AMENDMENT TO THE INSIDER TRADING REGULATIONS: INCENTIVE TO THE TRADERS VERSUS TIGHTENING THE LOOP

Written by ***Ishita Agarwal***

4th year BBA LLB Student, School of Law, University of Petroleum and Energy Studies, Dehradun

"There is no other kind of trading in India, but the insider variety. Insider trading has utterly no place in any fair-minded law-abiding economy." Mr. Arthur Levitt (1998), SEC Chairman

INTRODUCTION

It is a well-known notion that utmost good faith, good corporate governance and transparency form the core of capital markets. Insider trading is one such heinous crime which disrupts the normal functioning of capital markets and the flow of information to the market participants thus effecting their decision making capabilities and also affecting the fair play in the whole system. The main goal of insider trading regulations is to create a fair and leveled field so that the information is obtainable by all the market participants and stakeholders. The enforcement of insider trading laws increases market liquidity and decreases the cost of equity.[1]

In common parlance insider trading is dealing in securities of a company based on some price sensitive information which is not available to the general public. This gives an edge to the insider who has material price sensitive information over and above the other investors in the market giving that insider a significant advantage. Insider trading in India has seen a tremendous change when a new set of regulations were formed in 2015 which made mere 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 by increasing

[1] Utpal Bhattacharya & Hazem Daouk, *The world price of Insider trading*, 54, JOF, 75-108 (2002).

the burden of proof and the need for disclosures. This has been introduced keeping in the mind the current scenario and an attempt has been made to solve the confusion regarding interpretation of the terms that form a part of the legislation. This research article will deal with insider trading regime in detail in India along with a critical analysis of recent developments or amendments specially focusing on the amendment on 31st December, 2018 after the recommendations of the FMC committee.

CONCEPT AND NEED FOR REGULATION

'Insider trading' is the unlawful act of trading in securities while having access to unpublished information which, if published, could have impacted the price of the securities being traded in the market.[2] Trading forms an integral part of the capital market and the investment regime. The distinction between legally permitted share trading by insiders and what is illegal needs to be carefully understood. The management and promoters of a company owe a fiduciary duty to the public shareholders for the infusion of funds in the company. If insider trading is allowed unchecked in the capital markets, persons with insider information will have a consistent edge in trades executed with such information and those without the information will be consistent losers on the market.[3]

Regulations are fundamentally rules of behavior.[4] Each and every nation creates various different rules and regulations to reconcile difference in opinions among its citizens and to establish a rule of order and rules regarding social interaction. Existence of unfair competition and monopolies and existence of asymmetrical information in the market places certain participants over the others giving them certain advantages over the investors by abusing the regulatory deficiency. Santomero and Herring[5] have classified the main rationales behind regulation of finances as under:

[2] Report of committee on fair market conduct under Dr. T.K. Vishwanathan, https://www.sebi.gov.in/reports/reports/aug-2018/report-of-committee-on-fair-market-conduct-for-public-comments_39884.html (2018).
[3] Karn gupta, *Insider trading in capital market: An overview*, http://www.manupatrafast.com/articles/popopenarticle.aspx?id=275878d3-e9c8-4de4-9bd0-3f30b34db853&txtsearch=subject:%20capital%20market
[4] Jeffrey Camicheal & Michal Pomerleano, *The development and regulation of non-banking institutions*, 12-33 (2002).
[5] Richard herring & Anthony Santomero, *What is optimal financial regulation,* (1999).

a) Providing safeguards against un-diversifiable market risk;

b) Protection of consumers and investors against opportunist behaviors of the suppliers of these financial services;

c) Making the financial market more efficient and sustainable.

d) Achieving social objectives like providing home ownership, assistance, financial help and resource allocation.

The main objective behind regulating capital market is to create a stable market and enhancing the efficiency and working of the market. In an efficient market, even one illegally traded share can affect the whole market. According to the Efficient Capital Market Hypothesis, a buyer of just one share impacts not merely the counterparty seller, but the entire market.

In the famous case of Basic v. Levinson[6], it was held that a person or investor need not show the common law requirement of reliance in a suit for damages based on fraud. The market is the main agent, informing the investor about all the transactions and information available to it about the value of the stock. Thus, Insider trading regulations are based on the concept of fairness among all and creating a leveled playing field for maximum public participation and hence, the insider trading regulation regime was developed and needed over the years.

