

**SEBI'S CONSULTATION PAPER ON DEFINITION OF UPSI UNDER  
PIT REGULATIONS – AN ATTEMPT TO OVERREGULATE OR FIGHT  
BACK INSIDER TRADING?**

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**Abstract**

Security and Exchange Board of India (SEBI) on the quest to protect the interest of market participants and maintaining the ecosystem & smooth functioning of market, have taken many steps to curb the malpractices therein, like that of insider trading. Insider trading is the practice of trading in shares using unpublished price sensitive information, which can have material impact on the prices of stocks of a listed company. The *SEBI (Prohibition of Insider Trading) Regulations, 2015* lays down the framework for regulating the norms related to insider trading, under its *Regulation 2(1)(n)*, 'unpublished price sensitive information' (UPSI) has been defined. By using the loophole present in the definition, the listed companies adopted the practice of not categorising material information as UPSI, which should have been so categorised. This practice has resulted in making the market unfair for those not in possession of such information and making it difficult for SEBI to regulate and curb insider trading.

SEBI in order to bring uniformity, clarity and certainty in compliance for listed companies, came up with a Consultation Paper on definition of Unpublished Price Sensitive Information under the *SEBI (Prohibition of Insider Trading) Regulations, 2015*. Under this paper, a proposal was put forth to amend the current definition of UPSI to bring the disclosure requirement under *Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015* under *Regulation 2(1)(n)* of the *SEBI (Prohibition of Insider Trading) Regulations, 2015*. Though the amendment was proposed to make the market a fair playing field for the participants, it may come up as inconsistent with the intention of legislature, an

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attempt to overregulate, and unpleasing to the companies. This article analyses the recent Consultation Paper of SEBI on definition of UPSI under PIT Regulations and tries to bring out the impact and challenges of the same.

## Introduction

With growing popularity of stock markets in India, the investors have found multi-fold ways to gain price sensitive information so as to put themselves into an advantageous position, making the trade unfair for others. Insider trading is considered to be an unfair and illegal practice in India, which is also highly discouraged by the Securities and Exchange Board of India (SEBI). It is trading of shares by an ‘insider’ based on unpublished price sensitive information (UPSI). Insider trading includes using of non-public information which can have material impact on the stock prices, for buying or selling shares of a listed company.

In India, *SEBI (Prohibition of Insider Trading) Regulations, 2015 (PIT Regulations)* has laid down framework for prohibition of insider trading in securities and to strengthen the legal framework thereof. It defines an “insider” as any person who is a connected person or in possession of or having access to unpublished price sensitive information.<sup>2</sup> Here, a person who in some way was associated with the company during the six months preceding the insider trade is considered to be a ‘connected person’.

UPSI has been defined under *Regulation 2(1)(n)* of the *PIT Regulations*, which explicitly provides for the events/information that needs to be categorised as such.<sup>3</sup> The inclusive and narrow definition of UPSI has showed the companies a way of making the most out of this lacuna, by not categorising most announcements as sensitive and thus, allowing the insider of company to profit from such knowledge.

On May 18, 2023, SEBI issued its consultation paper on proposed review of the definition of Unpublished Price Sensitive Information (UPSI) under *PIT Regulations, 2015* in order to bring greater clarity and uniformity of compliance in the ecosystem.<sup>4</sup> This was done by

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<sup>2</sup> Regulation 2(1)(g), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>3</sup> Regulation 2(1)(n), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>4</sup> Consultation Paper on proposed review of the definition of Unpublished Price Sensitive Information (UPSI) under SEBI (Prohibition of Insider Trading) Regulations, 2015 to bring greater clarity and uniformity of compliance in the ecosystem (May 18, 2023), <https://www.sebi.gov.in/reports-and-statistics/reports/may-2023-consultation-paper-on-proposed-review-of-the-definition-of-unpublished-price-sensitive-information-upsi-under-sebi-prohibition-of-insider-trading-regulations-2015-to-bring-greater-clarity-and-uniformity-of-compliance-in-the-ecosystem>

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linking ‘material events’ defined under *SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations)*.

### **Legislative framework for disclosure of UPSI under *PIT Regulations*:**

A person is prohibited from engaging in insider trading by virtue of *Chapter VA* of the *SEBI Act, 1992*. The *PIT Regulations* deals with the communication or procurement of UPSI.<sup>5</sup> As per the Regulation, any insider shall not communicate, provide or allow access to any UPSI relating to company or securities listed or proposed to be listed, to any person including other insiders except where such communication is towards a legitimate purpose, performance of duties or discharge of legal obligations.<sup>6</sup> The Board of Directors are entrusted with the duty to formulate policy for determining ‘legitimate purposes’ as a part of ‘Code of Fair Disclosure and Conduct’, which is created under *Regulation 8*.<sup>7</sup> Also, every listed company is under an obligation to disclose material events or information, as per the materiality policy framed by them. *Regulation 30* of the *LODR Regulations* provides for disclosure requirement of material events and information. For this matter, companies need to exercise prudence while determining the material events that would classify as UPSI, affecting the price of securities.<sup>8</sup>

*Regulation 2(1)(n)* of the *PIT Regulations* before its amendment, defined ‘unpublished price sensitive information’ as “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 materially affect the price of the securities and shall, ordinarily including but not restricted to, information relation to the following: -

- (i) financial results;
- (ii) dividends;

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<sup>5</sup> Regulation 3, Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>6</sup> Regulation 3(1), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>7</sup> Regulation 3(2A), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>8</sup> Regulation 30, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, <https://www.sebi.gov.in/legal/regulations/feb-2023/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-february-07-2023-69224.html>.

