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AT INDIA

A PUBLICATION OF ASHU THAKUR & ASSOCIATES



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Dear Reader,

As the year comes to a close, we share with you our year end edition of "**AT INDIA**" which throws light on the Insider Trading Regulations 2015 and highlights the latest amendments to the regulatory regime in India including the recently amended Foreign Direct Investment Policy of India. I hope you find it informative and interesting.

We all at **Ashu Thakur & Associates** wish you a Merry X'mas and a wonderful New Year.

Best regards,

Ashu Thakur
Editor in chief

A DECIPHER TO THE INSIDER TRADING REGULATIONS

Insider trading regulations world over attempt to prohibit individuals and entities that have access to unpublished price sensitive information ("**UPSI**") of a company, from dealing in that company's publicly traded shares. To curb the menace of insider trading many developed nations have framed stringent laws. In the past two decades, the laws & understanding of insider trading (both globally & in India) have evolved significantly. In India, the Securities and Exchange Board of India ("**SEBI**") promulgated the SEBI (Insider Trading) Regulations, 1992 which has now been replaced by the SEBI (Prohibition of Insider Trading Regulations) 2015 ("**Regulations**") which came into effect from 15th May, 2015.

KEY DEFINITIONS:

The Regulations have redefined certain key definitions in order to align the Regulations with the best international practices. In view of which an "**Insider**" has now been defined to mean any person who is a "connected person" or is in possession of or having access to Unpublished Price Sensitive Information "**UPSI**", which makes every connected person an "insider" under the Regulations and hence even an outsider who is not a "connected person" would qualify as an "insider" if such person was "in possession of" or "having access to" "**UPSI**". The term "**Connected Person**" has been widened to include persons associated with the company in a contractual, fiduciary or employment relationship or having direct or indirect access to "**UPSI**" i.e. any information relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming available is likely to materially affect the price of the securities and includes financial results, dividends, change in capital structure, mergers, demergers, acquisitions, delisting, disposals and expansion of business and such other transactions, changes in key managerial personnel; and material events in accordance with the Listing Agreement. The Regulations not only prohibits the communication and procurement of "**UPSI**" but also "trading in securities" when in possession of "**UPSI**".

It is pertinent to note that the expression "dealing in securities" as per the 1992 Regulations has been replaced with "trading in securities" which has been kept wide to mean and include

subscribing, buying, selling, dealing, or agreeing to subscribe, buy, sell, deal in any securities including pledging of securities when in possession of price-sensitive information, which is not known to the public. The Regulations introduces provisions of "Trading Plans" which is a novel concept for India whereby every insider is entitled to execute trades in pursuance of pre-determined trading plan in accordance with the Regulations.

DISCLOSURE OBLIGATIONS:

The earlier disclosure requirements have been done away with and the Regulations now stipulates that the **"initial disclosures"** of trades are to be made only by the promoters, key managerial personnel & directors internally as against all persons holding more than 5% shares or voting rights or in case of any further change in their shareholding or voting rights and **"continual disclosures"** are now required to be made by every promoter, employee or director in case value of trade exceeds the monetary threshold of INR 10,00,000 (*Rupees Ten Lakh Only*) over a calendar quarter and the company is to notify the stock exchanges within two trading days.

CODE OF FAIR DISCLOSURE & CODE OF CONDUCT:

The Regulations mandate every listed company to formulate and publish on its official website a code of practices and procedures for fair disclosure of **"UPSI"**. Every code of Fair Disclosure of **"UPSI"** and its amendments is required to be promptly intimated to the stock exchanges where the securities are listed. Further, the Board of directors of every listed company and market intermediary is required to formulate a code of conduct to regulate monitor and report trading by its employees and other connected persons.

EXCLUSIONS:

The Regulations provide for exclusions where the charge of insider trading would not get attracted provided the insider proves his innocence by demonstrating circumstances including i.e:

- Communication & procurement of information in connection with transactions in conduct of due diligences;
- Off-market inter-se transfer between promoters who are in possession of the same information and are making a conscious and informed decision;
- Non-individual insiders i.e. the individuals who were in possession of such **"UPSI"** were different from the individuals taking trading decisions and such decision-making individuals were not in possession of such **"UPSI"** when they took the decision to trade;
- Trade executed in the absence of any leakage of information, thereby recognizing the concept of 'Chinese walls' in large organizations &
- Trades executed in pursuance of trading plans.