HISTORY AND EVOLUTION OF INSIDER TRADING

Insider Trading has been around the United States from 1792. Hence, laws against Insider Trading were formed strictly in the United States of America.[7] The market crash in 1929 due to investors 'lack of confidence' followed by the Great depression gave rise to the enactment of the Securities Act of 1933. Section 16(b) of the Securities Act, 1933 tackled insider trading by prohibiting 'short swing profits' made by corporate insider in their own companies and its

[6] 485 U.S. 224 (1988).
[7] Manoj jain, *Insider trading in India: A zero tolerance event*, http://www.riskpro.in/download/insider_wp.pdf (visited on 15th April, 2019).

stock. U.S. courts have played the largest role in defining the laws prohibiting insider trading because laws regulating insider trading first arose largely out of U.S. common law.[8]

In the case of Re Cady Roberts & co (1961)[9], SEC finally became successful in prosecuting an individual for insider trading under sec 10(b) and rule 105-b. It was not until the late 1980s that prohibition of insider trading was recognized in rest of the world. It was quite shocking to know that even till 1990 only 34 countries out of 103 countries had proper insider trading regulations.[10] There was a sudden boom in 1990s with over 87 countries with total prohibition.

The first instance of insider trading in India can be seen during the 1940s when directors, agents, managers and promoters were found to be using information to speculate market prices of the securities of their own companies.[11] Indian securities market started after the establishment of Bombay Stock Exchange in 1875. Then came in 1979, the Sachar Committee which said in its report that directors, auditors, company secretaries etc. may have some price sensitive information that could be used to manipulate stock prices which may cause financial misfortunes to the investing public. The companies recommended amendments to Companies Act 1956 to restrict or prohibit the dealings of the employees.[12] Another important committee was the Abid Hussain Committee constituted in 1989 that recommended that a person guilty of insider trading should be penalized, both in the form of civil and criminal proceeding.

Finally came the most important statutory body which became a major player and is the main regulator of securities and capital market in India. Securities and Exchange Board of India was established in the year 1992 through the SEBI act, 1992 and finally insider trading along with other crimes like misrepresentation and fraud were prohibited through this act. SEBI formulated the much needed SEBI (prohibition of insider trading) regulations, 1992. Then to bring some necessary changes with the ever-changing nature of capital markets, Sodhi committee was created which gave its report and finally SEBI (Prohibition of Insider trading) regulations, 2015 were created which replaced the previous regulation and brought necessary

[8] Thomas Newkirk & Melissa Robertson, *Insider trading – A U.S perspective*, (sept 19, 1998), http://www.sec.gov/news/speech/speecharchive/1998/spch221.html.
[9] 40 S.E.C. 907 (1961).
[10] Frankling Gevurtz, *The globalization of Inser trading prohibitons*, 15, TLL, 63-5 (2002) http://faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2006/ BD_The_world.pdf.
[11]Government of India, Report on the Regulation of Stock Exchanges in India (1948) http://www.sebi.gov.in./History/HistoryReport1948.pdf.
[12] *Supra*, note 4 at 2.

changes. Now, further the Government has also introduced a major amendment in 2018 which will be further discussed in the article in detail.

The main objective behind formulation of SEBI is to protect the interests of the investors in securities and to promote the development of, and to regulate the securities market by such measures as it thinks fit.[13] In doing so, it has been give wide powers and one such power is to regulate insider trading u/s 11. In light of the changing circumstances SEBI introduces various amendments in the already existing regulations to keep them updated.

INSIDER TRADING REGULATIONS IN INDIA: A STUDY

India is now among the fastest growing economies in the world. But this phenomena has its side effects too since the increase in growth has seen a rapid increase in the financial and economic crimes in the Indian capital market, amongst which insider trading has been the most pervasive one.[14] India regulates its insider trading regime through the set of regulations mainly consisting of the SEBI act and PIT regulations along with involvement of Self-Regulatory organizations such as the bye-laws and regulations of the Stock exchanges and rules and code of conduct governing brokers, merchant bankers, agents etc.

