

Global Investigations Review

The Guide to International Enforcement of the Securities Laws

Editors

John D Buretta, David M Stuart and Lindsay J Timlin

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Publisher's Note

Global Investigations Review is delighted to publish *The Guide to International Enforcement of the Securities Laws*. For those who don't yet know, Global Investigations Review is the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters.

GIR is famous for its daily news, but we also create more in-depth content. It includes a technical library, a volume of which you're now reading; full reporting of the liveliest conference series in the white-collar world, GIR Live (our motto: 'less talk, more conversation'); and unique data sets and related workflow tools to make daily life easier. And much else besides.

Being at the heart of the corporate investigations world, we often become aware of gaps in the literature before others – topics that are crying out for in-depth but practical treatment. Recently, the enforcement of securities laws emerged as one such fertile area.

Capital these days knows no borders, but securities-law enforcement regimes very much do. In that juxtaposition lie all sorts of questions. The book you are holding aims to provide some of the answers. It is a practical, know-how text for investigations whose consequences may ring in securities law. Part I addresses overarching themes and Part II tackles specifics.

If you find it helpful, you may also enjoy some of the other titles in our series. *The Practitioner's Guide to Global Investigations* is the best known. It walks the reader through what to do, and consider, at every stage in the life cycle of a corporate investigation, from discovery of a possible problem to its resolution. Its success has spawned a series of companion volumes that address monitorships, sanctions, cyber-related investigations and, now, securities laws. Please visit the Insight section at www.globalinvestigationsreview.com to view the full technical library. GIR subscribers receive a copy of all our guides, gratis, as part of their subscription. Non-subscribers can read the e-version at www.globalinvestigationsreview.com.

I would like to thank the editors of *The Guide to International Enforcement of the Securities Laws* for helping us to shape the idea. It's always a privilege to work with Cravath, Swaine & Moore. I'd also like to thank our authors and my colleagues for the elan with which they've brought the vision to life.

We hope you find it an enjoyable and useful book. If you have comments or suggestions please write to us at insight@globalinvestigationsreview.com. We are always keen to hear how we could make the guides series better.

David Samuels
Publisher, GIR
November 2021

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Part II

Expert International Perspectives

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India

Niti Dixit, Shahezad Kazi, Dhruv Nath and Zahra Aziz¹

What are the relevant statutes and which government authorities are responsible for investigating and enforcing them?

Relevant statutes

Listed securities in India are primarily governed by three statutes: the Securities and Exchange Board of India Act 1992 (the SEBI Act); the Securities Contract (Regulation) Act 1956 (SCRA); and the Depositories Act 1996 (the Depositories Act), each as amended (collectively, the Primary Statutes).

The Securities and Exchange Board of India (SEBI) is the principal regulator responsible for securities law in India. SEBI was established to protect the interests of investors and to promote the development of, and to regulate, the securities market.² The SEBI Act provides for, among other things: the powers and functions of SEBI;³ the registration of intermediaries (such as stock brokers, sub-brokers and share transfer agents);⁴ the imposition of penalties by, and powers of adjudication of, SEBI;⁵ the establishment, jurisdiction, authority and procedure of an appellate tribunal (i.e., the Securities Appellate Tribunal (SAT)) to hear and decide appeals against SEBI's orders;⁶ and making rules and regulations to achieve the objectives of the SEBI Act.⁷

1 Niti Dixit, Shahezad Kazi and Dhruv Nath are partners and Zahra Aziz is an associate at S&R Associates. The authors would like to thank Muizz Drabu and Gladwin Issac, associates at S&R Associates, for their assistance with this chapter.

2 Preamble, SEBI Act.

3 Chapter IV, SEBI Act.

4 Chapter V, SEBI Act.

5 Chapter VIA, SEBI Act.

6 Chapter VIB, SEBI Act.

7 Sections 29 and 30, SEBI Act.

The SEBI Act is a special law, and the powers of SEBI under the Act are not fettered by other laws on matters governed under the Act.⁸

The SCRA was enacted to prevent undesirable transactions in securities by regulating the business of dealing in securities.⁹ The SCRA provides for, among other things: the recognition, corporatisation and demutualisation of stock exchanges;¹⁰ the powers of SEBI and the government of India to regulate recognised stock exchanges;¹¹ the provisions governing contracts and options in securities and listing of securities;¹² and the penalties for contravention of the SCRA and the process of adjudication of such proceedings.¹³

The Depositories Act was enacted for the regulation of depositories and provides for, among other things, the rights and obligations of depositories, participants, issuers and beneficial owners of securities.¹⁴

Pursuant to the powers granted to it under the Primary Statutes, SEBI has issued several regulations (collectively, the SEBI Regulations), including the following:

- the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations 2003 (the FUTP Regulations), which, among other things, prohibit fraudulent and unfair trade practices relating to the securities market, such as manipulation of books of accounts, false or misleading appearance of trading and dealing in securities to inflate, depress or cause fluctuations in the price of such security;
- the SEBI (Prohibition of Insider Trading) Regulations 2015 (Insider Trading Regulations), which, among other things, restrict communication of, and trading by insiders on the basis of, unpublished price-sensitive information, require disclosure of trading by insiders, mandate codes of fair disclosure and conduct to be followed by listed entities, and provide the legal regime applicable to violations of these regulations;
- the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Code), which, among other things, provide thresholds for the substantial acquisition of shares,¹⁵ voting rights or control in listed entities by an acquirer along with persons acting in concert, the process for such acquisition and the requirements for disclosure of acquisition of such shares, voting rights or control;
- the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations), which, among other things, specify the obligations of listed entities, including in relation to corporate governance matters to protect the interests of shareholders and investors;

8 *Sabana India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another*, (2013) 1 SCC 1 at Paragraphs 66 and 309.

