THE INSTITUTE OF Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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CS NITOR

ICSI E-NEWSLETTER

Issue No. 30 ❑ Volume 02 ❑ August 20, 2015

PRESIDENT MESSAGE

Dear Professional Colleagues,

"Let him who would move the world first move himself."

-Socrates

Friends, for continued development, it is not sufficient to merely restrict ourselves to enfold the existing opportunities, rather we need to explore and generate new opportunities. It is worth mentioning that the ICSI, provides an opportunity of self employment to its members and endeavors to continuously explore new opportunities for its practicing and employed members. As an initiative to explore emerging areas of practice and enhance the quality of services provided by Company Secretaries, the Institute organizes National Conference of Practicing Company Secretaries, every year.

I am happy to inform that this year, the 16th National Conference of Practicing Company Secretaries on the theme 'PCS-Calibrating Competence for Achieving Excellence" was successfully organised at Kochi on August 13-14, 2015. The technical sessions at the Conference were very informative, offering fantastic insights and perspectives about the emerging opportunities for Practicing Company Secretaries. The Conference served as a platform for mutual exchange of ideas and sharing of experiences among the professionals from across the country. We have pleasure in bringing out this issue of e-CS Nitor containing highlights of the conference which will be surely enriching.

I am sure; we will continue our endeavor in the pursuit of professional excellence and contribute towards creation of vibrant and energetic India.

Regards,

CS Atul H. Mehta

President
president@icsi.edu

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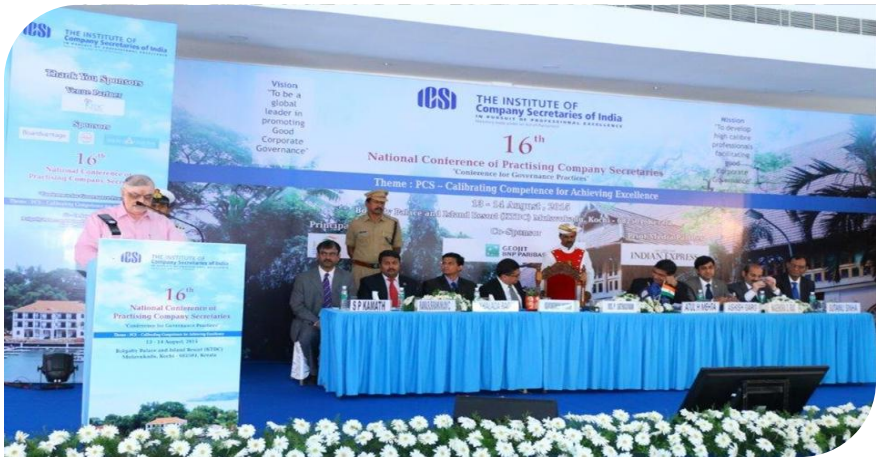

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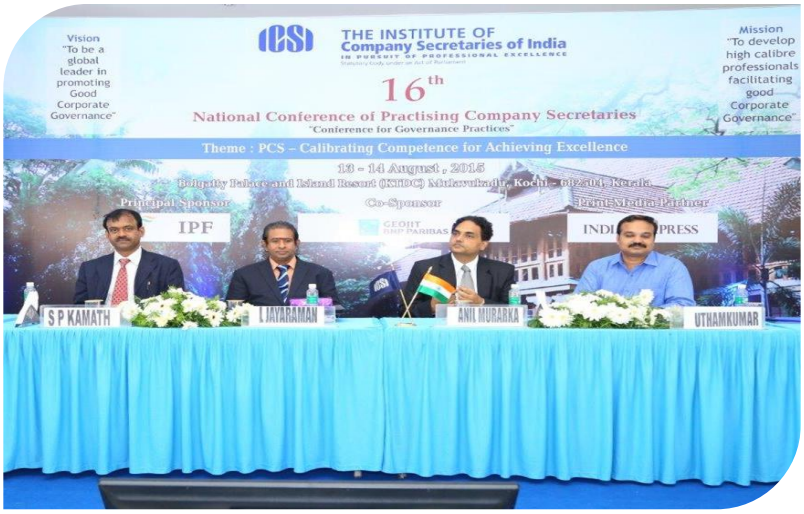