Looking at the parent act, i.e. the Securities and Exchange Board of India Act, 1992, section 12A expressly prohibits insider trading by stating that "no person shall directly or indirectly: (a) engage in insider trading; or (b) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the Rules or the Regulations made there under." Under sec 11 (2) (g) of the same act SEBI has been given exclusive powers to deal with insider trading issues. Along with this, penalties amounting to twenty-five crores or three times the amounts of profit made from the act of insider trading are also provided under s. 15G of the SEBI Act. Insider trading can also be made criminally punishable under sec 24 of the act with punishments constituting imprisonment for a term extending upto 10 years or fine which may extend to 25 crores rupees or both. Investigation

[13]The chairman, SEBI v. Shriram Mutual Fund and Anr 2003 46 SCL 571 SAT.
[14] Vaibhav Sharma, *Prohibition on Insider Trading: A Toothless Law*, http://ssrn.com/abstract=1400824.

powers are also given to the SEBI to check the relevant records, collect evidences and testify witnesses.[15]

Now, moving onto the major act which deals with insider trading is the PIT regulation which has been amended several times. Looking at the history of the act, SEBI framed the Securities and Exchange Board of India (Insider Trading) Regulations, 1992. The intention was stated in the case of Alpha Hi-Tech Fuel Ltd. v. SEBI[16] "The primary object of the regulations is to ensure that no person trades in the securities market while in possession of unpublished price sensitive information which may give him an extra advantage over the other investors. In other words, the regulations ensure to provide a level playing field to all the investors who come to trade in the securities market."

Securities and Exchange Boards of India (Insider trading) regulations, 1992 contained three chapters and twelve regulations in total. Various definitions related to insider, deemed to be connected person, price sensitive information and dealing in securities were provided.[17] Chapter II dealt with prohibition of insider trading, and even communicating and counseling in it. Chapter III gave investigative powers to the SEBI to review such cases.

Then came the SEBI (Insider Trading) (Amendment) Regulations, 2002 after constitution of Kumar Mnagalam Birla Committee, which specified a separate chapter for a necessary code of conduct. The amended regulations provided for a code of conduct by the director and defences like Chinese walls to monitor and curb this crime. Some major developments included removal of the words "by virtue of this connection" which narrowed the definition of a connected person by removing the necessity to prove that the person has access to the information.

In November, 2014, India's economy and market capital crossed USD 1.6 trillion which made it the night largest economy in terms of capital in the world.[18] With regards to the changes and several scams which led to a loss in shareholder confidence, Sodhi committee was constituted which gave a new set of regulations called as SEBI (Prohibition of Insider Trading)

[15] *Insider trading regulations: A primer*, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Insider_Trading_Regulations_-_A_Primer.pdf. (2013).
[16] SAT Appeal No. 142 of 2009 vide order dated December 04, 2009.
[17] *Indian Regulations on Insider Trading*, https://www..inflibnet.ac.in%2Fbitstream%2F10603%2F174708%2F11%2F11_chapter%25206.com.
[18] Samie Modak, "*India's market capitalisation cross 100 trillion*" Business Standard, Nov. 28, 2014.

Regulations, 2015. These regulations changed the whole game by tightening the rope to such an extent that mens rea which should be a sine quo non for such crimes was overlooked and mere possession of unpublished price sensitive information was prohibited. The new regulations bought the concept of submitting trading plans by the insiders who are in possession of UPSI. This plan shall have the value, number and dates of the dealings/shares traded on a pre-determined basis.[19] Due-diligence formed another such significant addition to carry out activities in the best interests of the company. However, several loopholes specially with regards to defining the scope of the terms were left which led to the recent amendments in 2018 and 2019, to be discussed further.