9 Preamble, SCRA.

10 Sections 3 to 5, SCRA.

11 Section 6 to 12A, SCRA.

12 Sections 13 to 19 and 21 to 22F, SCRA.

13 Sections 23 to 26E, SCRA.

14 Chapter III, Depositories Act.

15 Regulation 3, Takeover Code. The threshold prescribed under the Takeover Code is: 25 per cent for new or existing shareholders along with persons acting in concert; and 5 per cent for existing shareholders who already hold more than 25 per cent and less than 75 per cent in the company (otherwise known as creeping acquisition) in one financial year.

- the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018, which, among other things, provide for the conditions (including disclosure requirements in the offer document) and process for listing of securities by an Indian company and further issuance of securities by a listed entity (including by way of qualified placement to institutions, follow-on public offer and issuance of shares through a preferential allotment basis or a rights issue in India, or both);
- the SEBI (Merchant Bankers) Regulations 1992, which, among other things, specify the process of, and qualification for, registration with SEBI allowing entities to act as merchant bankers and their general obligations and responsibilities; and
- the SEBI (Intermediaries) Regulations 2008, which, among other things, provide for the registration and obligations of intermediaries, inspection and disciplinary proceedings against intermediaries by SEBI, and action in case of default and manner of suspension or cancellation of certificate of registration of such intermediaries.

SEBI has also issued regulations governing specific categories of investors, including foreign investors, such as:

- the SEBI (Foreign Portfolio Investors) Regulations 2019;
- the SEBI (Foreign Venture Capital Investors) Regulations 2000; and
- the SEBI (Alternative Investment Funds) Regulations 2012.

The above regulations govern:

- the process for registration of such classes of foreign investors;
- applicable investment conditions and restrictions;
- foreign investors' general obligations and responsibilities; and
- the procedure for action in case of default by such investors.

Additionally, there are certain other statutes and regulations that may be violated in the event of a breach of securities law. These include:

- the Companies Act 2013 and the rules framed thereunder (collectively, the Companies Act) for regulation of companies;
- the Reserve Bank of India Act 1934, pursuant to which the Indian central bank (the Reserve Bank of India (RBI)) is established and provides for, among other things, the regulation of transactions in derivatives, money market instruments and securities;
- the Foreign Exchange Management Act 1999 for regulation of foreign exchange markets by the RBI and the regulation of current account and capital account transactions (including in relation to the transfer and issue of securities of Indian listed entities);¹⁶ and
- the Prevention of Money Laundering Act 2002, which aims to prevent money laundering and provides for confiscation of property in relation to certain specified offences.

Regulators

SEBI acts as the principal, but not the exclusive, regulator for securities laws in India. It has extensive statutory powers, including the power to: issue appropriate directions to a person

¹⁶ Sections 5 and 6, Foreign Exchange Management Act 1999.

who is associated with the securities market, in the interest of investors in securities and the securities market;¹⁷ regulate stock exchanges; prohibit insider trading; regulate substantial acquisitions of shares and takeovers of companies; and conduct inquiries and audits of entities associated with the securities market.¹⁸ Certain provisions of the Companies Act in relation to the issue and transfer of securities, share capital and debenture, and non-payment of dividends by listed companies are also enforced by SEBI.¹⁹

SEBI is empowered to take civil and criminal enforcement actions. Civil actions generally involve issuing directions, such as: remedial orders;²⁰ cease-and-desist orders²¹ and imposition of monetary penalties;²² suspension or cancellation of an intermediary's certificate of registration;²³ suspension of trading of any security in a recognised stock exchange;²⁴ restraining persons from accessing the securities market and prohibiting persons from buying, selling or dealing in securities;²⁵ issuance of directions;²⁶ and other prohibitive orders.²⁷ Criminal action involves SEBI initiating prosecution against alleged violators by filing criminal complaints before the competent courts.²⁸

SEBI has the power of a civil court for the discovery and production of books of accounts and other documents, summoning and enforcing the attendance of persons and examining them on oath, and inspection of books, registers or other documents, in relation to listed companies or public companies that intend to list their securities on a recognised stock exchange.²⁹ In fact, SEBI itself determines the legal measures it will adopt to fulfil the functions assigned to it by the SEBI Act.³⁰

In addition to SEBI, the Indian securities market is regulated and monitored by the Ministry of Finance (MoF) through the Capital Markets Division and the Financial Markets Division, and by the RBI. The MoF is, among other things, responsible for formulating the policies related to the orderly growth and development of the Indian securities market.³¹

Recognised stock exchanges in India have issued by-laws and monitor compliance by listed entities with such by-laws and the Listing Regulations. The by-laws are concerned with, among other things, regulation and control of securities contracts, dealings in securities,

17 *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another*, (2013) 1 SCC 1 at Paragraphs 57 and 303.4.