ESOPS:

As per the Regulations, no "insider" shall "trade in securities" of the company, when in possession of **"UPSI"**. Hence as a result among others, no officer or employee of a company may trade in securities when he may actually possess or due to his role is expected to possess **"UPSI"**. While restrictions on ESOPs were imposed even by the 1992 Regulations, an exception for exercise of ESOPs was provided under its Model Code of Conduct. Pursuant to the exception, employees could convert their stock options into shares, even during window closure periods. In practice, when an event or transaction involving **"UPSI"** is under consideration (**"UPSI Event"**), the compliance officer of the company declares closure of the trading window for designated employees of the company. The window closure period usually continues till 48 (forty eight) hours after the disclosure of **"UPSI"** on stock exchanges. As no such exception is available under the present Regulations, exercise of ESOPs during window closure period shall now be treated as Insider Trading. Such a change affects the marketability of ESOPs per se, as frequency of **"UPSI Events"** leave little window for an employee to exercise his ESOPs. Employees of listed companies will have to explore the new option of

submitting trading plans with the compliance officers. Such a submission of the trading plan will allow the employees to implement their pre-decided ESOP trades without any threat of indictment but employees can commence trading only after 6 (six) months from public disclosure of such plan.

PENALTIES:

The Regulations prescribe no separate penalties however the penalty provisions of the SEBI Act 1992 ("Act") are applicable. As per the Act, insider trading is punishable with a penalty of INR 250,000,000 (*Rupees Twenty-Five Crore Only*) or 3 times the profit made out of insider trading, whichever is higher. SEBI is empowered to prohibit an insider from investing in or dealing in securities, declare transactions as void and order return of securities so purchased or sold. Any person contravening or attempting to contravene or abetting the contravention of the Act may also be liable to imprisonment for a term which may extend to ten years or with fine which may extend to INR 250,000,000 (*Rupees Twenty-Five Crore Only*) or both.

CONCLUSION:

The Regulations whilst having ramifications on pledged -share financing, ESOPs, Due Diligence etc. it mandates every listed company, registered intermediary, professionals including law firms, audit firm, analysts, consultants etc assisting or advising listed companies, market intermediaries and other capital market participants to have their own model code of conduct to prevent insider trading by employees or the management. SEBI has now defined minimum standards which need to be followed to regulate insider trading which now shifts the onus of checking internal leakages on the various parties. The Regulations stresses that the mere communication of UPSI would be punishable and hence companies will now need to be more careful what they disclose even to the analysts. It's been 6 months since applicability of the Regulations however there are still grey areas which need to be addressed, the chief concern being the evaluation of actions concerning price sensitive information which may trigger the Regulations.

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AT INDIA - LEGAL SNAPSHOTS

Review of Foreign Direct Investment policy on various sectors:

The Government of India has vide a Press Note dated 10th November, 2015 eased restrictions in various sectors under its Foreign Direct Investment ("**FDI**")Policy. Proposals with foreign equity inflow below INR 5000 crore would now be considered by the Ministry of Finance on recommendations of the Foreign Investment Promotion Board ("**FIPB**") & proposals above INR 5000 crore would be considered by the Cabinet Committee on Economic Affairs. The key changes in the FDI thresholds highlighted below:

FDI Threshold

- 100% FDI automatic route:

Permitted Sectors

Limited Liability Partnerships*, Duty-free shops at airports, Tea, coffee, rubber, cardamom, Palm oil tree & Olive oil tree plantations, Up-linking of Non-news & Current Affairs TV channels / down-linking TV channels, Non-scheduled Air transport service, Helicopter services/

seaplane services requiring DGCA approval, maintenance & Repair organizations, flying training institutes, technical training institutes & Credit Information companies.