AMENDMENT: INCENTIVES VERSUS TIGHTENING OF THE NOOSE

The Securities and Exchange Board of India ("SEBI") on 31st December, 2018 issued an amendment to the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("PIT Regulations"). The necessary amendments are based on the recommendations on the report of the committee on fair market conduct constituted under Shri T.K. Viswanathan. The Committee was mandated to review the existing legal framework to deal with market abuse to ensure fair market conduct in the securities market.[20] The committee submitted its final report on August 08, 2018 proposing several amendments in the SEBI Act, 1992, PIT regulations, 2015 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 2003. Several salient features or additions through this amendment are listed as below:

a) The foremost change is a change in the SEBI Act, 1992 which provided a penalty for dealing in securities "on the basis" of UPSI whereas the PIT regulations, 2015 provided for a violation "while in possession" of UPSI which created a gap. Hence this gap was finally corrected through an amendment in section 15G of the SEBI Act.
b) An 'insider' is a person who in possession of, or has access to, unpublished price sensitive information ("UPSI") or is a connected person (as defined under the PIT Regulations). An insider is prohibited from communicating the UPSI to any person except for a legitimate

[19] SEBI (Prohibition of Insider Trading) Regulation, 2015, reg 5.
[20] *Supra* note 3, at 2.

purpose, performance of duties or discharge of obligations.[21] The recent amendment provided the very necessary *definition of "legitimate purposes"* which included sharing UPSI in ordinary course of business with partners, collaborators, lenders, customers, suppliers, merchant bankers, legal advisors, auditors, insolvency professionals or other advisors or consultants, provided that such sharing has not been carried out to evade or circumvent the prohibitions of these regulations. However, the amended PIT Regulations include a new requirement that such persons must be provided with a notice to keep the UPSI confidential. Further, the board of directors is required to maintain a digital database with names of persons with whom UPSI has been shared and are given powers to make a policy for determination of legitimate purpose under the code of conduct in reg 3(2A).[22]

c) Another amendment is with regards to the *disclosures during due diligence*, the reg 3(3) now specifies it clearly that the board of a listed company shall entail an obligation to assess whether the sharing of the UPSI will be in the best interests of the company or not for the process of due diligence. The committee noted that, during the nascent stages of a proposed transaction, it may not be possible for the board of directors of the target listed company to opine whether such proposed transaction is in the best interests of such target listed company.[23] Hence such changes were introduced. The amendment, therefore, would enable boards to feel relief since it realigns the basis on which communication of UPSI may be permitted.[24]

d) Another change that has been brought is the removal of the words "*material events in accordance with the listing agreement*" from the definition of UPSI under reg 2(n) which will narrow the scope of the information which may be classified as UPSI under the LODR along with providing clarity since some information like appointment of directors under listing agreement may not have a price bearing effect under the PIT regulations, hence requires no disclosure.

e) The most major development that has been provided is regarding some new *defenses* that have been made available. Since insider trading is considered as a heinous while collar corporate crime which has high penalties, it is necessary to provide some necessary and reasonable defenses to the insiders to impute accountability. Some defences that have been provided are

[21] *Amendment to Insider Trading Regulations: An Incentive for Insiders?,* https://elplaw.in/leadership/amendment-to-insider-trading-regulations-an-incentive-for-insiders/ (2019).
[22] Keshav Malpani, *Amendments to SEBI's Regulations on Insider Trading Are they Sufficient?* (2019).
[23] *Supra*, note 3 at 2.
[24] Vijay Bhutada & Manisha Tejwani, *New insider trading norms: Tightening the noose!* (Feb 25, 2019) http://lawstreetindia.com/experts/column?sid=288.

(i) off- market transactions carried out between insiders having the same UPSI; (ii) block trades between insiders who have the same UPSI; (iii) trades done as a result of regulatory obligations; and (iv) exercise of employee stock options for which the exercise price was pre-determined.

- ***OFF-MARKET TRADES-*** Generally an off-market transaction is settled between two parties on mutually agreed terms and the clearing corporation or the stock exchange is not involved.[25] Earlier this defence was only available to promoters but now has been extended to others. The information shared should not be in regards to the due diligence under reg 2 and the intimation of the particulars should be provided within 2 working days.
- ***POSSESSION OF SAME UPSI:*** Now, insiders holding symmetric UPSI that is obtained by complying with the Insider Trading Regulations can undertake off-market trades and block deals while in possession of such UPSI.[26] However, the transaction shall be made in a bonafide manner, pursuant to a regulatory or statutory obligation.
- ***TRADING PLANS:*** The committee noted that trading plans do create a problem in the recent scenario but they couldn't reach a consensus. These plans have remained unpopular since these are irrevocable and require a 6 months gap between the disclosure and the actual trading. The Key managerial personnel involved in the major financial decisions of the firm have to trade even if they are in an economically disadvantageous position in the market because of the irrevocability of these plans. Trading plans can themselves prove to be a misnomer since disclosure of such plans can affect the prices of the securities as the investors becomes privy to the price sensitive information.