18 Section 11, SEBI Act.

19 Section 24, Companies Act; Section 55A, Companies Act 1956, as amended (Companies Act 1956).

20 Section 11B, SEBI Act.

21 Section 11D, SEBI Act.

22 Chapter VI-A, SEBI Act.

23 Section 12(3), SEBI Act.

24 Section 11(4)(a), SEBI Act.

25 Section 11(4)(b), SEBI Act.

26 Section 11B, SEBI Act.

27 Section 11D, SEBI Act.

28 Section 24, SEBI Act.

29 *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another*, (2013) 1 SCC 1 at Paragraphs 303.3 and 304.4.

30 *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another*, (2013) 1 SCC 1 at Paragraph 303.1.

31 NSE Website – Regulations in India (https://www1.nseindia.com/int_invest/content/regulatory_framework.htm) accessed on 15 August 2021.

rights and liabilities of trading members.³² The stock exchanges investigate complaints in relation to their trading members or stock brokers and can suspend trading of, or withdraw admission to dealings in, a listed security for breach or non-compliance of any conditions or breach of a company's obligations under the Listing Regulations.³³

The other key regulators for listed and unlisted securities in India are: the Regional Director and the Registrar of Companies under the Ministry of Corporate Affairs for ensuring compliance with the requirements of the Companies Act; the Serious Fraud Investigations Office (established under the Companies Act) for investigating cases of serious fraud and complex financial offences;³⁴ the Enforcement Directorate for investigating and prosecuting offences of money laundering; and the Economic Offence Wing of each state's police department for investigating economic offences such as fraud and market manipulation.

What conduct is most commonly the subject of securities enforcement?

The most common subjects of securities enforcement proceedings are:

- market and issue-related manipulation and price rigging under the FUTP Regulations;
- insider trading under the Insider Trading Regulations;
- takeovers under the Takeover Code; and
- violations of the Listing Regulations.³⁵

Market and issue-related manipulation and price rigging

The FUTP Regulations prohibit manipulative, fraudulent and unfair trade practices,³⁶ which include, among other things: manipulation of books of accounts or financial statements;³⁷ false or misleading appearance of trading in the securities market;³⁸ artificially inflating, depressing, maintaining or causing fluctuation in the price of securities through any means;³⁹ influencing or manipulating the reference price or benchmark price of any securities;⁴⁰ and publishing or causing to publish false information while dealing in securities.⁴¹

SEBI has initiated proceedings in respect of direct or indirect: use or employment of a manipulative or deceptive device or contrivance contrary to the provisions of the SEBI Act or the SEBI Regulations;⁴² employment of a device, scheme or artifice to defraud investors;⁴³ engagement in an act, practice or course of business that operates or would operate as fraud

32 See Chapters V, X, XI and XII BSE Bye-Laws; Section 9, SCRA.

33 Section 9, SCRA; Regulation 98 of the Listing Regulations, 2015; Circular issued by SEBI dated 22 January 2020.

34 SFIO website – About SFIO History (https://sfio.nic.in/about_history_sfio), accessed on 15 August 2021.

35 SEBI, Annual Report 2019-20, pages 195–196, available at: https://www.sebi.gov.in/reports-and-statistics/publications/feb-2021/annual-report-2019-20_49071.html.

36 Regulation 4(1), FUTP Regulations.

37 Explanation to Regulation 4(1), FUTP Regulations.

38 Regulation 4(2)(a), FUTP Regulations.

39 Regulation 4(2)(d), FUTP Regulations.

40 Regulation 4(2)(e), FUTP Regulations.

41 Regulations 4(2)(f) and (k), FUTP Regulations.

42 Section 12A(a), SEBI Act; Regulation 3(b), FUTP Regulations.

43 Section 12A(b), SEBI Act; Regulation 3(c), FUTP Regulations.

or deceit upon a person;⁴⁴ and buying or selling or otherwise dealing in securities in a fraudulent manner.⁴⁵

Insider trading

An ‘insider’ includes any person in possession of or having access to unpublished price-sensitive information (UPSI) or a connected person.⁴⁶ A connected person⁴⁷ is identified either based on their association with a company or because they are deemed to be a connected person. A connected person includes any person directly or indirectly associated with the company during the six months prior to the relevant act of insider trading in any capacity that allows such person access to UPSI or for whom access is reasonably expected. Such access could be by reason of frequent communication with the company’s officers or by being a director, officer or employee of, or holding a professional or business relationship with, the company, which may be either temporary or permanent. A deemed connected person includes, among others, immediate relatives of a person associated with the company, a holding company, subsidiary or associate companies, intermediaries (or employees or directors thereof) or bankers.⁴⁸

