CONFIDENTIALITY AGREEMENTS AS A COMPLIANCE TOOL: NDAs, UPSI DISCLOSURE, AND DUE DILIGENCE IN INDIAN M&A

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ABSTRACT

Mergers and acquisitions involving publicly listed entities in India require dealmakers to carefully balance the business need for due diligence with strict securities regulations. To accurately price a target company, potential buyers need access to highly sensitive, non-public data, much of which qualifies as Unpublished Price-Sensitive Information (UPSI) under the SEBI (Prohibition of Insider Trading) Regulations, 2015. While Regulation 3 offers a conditional safe harbor to share this data for legitimate corporate deals, it demands strict governance safeguards. This legal requirement transforms the Non-Disclosure Agreement (NDA) from a basic business contract used to protect trade secrets into a mandatory tool for regulatory compliance. Using a doctrinal research methodology, this paper examines the laws governing UPSI disclosure, including the critical 2019 amendments that require listed companies to set "legitimate purpose" policies and keep a time-stamped Structured Digital Database (SDD). The research points out a major legal gap: the law requires a target company's board to form an "informed opinion" that sharing the data is in the company's best interests, but it offers no clear criteria for this standard, leaving dealmakers vulnerable to regulatory audits if a deal falls apart. Additionally, the paper explores the practical friction between the strict secrecy of M&A NDAs and the continuous reporting rules under the SEBI LODR Regulations, especially when companies are forced to publicly confirm or deny market rumors. To navigate this regulatory minefield, the paper proposes a custom, compliance-linked NDA framework designed specifically for public M&A in India. By building absolute trading bans, strict SDD logging rules, and rapid leak-reporting deadlines directly into the contract, this framework helps dealmakers seamlessly combine private contractual obligations with public securities law to protect market integrity.

Keywords: Mergers and Acquisitions, Unpublished Price-Sensitive Information (UPSI), SEBI (PIT) Regulations, Due Diligence, Non-Disclosure Agreement, Structured Digital Database.

Introduction

At the heart of every successful Mergers and Acquisitions (M&A) transaction is the due diligence process. This is an intensive information-gathering exercise that allows an acquirer to figure out the true economic value, hidden risks, and operational realities of a target entity. Without this detailed examination, combining companies would be little more than blind speculation, leaving investors and stakeholders exposed to unforeseen liabilities. However, this business need for comprehensive corporate data creates a major legal tension, especially when the target is a publicly listed entity in India. While potential buyers need access to highly sensitive financial models and strategic forecasts to justify their valuations, listed target companies are tightly restricted by the Securities and Exchange Board of India (SEBI) and its strict insider trading laws. Sharing Unpublished Price Sensitive Information (UPSI) with outside parties during early deal negotiations risks severe regulatory penalties, potential market manipulation, and a fundamental breakdown of market integrity.[1]

To navigate this difficult balance between business needs and regulatory rules, the Non-Disclosure Agreement (NDA) goes beyond its traditional common-law roots. Instead of just acting as a standard contract used to protect trade secrets, the NDA in Indian listed M&A operates as a necessary tool for regulatory compliance. It serves as the legal gateway that allows UPSI to be lawfully shared under the "legitimate purposes" and "due diligence" exceptions of the SEBI (Prohibition of Insider Trading) Regulations, 2015.[2] As a result, signing a strong confidentiality agreement turns a private commercial contract into a required statutory safeguard.[3]

This paper examines the evolving, dual role of NDAs in Indian corporate transactions. Section II outlines the statutory framework governing UPSI, looking closely at the strict rules of SEBI's insider trading regime. Section III breaks down how information is exchanged during corporate due diligence, highlighting the built-in legal friction between the business need to share data and the statutory mandate of confidentiality. Section IV looks at the legal and practical ways confidentiality agreements act as a mandatory compliance bridge, allowing

[1] Michael A. Perino, *The Lost History of Insider Trading*, SSRN (2018), https://doi.org/10.2139/ssrn.3099682.
[2] Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Gazette of India, pt. III, sec. 4 (May 15, 2015) (India)
[3] Dev Kumawat & Anisha, *Beyond Confidentiality: The Legal and Economic Pitfalls of NDAs in India*, GNLU J.L. & Econ. (2025), http://gjle.in/2025/12/01/beyond-confidentiality-the-legal-and-economic-pitfalls-of-ndas-in-india/

UPSI to flow legally. Finally, Section V concludes by suggesting practical best practices for drafting NDAs that meet both the business needs of deal-making and SEBI's strict regulatory expectations.

