BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PB/AO- 57 /2011]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995.

In respect of

Mr. Bakul R. Parekh

(Pan No.: AACPP5587D)

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted examination in the trading in the scrip of M/s Action Financial Services (India) Limited (hereinafter referred to as 'AFSIL/Company') for the period from August 19, 2005 to February 28, 2006 (hereinafter referred to as **"Investigation period"**).

2. The findings of the examination led to the allegation that Mr. Bakul R. Parekh (hereinafter referred to as 'Noticee') had violated regulation 12(1) read with clause 3.2-5 of the Code of Conduct specified under Part A of Schedule I of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **"PIT Regulations"**) and

consequently, liable for monetary penalty under section 15HB of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **"SEBI Act"**).

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned has been appointed as Adjudicating Officer vide order dated March 25, 2010 under section 15 I of the SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15HB of the SEBI Act.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice No. EAD-7/PB/RG/2543/2011 dated February 10, 2011 (hereinafter referred to as "**SCN**") was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15HB of the SEBI Act for the alleged violation of PIT Regulations as alleged in the SCN.

5. It was alleged in the SCN that the Noticee had violated regulation 12(1) read with clause 3.2-5 of the Code of Conduct specified under Part A of Schedule I of the PIT Regulations. The trading window was closed from September 06, 2005 to September 07, 2005 and from September 11, 2005 to September 12, 2005. The announcements that the Board meeting of AFSIL to be held on September 12, 2005 would discuss the change of name of the company, stock split and increase of authorized capital of the company was made at 2:54 PM on September 08, 2005. The decisions of the Board approving the above issues were

announced at 4:00 PM on September 14, 2005. The corporate announcement was reflected on the BSE website on September 08, 2005 and September 14, 2005. It was alleged that the trading window was opened before the corporate announcements came in the public domain i.e. it was open on September 08, 2005 and September 13, 2005. The trading window should have been closed on September 08, 2005 and September 13, 2005. It was alleged that trade clearance was given by the company before announcements relating to change of name of the company, stock split and increase of authorized capital came into public domain. Since the model code of conduct specifies that the trading window should be opened after 24 hrs of the information being made public, the Noticee being the compliance officer failed to comply with regulation 12 (1) read with clause 3.2-5 of Code of Conduct specified under Part A of Schedule I of the PIT Regulations.

6. The aforesaid SCN was sent through Hand Delivery. The said notice was received and acknowledged by the Noticee. Vide letter dated February 21, 2011, the Noticee requested for 4 weeks' time for filing reply. Vide letter dated March 24, 2011, the Noticee filed the reply. The Noticee in his reply, inter-alia stated:

    - *There was a delay of two days by the exchange in publishing the corporate announcement on its website with respect to the information submitted vide letter dated September 06, 2005. The information was submitted to the exchange by us vide letter dated September 06, 2005 which was published on September 08, 2005. we should not be held responsible for delay of two days by the exchange in publishing the said information submitted vide our letter dated September 06, 2005*

as we do not have control over the acts of omission and commissions of the esteemed exchange.

- *There was an inadvertent technical lapse on our part in keeping the trading window open on September 13, 2005 under honest belief that the letter dated September 12, 2005 was served on the BSE on September 12, 2005.*

- *We had duly served our aforesaid letter dated September 06, 2005 on September 06, 2005 on the exchange. We were unaware of the clerical delay of two days on our part and believed that the letter dated September 12, 2005 was also served on September 12, 2005. However, it was served on September 14, 2005. The technical lapse of allowing the trade window to remain open on September 13, 2005 under honest belief that the said letter dated September 12, 2005 pertaining to the decisions taken in the board meeting held on September 12, 2005 was filed on September 12, 2005.*

- *We had thus, considered the dates as on when the corporate announcements were made public as September 06, 2005 and September 12, 2005 and accordingly the trading window remained closed from September 06, 2005 to September 07, 2005 and from September 11, 2005 to September 12, 2005.*

