

M&A Hotline

August 05, 2022

SEBI'S CONSERVATIVE GUIDANCE TO DEEPAK NITRITE LIMITED

BACKGROUND

Deepak Nitrite Limited (the "**Company**") had recently sought guidance from the Securities and Exchange Board of India ("**SEBI**"), pursuant to its application letter dated February 11, 2022 ("**Application**")¹. Prior to making the Application, the board of directors of the Company ("**Board**") had announced a qualified institutional placement of equity shares of the Company upto INR 2,000 crores ("**QIP**") vide a meeting of the Board held on December 22, 2021². Further, the shareholders of the Company approved the QIP by way of a special resolution passed on January 27, 2022³.

It is important to note here that, the Application states that the QIP will be launched at an appropriate time and for a size as may be decided by the Board or any committee thereof and the issue price of the QIP will be determined as prescribed under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR Regulations**").

QUERIES

Considering the abovementioned background and material facts, the Company had sought informal guidance from SEBI by way of the Application in relation to the following queries:

- I. Whether the pending QIP issue, its pricing and probable impact on the share capital of the Company, which is not yet known and shall be determined per the ICDR Regulations, be considered as unpublished price sensitive information ("**UPSI**")?
- II. In view of the above, whether the individual Promoters which include the Chairman & Managing Director, the Executive Director and the CEO of the Company or any member of the promoter group of the Company, can purchase the shares of the Company from the open market during the pendency of the QIP?

SEBI GUIDANCE

SEBI issued its guidance letter to the Company responding to the queries in the Application vide letter dated July 12, 2022 ("**Guidance Letter**")⁴. In relation to the first query of the Company, SEBI placed reliance on the definition of UPSI under the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("**PIT Regulations**"), which is reproduced herein below:

"unpublished price sensitive information" means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon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 relating to the following:

- a. *financial results;*
- b. *dividends;*
- c. *change in capital structure;*
- d. *mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions;*
- e. *changes in key managerial personnel"*

QIPs are a way for listed companies to raise capital by issuing eligible securities to qualified institutional buyers on a private placement basis⁵. Since, a QIP involves issuing securities, SEBI in its Guidance Letter stated that the QIP issue by the Company will result in increase in the capital of the Company and in turn lead to a change in the capital structure of the Company. In its Guidance Letter SEBI states, "Accordingly, the QIP issue, its pricing and probable impact on the Share Capital of the Company, is UPSI". We feel the wording of this statement is wider than was perhaps intended. The fact of the QIP is already published so it can't be UPSI. Also, till such time as the pricing and size are not determined, there does not exist such information and therefore no UPSI. It is only during the period that the price and size is known to the insiders and not published, can there be said to be UPSI.

In relation to the second query of the Company, SEBI placed reliance on the definition of 'Insider'⁶ and 'Connected Person'⁷ under the PIT Regulations. In terms of aforesaid definitions, SEBI stated that the Chairman & Managing Director, the Executive Director and the CEO of the Company qualify to be 'connected persons' and thereby fall under the ambit of the term 'insider'. SEBI further stated that, on a case to case basis, a member of the promoter group may be deemed to be a 'connected person' or may be in possession of UPSI, accordingly, such members of

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the promoter group may also fall under the definition of 'insider'. Further, Regulation 4(1) of the PIT Regulations restricts an insider to trade in securities, that are listed on a stock exchange, when in possession of UPSI⁸. Basis the above understanding, SEBI responded to the second query of the Company in negative. However, it specifically drew a reference to the exemption by way of a pre declared trading plan as the permitted means for persons perpetually in possession of UPSI to trade in the relevant security.

CONCLUSION

We understand that it is common practice for listed companies to pass resolutions for a QIP that are enabling in nature, which often do not materialise into a fund-raising activity. Merely passing of an enabling resolution which does not comprise specific details of a QIP such as the timing, pricing, size etc., should not qualify as UPSI. However, in the event a Company proceeds in relation to such enabling resolutions, the market watchdogs should step in to analyse if any restrictions under the PIT Regulations have been triggered. Further, in the current scenario, the QIP on being approved by the Board and the shareholders of the Company becomes information that is generally available in the public domain. Accordingly, it should have been permissible to trade in the securities of a Company even after an enabling resolution for a QIP has been passed, so long as the Company has not acted further on it which would lead to circumstances generating UPSI. However, in the event a Company proceeds in relation to such enabling resolutions, the company and relevant insiders will need to analyse if any restrictions under the PIT Regulations have been triggered. Accordingly, we feel, SEBI in the current scenario, has taken a conservative approach by not allowing the individual Promoters and the members of the promoter group to trade pending the QIP issue of the Company.

SEBI's reference to Regulation 4(1) of the PIT Regulations providing for an exception by way of a trading plan is of limited use, given its unlikely adoption by market players (not least on account of the obligation to follow the trading plan even in the face of adverse market conditions).

– Harman Khorana & Ratnadeep Roychowdhury

You can direct your queries or comments to the authors

¹ Application Letter dated February 11, 2022, *available at*:
https://www.sebi.gov.in/sebi_data/commondocs/jul-2022/Deepak_Nitrite_AL_p.pdf

² Ibid to i

³ Ibid to i

⁴ SEBI Informal Guidance Letter dated July 12, 2022, *available at*:
https://www.sebi.gov.in/sebi_data/commondocs/jul-2022/Deepak_Nitrite_IG_p.pdf

⁵ Regulation 2(tt) of the SEBI ICDR Regulations

⁶ Regulation 2(1)(g) of the PIT Regulations: "insider" means any person who is: i) a connected person; or ii) in possession of or having access to unpublished price sensitive information;

⁷ Regulation 2(1)(d) of the PIT Regulations: "connected person" means, any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access.

⁸ Regulation 4(1) of the PIT Regulations.

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