  In US, trading plans have often been misappropriated by aligning the trades in accordance with these plans and planning big transactions like mergers and de-mergers around these plans to artificially affect the securities. In cases like *SEC v Mozilo*[27] the judge observed that the insider's action of modifying the rule 105-b plans after he knew about the material, non-public information concerning Countrywide's increasing credit risk,

[25] Girija Gadre & Arti Bhargava, *Off market transactions: All you want to know* (Sep 30, 2013) https://economictimes.indiatimes.com/analysis/off-market-transactions-all-you-want-to-know/articleshow/23209723.cms?from=mdr.

[26]Aakash Choubey, Akshay Bhargav and Julie Roy, *the "Inside" Tale of Enhanced Accountability, Compliances And Defences,* http://www.mondaq.com/india/x/773836/Securities/The+Inside+Tale+Of+Enchanced+Accountablity+Compliances+And+Defences (2019).

[27] CV 09-3994 JFW (MAN).

defeated the purpose behind these plans as they were created to trade in stocks at a pre-scheduled time and price.

These plans were introduced by the Sodhi committee[28] on an experimental basis and still haven't reached popularity with less than 10 of such trading places currently being intimate to the stock exchanges. Hence trading plans as a defence to insider trading is still a big question in the Indian regime. However, the new amendment now provides that pre-clearance of trades, trading window rules and norms, any restrictions on contra trading will not be required or necessary for the transactions done pursuant to the trading plans that have already been approved.

f) Another refreshing change that has been brought is regarding the *code of conduct*. Earlier Listed Companies and Market Intermediaries were required to have code of conduct as per Schedule B of the existing insider law.

But, now the amendment has created two different "code of conducts" where now the listed companies and all the intermediaries such as auditors, accountancy firms, law firms, analysts, insolvency professional entities, consultants, banks etc. have to create a code of conduct. These intermediaries have been used under the nomenclature of the term "fiduciary".

g) Earlier various companies were examined for circulation of UPSI through Whatsapp group. This created a whole new discussion with a conflict between the system of data privacy and encryption along with the investigation process for insider trading. It was also difficult to allocate the source of such information and to prevent data leaks. The new amendment has provided incentives for whistleblowers to come forward and lesser penalties for people who come forward with full disclosure. It is now a special requirement for the listed companies to devise policies to deal with leak or an apprehension of leakage of UPSI and to inform SEBI instantly.[29]

h) *Designated persons, disclosures and material financial relationship:* The amendment has propounded a new term 'designated person' along with the promoter who is required to make necessary disclosures about disposal or acquisition of securities within 2 trading days of such securities. Designated person is also required to provide details of the people with whom it shares a 'Material financial relationship' which has been specified as to consist a payment not

[28] Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading Regulations 1992), (Dec. 7, 2013), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1386758945803.pdf.
[29] *Supra*, note 26 at 9.

involving an arm's length transaction, in the preceding 12 months, equal to at least 25% of the insider's income generated annually.[30] It will also apply in cases with less than 25% of the income of the insider but the income of the other party involved is more than 25%.

i) Further, new definitions of terms like 'financially literate' and 'proposed to be listed' were added to provide more clarity. The term financially literate has been added for the compliance officer, which has been adopted from the LODR regulations itself.[31] Thus financially literate now means mean a person who has the ability to read and understand basic financial statements. The term 'proposed to be listed' may cause much confusion in the capital market since it is important to know disclosure of information and the time associated with it. Hence, it was defined to contain securities after the company has filed offer documents with the registrar, board or the stock exchange or the company has filed a scheme of amalgamation pursuant to a proposed M&A transaction.