- *It is submitted that the company was in desperate need of finance. The price of our scrip was rising from August 26, 2005 onwards. In view of the above, our Chairman and Managing Director, Mr. Milan Parekh proposed to sell his shares and bring the money back in the company by way of subscribing preference shares in the company. Under the said*

circumstances, we granted trade clearance to Mr. Milan Parekh and he traded on September 05, 2005, September 08, 2005, and September 13, 2005 when the trading window was open. He totally sold 7,00,000 lacs shares for the sum of ₹ 1,07,62,750.00 on the aforesaid dates. The entire amount of ₹ 1,07,62,750.00 was brought back by him in the company by way of subscribing in non-convertible redeemable preference shares. The aforesaid shares were floated back in the company as and by way of subscription in non- convertible redeemable preference shares which were allotted to him on September 30, 2005. This goes to prove that there were no malafide intentions. Thus, it was a business decision, in the circumstances of financial emergency to save the company. Thus, the act of granting clearance may be exempted and no adverse inference may be drawn therefrom. Further, Mr. Milan Parekh sold the aforesaid 7,00,000 shares of the company at an average price of Rs. 15.37 per share. Thus, it was neither a case of earning any undue profit nor a case of taking any undue advantage of the unpublished price sensitive information by him. There was no loss or disadvantage caused to the general public.

The Noticee vide letter dated March 24, 2011 requested for granting personal hearing.

In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticee was granted an opportunity of personal hearing on April 25, 2011 vide notice dated April 13, 2011. Mr. Milan Parekh appeared as Authorized Representative (hereinafter referred to as **"AR"**) on behalf of the Noticee for the hearing. During the course of the hearing, the AR reiterated the submissions made by the Noticee vide letter dated March 24, 2011.

CONSIDERATION OF ISSUES AND FINDINGS

7. The issues that arise for consideration in the present case are :

    a. Whether there is any violation of regulation 12(1) read with clause 3.2-5 of the Code of Conduct specified under Part A of Schedule I of the PIT Regulations by the Noticee?
    b. Does the violation, if any, attract monetary penalty under section 15HB of the SEBI Act?
    c. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

8. Before moving forward, it would be pertinent to refer to the provisions of regulation 12(1) of PIT Regulations, clauses 3.2-3, 3.2-4 and 3.2-5 of Code of Conduct specified under Part A of Schedule I of the PIT Regulations which reads as under:-

Regulation 12

Code of internal procedures and conduct for listed companies and other entities.

(1) All listed companies and organisations associated with securities markets including:
(a) the intermediaries as mentioned in section 12 of the Act, asset management company and trustees of mutual funds;
(b) the self-regulatory organisations recognised or authorised by the Board;
(c) the recognised stock exchanges and clearing house or corporations;
(d) the public financial institutions as defined in section 4A of the Companies Act, 1956; and
(e) the professional firms such as auditors, accountancy firms, law firms, analysts, consultants, etc., assisting or advising listed companies,

shall frame a code of internal procedures and conduct as near thereto the Model Code specified in Schedule I of these Regulations without diluting it in any manner and ensure compliance of the same.

3.2-3 *The trading window shall be, inter alia, closed at the time:—*
(a) Declaration of financial results (quarterly, half-yearly and annually).
(b) Declaration of dividends (interim and final).
(c) Issue of securities by way of public/rights/bonus etc.
(d) Any major expansion plans or execution of new projects.
(e) Amalgamation, mergers, takeovers and buy-back.
(f) Disposal of whole or substantially whole of the undertaking.

(g) Any changes in policies, plans or operations of the company.

3.2-4 The trading window shall be opened 24 hours after the information referred to in para 3.2.3 is made public.

3.2-5 *All directors/officers/designated employees of the company shall conduct all their dealings in the securities of the Company only in a valid trading window and shall not deal in any transaction involving the purchase or sale of the company's securities during the periods when trading window is closed, as referred to in para 3.2.3 or during any other period as may be specified by the Company from time to time.*

9. The first issue for examination is whether there is any violation of regulation 12(1) read with clause 3.2-5 of the Code of Conduct specified under Part A of Schedule I of the PIT Regulations by the Noticee.