The Role of Confidentiality Agreements in M&A Due Diligence

Due diligence is the linchpin of risk allocation and valuation in any Mergers and Acquisitions (M&A) transaction.[4] To accurately price a target entity and successfully structure an acquisition, a potential buyer must look behind the corporate veil to examine the target's actual operational and financial realities. This process requires full access to highly sensitive, non-public data that goes far beyond what is available in statutory public filings or annual reports. Buyers must carefully review detailed financial projections, unredacted material contracts, hidden litigation exposure, and proprietary intellectual property portfolios, such as source code and pending patent filings. For example, understanding the target's contingent liabilities in pending tax litigation or the "change-of-control" provisions hidden in vital supplier contracts can completely change the transaction's economic viability. Without this deep dive, buyers face severe information asymmetry, risking the inheritance of undisclosed liabilities or overpaying for distressed assets. Therefore, sharing this sensitive, non-public information is a necessary commercial requirement to get the deal done.[5]

Traditionally, the Non-Disclosure Agreement (NDA) has worked as a basic tool of contract law, designed to help commercial exchanges while lowering the risk of intellectual property theft. In its standard use, the NDA creates a binding contractual obligation of confidence. This prevents the receiving party from stealing trade secrets, client lists, or proprietary business methods for its own competitive advantage. The legal framework for these standard NDAs is rooted firmly in the Indian Contract Act, 1872. Under this act, a breach triggers normal civil remedies, such as injunctions to stop an unauthorized disclosure or claims for damages caused by the commercial loss.

However, an NDA used during M&A due diligence is very different from this standard commercial baseline. While a standard vendor or employment NDA mostly protects the independent commercial value of isolated trade secrets, an M&A NDA must manage a

[4] Umakanth Varottil, *Due Diligence in Share Acquisitions: Navigating the Insider Trading Regime*, SSRN Elec. J. (2016), https://doi.org/10.2139/ssrn.2759771.
[5] Due Diligence, Information and Disclosure in M&A Transactions in India, Lexology (Apr. 12, 2018), https://www.lexology.com/library/detail.aspx?g=9909d6b7-29a8-4506-acf2-48724e47ad18

massive, wholesale transfer of a target company's most critical internal data. The M&A NDA is uniquely structured to manage the rules of a virtual data room (VDR). It clearly defines the "Permitted Purpose," which strictly limits the use of the shared information only to evaluating, negotiating, and closing the specific proposed transaction.

Furthermore, M&A NDAs impose strict rules on how information is shared. They require the buyer to ring-fence the data from its own operational teams and limit access only to a "need-to-know" circle of dealmakers, external legal counsel, and financial advisors. They also frequently include specialized covenants, such as "standstill" provisions. These clauses prevent the potential buyer from using the shared data to launch a hostile takeover if friendly negotiations fail. Most crucially, when the target is a publicly traded company, the M&A NDA goes beyond just protecting against private commercial loss. It evolves into a complex governance framework designed to ensure that the massive disclosure needed to complete a corporate buyout does not accidentally trigger a catastrophic breach of securities law.

The Regulatory Overlay: SEBI’s Insider Trading Framework

To understand the heavy authorized weight placed on NDAs in Indian M&A deals, we need to look at the larger framework of the SEBI (Prohibition of Insider Trading) Regulations, 2015 (the "PIT Regulations"). The main goal of the PIT Regulations is to keep information fair and balanced across the securities market. At their core, Regulations 3(1) and 3(2) create a strict, blanket ban: no insider is allowed to share, provide, or give access to any Unpublished Price-Sensitive Information (UPSI). Likewise, no one is allowed to gather this information unless it is for legitimate purposes, performing job duties, or fulfilling legal obligations. The rules broadly define UPSI as any non-public information that could significantly impact a company's stock price.[6] Naturally, this is exactly the kind of strategic, financial, and operational data that buyers need during M&A due diligence.

Without a legal exception, this blanket ban on sharing UPSI would completely freeze public M&A transactions. SEBI solves this business roadblock through Regulation 3(3), which offers a conditional safe harbor for sharing UPSI during proposed corporate deals. The rule splits

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[6] SEBI, *Consultation Paper on Proposed Review of the Definition of Unpublished Price Sensitive Information Under the SEBI (Prohibition of Insider Trading) Regulations, 2015* (May 18, 2023), https://www.sebi.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-proposed-review-of-the-definition-of-unpublished-price-sensitive-information-upsi-under-sebi-prohibition-of-insider-trading-regulations2015-to-bring-greater-clarity-and-uni-_71337.html.