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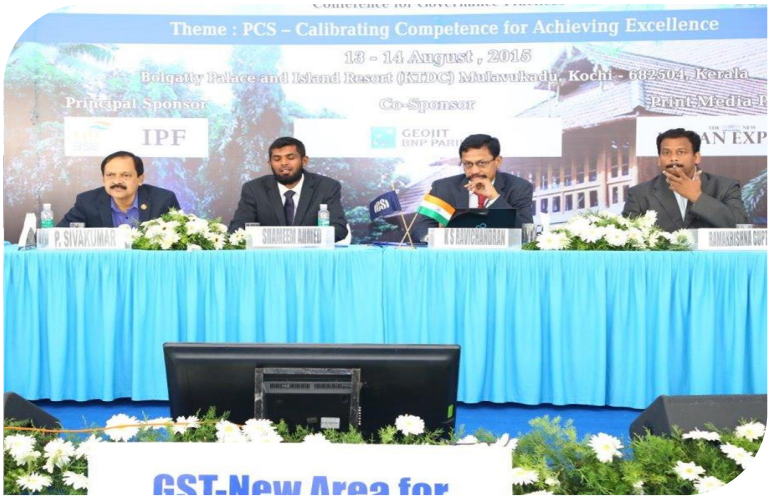

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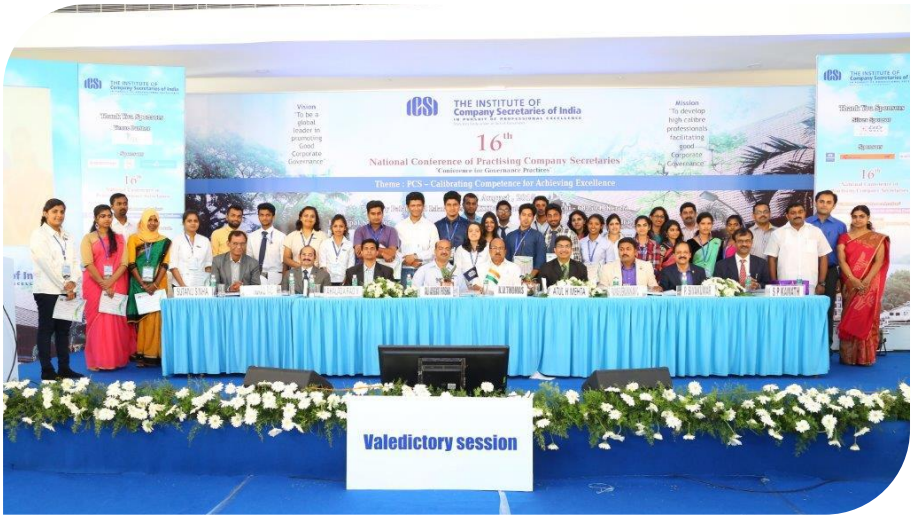