   Regulation 12(1) of PIT Regulations deals with the code of internal procedures and conduct for listed companies and other entities which include intermediaries, self-regulatory organisations, recognised stock exchanges and clearing house or corporation, public financial institutions, professional firms such as auditors, accountancy firms, law firms, analysts, consultants, etc, assisting or advising listed companies. The regulations require such entities to frame a code of internal procedures and conduct as near thereto the Model Code specified in Schedule I of the PIT Regulations.

   Clause 3.2-5 of Code of Conduct specified under Part A of Schedule I of the PIT Regulations states that all the directors/officers/designated employees of the company shall conduct all their dealings in the securities of the company only in a valid trading window and shall not deal in any transaction involving the purchase or sale of the company's securities during the periods when the trading window is closed which is explained under clause 3.2-3 of the Code of Conduct specified under Part A of Schedule I of the PIT Regulations or during any other period as may be specified by the company from time to time.

10. Upon perusal of the facts and circumstances of the case, submissions of the Noticee and the charges thereof, I find that the contention of the Noticee that there was a delay of two days by the exchange in publishing the corporate announcement on its website with respect to the information submitted by the company vide letter dated September 06, 2005 can be accepted. On perusal of records, I find that the information was submitted to BSE by the company vide letter dated September 06, 2005 the letter was received and acknowledged by BSE on the same day i.e. September 06, 2005. However, BSE published the information only on September 08, 2005. I find that it was not reasonably possible for the company to foresee such a possibility. The company was under an impression that the information received by the exchange on September 06, 2005 will be published by the exchange on the same day. Therefore, the company kept the trading window open on September 08, 2005. I find that the contention of the Noticee can be accepted. However, the second contention of the Noticee stating that there was an inadvertent technical lapse on their part in keeping the trading window open on September 13, 2005 under honest belief that the letter dated September 12, 2005 was served on the BSE on September 12, 2005 cannot be accepted. On perusal of records, I find that the company wrongly presumed that the letter dated September 12, 2005 was received by the exchange on the same day. The letter dated September 12, 2005 was received by the exchange on September 14, 2005. I find that the contention of the Noticee is devoid of merit. In this regard, it will be appropriate to refer to the observations of The Hon'ble High Court at Calcutta in Writ Petition 331/2001 in the matter of Arun Kumar Bajoria v/s SEBI – Order dated March 27, 2001. The Hon'ble Court while examining the issue of compliance with regard to regulation 7 (the provision deals with disclosure by an acquirer to the target company) of SEBI

(Substantial Acquisition of Shares and Takeovers) Regulations, 1997, made the following observations:-

> *"…… Therefore, it is obligatory on the part of the person so acquiring to inform the company. In what mode or manner such information should be given has not been prescribed. It has not also been mentioned that the subject information or disclosure must be given in writing. Such disclosure, therefore, may be made orally or through telephone or in writing transmitted in some known manner. The information or disclosure must, however, reach the company. In law, anyone sending a written information through the agency of someone else, appoints such agency as his agent. If a letter is posted, unless the law specifies, the Postal Authority acts as an agent of the sender. As appears to me, by law, in respect of two instances the post office is considered as the agent of the receiver of the letter. The first is in relation to acceptance of an offer and the second is in respect of a letter sent by registered post. In all other circumstances, the post office acts as a mere agent of the sender of the letter. The Certificate of Posting may be an evidence of engaging the Postal Authority as an agent of the sender to deliver the subject letter, but not the proof of receipt of the letter by the addressee. In the event, it is contended by the addressee that the letter has not been received by him, it must be established and if necessary through the agent that the letter has been received by the addressee. Merely because the letter was sent by post, it cannot be contended that the sender has discharged his obligations under Regulation 7 of the said Regulations as the said regulation cast the duty and obligation upon the acquirer to ensure receipt of the disclosure or information by the company concerned and argument contrary thereto is not acceptable. It is not permissible for the sender to contend that he has no control over the mode of transmission inasmuch as he has free choice of selecting the mode of transmission and for that purpose to engage a suitable agent."*

In the instant case, the information did not reach the exchange on September 12, 2005. Since, the said information was received by the exchange on September 14, 2005 and published at 4 p.m. by the exchange; the company was required under the PIT Regulations to keep the trading window closed on September 13, 2005. The Noticee being the compliance officer was under a duty to ensure that the

company complied with the PIT Regulations which the Noticee failed to do. The lapse by the Noticee cannot be ignored.