UPSI means information relating to a company or its securities that is not accessible to the public on a non-discriminatory basis, and when it becomes accessible, is likely to materially affect the price of its securities. Such information includes (but is not limited to) information relating to financial results, dividends, changes in capital structure, mergers, demergers, acquisitions, disposal and expansion of business, delisting and changes in key managerial personnel.⁴⁹

‘Trading’ includes subscribing, buying, selling or dealing, or agreeing to subscribe, buy, sell or deal, in any securities.⁵⁰ SEBI has initiated investigations under the Insider Trading Regulations for, among other things: directly or indirectly engaging in insider trading;⁵¹ directly or indirectly dealing in securities while in possession of UPSI or communication of such UPSI to any other person, in a manner that is in contravention of the provisions of the SEBI Act or the SEBI Regulations;⁵² communicating or providing or allowing access to any UPSI relating to a company or securities to any person;⁵³ and failing to make adequate disclosures about acquiring or disposing of securities above a certain threshold.⁵⁴

44 Section 12A(c), SEBI Act; Regulation 3(d), FUTP Regulations.

45 Regulation 3(a), FUTP Regulations.

46 Regulation 2(g), Insider Trading Regulations.

47 Regulation 2(d), Insider Trading Regulations.

48 Regulation 2(d)(ii), Insider Trading Regulations.

49 Regulation 2(g), Insider Trading Regulations.

50 Regulation 2(l), Insider Trading Regulations.

51 Section 12A(d), SEBI Act.

52 Section 12A(e), SEBI Act; Regulation 4(1), Insider Trading Regulations.

53 Regulation 3, Insider Trading Regulations.

54 Regulation 7, Insider Trading Regulations.

Takeovers

SEBI investigates, among other things: substantial acquisition of shares or voting rights above the prescribed threshold⁵⁵ or acquiring direct or indirect control over a company⁵⁶ without making a public announcement of an open offer for acquiring shares of such company in accordance with the Takeover Code; and non-compliance with obligations to disclose shareholding and control under the Takeover Code.⁵⁷

Other miscellaneous investigations

SEBI has sought to enforce the provisions of the Listing Regulations applicable to listed entities for failure to, among other things:

- prepare and provide information in accordance with the applicable standards of accounting and financial disclosure;⁵⁸
- provide adequate and timely information to recognised stock exchanges and investors;⁵⁹
- disseminate information in simple, adequate, accurate and explicit terms and in a timely manner;⁶⁰
- consider the interests of stakeholders;⁶¹
- comply with the corporate governance requirements identified in the Listing Regulations⁶² such as providing critical information to the board of directors of a company⁶³ or requirements relating to the composition of the board of directors,⁶⁴ and
- disclose to the stock exchanges material events or information within the prescribed time period.⁶⁵

SEBI has also brought proceedings under the Listing Regulations for misrepresentation or providing misleading information to stock exchanges and investors.⁶⁶

SEBI also brings proceedings against, among others, stock brokers, sub-brokers, share transfer agents and other intermediaries acting without requisite registrations⁶⁷ or against intermediaries and investment advisers for failure to comply with their obligations and responsibilities under the SEBI Regulations.⁶⁸

55 Regulation 3, Takeover Code. The threshold prescribed under the Takeover Code is: 25 per cent for new or existing shareholders; and 5 per cent for existing shareholders who already hold 25 per cent in the company.

56 Regulation 4, Takeover Code.

57 Chapter V, Takeover Code.

58 Regulation 4(1)(a), Listing Regulations.

59 Regulation 4(1)(d), Listing Regulations.

60 Regulations 4(1)(e), Listing Regulations.

61 Regulation 4(1)(h), Listing Regulations.

62 Regulation 4(2) and Chapter IV, Listing Regulations.

63 Regulation 4(2)(f)(iii)(13), Listing Regulations.

64 Regulations 16 and 17, Listing Regulations.

65 Regulation 30, Listing Regulations.

66 Regulations 4(1)(c), Listing Regulations.

67 Section 12(1), SEBI Act; Regulation 3(1), Securities and Exchange Board of India (Investment Advisers) Regulations 2013.

68 Regulation 15, Securities and Exchange Board of India (Investment Advisers) Regulations 2013.

SEBI is also responsible for regulating the issue and transfer of securities under the Companies Act⁶⁹ and it commonly institutes proceedings against companies and their directors or principal shareholders for enforcement of these provisions relating to, among other things, matters to be stated (such as general information, capital structure of the company and terms of issue) and reports to be set out (such as financial information, auditors' report, statutory information and material contracts) in the company's prospectus,⁷⁰ registration of the prospectus,⁷¹ misstatements in the prospectus,⁷² construction of references to offering shares or debentures to the public⁷³ and allotment of securities to be dealt in on stock exchanges.⁷⁴

What legal issues commonly arise in enforcement investigations?