M&A deals into two specific categories. Under Regulation 3(3)(i), a company can share UPSI if the proposed deal involves an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulations).[7] On the other hand, Regulation 3(3)(ii) covers deals that do not trigger an open offer. In these cases, UPSI can only be shared if the target company's board of directors issues an informed opinion stating that the deal is in the "best interests of the company." Furthermore, to fix the unfair information advantage created during due diligence, the target company must share this UPSI with the general public at least two trading days before the deal officially closes.

However, the legal mechanism that holds this entire safe harbor together is found in Regulation 3(4). The PIT Regulations clearly state that the board of directors must require both parties to sign agreements committing to confidentiality and non-disclosure obligations. This specific rule legally transforms the NDA from a simple private business protection into a mandatory tool for regulatory compliance. By law, the buyer is forced to keep the UPSI strictly confidential and is explicitly banned from trading the target’s stock while holding this information. As a result, the NDA becomes the main enforcement tool used to apply and manage SEBI’s insider trading bans within the framework of a private deal.

This regulatory reliance on the NDA became even stronger following the recommendations of the T.K. Viswanathan Committee.[8] These recommendations led to important regulatory clarifications in 2018 and further amendments that took effect in April 2019.[9] To clear up confusion around information sharing, SEBI clarified exactly what counts as a "legitimate purpose." The new amendments required listed companies to set their own guidelines by creating a formal "Policy for Determination of Legitimate Purposes." Sharing UPSI with potential buyers, legal advisors, auditors, and consultants during due diligence is now explicitly recognized as a legitimate purpose, as long as it is not done to dodge or bypass the PIT Regulations.

Crucially, the 2019 amendments also introduced a heavy administrative task to go alongside the NDA: the Structured Digital Database (SDD). It is no longer enough to just sign an NDA.

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[7] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (India).

[8] SEBI, *Report of the Committee on Fair Market Conduct* (Aug. 8, 2018), https://www.sebi.gov.i

[9] Securities and Exchange Board of India (Prohibition of Insider Trading) (Second Amendment) Regulations, 2019 (India) (effective April 1, 2019).

The target company must now actively keep a time-stamped digital log containing the names, Permanent Account Numbers (PAN), and company affiliations of every single person who receives UPSI under the confidentiality agreement. Because of this, the NDA acts as the trigger for a strict chain of custody. It not only makes the initial sharing of UPSI legal but also fully brings the potential buyer into the target company's internal insider trading compliance system, making sure that regulatory oversight continues throughout the entire due diligence process.

Where the NDA Becomes a Compliance Instrument, Not Just a Contract

The overlap between corporate deals and securities rules completely changes the legal nature of the NDA in Indian M&A. Under Regulation 3(3) and Regulation 3(4) of the PIT Regulations, signing an NDA is no longer just a smart business move to divide private risk between two negotiating parties. Instead, it becomes a strict, non-negotiable statutory precondition for lawfully sharing UPSI. If a listed target company shares UPSI with a potential buyer without setting up this contract first, the disclosure loses its safe harbor protection. It instantly turns from a "legitimate purpose" into an illegal sharing of insider information. This exposes the target's management to severe penalties and opens the buyer up to charges of unlawful procurement. Therefore, the NDA acts as a regulatory shield, officially turning what would otherwise be an illegal act into a compliant corporate process.

Because of this, a standard, boilerplate confidentiality agreement which usually just focuses on protecting trade secrets and making sure documents are returned is simply not enough for public M&A. To work as a strong compliance tool, the NDA must directly include the strict rules of the PIT framework. A "compliant" NDA must include clear promises (affirmative covenants) where the receiving party officially acknowledges they are getting UPSI and agrees to a total ban on trading the target's stock while holding that data. Furthermore, it needs to set up strict rules for handling information, often requiring companies to build institutional "Chinese Walls." These physical and electronic barriers are essential to isolate the UPSI within a small "deal team." This ensures the data does not leak into the buyer's trading desks or other business departments. Lawyers also regularly include "standstill" provisions. By legally blocking the buyer from purchasing target shares in the open market or launching a hostile takeover for a set time, the standstill provision uses a contract to enforce SEBI's rule that UPSI can only be used for the exact, negotiated deal.

Signing this specialized NDA is deeply tied to a heavy load of paperwork and governance duties placed on the target company's board of directors. Before the NDA can legally allow the flow of UPSI especially in deals that do not trigger a mandatory open offer the board must act as the main gatekeeper for market integrity. The board is required to actively discuss and record an "informed opinion" stating that sharing the information and going through with the deal are in the "best interests of the company." Additionally, under the regulatory rules of Regulation 3(5), the board carries the ongoing burden of tracking exactly who receives this data using a Structured Digital Database. This directly connects the NDA's recipient list to the company's statutory compliance records.