IMPACT AND ANALYSIS OF THE AMENDMENTS

The recent amendment introduced in the PIT regulations on 31st December by the SEBI on the recommendation of Expert Committee chaired by Dr. T. K. Vishwanathan, Ex-Secretary General, Lok Sabha and Ex- Law Secretary, Govt. of India effective from 1st April, 2019, has brought in various different changes in the recent insider trading regulations in India. The question however is whether it has tightened the noose or whether it has provided incentives to the traders. While on one hand, the amendments provide a stringent set of compliances and accountability norms but on the other hand it also provides a new set of defences and other relaxations to the traders providing clarity to the whole concept. It was necessary to provide a balance between incentives and need for regular disclosures or compliances. Some personal observations that are made with regards to this amendment are:

1) India jurisprudence with regards to insider trading and such other corporate crimes is still in its nascent stage. Broad terms and ambiguous language may often lead to misuse from both the ends and may lead to a hindrance in the interpretation. Hence, definitions of terms like

[30]Kajal Gupta, *Analysis of SEBI (PIT) amendment regulations 2018,* https://taxguru.in/sebi/analysis-sebi-prohibition-insider-trading-amendment-regulations-2018.html (2019).
[31] Listing obligations and disclosure requirements, 2015, reg 18.

legitimate purpose, proposed to be listed and financially literate will provide much needed clarity for the courts to develop the necessary jurisprudence.

2) The new amendment provides for listed companies to provide for a policy and procedure for conducting an inquiry in case of leak of UPSI. Companies are also required to have whistleblower policies for reporting any violation in the insider trading regulations. Such stringent mechanisms are often needed since insider trading is mostly done through back door methods and entities and such indirect links are often hard to investigate. Companies are also required to form a list of what constitutes as a 'legitimate purpose' as well as also need to frame a code of conduct. This is a much needed change to make the system more deterrent.
3) The new amendment also takes a step towards digital inclusion by adding the need to maintain a digital database of all the people with whom such UPSI has been shared along with some personal details and PAN number. Such database to have time stamping and audit trail.
4) It is debated that this amendment will increase the cost of compliances after introduction of these new mechanisms and introduction of such databases. Since now outsourcing of major work in given to listed companies and intermediaries it can affect the cost of upkeep and compliances. This will result in an increase in the maintenance of records and other such policies that are to be followed under the regulations.
5) Since now the responsibilities regarding creating a database as well as deciding what actually constitutes "legitimate purpose" and to decide whether the sharing of the UPSI is in the best interests of the company to carry out the process of due diligence has been casted on the board of directors it will drive the board to be more responsible and stringent along with providing internal checks and distribution of responsibility. Many other responsibilities like providing policies for whistle blowers, code of conduct, and policies to report and investigate leak of UPSI imputes a better sense of responsibility on the companies and its directors.
6) Thee requirement to send a notice under to an insider to keep the UPSI confidential has not been properly drafted and is left ambiguous. It is totally left silent as to who is actually responsible to send such notices.[32] This creates confusion as whether the company, directors or the compliance officer is supposed to send a notice and may lead to such persons taking a defence and the actual insider taking the defence of not receiving any such notice. Such an insider may not be familiar that he is an insider under the PIT regulations, 2015 and may lead

[32] *Supra* note 25, at 8.

to him being unnecessarily penalized since mere possession is also a violation under the PIT regime.

7) Now off-market trades have to be reported to the company within 2 working days to the listed entity by all the insiders. Such transactions are not regulated by SEBI and are based on mutually agreed terms and conditions of the parties involved. But these transactions require great surveillance, hence the regulations or the amendment fail to provide the details or requirements that need to be disclosed by such an insider. The insider may choose to disclose only some part of the details and not the others and can get away from the radar.
8) The amendment certainly brings and aligns SEBI act, PIT regulations and LODR together by providing definitions like that of "financially literate", "proposed to be listed" and removing the term "material events" from the definition of UPSI. The committee report also focused on changing the penalty/ charging provision under the SEBI act to remove the loophole created by the use of the words "on the basis of UPSI".
9) Although with the introduction of mere possession of UPSI under the PIT 2015 regime, the concept of mens rea has been sufficiently ignored, yet the introduction of the term "legitimate purpose" will bring us a step towards introduction of much necessary mens rea in the insider trading regulatory system. However, shareholders are still not included in the definition.
10) Now the burden has been shifted on the concerned person who has traded in the securities rather than SEBI and it will be presumed that the person was motivated by the knowledge of the UPSI involved. More defences have been introduced in the amendment providing better incentives to the traders. Now, block trades between insiders who have the same UPSI, transaction made as a result of regulatory obligation, exercise of employee stock options for which the exercise price was pre-determined will also be acceptable defences against insider trading. However, trading plans still remain a big mystery or challenge under the PIT regulations with very less implementation and the questions are still not addressed.