Overview

Investigations conducted by SEBI are quasi-judicial in nature,⁷⁵ where principles of natural justice apply, including, but not limited to, providing the opportunity for a fair hearing and issuing a reasoned decision.⁷⁶

SEBI is empowered to conduct search and seizure operations, including dawn raids, but these require prior permission from a competent court.⁷⁷

Investigation proceedings are conducted under the rules framed for holding inquiries and imposing penalties under the Primary Statutes and the SEBI Regulations.⁷⁸ SEBI may, either on its own or upon receipt of information or a complaint from a person, conduct initial inquiries prior to initiating a formal investigation.⁷⁹ Upon completion of its initial inquiries, SEBI may issue any directions it deems necessary in the interest of investors or the securities market,⁸⁰ or order a formal investigation to be conducted into the affairs of the relevant entity or person.⁸¹

69 Section 24, Companies Act.

70 Section 56, Companies Act 1956; Section 26, Companies Act.

71 Section 60, Companies Act 1956.

72 Section 62, Companies Act 1956; Section 35, Companies Act.

73 Section 67, Companies Act 1956.

74 Section 73, Companies Act 1956; Section 39, Companies Act.

75 *National Securities Depositories Ltd. v. SEBI*, (2017) 5 SCC 517.

76 Order dated 12 March 2019 issued by the SAT in *North End Foods Marketing Pvt. Ltd. v. SEBI*, Appeal No. 80 of 2019 at Paragraph 13; Order dated 21 February 2018 issued by the SAT in *Zenith Infotech Limited and Ors. v. SEBI*, Appeal No. 50 of 2013 at Paragraph 27.

77 Section 11C(9), SEBI Act. For instance, SEBI had conducted search and seizure operations against certain entities involved in the circulation of UPSI over the popular social messaging platform WhatsApp, and about 190 devices were seized in that search (Order dated 22 March 2021 issued by the SAT in *Shruti Vora v. SEBI*, Misc. Application No. 347 of 2020 and Appeal No. 309 of 2020 at Paragraph 3).

78 SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules 1995 (the SEBI Inquiry Rules); The Securities Contracts (Regulations) (Procedure for Holding Inquiry and Imposing Penalties) Rules 2005 (the Securities Contracts Regulations Inquiry Rules); Depositories (Procedure for Holding Inquiry and Imposing Penalties) Rules 2005 (the Depositories Inquiry Rules); SEBI (Intermediaries) Regulations 2008.

79 Section 19 read with Section 15-I(1), SEBI Act; Rule 3, SEBI Inquiry Rules.

80 Section 11B, SEBI Act.

81 Section 11C, SEBI Act.

SEBI also has powers to issue interim, *ex parte*, *ad interim* and final orders.⁸² Interim orders may be issued pending an investigation or inquiry to prevent potential further mischief in the securities market, and final orders are issued after completion of investigation or inquiry. Further, in a situation where the action cannot be delayed, an *ex parte ad interim* order can be issued by SEBI.⁸³

Where the matter requires adjudication in respect of an offence,⁸⁴ SEBI appoints one of its officers not below the rank of a division chief to be an adjudicating officer for holding an inquiry under the Primary Statutes and the SEBI Regulations.⁸⁵ The adjudicating officer is authorised to issue summons, order discovery and production of documents, and examine witnesses.⁸⁶ Formal regulatory proceedings commence with the issuance of a notice to show cause to the persons against whom proceedings are brought.⁸⁷ This notice sets out the facts, circumstances and supporting documents, and identifies the specific regulations that SEBI believes have been contravened. A SEBI show-cause notice will specify the time within which SEBI expects a written response to the allegations along with supporting documents (at least 14 days).⁸⁸ SEBI may issue a supplemental notice to show cause for additional violations.⁸⁹

Adjudication proceedings are quasi-judicial and the respondent is entitled to a hearing, representation through counsel and, where the notice requests it, examination and cross-examination of witnesses.⁹⁰ If the respondent has received notice of the proceedings and does not attend a hearing, the adjudicating officer can decide the matter in the absence of the respondent.⁹¹

For civil proceedings under the SEBI Act, *mens rea*⁹² is not an essential ingredient to establish contravention of a provision under the Primary Statutes or the SEBI Regulations.⁹³ In other words, a penalty is attracted if there is contravention of a provision, regardless of an intention to commit such offence. Violations of insider trading law would qualify as a strict liability offence and an insider, while in possession of UPSI, will be presumed to be motivated

82 Sections 11, 11B and 15J, SEBI Act.

83 *Anand Ratbi v. SEBI*, 2001 SCC OnLineBom 381 at Paragraph 32.

84 Chapter VIA, SEBI Act; Sections 23A, 23B, 23C, 23D, 23E, 23F, 23G and 23H, SCRA; Sections 19A, 19B, 19C, 19D, 19E, 19F and 19G, Depositories Act.

85 Rule 3, SEBI Inquiry Rules; Rule 3, Securities Contracts Regulations Inquiry Rules; Rule 3, Depositories Inquiry Rules.

86 Rule 4(6), SEBI Inquiry Rules; Rule 4(6), Securities Contracts Regulations Inquiry Rules; Rule 4(6), Depositories Inquiry Rules.

87 Rule 4(1), SEBI Inquiry Rules; Rule 4(1), Securities Contracts Regulations Inquiry Rules; Rule 4(1), Depositories Inquiry Rules.