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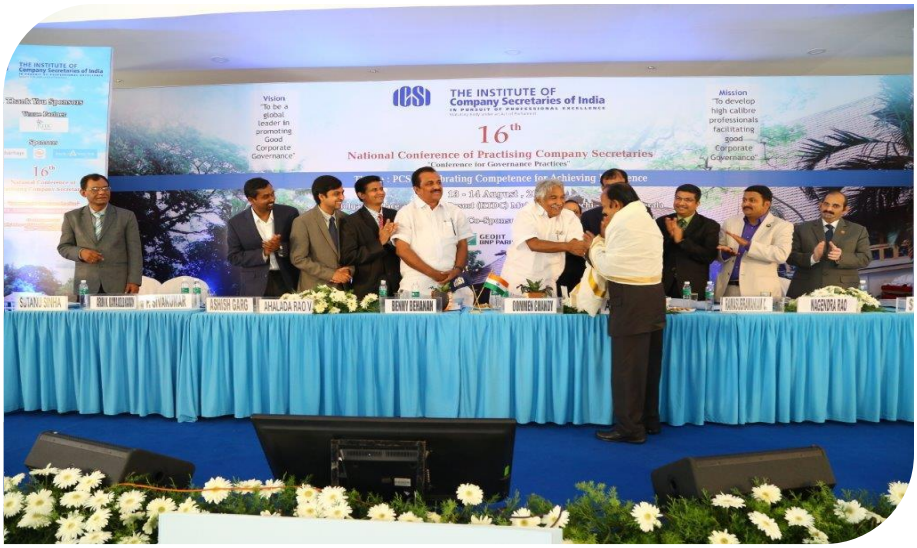
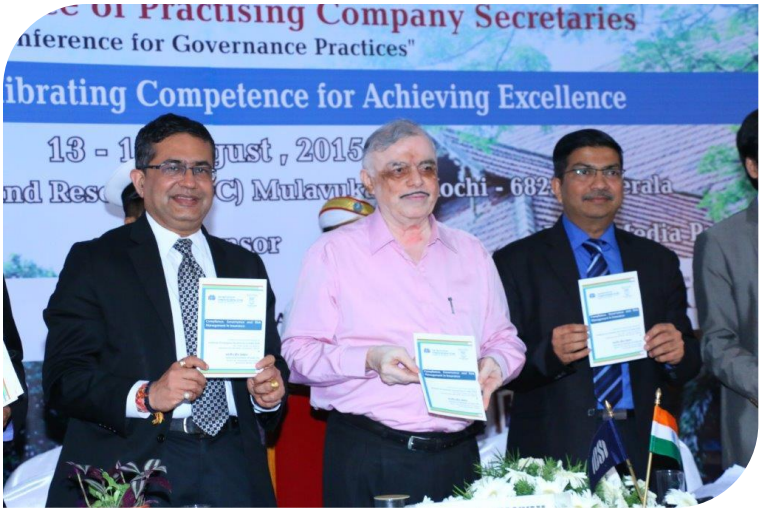


Felicitation of Senior Members of the Profession



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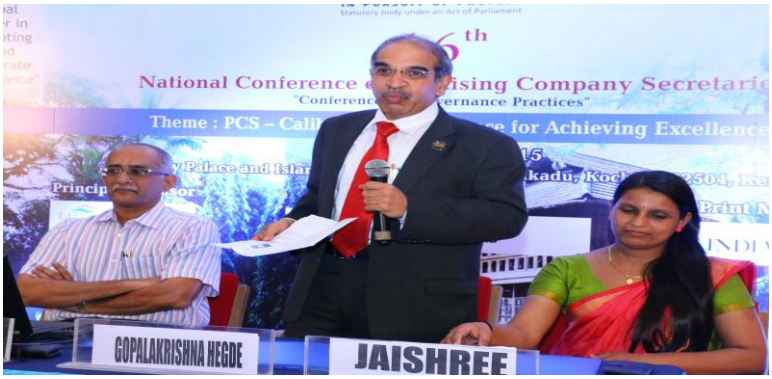

CA Ramesh Lakshman, Ramesh Lakshman & Company, Mumbai; CS Gopalakrishna Hegde; Council Member, ICSI and CS Jaishree, Chairperson, Thiruvanathapuram Chapter of ICSI at the Panel Discussion on Internal Audit – CS can Play Role ?

Cross Section of the Audience

Announcement

43rd National Convention of Company Secretaries

Days

Thursday-Friday-Saturday

Dates

17-18-19 December, 2015

Venue

Kempinski Ambience Hotel, Delhi

Kindly block these dates in your diary.
Details being hosted on ICSI website.