11. The company by not making disclosure on time and thereby keeping the trading window open, the Noticee being the compliance officer failed to comply with his statutory obligation to ensure that the company complied with the PIT Regulations. The timely disclosure of information and restriction in trading is mandated for the benefit of the investors at large. In Appeal No. 66 of 2003-Milan Mahendra Securities Pvt. Ltd. V. SEBI- Order dated April 15, 2005 the Hon'ble Securities Appellate Tribunal (hereinafter referred to as **"SAT"**) has observed that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market."*

12. At same time I have considered the following submissions of the Noticee:

- *There was an inadvertent technical lapse on our part in keeping the trading window open on September 13, 2005 under honest belief that the letter dated September 12, 2005 was served on the BSE on September 12, 2005.*

- *The company was in desperate need of finance. The price of AFSIL was rising from August 26, 2005 onwards. In view of the above, Chairman and Managing Director of the company, Mr. Milan Parekh proposed to sell his shares and bring the money back in the company by way of subscribing preference shares in the company. Under the said circumstances, the company granted trade clearance to Mr. Milan Parekh and he traded on September*

05, 2005, September 08, 2005, and September 13, 2005 when the trading window was open.

I am of the view that the reasons cited by the Noticee, did not, in any way, absolve the Noticee from the violation. At the best, these are the factors which may, to some extent, be relevant while considering the penal consequences that could attract the violation.

In view of the foregoing, the allegation of violation of provisions of regulation 12(1) of the PIT Regulations read with clause 3.2-5 of Code of Conduct specified under Part A of Schedule I of the PIT Regulations against the Noticee stands established as the trading window was open on September 13, 2005.

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13. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216 (SC)* held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow"*.

14. As the violation of the statutory obligation under regulation 12(1) of PIT Regulations read with clause 3.2-5 of Code of Conduct specified under Part A of Schedule I of the PIT Regulations has been established, I hold that the Noticee is liable for monetary penalty under section 15HB of the SEBI Act, which reads as under:-

> ***15HB.Penalty for contravention where no separate penalty has been provided.-***
> *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.*

15. While determining the quantum of penalty under section 15HB of the SEBI Act, it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

> ***"15J - Factors to be taken into account by the adjudicating officer***
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> *While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*
>
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
>
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
>
> *(c) the repetitive nature of the default."*

From the material available on record, I find that the PIT Regulations mandate that the trading window should be opened after 24 hrs of the information being made public. The company, in the instant case, was under an obligation to keep the trading window closed on September 13, 2005 as the information submitted by the company was received by BSE on September 14, 2005. The Noticee being the compliance officer of the company was under a duty to ensure that the company complied with the PIT Regulations which the Noticee failed to do. So, there was a technical lapse on the part of the Noticee in failing to ensure that the trading window remain closed on September 13, 2005.

ORDER

16. After taking into consideration all the facts and circumstances of the case, I impose a penalty of ₹ 25,000/- (Rupees Twenty Five Thousand Only/-) under section 15HB of SEBI Act, on the Noticee which will be commensurate with the violation/s committed by him.

17. The Noticee shall pay the said amount of penalty by way of demand draft in favour of “SEBI - Penalties Remittable to Government of India”, payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Smt. Medha Sonparote, Deputy General Manager, Investigation Department- 1, SEBI, SEBI Bhavan, Plot No. C– 4 A, “G” Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

18. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **MAY 31, 2011** **PARAG BASU**
Place: **MUMBAI** **ADJUDICATING OFFICER**