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- (iii) change in capital structure;
- (iv) mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions;
- (v) changes in key managerial personnel;
- (vi) material events in accordance with the listing agreement.”<sup>9</sup>

Under the above-mentioned circumstances, the listed companies were required to disclose the information, which were material in nature. In case UPSI is communicated for a reason which is not legitimate, whether orally or in written form, it will be deemed as an offence.

### **Rationale behind amending PIT Regulations:**

In August, 2017, SEBI constituted a Committee on Fair Market Conduct, headed by TK Vishwanathan, which submitted its report to SEBI on August, 2018 with the recommendation to amend *SEBI (Prohibition of Insider Trading) Regulations, 2015* among other acts and regulations. As per the Committee, the definition of UPSI under *Regulation 2(1)(n)* of the *PIT Regulations* was an inclusive one, which included “material events in accordance with the listing agreement”.<sup>10</sup> On the other hand, the provision in respect of “material events” under *Regulation 68* of *LODR Regulations* mandates listed entity to inform stock exchange(s) of all material events or information which is price sensitive and/or have bearing on performance/operation of the listed entity.<sup>11</sup>

In respect of the above, the Committee recommended that the definition of UPSI shall remove the explicit inclusion of “material events in accordance with the listing agreement” as it was not necessary that all material events required to be disclosed as per *Regulation 68* of *LODR Regulations* must always categorise to be UPSI under the *PIT Regulations*.

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<sup>9</sup> Regulation 2(1)(n), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>10</sup> Regulation 2(1)(n), Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-41717.html>.

<sup>11</sup> Regulation 68, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, <https://www.sebi.gov.in/legal/regulations/feb-2023/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-february-07-2023-69224.html>.

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**Challenges Post Amendment:**

Pursuant to the amendment, *clause 2(1)(n)(vi)* which mentioned “*material events in accordance with the listing agreement*” was omitted from the definition of UPSI with effect from April 01, 2019.

The expectation of the board was that the listed entities will categorise information as UPSI while getting guided by the principles laid down in the definition of UPSI and exercising their judgment with prudence. However, on several instances, the information/event were not categorised as UPSI by the listed entities inspite of them being so. SEBI noted few such instances, which included a company making announcement through press release of acquiring another company, which was claimed to help in growing a particular business vertically and having direct impact on profits and revenue, by the press release, which resulted in increasing the share price of company by 4.79% in one trading day.

In this data-based approach, SEBI also carried out a study to determine the type of announcements/information which were not getting included under UPSI. The findings of the same indicated that, out of 1,099 press releases, there were 227 instances where price movement adjusted for index was more than 2%, out of which the listed companies categorised only 8% or 18 press releases as UPSI, which was only 1.64% of the total press releases considered. In these statistics, announcements which were of the nature of sales/production related press release, potential investments by the listed company, expansion of business and strategic tie-ups should have been categorised as UPSI, which was not the case.

It was clear that the companies were only categorising items explicitly mentioned under *Regulation 2(1)(n)* of *PIT Regulations* as UPSI, as it was considered to be an ‘uniform practice’ by most companies. Also, many alerts on suspected insider trading cases by the SEBI’s surveillance system could not be processed further for examination as listed companies did not categorise material information as UPSI. This approach prevented SEBI from effectively curbing insider trading.

**Review and Rationalisation of disclosure of material events/information by Listed Entities:**

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As per the disclosure requirement under *Regulation 30* of the *LODR Regulations*, listed entities are required to disclose material events or information to the stock exchanges.<sup>12</sup> For this matter, the events specified in *Part A* of *Part A* of *Schedule III* of *LODR Regulations* have to be mandatorily disclosed as they are deemed to be material events, whereas, events specified in *Part B* of *Part A* of *Schedule III* of such regulations are required to be disclosed based on application of the guidelines of materiality framed by the listed entities.<sup>13</sup>

Thus, on March 29, 2023, SEBI approved the proposal for review and rationalisation of disclosure of material events or information by the listed entities. This was a step towards establishing transparency and ensuring timely disclosures, by incorporating changes including disclosure of certain types of agreements binding listed entities, introduction of quantitative threshold for determining ‘materiality’ of events or information, etc.