Strengthening Corporate Governance with Internal Audit - Companies Act, 2013

CS Nishita Singhal*
Assistant Education Officer, ICSI

Introduction

Today, the biggest challenge facing companies is keeping the focus on good governance over the long term. An uncertain economic environment punctuated by financial scandals has pushed the idea of corporate governance to the forefront.Good corporate governance is a journey that begins with a broad, organizational perspective. Making steady progress requires committed senior leadership, integrated planning, coordinated execution, and constant monitoring. Internal audit performs critical roles in all aspects of corporate governance. Internal Audit involves a continuous and critical appraisal of the functioning of an entity with a view to suggest improvements thereto and add value to and strengthen the overall governance mechanism of the entity, including the entity's strategic risk management and internal control system. Internal audit's responsibilities are growing due to increased regulatory scrutiny as well as directives from executives to strengthen controls and improve risk management.

The Companies Act 2013 marks a new era of corporate governance and transparency in the Indian corporate sector by making internal audit mandatory for certain classes of companies. The new requirements of adequacy of internal financial controls, effective risk management processes, anti-fraud controls and effective legal compliance framework etc. in the Act will be an important vehicle and an enabler of good corporate governance. An emphasis on internal controls, stemming from legislation will have the biggest impact on strengthening good corporate governance in the Indian corporate sector in coming times.

What is internal audit?

Internal Audit is an independent appraisal activity within an organization for the review of systems, procedures, practices, compliance with policies for accounting, financial and other operations as a basis for service to management. It is a tool of control -

- To measure and evaluate the effectiveness of the working of an organization
- To ensure that all the laws, rules and regulations governing the operations of the organization are adhered to
- To identify risks and also suggests remedial measures, thereby acting as a catalyst for change and action.

The role of internal audit is to provide independent assurance that an organisation's risk management, governance and internal control processes are operating effectively. An effective internal audit function plays a key role in assisting the board to discharge its governance responsibilities. Thus, it contributes in accomplishment of objectives and goals of the organisation through ethical and effective governance.

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* *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*

The Institute of Chartered Accountants of India has defined Internal Audit -

"Internal audit is an independent management function, which involves a continuous and critical appraisal of the functioning of an entity with a view to suggest improvements thereto and add value to and strengthen the overall governance mechanism of the entity, including the entity's strategic risk management and internal control system."

Modern definition of Internal Audit

The new modern definition of internal audit is given by Institute of Internal Auditors. *"Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes."*

There are following four main elements in the modern definition of internal audit.

- Reliability and integrity of financial and operational information
- Effectiveness and efficiency of operations
- Safeguarding of assets
- Compliance with laws, regulations and contracts

Evolution of the internal Audit as an Extension of External Audit

Internal audit developed as an extension of the external audit role in testing the reliability of accounting records that contribute to published financial statements. The nineteenth century saw the proliferation of owners who delegated the day-to-day management of their businesses to others. These owners needed an independent assessment of the performance of their organizations. They were at greater risk of error, omissions or fraud in the business activities and in the reporting of the performance of these businesses. This first gave rise to the profession of external auditing. External auditors examine the accounting data and give owners an opinion on the accuracy and reliability of this data. More slowly the need for internal auditing of business activities was recognized. Initially this activity focused on the accounting records. Gradually it has evolved as an assurance and consulting activity focused on risk management, control and governance processes.

Paradigm Shift in Internal Audit

The controls landscape within organizations today is quite different from those existing in the industrial-era traditional organizations for most of the 20th century. In this radically changed business environment, the internal audit function has become a major support function for management, the audit committee, the board of directors, the external auditors, as well as key stakeholders.

The traditional internal audit model has been transaction-based and cost-driven. Today, internal audit is undergoing significant change in migrating from a reactive, historically focused function to a proactive group that takes a risk based focus.