88 Rule 4(1), SEBI Inquiry Rules; Rule 4(1), Securities Contracts Regulations Inquiry Rules; Rule 4(1), Depositories Inquiry Rules.

89 Rule 4(2), SEBI Inquiry Rules; Rule 4(2), Securities Contracts Regulations Inquiry Rules; Rule 4(2), Depositories Inquiry Rules.

90 Rule 4(3), SEBI Inquiry Rules; Rule 4(3), Securities Contracts Regulations Inquiry Rules; Rule 4(3), Depositories Inquiry Rules. Order dated 15 September 2010 issued by the SAT in *Bharat Jayantilal Patel v. SEBI*, Appeal No. 126 of 2010 at Paragraphs 4, 5 and 7.

91 Rule 4(7), SEBI Inquiry Rules; Rule 4(7), Securities Contracts Regulations Inquiry Rules; Rule 4(7), Depositories Inquiry Rules.

92 *Mens rea* (Latin for 'guilty mind') refers to the state of mind statutorily required to convict a particular defendant of a particular crime.

93 *SEBI v. Shrinam Mutual Fund*, (2006) 5 SCC 361.

by the knowledge and awareness of such information that he or she is in possession of, unless he or she can provide evidence to the contrary.⁹⁴

SEBI issues its decision or order in the matter, pursuant to which it may close the proceedings or impose a monetary penalty.⁹⁵ SEBI may also issue other declaratory orders or injunctions and cease-and-desist orders (see the section below on remedies and sanctions).

Orders issued by SEBI can be challenged before the SAT.⁹⁶ Orders of the SAT can be challenged before the Supreme Court of India on questions of law.⁹⁷

Criminal proceedings

Certain offences under the Primary Statutes and the SEBI Regulations are punishable by imprisonment but SEBI is not competent to conduct a criminal trial. Therefore, upon completion of initial inquiries, SEBI may file a complaint before a court competent to try offences under Indian law, against an individual or company for such offences, which include, among other things, market manipulation under the FUTP Regulations and insider trading under the Insider Trading Regulations.⁹⁸

Civil proceedings and criminal proceedings can be initiated simultaneously by SEBI. As a practical matter, SEBI may await the outcome of the civil proceedings (although it is not obliged to do so) before initiating action under criminal law.

Legal issues

Privilege

Under Indian law, privilege extends to: legal advice rendered by a professional legal adviser to his or her client; communications exchanged between such professional legal adviser and client; and documents that are created in anticipation of litigation.⁹⁹ The statutory exceptions to the rule of privilege are (1) any communication made in furtherance of an illegal purpose and (2) any fact observed by the professional legal adviser indicating that a crime or fraud has been committed in the course of his or her engagement.

However, privilege is not applicable if the client offers itself as a witness, in which case the client may be compelled to disclose such communication that the court thinks necessary to explain the evidence that the client has given, but no other communication.¹⁰⁰

Any information or documents requested by and provided to SEBI during the course of an inquiry, investigation or proceedings under the SEBI Act are received by SEBI in a fiduciary capacity. SEBI is exempt from disclosing such information or documents to third parties.¹⁰¹

94 Regulation 4(1), SEBI Insider Trading Regulations.

95 Rule 5, SEBI Inquiry Rules; Rule 5, Securities Contracts Regulations Inquiry Rules; Rule 5, Depositories Inquiry Rules.

96 Section 15T, SEBI Act; Section 23L, SCRA; Section 23A, Depositories Act.

97 Section 15Z, SEBI Act.

98 Section 24(1), SEBI Act.

99 Section 126, Indian Evidence Act 1872.

100 Section 129, Indian Evidence Act 1872; *Municipal Corporation of Greater Bombay and Anr. v. Vijay Metal Works*, AIR 1982 Bom 6.

101 Order dated 11 December 2018 issued by the SAT in *Sandip Sabharwal v. CPIO*, SEBI Mumbai, Appeal No. 3258 of 2018 at Paragraph 10(i).

Cooperation with the investigating authorities

Failure to comply with SEBI's directions to produce documents or information by a person being investigated can result in the imposition of a penalty amounting to approximately US\$1,345 for each day during which such failure continues or approximately US\$134,445, whichever is less.¹⁰²

Cross-border cooperation and information sharing

SEBI's Office of International Affairs is responsible for liaising with foreign entities and other national securities regulators, such as the Securities Exchange Commission (SEC) in the United States, the United Kingdom's Financial Conduct Authority and the Monetary Authority of Singapore. SEBI is a member of the International Organization of Securities Commissions, a worldwide association of national securities regulatory commissions, and it collaborates with foreign securities regulators to strengthen cross-border cooperation in the area of securities regulation and enforcement.¹⁰³ For instance, following the global covid-19 pandemic, SEBI and other national securities regulators have regularly shared information on the securities policy measures that each regulator has implemented.¹⁰⁴ SEBI also has bilateral arrangements with various other securities regulators (such as the SEC) to facilitate mutual assistance, provide technical assistance, and enable effective enforcement of the laws and regulations governing the securities markets.¹⁰⁵ One of the significant advantages of such bilateral cooperation is regular information sharing on various issues, which includes, among other things, securities-backed loans, guidelines on investor compensation funds, the functioning of investor grievance redressal mechanisms and whistleblower policies.¹⁰⁶