- 100% FDI with Government approval beyond 49% : Broadcasting services like Teleports, Direct to Home, Cable networks [Multi System Operators (“MSOs”)], Mobile TV, Headend-in-the sky Broadcasting & Cable Networks*
- 49% FDI through Government route: Terrestrial Broadcasting FM (FM Radio) & Up-linking of News & Current Affairs TV Channels
- 100% FDI under Government route: Satellites – establishment & operation
- Special provisions for NRIs: Investments by NRIs* deemed to be domestic investment at par with the investment made by residents and a company, trust & partnership firm incorporated outside India & owned & controlled by NRI can now invest in India.
- Wholesale/cash & carry: Permitted to undertake single brand retail trading
- E-commerce: Single Brand retail trading entities permitted to undertake retail trading through e-commerce & a “manufacturer” is permitted to sell products manufactured in India through wholesale &/or retail, including through ecommerce without Government approval

**Subject to relevant sectoral conditions on entry route.*

Government of India gives its assent to the Arbitration & Conciliation (Amendment) Bill, 2015:

The Union Cabinet on 26th August 2015 approved the amendments to the Arbitration & Conciliation Act, 1996 by the introduction of the Arbitration & Conciliation (Amendment) Bill, 2015., which provides for:

- Neutrality of arbitrators;
- Arbitral Tribunal award being made within a period of 12 months which may be extended up to 6 months by the parties, thereafter can only be extended by the court on sufficient cause;
- Optional 'Fast track procedure' where the award shall be given in 6 months;
- Restrictive use of 'Public Policy of India' as a ground to challenge of an arbitral award
- Disposal of appeals within 1 year;
- Stay of award only where the court has passed any specific order on an application filed by the party;
- Disposal of application for appointment by the court expeditiously & ideally within 60 days;
- Comprehensive provisions for costs regime to avoid frivolous & meritless arbitration &
- Empowerment of arbitral tribunals to grant all kinds of interim measures which the courts are empowered to grant.

The Amendment Bill was passed by the Lok Sabha on 17th December, 2015 during the winter session of the Parliament.

"Facility Sharing Arrangements" between Group Companies:

The Department of Industrial Policy & Promotion, has clarified vide its circular dated 15th Sept. 2015, that "facility sharing arrangements" between Group Companies either by way of leasing/sub-leasing within Group Companies for the larger purpose of business activities would not be construed to be covered within the meaning of the "real estate business" within the provision of the consolidated FDI Policy circular of 2015 provided such arrangements are at arms' length basis in accordance with the relevant provisions of the Income Tax Act, 1996 & the annual lease rent earned by the lessor company does not exceed 5% of its total revenue.

DIPP notifies automatic FDI route for White-label ATMs:

The Department of Industrial Policy & Promotion ("**DIPP**") has vide a Press Note dated 1st Oct, 2015 permitted foreign direct investment ("**FDI**") up to 100% in White-label ATM Operations ("**WLA**") under the automatic route. WLA are set up by any non-bank entity that own & operate their own ATMs having a minimum net worth of INR 100 crores as per the latest financial years audited balance sheet which is required to be maintained at all times. In case the entity is engaged in any other 18 Non-Banking Financial Company ("**NBFC**") activities then foreign investment in the company setting up WLA shall have to comply with the minimum capitalization norms for foreign investments in NBFC activities. FDI in the WLA operations will however be subject to specific criteria & guidelines issued by the Reserve Bank of India from time to time.

FDI allowed via Partly Paid Shares & Warrants:

The Department of Industrial Policy & Promotion ("**DIPP**") has vide a Press Note dated 15th September 2015 permitted foreign direct investments ("**FDI**") in partly-paid shares & warrants as eligible "capital instruments" for the purposes of the FDI Policy. This Press Note aligns the FDI policy with the exchange control regulations, thereby removing the ambiguity on the requirement of obtaining approval from FIPB on issuance of the partly paid up equity shares/warrants to non-residents. The Press Note clarifies that only partly paid equity shares can be issued whereas preference shares & debentures are required to be fully paid & mandatorily & fully convertible.