Today the internal audit is in the unique position of being able to see the organisation as a whole. The properly conceived and implemented, the internal audit function can play a critical role in promoting and supporting effective organizational governance. Internal Audit functions are now more committed to providing an assurance function that is aligned with business priorities. The role of Internal Audit has undergone significant growth and now includes a variety of requirements, including an increased focus on:

- Risk Management
- Internal Controls
- Overall Compliance Framework

- Fraud detection
- Consulting and operations

Companies Act 2013 – The New Internal Audit Charter

The Companies Act 2013 has enhanced the scope of internal audit to a great extent. There are many new requirements warranting organisations to provide assurance to the Board of Directors and Audit Committees on adequacy of internal financial controls, effective risk management processes, anti-fraud controls and effective legal compliance framework etc. which has increased the role of internal audit in the organisation.

1. **Mandatory Internal Audit :** The Act has made it mandatory for following class of companies to conduct internal audit of the functions and activities of the company and to appoint an internal auditor for conducting the internal audit of the company who may or may not be an employee of the company under section 138(1).

    I. Every listed company

    II. Every unlisted public company having –

    - paid up share capital of fifty crore rupees or more during the preceding financial year; or
    - turnover of two hundred crore rupees or more during the preceding financial year; or
    - outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year; or
    - outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year; and

    III. every private company having –

    - turnover of two hundred crore rupees or more during the preceding financial year; or
    - outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year.

    The Audit Committee or the Board is given the responsibility to formulate the scope, functioning, periodicity and methodology for conducting the internal audit. Through the audit committee, the internal audit function is accountable to the board for maintaining ongoing, constructive relationships and for regular reporting of assurance related issues.
    An internal auditor may be chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.
2. **Mandatory reporting on internal financial controls:** The Companies Act 2013 requires the Directors Report and auditor's report to comment on whether the company has adequate internal financial controls system in place and operating effectiveness for such controls.

    Section 134 of the Companies Act, 2013, has added the following new requirements to be included in "Directors' Responsibility Statement" : The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively. Explanation – For the purpose of this clause, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of

frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information;

Companies (Auditor's Report) Order, 2015 : The Companies (Auditor's Report) Order, 2015 notified on 10th April 2015, also requires the auditor to report –

- Whether there is an adequate internal control system commensurate with the size of the company and the nature of its business, for the purchase of inventory and fixed assets and for the sale of goods and services.
- Whether there is a continuing failure to correct major weaknesses in internal control system.

Every report made by the auditor under section 143 of the Companies Act, for the financial year commencing on or after 1st April, 2014, shall contain the matters specified above.

Thus, the Act has significantly expanded applicability of internal financial controls to cover all aspects of operations of the company. Business leaders would now need to embed internal controls monitoring their operations, reporting and compliance processes within the business processes as opposed to financial reporting only. Organisations would need to shift from point in time testing to ongoing testing which would be facilitated by effective internal audit in the organisation.

3. **Risk Management :** Risk management is a central part of any organisation's strategic management. Successful organisations seek to integrate risk management and internal control into all activities, through a framework of risk identification, risk assessment and risk response. Internal audit is third line of defense, which through its risk based approach provides reasonable independent assurance to the organisation's board of directors and senior management on the effectiveness of risk management processes. In organisations where risk management implementation is in its initial stages, the role of internal audit is often that of a catalyst or facilitator to help foster development of the organisation's risk management process. Further, the more risk mature the organization is, it is better for the internal audit function to provide a realistic picture to the board on risk management against its strategic objectives.

   Section 134 of the Companies Act, 2013, has introduced the following new requirement to be included in the Report by the Board of Directors presented before a company in general meeting - **"***134 (3)(n) a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company."*

   Section 177*(5)*, for the Audit Committee to evaluate internal financial controls and risk management systems clearly states as follows: *The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company.*

   Schedule IV of the Companies Act, 2013 specifies that the *Independent directors should satisfy themselves that systems of risk management are robust and defensible.*

   There are specific requirements in the Act that a company needs to comply with in respect to Enterprise Risk Management. In addition, the board and audit committee have been vested with specific responsibilities in assessing the robustness of risk management policy, process and systems. The Act places a stronger emphasis than before on the role of the Audit Committee on internal financial controls and risk management. Given the importance of these areas, the role of internal audit is very important in helping audit committee directors fulfill their oversight responsibility and legal duties.