Whistleblower protection

Every listed company in India is required to establish and display on its website a whistleblower policy for its directors and employees to report genuine concerns regarding, among other things, financial impropriety and regulatory non-compliance.¹⁰⁷ SEBI relies on this whistleblower policy to curb violations of insider trading by enabling reporting of leaks of unpublished price-sensitive information.¹⁰⁸ In 2019, SEBI introduced an informant mechanism to incentivise informants to report violations of insider trading laws to SEBI in return for a monetary reward.¹⁰⁹

102 Section 15A(a), SEBI Act.

103 International Organization of Securities Commissions Multilateral Memorandum of Understanding, Appendix A (Current Signatories) available at: <https://www.iosco.org/about/?subSection=mmou&subSection1=signatories>.

104 SEBI Annual Report 2019-20, pages 216–217, available at: https://www.sebi.gov.in/reports-and-statistics/publications/feb-2021/annual-report-2019-20_49071.html.

105 List of Bilateral Memoranda of Understanding signed by SEBI, available at: <https://www.sebi.gov.in/department/office-of-international-affairs-36/oia-bilateral.html>.

106 SEBI Annual Report 2019-20, pages 218–219, available at: https://www.sebi.gov.in/reports-and-statistics/publications/feb-2021/annual-report-2019-20_49071.html.

107 Section 177(9), Companies Act; Regulations 4(2)(d)(iv), 22 and 46, Listing Regulations.

108 Regulation 9A(6), Insider Trading Regulations.

109 Regulation 7D, Insider Trading Regulations.

Multiple investigations and parallel proceedings

The SEBI Act does not prevent SEBI from initiating parallel proceedings alongside other regulators on the basis of the same set of facts. Likewise, other law enforcement agencies, such as the Enforcement Directorate, the Central Bureau of Investigation (CBI), the Registrar of Companies and the Income Tax Department, may also initiate investigations and prosecution simultaneously with SEBI proceedings arising from the same set of facts. For instance, SEBI is currently investigating a bank and its former managing director and chief executive officer for alleged non-compliance with certain provisions of the Listing Regulations.¹¹⁰ The CBI and the Enforcement Directorate are conducting parallel investigations for offences of criminal conspiracy, cheating and money laundering that arise out of the aforesaid allegations.

Settlement and leniency mechanism before SEBI and other regulators

Under the SEBI Act, a person against whom civil proceedings have been initiated may file an application proposing a settlement of the proceedings initiated, or which may be initiated, without admitting or denying the violation or liability.¹¹¹ Such application cannot be filed if an inquiry, investigation, audit or inspection is pending.¹¹² SEBI may agree to the proposal for settlement depending on the nature, gravity and impact of the default.¹¹³ The terms of settlement may include monetary or non-monetary terms, or both.¹¹⁴ For monetary terms, the amount to be paid is calculated by a formula prescribed by SEBI, which currently comprises an indicative amount (minimum of US\$4,035 for first-time applicants and US\$9,415 for other applicants)¹¹⁵ that is then considered against various other aggravating and mitigating factors, including the conduct of the applicant during such proceedings, any other pending or concluded proceedings against the applicant for non-compliance of securities laws and the extent of harm or loss to the investors or gains made by the applicant.¹¹⁶

Non-monetary terms may include suspension or cessation of business activities for a specified period, disgorgement on account of the action or inaction of the applicant, exit from the management of the company and similar terms.¹¹⁷ SEBI may also agree to settle-in-confidence proceedings against applicants who agree to provide substantial assistance in the investigation, inspection, inquiry or audit, to be initiated or ongoing, against another person in respect of violations under the Primary Statutes or the SEBI Regulations.¹¹⁸

110 Show-cause notice issued by SEBI to Ms. Chanda Kochhar dated 24 May 2018.

111 Section 15JB, SEBI Act.

112 Regulation 5(1)(b), SEBI (Settlement Proceedings) Regulations 2018.

113 Section 15JB(2), SEBI Act.

114 Regulation 9(1), SEBI (Settlement Proceedings) Regulations 2018.

115 Paragraph 2, Chapter I, Schedule II, SEBI (Settlement Proceedings) Regulations 2018.

116 Paragraph 2, Chapter I, Schedule II, SEBI (Settlement Proceedings) Regulations 2018 read with Regulation 10, SEBI (Settlement Proceedings) Regulations 2018.

117 Regulation 9(2), SEBI (Settlement Proceedings) Regulations 2018.

118 Chapter IX, SEBI (Settlement Proceedings) Regulations 2018.

What remedies and sanctions are available to government authorities?