The proposal emphasised on amending the current definition of UPSI to bring the disclosure requirements under *Regulation 30* of *LODR* under it, so as to bring regulatory clarity, certainty and uniformity in compliance for listed companies. The draft of proposed amendment mentions “*material event in accordance with Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015*” under *clause (vi)* of *Regulation 2(1)(n)* of the *PIT Regulations*.<sup>14</sup>

### **Implication of SEBI’s Consultation Paper:**

SEBI while broadening the scope of UPSI, has taken a huge step towards including various types of announcements under insider trading rules, which will in-turn put SEBI in charge of taking actions for any misconduct. The events which will get covered under the definition of UPSI will include product launch, capacity addition, insolvency proceedings, resolution or restructuring plan for company debt, sale of a subsidiary or unit, share split, buybacks, etc.

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<sup>12</sup> Regulation 30, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, <https://www.sebi.gov.in/legal/regulations/feb-2023/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-february-07-2023-69224.html>.

<sup>13</sup> Schedule III, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, <https://www.sebi.gov.in/legal/regulations/feb-2023/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-february-07-2023-69224.html>.

<sup>14</sup> Consultation Paper on proposed review of the definition of Unpublished Price Sensitive Information (UPSI) under SEBI (Prohibition of Insider Trading) Regulations, 2015 to bring greater clarity and uniformity of compliance in the ecosystem (May 18, 2023), <https://www.sebi.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-proposed-review-of-the-definition-of-unpublished-price-sensitive-information-upsi-under-sebi-prohibition-of-insider-trading-regulations-2015-to-bring-greater-clarity-and-uni-71337.html>.

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Indian Companies could feel this to be overregulation by SEBI and may lead to additional compliance burden for them, and thus, they may not be very welcoming of this step, but, displeasing the Indian Companies by this move is a smaller cost to pay for SEBI, than jeopardizing its goal of safeguarding the ecosystem of stock market and protecting the interest of investors. For this matter, SEBI can issue clarification as to what kind of compliances needs to be made by the companies. Establishing a 'threshold' is the key to determine this, as it would clarify if the information will have any impact on the company or its ability to conduct business.

The proposal aims at countering insider trading by implementing a regime that would not allow any material event or information from escaping the definition of UPSI. This will prevent companies from taking advantage of the loophole present in the framework and thus, create a level playing field for market participants.

### **Is the proposal in-line with the legislative intention?**

The proposal of SEBI seems to be a positive one, but it may not fulfil the intention of legislature set forth in the *SEBI Act, 1992*. The proposed amendment in the *PIT Regulations* will put more limelight on materiality of information than price sensitivity. Critics may think that the requirement of disclosing material events or information was already present in *Regulation 30* of the *LODR Regulations*, and there was no need of incorporating the same within the definition of UPSI.

The legislature already made a distinction between UPSI and material non-public information (MNPI) by putting them at different places under the SEBI Act, 1992, as MNPI has been referred under *Section 12A(e)* and UPSI has been dealt with under *Section 15G* of the said Act.<sup>15</sup> The proposed amendment by SEBI will erase the intentional differentiation made between the two terms. Additionally, it may complicate the measures like obtaining pre-clearances and closing the trading window under the *PIT Regulations* for the purpose of making disclosures under *Regulation 30* of the *LODR Regulations*.

The Committee on Fair Market Conduct constituted by SEBI in 2017, already presented its finding that 'all material events may not always categorise as UPSI under the *PIT Regulations*', and in light of the same, one can question whether the amendment is truly

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<sup>15</sup> Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992 (India).

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needed? To substantiate the same, SEBI has maintained that regardless of any unpublished information explicitly being categorised as UPSI, it will fall under the same if it is likely to be price sensitive.

### **Conclusion**

SEBI has made an attempt to bring uniformity, clarity and certainty in compliances for listed companies through this consultation paper, but it may not come forward as the ultimate solution for what has been envisaged by it. The practice of SEBI of providing clarifications has been proved to be effective time and again to address any regulatory concern, and the objective of SEBI behind the proposed amendment can also be achieved by the providing clarifications for this matter. Also, if SEBI goes on to amend the norms on instances where the problem could be solved by issuing clarifications, it could come out as a challenging precedent for it. Therefore, a sound deliberation is needed to reach a conclusion which could balance the scales between making the provision effective and saving the trouble of listed companies in their compliances.

As per the *PIT Regulations*, any insider who is in possession of UPSI shall not trade in securities. SEBI in order to arrest any misconduct by listed companies, has tried to enhance regulatory effectiveness through this consultation paper. Though the proposal of SEBI seems as a step to ensure consistency and transparency in the disclosure requirement, it needs to make sure that it does not blurs the line between UPSI and MNPI. Though the intention of the authority remains to fight back insider trading practices, it should come up with the solution in such a way that it does not over regulate the market. In this regard, stakeholders should grab the opportunity to express their concerns and views in order to build the framework where the edge of information would not allow any person to beat the market.

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