4. **Overall Compliance Framework :** In order to ensure compliance with laws and regulations prevailing in our country, the Companies Act 2013 is a step in this direction for making corporate India more accountable. Together with Clause 49 of the listing agreement, the government is seeking to make Directors of companies responsible for devising proper system to help ensure compliance with 'Provisions of All Applicable Laws' and that such systems are adequate and operating effectively. The Boards now need to periodically review compliance reports of all laws applicable to the company, prepared by the company, as well as steps taken by the company to rectify instances of non-compliance.

   Now, the Directors' Responsibility Statement" under section 134 of the Companies Act, 2013 will also include that – *"the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively."*

   The Board of Directors, and in particular, the independent directors will increasingly look upon to the internal auditors to give reasonable assurance that the Legal Compliance process is adequate and operating effectively and is suitably evidenced. With these new expectations, it will be necessary for Internal Auditors to ensure a framework to check comprehensive compliance with all applicable laws and regulations.

5. **Fraud Detection :** Globalisation has also increased the scale and complexity of today's business environment. It has further been complicated by continual changes in the business environment, mounting competition and multitude of regulations creating significant pressures on management to effectively maintain oversight of all operations. These challenging scenarios create various vulnerabilities in systems, procedures and frameworks for manipulation and frauds.

   Fraud negatively impacts the organisation in many ways including financial, reputational, psychological and social implications. Depending on the severity of loss, organisations can be irreparably harmed due to the financial impact of the fraudulent activity.

   The new Act proposes vital changes in this context for the first time - it defines fraud, lays down severe penalties for delinquency, fixes extensive responsibility for senior management, independent directors and auditors, introduces the establishment of vigil mechanism and accords statutory status to Serious Fraud Investigation Office (SFIO).

   - Section 447 of the Act provides a specific definition of fraud and also makes extensive provisions for penalising fraudulent activities.
   - Under the act, liability and punishment for fraud is extended to every individual who has been a party to it deliberately, including the auditors of the company.
   - Companies are also required to establish a vigil mechanism for directors and employees to report genuine concerns, even directly to the chairperson of the Audit Committee for appropriate cases.
   - The mechanism should provide for adequate safeguards against victimisation of persons who use such mechanism. Importantly, the details of such mechanism are required to be disclosed by the company on its website and in the Board's report.
   - The directors' responsibility statement is required to include a confirmation regarding proper and sufficient care for the maintenance of adequate accounting records for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities. The companies will have to make sure they have adequate processes, controls and oversight mechanisms to ensure that there are adequate fraud prevention controls.

The primary responsibility for prevention and detection of fraud rests with management and those charged with governance. Establishing a fraud risk management procedures would be of importance for preventing fraudulent situations and enabling timely and due monitoring and oversight by the directors. Internal audit is in a suitable position to identify potentially fraudulent situations during the course of the audit and thus plays a strong role in preventing fraud and other illegal acts. Internal auditors are often in a better position to detect the symptoms that accompany fraud. Internal auditors usually have continual presence in the organisation that provides them with a better understanding of the organisation and its control systems.

Clause 49 of Listing Agreement

The Securities and Exchange Board of India (SEBI) with the objective to align its provisions to the Companies Act, 2013 has specifically reviewed clause 49 of the Listing Agreement, to adopt leading industry practices on corporate governance and to make the corporate governance framework more effective.

The mandatory requirements of Clause 49 pertaining to internal audit are as follows:

- The audit committee shall mandatorily review with the management
  - (a) the performance of statutory and internal auditors and
  - (b) adequacy of the internal control systems.
- The audit committee shall mandatorily review the adequacy of internal audit function, if any, including
  - (a) the structure of the internal audit department,
  - (b) staffing and seniority of the official heading the department,
  - (c) reporting structure coverage and frequency of internal audit;
- The audit committee shall discuss with internal auditors of any significant findings and follow up there on.
- It shall also review the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board;
- It shall also review internal audit reports relating to internal control weaknesses.
- The appointment, removal and terms of remuneration of the Chief internal auditor shall be subject to review by the Audit Committee.
- The CEO and the CFO is required to certify to the Board of Directors that:
  - (a) They accept responsibility for effectiveness of internal controls and that they have disclosed to the Auditors and the Audit Committee deficiencies in the design and operation of the internal controls and steps taken for rectification of the same.
  - (b) They have indicated to the Audit Committee and the internal as well as external auditors as to the following aspects:
  - (c) Any significant changes in internal controls.
  - (d) Any significant changes in the accounting policies and instance of significant fraud, if any, and that the same have been disclosed in the notes to the financial statements.

(e) Instances of any significant fraud and involvement, if any, therein of the management or any employee having a significant role in the internal control systems of the company.

The non-mandatory requirements of Clause 49 pertaining to internal audit are as follows:

- The Internal auditor may report directly to the Audit Committee.

Internal Audit as an enabler of good corporate governance

Keeping in view the enhanced role of Internal Audit under Companies Act 2013 and Clause 49 of Listing Agreement, an Internal Auditor now needs to review and re-define its role and fulfil its role as an important vehicle and an enabler of good corporate governance. Internal Audit function is suitably positioned to be an enabler of good corporate governance because-

- Internal audit is recognised as the third line of defense as it provides the governing body and senior management with comprehensive assurance based on the highest level of independence and objectivity within the organization. Internal audit provides assurance on the effectiveness of governance, risk management, and internal controls, including the manner in which the first and second lines of defense achieve risk management and control objectives. This high level of independence is not available in the second line of defense.
- Internal audit function has sound understanding of business strategy and the associated risks, ability to challenge the control environment and infrastructure supporting the strategy, visibility across the various functional areas/ business units.
- Internal audit is more than a compliance function. It is recognised by business leaders as a function providing quality challenge.
- Internal audit builds a strategic (two to three years) plan, developed in collaboration with the management, aligned to the organisation's risk profile.
- Internal audit is structured to enable both the maintenance of independence and objectivity, as well as proximity to the business, to establish and maintain relationships with an in-depth understanding of the business.
- Internal audit is a dynamic process with integrated quality assurance and learning programs.

Company Secretary as Internal Auditor

Company Secretaries are governance professionals who facilitate the process of good governance in the organisation. They have a significant impact on the level and quality of corporate governance and governance culture within an organisation, including a pivotal role in assisting the board to achieve the organisation’s vision and strategy. Their role is to enforce a compliance framework to safeguard the integrity of the organisation and to promote high standards of ethical behaviour.

Company Secretary is a key functionary in the corporate pyramid. A Company Secretary is a Key Managerial Personnel and an expert in Corporate Laws, Securities Laws, Competition Laws and Corporate Governance. With increasing emphasis on the principles of good governance and on compliances, responsibilities of Company secretary have increased manifolds towards safeguarding the interests of all stakeholders.

Section 138 (1) of the Companies Act 2013, states that the internal audit can be conducted by a chartered accountant or a cost accountant, or such other professional as may be decided by the Board. The Company Secretaries being governance professionals are aptly suitable to perform the role of internal auditor. The Company Secretaries can utilize the internal audit as a professional opportunity as an area of practice. Keeping in view the expanding responsibilities of internal audit and,

consequently, the changing requirements of skill sets, the internal audit professionals like Company Secretaries should -

- Focus on the future—take a proactive approach to risk identification
- Integrate Enterprise Risk Management to develop a mix of risk and compliance based audit efforts
- Augment skill sets (increasing the role of IT) and leverage resources
- Focus on fraud, control environment, hotline activities, fraud risk assessments
- Establish the role of an adviser
- Build continuous audit capability and influence continuous monitoring techniques
- Maintain independence and objectivity
- Provide value-added assurance services beyond compliance

Conclusion

The Companies Act 2013 has brought into the forefront, many requirements which necessitate the internal audit function. The new purpose, authority, and responsibility of the internal audit activity must be formally defined in the new internal audit charter and presented to the senior management and the board for approval for good corporate governance. There are costs to improving governance and the returns may not be immediately measurable, but the long-term results of a successful governance program include better brand and reputation management, enhanced market value, compliance with regulations, sound business practices, and a more solid foundation for growth.