However, relying on the board's judgment creates a major source of confusion for M&A professionals. The PIT Regulations do not define the exact criteria needed to meet this "best interests" standard.[10] There is no clear legal guidance on how much strategic justification a board needs to authorize a massive release of highly sensitive UPSI to an outside party. Does "best interests" only mean there is a high chance of maximizing shareholder value, or does it allow the board to speculatively explore broader business synergies? This vague regulation leaves dealmakers in a risky spot. If negotiations fall apart and the deal is canceled a common thing in M&A the board remains open to later regulatory scrutiny over whether the initial release of UPSI was truly justified. Because of this, legal counsel must carefully draft board resolutions as a defensive measure. They have to painstakingly document the business reasons alongside the strict rules of the NDA, making sure the contract and board decisions work together to provide an airtight defense against future regulatory audits.

Practical and Doctrinal Difficulties

While the rules theoretically balance M&A due diligence with bans on insider trading, relying on the Non-Disclosure Agreement (NDA) as the main way to follow the law creates major practical problems and legal headaches for deal lawyers and corporate boards. The first major practical problem comes down to the timing of M&A negotiations. Due diligence is an exploratory process. It happens at the very beginning of a potential deal, long before anyone knows if the transaction makes business sense or before final agreements are written. Still, under Regulation 3(3) of the PIT Regulations, to legally sign the NDA and open the data room, the target's board must already have formed an "informed opinion" that sharing the

[10] *Unpublished Price Sensitive Information – Dilemma to Be Looked Upon*, Corp. Pros. (2019), https://www.corporateprofessionals.com/articles/unpublished-price-sensitive-information-dilemma-to-be-looked-upon/.

Unpublished Price-Sensitive Information (UPSI) is in the company's best interests. This creates a tricky timing mismatch. Boards are forced to justify sharing highly sensitive data for deals that often fall apart. If the deal falls through, the target company is left having shared its most critical UPSI with a potential competitor. It is protected only by a contract promise and is left open to regulators questioning whether the initial sharing of data was truly justified.

This tension gets even worse because of the ongoing reporting rules under Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR). M&A deals rely on strict secrecy, but SEBI LODR requires companies to publicly report important material events immediately. This conflict has reached a breaking point with the recent updates to Regulation 30(11) of the LODR.[11] To fight market manipulation, SEBI now requires top-tier listed companies to clearly confirm, deny, or explain mainstream media rumors if they cause a "material price movement" in the stock. As a result, if details of an NDA-protected due diligence process leak out even by accident and spark market rumors, the target company can no longer hide behind a "no comment" policy. It may be forced to reveal that negotiations are happening much too early. This forced public reveal destroys the business secrecy the NDA was meant to protect, often causing the buyer to walk away from a deal that is now facing inflated stock prices and intense public attention.

From a legal standpoint, the dual role of the M&A NDA creates a huge gap in how it is enforced. In a normal business setting, breaking an NDA triggers civil penalties under the Indian Contract Act, 1872 mostly court orders to stop the leak or claims for unliquidated damages. However, when an M&A NDA fails and the buyer misuses the UPSI, the fallout is regulatory and falls under the SEBI Act, 1992. This raises a deep question about who is at fault: if the receiving party breaks the NDA and trades on the UPSI, that person faces harsh regulatory penalties under Section 15G of the SEBI Act, including fines up to INR 25 crore (or three times the profit made) and potential jail time.[12] But what happens to the target company? Does the buyer's broken contract go back and ruin the target's "legitimate purpose" safe harbor?

While the target company can theoretically sue the buyer in civil court for breaking the

[11] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 30(11), as amended by Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023, No. SEBI/LAD-NRO/GN/2023/131 (June 14, 2023) (India).

[12] Securities and Exchange Board of India Act, No. 15 of 1992, § 15G (India)

contract, it also faces a tough SEBI investigation into whether its internal controls and initial board approvals were actually good enough. SEBI's own enforcement practice offers some, if incomplete, reassurance on this point. In an order concerning trading in the shares of Palred Technologies Ltd., SEBI observed that an NDA is executed to facilitate due diligence and does not by itself signify that a transaction has been agreed, since the deal may be abandoned at any stage of the diligence process; in an order concerning Biocon Ltd., SEBI similarly treated a merely exploratory stage of discussions as carrying a low probability that the transaction would materialise.[13] These orders suggest that regulators can, in principle, distinguish the mere act of sharing UPSI under an NDA from a definitive decision to transact though neither order directly adjudicates the adequacy of a board's Regulation 3(3)(ii) informed opinion, so the reassurance they offer is limited rather than settled doctrine.