Reserve Bank of India notifies Overseas Rupee Debt norms:

In order to facilitate Rupee denominated borrowings from overseas, the Reserve Bank of India ("**RBI**") has vide circular dated 29th September, 2015 put in place a new framework for issuance of Rupee-denominated bonds ("**RDBs**") overseas under the prevalent External Commercial Borrowing norms. These Guidelines permit any Indian corporate which includes non-banking finance companies, housing finance companies, or other Indian companies to issue RDBs. These Guidelines explicitly permit Real Estate Investment Trusts & Infrastructure Investment Trusts to make use of RDBs facility for raising leverage. The proceeds can be used for all purposes except real estate activities other than for the development of integrated township/affordable housing projects, investing in capital markets & using the proceeds for equity investment domestically, activities prohibited as per the FDI guidelines, on-lending to other entities for any of these activities & purchase of land.

Gazette notification of Central Government have been fully digitized:

The Ministry of Urban Development has vide a notification dated 30th September 2015 decided to discontinue the physical printing of gazette notifications & switch to e-publishing of the Gazettes by

uploading on the official website www.egazette.nic.in w.e.f 1st Oct. 2015 as specified in Section 8 of the Information Technology Act, 2000. However as a measure of abundant caution the Ministry shall continue to maintain the record of notifications published & make available the same for reference whenever required.

Government enables online filing of form FC-TRS for transfer of shares between NRIs & Residents via e-Biz Portal:

With a view to promoting the ease of reporting of transactions under Foreign Direct Investment, the Reserve Bank of India has with effect from 24th August, 2015, under the aegis of the e-Biz project of the Government of India enabled online filing of the Foreign Currency Transfer of shares ("**FCTRS**") returns for reporting transfer of shares, convertible debentures, partly paid shares & warrants from a person resident in India to a person resident outside India or vice versa.

IRDA issues master circular on Insurance Advertisements:

The Insurance Regulatory & Development Authority ("**IRDA**") has with a view to protect the interests of the insuring public & enhance their level of confidence on the nature of sales material used & in order to encourage fair business practices on 13th August, 2015 issued a master circular notifying guidelines on "insurance advertisement". The guidelines are the minimum standards to be adhered to by all insurers i.e. life insurer, Non-life & Health insurers & Insurance intermediaries, in addition to compliance with the IRDA (Insurance Advertisements & Disclosure) Regulations, 2000 & the code of conduct prescribed by the Advertisement Standards Council of India. These provisions apply to advertisements, issued through all recognised marketing media, in any mode including printed material, radio, television, e-mails, hosting on the internet & any other audio/visual electronic media.

IRDA issues Guidelines on "India Owned & Controlled":

The Insurance Regulatory & Development Authority of India has on 19th Oct. 2015 issued guidelines on "Indian owned & controlled" for insurance companies, insurance intermediaries i.e. brokers, third party administrators, surveyors & loss assessors etc. As per the guidelines control can be exercised by virtue of shareholding, management rights, shareholders agreement, voting agreements, & in any other manner as applicable by the laws. Indian companies are required to ensure their direct & indirect holdings does not exceed 49% & in case an insurance intermediary is having more than 50% of its revenue from non-insurance activities these guidelines would not be applicable. Appointment of key management persons, majority directors excluding independent directors is required to be through Board of Directors or by the Indian promoter(s) &/ or Indian investor(s). Lastly where the chairman of the Board is having a casting vote, such Chairman should be nominated by the Indian promoter(s) &/ or Indian investor(s).

The Central Board of Direct Taxes notifies 'emails' as new mode of communication with taxpayers:

The Central Board of Direct Taxes ("**CBDT**") has on 2nd Dec. 2015 notified an amendment under Section 282 of the Income Tax Act ("**IT**") which permits the Tax department to serve notices, summons, requisition & other communication to taxpayers through their registered emails as the new mode of official communication along with existing modes like courier, postage or departmental dispatch. It would also be legitimate for assesses to file their responses & authenticated documents through electronic mails. The email addresses available in the income tax return furnished by the addressee to which the communication relates or the email address available in the last income-tax return furnished by the addressee or in case of addressee being a company, email address of the company as available on the website of Ministry of Corporate Affairs shall be used.

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