2 to mean information that is accessible to the public on a non-discriminatory basis and information published on website of a stock exchange, would ordinarily be considered as generally available.

1.4 Clause (g) of sub-regulation (1) of regulation 2 defines "Insider" to mean any person who is a connected person or is in possession of / having access to UPSI. Important part of this definition is the possessions / having access to UPSI and not the source through which a person is in possession of / had access to such UPSI. Onus of showing that certain person is in possession of / had access to UPSI at the time of trading would, therefore, be on that person leveling the charge after which the person who has traded when in possession of/having access to UPSI may demonstrate that he was not in such possession.

1.5 "Price sensitive information" 'as defined in the 1992 Regulations' provides for list of events. Now, under clause (n) of sub-regulation (1) of regulation 2 of 2015 Regulations, unpublished price sensitive information ('UPSI') provides for an illustrative list of events which are likely to materially affect price of securities. Events include : financial results, dividends, change in capital structure, mergers, de-mergers, acquisitions, delistings, disposals and expansion of business ; changes in key managerial personnel and material events in accordance with the Listing Agreement.

Communication or procurement of UPSI

2. Under sub-regulation (1) of regulation 3, insider is completely prohibited from communicating or providing or allow access to any UPSI, relating to a company or securities listed or proposed to be listed, to any person including other insiders. This provision intends to cast an obligation on all insiders who are in possession of UPSI to handle such information with care and to deal with information with them when transacting their business strictly on 'need-to-know' basis. SEBI's intention is that to organisations develop practices based on 'need-to-know' principles for treatment of information in their possession. Only exception to this provisions is communication for legitimate purposes or performance of duties or discharge of legal obligations.

Trading plans

3. For the first time Regulations permits an insider to formulate a trading plan. In terms of regulation 5, the plan needs to be presented to compliance officer for approval and public disclosure. This provisions intends to give an option to persons who may be perpetually in possession of UPSI and enabling them to trade in securities in compliant manner. The insider can formulate trading plan for trades to be executed in future. By formulation of pre-planned trading structure, the possession of UPSI will not prohibit insider from execution of trades, since trades are pre-decided and not based on UPSI. For the trading plan, SEBI has prescribed six detailed conditions. The trading plan once

approved shall be irrevocable and insider shall mandatorily implement it, without being entitled to either deviate from it or to execute any trade in the securities outside the scope of the trading plan.

Initial disclosures

4. Sub-regulation (1) of regulation 7 provides for initial disclosures as follows :

- *Transitional provision* – Every promoter, key managerial personnel ('KMP') and director of every company shall disclose their holding of securities of the company as on 15th May, 2015 (date of Regulations taking effect), to the company within 30 days of the 2015 Regulations taking effect.
- *Trigger for initial disclosures* – Every person on appointment as KMP or director or upon becoming promoter shall disclose his holding of securities of the company as on date of appointment or becoming a promoter, to the company within 7 days of such appointment or becoming promoter.

Continual disclosures

5. Sub-regulation (2) of regulation 7 contains provisions for continual disclosure according to which every promoter, employee and director of every company shall disclose to the company the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of Rs. 10 lakh. Every company shall notify the particulars of such trading to stock exchange within two trading days of receipt of the disclosure or from becoming aware of such information.

Disclosures by other connected persons

6. Sub-regulation (3) of regulation 7 states that listed company may, at its discretion require any other connected person/class of connected persons to make disclosures of holdings and trading in securities of the company in such form and at such frequency as determined by the company for monitoring compliance with the Regulations.

Principles of fair disclosure

7. A new Schedule "Schedule A" lays down the principles of fair disclosure for purposes of code of practices and procedures for fair disclosure of UPSI as follows :

1. Prompt public disclosure of UPSI that will impact price discovery no sooner than credible and concrete information comes into being in order to make such information generally available.
2. Uniform and universal dissemination of UPSI to avoid selective disclosure.
3. Designation of a senior officer as "chief investor relations officer" to deal with dissemination of information and disclosure of UPSI.
4. Prompt dissemination of UPSI that gets disclosed selectively, inadvertently or otherwise to make such information generally available.
5. Appropriate and fair response to queries on news reports and requests for verification of market rumours by regulatory authorities.
6. Ensuring that information shared with analysts and research personnel is not UPSI.
7. Developing best practices to make transcripts or records of proceedings of meetings with analysts and other investor relations conferences on official website to ensure official confirmation and documentation of disclosures made.
8. Handling of all UPSI on a need-to-know basis.

Adios to provisions of the 1992 Regulations

8. Following are the provisions of the 1992 Regulations which do not find place in 2015 Regulations.;

1. Board's right to investigate, procedure for investigation, obligation of insider on investigation by Board, etc.
2. Initial disclosure in Form A within 2 days by any person who holds more than 5 per cent shares/voting rights in any listed company [regulation 13(1)].
3. Initial disclosure in Form B within 2 working days by any person who is a director or officer of a listed company of the number of shares or voting rights held, etc. [regulation 13(2)].
4. Initial disclosure in Form B by any person who is a promoter or part of promoter group of the number of shares or voting rights held by such person, within 2 working days of becoming such promoter or person belonging to promoter group [regulation 13(2A)].
5. Continual Disclosure in Form C by any person who holds more than 5 per cent shares for voting rights regarding the number of shares or voting rights held and change in shareholding or voting rights exceeding 2 per cent of total shareholding or voting rights [regulation 13(3)].
6. Continual disclosure in Form D by any director or officer of a listed company for any change his shareholdings (and his dependents) and change exceeds Rs. 5 lakh in value or 25,000 shares or 1 per cent of total shareholding or voting rights, whichever is lower [regulation 13(4)].
7. Continual disclosure in Form D by promoter or part of promoter group, for any change in shareholdings exceeding Rs. 5 lakh in value or 25,000 shares or 1 per cent of total shareholding or voting rights, whichever is lower [regulation 13(4A)].

Conclusion

9. Significant changes have been made in 2015 Regulations vis-à-vis 1992 Regulation . The definitions USPI, insider and connected persons have considerably expanded and this suggests graver consequences for company officials involved in selective exchange of information. 2015 Regulations, has tightened the screws on company officials who communicate information to a select group as mere communication of UPSI will be punishable. In the due course, SEBI will notify the forms for disclosures by specified persons to company and then company to stock exchanges.

Footnotes

*Company Secretary, Pune.

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