SOLUTIONS AHEAD

Insider trading is one of the most difficult corporate crimes to be tackled. Experience of such regulation, which has attracted the unflattering label of 'the unwinnable war', prompts

reconsideration of the issue.[33] The rate of success is quite low with SEBI failing to investigate and regulate these transactions in such a huge capital market. Most of the cases have been not solved and some are not even reported. Even if the person is convicted, suspensions and warnings are provided.[34] Although, India has a stringent PIT regulatory system now it still needs to go a long way ahead through development of jurisprudence and unambiguous regulations with stricter application. The issues need to be addressed with some solutions and suggestions as herein provided:

1) The FMC committee has provided for number of suggestions which are not yet implemented but certainly will be required in the coming future. One of the major recommendations given by the committee was SEBI's power to intercept calls and electronic communication for collecting strong evidence and to eradicate the new generation of insider trading violations involving e-communication through platforms like Whatsapp.[35]
2) Inclusion of foreign element in insider trading is quite important since in today's economy globalization has led to phenomenon like cross-border mergers and insider trading can also be done through these methods. Since there is no penalty for such cases, these offences go unnoticed and make cause nuisance. Hence there is a need to bring penalties and provisions regarding the same.
3) It is now important to bring remedies like class action suits for insider trading violation too. Recently in 2016, class action suits were implemented in India under section 245 of the Companies At, 2013. Since shareholders and investors are normally the ones who face the immense loss due to these prohibited activities. It is important to bring private action in purview. Sec 245 still has ambiguous language and fails to connect various such issues.
4) Proper methods to compute loss and consideration have to be provided since insider trading forms a part of bigger picture of economic frauds and often money laundering. Unlike sufficient guidelines provided in rule 105-b in US, Indian regulations fail to provide some necessary criteria and factors to determine the actual loss caused and the requisite compensation for the same.

[33] Arthur M. Louis, "*The Unwinnable War on Insider Trading*", 72 (1981).
[34] Roopanshi Sachar & Afzal Wani, *Regulation of isndier trading in India: Dissecting the difficulties and solutions ahead*, JCIL, 2, 11.
[35] 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) The requirement of mens rea has always been in debate. After the new PIT regulations in 2015, mere possession of UPSI has been made an offence. Other jurisdictions like UK and US have mens rea as an essential component to prove insider trading. The offence of insider trading has major repercussions and carries huge penalties and punishments; hence it is important to separate intention or bad motive from an accidental tipping. The tipper-tippee test as prevalent in other jurisdictions and other such principles should be incorporated in the Indian jurisprudence as well.
6) Insider trading plans in India are irrevocable. Once made public, the company or the person cannot back out even if there is loss associated with it. Even the period of 6 months is quite long and capital markets being so prone to changes may lead to huge amount of losses to the companies. Moreover, the information or plan made public may lead to misuse by the investors as well. Hence, there needs to be a better research and provision regarding trading plans. Insiders should be allowed to at least set a price band to recover or avoid the potential losses.
7) Performance audits and tax assessments should be carried out along with the investigation powers given to SEBI and a better structure should be formed to distribute various different powers required to curb this offence.
8) Consent orders, injunctions and other preemptive and anticipatory actions should be developed to provide better and readily available remedies instead of waiting for the final judgement or conviction.
9) Better tip & bounty system and whistleblowing procedures should be made to encourage people to move forward and take part in the investigations itself.
10) More clarity and education and awareness regarding this offence is needed since being a high profile crime it is often not known to the home bound investors. Hence, it is necessary to make them aware of the consequences and board of directors should also be guided regarding the recent policies for code of conduct and legitimate purposes that they need to prepare.