SEBI has the power to issue both interim and final orders under the SEBI Act.¹¹⁹ Interim orders can be issued pending an investigation or inquiry and even *ex parte* to prevent further potential mischief or tampering with the securities market. Final orders are issued after completion of an investigation or inquiry. SEBI is required to adhere to the principles of natural justice, including providing parties with an opportunity to be heard.¹²⁰ However, in a situation where the act to be prevented is imminent or where action to be taken cannot be delayed, a pre-decisional hearing may be dispensed with and an *ex parte ad interim* order can be issued.¹²¹ Under such circumstances, a post-decisional hearing will be provided to the affected party.¹²² *Ex parte* orders typically record the reasons, necessity and urgency for issuance of such orders.

Sanctions imposed by SEBI could be monetary or non-monetary in nature. Monetary actions commonly include levying a penalty, which broadly ranges between US\$1,345 and US\$3,361,125.¹²³ The quantum of the penalty is based on factors such as the amount of disproportionate gain or unfair advantage obtained, the amount of loss caused to the investor as a result of the default, and the repetitive nature (if any) of the default.¹²⁴ SEBI may also pass orders for refund of monies and disgorgement of unlawful gains.¹²⁵ Non-monetary actions include: a suspension of trading of any security;¹²⁶ a restraint against persons from accessing, and a prohibition against buying, selling or dealing in, securities;¹²⁷ a suspension of office-bearers of any stock exchange;¹²⁸ a suspension or cancellation of the certificate of registration of an intermediary;¹²⁹ and a direction against an acquirer to make an open offer for acquiring the shares of the target company and, if there is a failure or delay to make such offer, payment of interest along with the offer price.¹³⁰ Other actions that could be taken to recover the amount of penalty include attachment of bank accounts or movable and immovable property¹³¹ and the appointment of a receiver to manage the property of the person. SEBI may also seek court orders for arrest and detention in prison of a defaulting person.¹³²

If there is a contravention of a provision under the Primary Statutes or the SEBI Regulations for which no punishment is provided under the Primary Statutes, the Primary Statutes also prescribe a punishment by way of imprisonment for a term of not less than one month (which may extend to 10 years) or a fine of up to approximately US\$3,361,125, or

119 Sections 11, 11B and 15J, SEBI Act.

120 Order dated 12 March 2019 issued by the SAT in *North End Foods Marketing Pvt. Ltd. v. SEBI*, Appeal No. 80 of 2019 at Paragraph 13; Order dated 21 February 2018 issued by the SAT in *Zenith Infotech Limited and Ors. v. SEBI*, Appeal No. 50 of 2013 at Paragraph 27.

121 *Anand Rathi v. SEBI*, 2001 SCC OnLineBom 381 at Paragraph 32.

122 *Anand Rathi v. SEBI*, 2001 SCC OnLineBom 381 at Paragraph 32.

123 Chapter VI-A, SEBI Act; assuming a conversion rate of US\$1 = 74.22 rupees.

124 Section 15J, SEBI Act; Section 23J, SCRA; Section 19I, Depositories Act.

125 Section 11B, SEBI Act.

126 Section 11(4)(a), SEBI Act.

127 Section 11(4)(b), SEBI Act.

128 Section 11(4)(c), SEBI Act.

129 Section 12(3), SEBI Act.

130 Regulation 32, Takeover Code.

131 Sections 11(4)(e), SEBI Act.

132 Section 28A(1)(d), SEBI Act.

both.¹³³ For punishment by way of imprisonment, the persons in charge of the company or responsible for the conduct of business of the company at the time of commission of the contravention may be ordered to serve the term of imprisonment as they are deemed guilty of the offence committed by the company under the Primary Statutes unless such person can establish that he or she had no knowledge of the contravention or that he or she had exercised all due diligence to prevent the commission of the contravention.¹³⁴

133 Section 24, SEBI Act; Section 23, SCRA; Section 20, Depositories Act.

134 Section 27, SEBI Act; Section 24, SCRA; Section 21, Depositories Act.

Appendix 1

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Niti Dixit is a partner at S&R Associates. Her practice focuses on advising multinational and Indian clients on international and domestic arbitration, regulatory proceedings, corporate and commercial litigation and non-contentious matters, including internal corporate investigations. Niti has practised as counsel before various courts and tribunals in India, including the Supreme Court of India, the High Court of Delhi and other state high courts and specialised tribunals focusing on constitutional law, corporate and commercial law and securities law. Niti has been recognised as one of the Top 100 Women in Litigation in 2020 and 2021 by *Benchmark Asia-Pacific* and one of the Top 15 Disputes Lawyers in India for 2019 by *Asian Legal Business*. She has also been identified as a leading lawyer by *Chambers Asia-Pacific* and *asialaw* in its Profiles for Dispute Resolution, and by *RSG India Report* for Disputes, Arbitration and Commercial Law. She regularly contributes to top industry publications and is a speaker at events. Further details are available at <https://www.snrlaw.in/niti-dixit/>.

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Capital these days seems to know no borders, but securities laws very much do. In that juxtaposition lie all sorts of challenges for those charged with investigating whether any law has been broken.

GIR's *The Guide to International Enforcement of the Securities Laws* aims to make practitioners' lives easier. Written by contributors with a wealth of experience, and edited by lawyers from Cravath, Swaine & Moore, this handy desktop reference guide seeks to address the most pressing questions in securities law enforcement.

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