The target company is caught in the middle trying to enforce a private contract in civil courts while defending its corporate governance decisions in front of regulators. This dynamic is not merely theoretical. In Reliance Industries Ltd. v. SEBI, Reliance and Facebook Inc. had executed a confidentiality and non-disclosure agreement while negotiating Facebook's proposed investment in Jio Platforms Ltd., a Reliance subsidiary; when a foreign newspaper reported details of the still-unannounced deal during the diligence period, SEBI, the Securities Appellate Tribunal, and ultimately the Supreme Court of India all held that the NDA did not excuse Reliance from its fair-disclosure obligations once the leak occurred, and upheld a monetary penalty for the delay in clarifying the reports to the stock exchanges.[14] The case illustrates precisely the friction this paper identifies: an NDA can lawfully gate the initial sharing of UPSI, but it cannot suspend the target's freestanding, continuous disclosure obligations once market rumours begin circulating. Ultimately, these difficulties show that while the NDA remains the necessary bridge for sharing information in Indian M&A, it is a bridge built over a regulatory minefield. It offers only fragile protection against the unpredictable realities of the public markets.

Recommendations

Fixing the problems mentioned above requires action in three main areas: writing better

[13] SEBI, *Order in the Matter of Trading in the Shares of Palred Technologies Ltd.* (Aug. 13, 2019) (India); SEBI, *Order in Respect of Mr. Shreehas P. Tambe in the Matter of Biocon Ltd.* (June 30, 2021) (India).
[14] *Reliance Indus. Ltd. & Ors. v. SEBI*, Appeal No. 603 of 2022 (Securities Appellate Tribunal, Mumbai, May 2, 2025), aff'd, *Reliance Indus. Ltd. v. SEBI*, Civil Appeal No. 9511 of 2025 (Supreme Court of India, Dec. 2, 2025)

contracts, getting clearer rules from regulators, and creating industry standards.

1. **A Compliance-Linked NDA Checklist:**

   Lawyers drafting confidentiality agreements for public company M&A need to stop using generic templates. At a minimum, they should include the following:

   A requirement for the buyer to keep and update a log of everyone who sees the data (names, PAN, and company affiliation). This log must feed directly into the target company's Regulation 3(5) database.

   A clear deadline for reporting any leaks. By matching this reporting window with the 24-hour "confirm-or-deny" timeline SEBI now requires for market rumors under Regulation 30(11) of the LODR Regulations, the NDA and the target's reporting duties would work on the same clock instead of fighting each other.

2. **A Proposed Framework for the Board's "Best Interests" Determination:** The biggest gap pointed out in this paper is that Regulation 3(3)(ii) does not explain what actually makes up an "informed opinion" that sharing UPSI is in the company's best interests. Instead of leaving this to be fought over in court later, SEBI could create a clear checklist of factors for boards to document at the time. This list could include:

   Proof of real intent to make a deal, like a preliminary term sheet or exclusivity agreement.

   Proof that the buyer has the financial capacity to do the deal and has no major conflicts of interest.

   A recorded business reason for the deal such as synergies, valuation logic, or strategic fit rather than just a vague claim of good faith.

   Confirmation that the safety measures (like Chinese walls and standstill terms) match how sensitive the shared information is.

   Most importantly, this framework should separate the initial sharing of data from the final outcome of the deal. That way, a collapsed deal does not automatically make regulators doubt the board's original decision to share the information.

3. **Standardized Industry Templates:**

   Finally, industry groups like CII or FICCI could work directly with SEBI to create a standard "UPSI-Compliant NDA." Much like the standard forms already used in venture capital funding, this template would build the trading bans, SDD-logging rules, and leak-reporting deadlines directly into a market-wide baseline. This would lower the risk of these important safeguards getting watered down during intense deal negotiations.

Conclusion

In the high-stakes world of Indian public M&A, the Non-Disclosure Agreement is no longer just a basic business contract. As this paper shows, the NDA does double duty. It acts as both a private contract to protect secrets and a mandatory tool to follow SEBI's insider trading rules. It is the definitive legal gateway that turns the otherwise illegal sharing of Unpublished Price-Sensitive Information (UPSI) into a lawful part of corporate due diligence.

For deal lawyers and corporate boards, this dual role completely changes the risks of making a deal. Writing a weak NDA is no longer just a contract mistake that leads to a civil lawsuit over shared trade secrets. Instead, it is a massive regulatory failure. Getting the NDA wrong removes legal safe harbors, exposing target companies, their directors, and potential buyers to severe penalties, huge fines, and charges of market manipulation. Ultimately, where corporate mergers meet securities law, a well-written, precise contract is the absolute first line of regulatory defense.