CONCLUSION

It can be seen that SEBI has been introducing various changes in the insider trading regulations and have been putting constant efforts to update it to the current standards; however, there is

still a lack of the desired effect or success that is needed to curb Insider trading. These amendments based on the recommendations of the FMC committee have surely freshened up the monitoring system and have caused quite a stir. Now, it's time to wait and actually see the changes that it will bring the securities market. These amendments are capable of bringing a shift in the much needed good corporate governance system in India by introducing behaviors changes in the corporates, board and other key managerial persons and other stakeholder involved. This amendment has indeed provided a perfect balance of providing incentives and defences to the insiders along with accountability and stricter compliance norms. Now, India awaits the new changes that this amendment may bring in the new financial year for market driver by integrity and fairness.

BIBLIOGRAPHY

Statutes

SEBI (Listing Obligations and Disclosure Requirements), 2015

SEBI (Prohibition of Insider Trading) Regulations, 2015

Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992

Securities and exchange board of India act, 1992

The Companies Act, 2013

Reports referred

Abid Hussain committee report, 1989

Kumar Mangalam Birla Committee Report, 2000

Report on Fair market conduct, 2018

Sachar committee report, 1979

Sodhi committee report, 2013

Online articles, sources and websites

- A.M. Louis, "The Unwinnable War on Insider Trading" Fortune 72 (1981)
- Aakash Choubey, Akshay Bhargav and Julie Roy, The "Inside" Tale Of Enchanced Accountablity, Compliances And Defences http://www.mondaq.com/india/x/773836/Securities/The+Inside+Tale+Of+Enchanced+Accountablity+Compliances+And+Defences (2019).
- Amendment to Insider Trading Regulations: An Incentive for Insiders?, https://elplaw.in/leadership/amendment-to-insider-trading-regulations-an-incentive-for-insiders/ (2019)
- Bhattacharyya Utpal & Daouk Hazem, The World Price of Insider Trading, Journal of Finance, (2002)

- Bose Suchismita, Securities Market Regulation: Lessons from US and Indian Experience, ICRA Bulletin. Money and Finance (2005)
- Carmicheal Jeffry& Pomerleano Michael, The Development and Regulation of Non-Banking Institutions, (2002)
- Franklin A. Gevurtz, The Globalization of Insider Trading Prohibitions, 15 TRANSNAT'L L. 63, 65 (2002) (citing Utpal Bhattacharya & Hazem Daouk, The World Price of Insider Trading, 11,
- Herring, Richard & Anthony M. Santomero , What Is Optimal Financial Regulation University of Pennsylvaniaa, (1999).
- Indian Regulations on Insider Trading, https://www..inflibnet.ac.in%2Fbitstream%2F10603%2F174708%2F11%2F11_chapter%25206.com
- Insider trading regulations: A primer, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Insider_Trading_Regulations_-_A_Primer.pdf. (2013).
- Kajal Gupta, Anakysis of SEBI (PIT) amendment regulations 2018 https://taxguru.in/sebi/analysis-sebi-prohibition-insider-trading-amendment-regulations-2018.html (2019).
- Karn gupta, Insider trading in capital market: An overview, http://www.manupatrafast.com/articles/popopenarticle.aspx?id=275878d3-e9c8-4de4-9bd0-3f30b34db853&txtsearch=subject:%20capital%20market
- Keshav Malpani, Amendments to SEBI's Regulations on Insider Trading Are they Sufficient? (2019).
- Lubinisha Saha, Insider Trading: SEBI Regulation, Corporate Law Adviser, (2002)
- Roopanshi Sachar & Afzal Wani, Regulation of isndier trading in India: Dissecting the difficulties and solutions ahead, JCIL.
- Samie Modak, "India's market capitalisation cross 100 trillion" Business Standard, Nov. 28, 2014.
- Thomas C. Newkirk, & Melissa A. Robertson, SEC, Insider Trading – A U.S. Perspective, Remarks at the 16th International Symposium on Economic Crime, Jesus College, Cambridge, England (Sept. 19, 1998), available at http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm.

- Vaibhav Sharma, Prohibition on Insider Trading: A Toothless Law, available at SSRN: http://ssrn.com/abstract=1400824.
- Vijay Bhutada & Manisha Tejwani, New Insider Trading Norms - Tightening the Noose, http://lawstreetindia.com/experts/column?sid=288 (2019)
  https://economictimes.indiatimes.com/analysis/off-market-transactions-all-you-want-to-know/articleshow/23209723.cms?from=mdr