Currently, internal audit is synonymous to risk management and compliance. The future of audit lies in continuous risk monitoring, continuously updated audit plan, auditing at the speed of the business, providing assurance when it is needed and continuous reporting. To help meet expectations, the corporate world needs strategic thinkers who understand business issues, perceive the risks to the achievement of business objectives, can evaluate related control implications and communicate these effectively to senior management. Internal Audit Function is set to evolve into a more extensive, outward, forward looking and continuous activity playing an enhanced role in 'Integrated Assurance'.

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National Company Law Tribunal (NCLT)
&
National Company Law Appellate Tribunal (NCLAT)

Chittaranjan Pal & Dheeraj Gupta*
Assistant Education Officers, ICSI

Introduction

In the corporate structure of our country, Judicial Forums play a very important role in the life of a company. There is discernible trend around the world towards rationalisation of business processes and simplification of legislations governing them. This trend is being driven partly by the use of electronic communication and information technology that has speeded up business transactions as well as making them international. Time is, therefore, ripe to ensure that dispensation of justice and disposal of business matters by the court and authorities should be in tune with the speed with which business is being transacted. Further certain business matters require specialized domain knowledge for dealing with the matters justifiably. Keeping in view the pendency of legal matters and need for specialized knowledge of the persons discharging the responsibility of adjudicating the matters involving intricate issues relating to the subjects, the process of setting up of specialized tribunals has gained acceptability over a period of time.

Establishment of NCLT & NCALT under the Companies (Second Amendment) Act, 2002

There was a growing need for empowering the Company Law Board and reducing the burden of High Courts by constituting a high-power Tribunal, which could take up all matters relating to Company Law and other Corporate Laws at one Forum.

In 2000 the Justice Eradi Committee was the first to recommend the creation of a National Company Law Tribunal & Appellate Tribunal that would subsume the company law board, BIFR and winding up cases in high courts. The rationale - to avoid long, drawn court proceedings.

Keeping this in view, the 2002 Amendment inserted new Parts IB & IC in the Principal Act for formation of National Company Law Tribunal (NCLT or Tribunal) and National Company Law Appellate Tribunal (Appellate Tribunal) respectively. Necessary Section - Section 10FA was also inserted to provide for dissolution of the present Company Law Board.

The Companies (Second Amendment) Act, 2002 provides for the setting up of a National Company Law Tribunal and Appellate Tribunal to replace the existing Company Law Board and Board for Industrial and Financial Reconstruction. It also provides for dealing with various matters, which fall presently under the jurisdiction of High Court pursuant to various provisions contained in the Companies Act, 1956.

Madras High Court Judgement on NCLT & NCLAT (2007)

The Madras High Court in the matter of R. *Gandhi, President, Madras Bar Association v. Union of India* held that the Parliament's power to create National Company Law Tribunal and National Company Law Appellate Tribunal is clearly traceable to Entries 43 and 44 of List I. The Court also viewed that Parliament is thus competent to enact law with regard to the incorporation, regulation and winding up of Companies. The power of regulation would include the power to set up adjudicatory machinery for resolving the matters litigated upon, and which concern the working of the companies in all their facets.

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* *The views expressed are personal views of the author(s) and do not necessarily reflect those of the Institute.*

The Madras High Court, however, declared that until the provisions in parts 1B and 1C of the Companies Act introduced by the Companies (Amendment) Act, 2002, which have been found to be defective in as much as they are in breach of the basic constitutional scheme of separation of powers and independence of the judicial function, are duly amended, by removing the defects that have been pointed out, it would be unconstitutional to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High courts or the Company Law Board.

Supreme Court Judgement on NCLT & NCLAT (2010)

Supreme Court in the matter of *R. Gandhi, President, Madras Bar Association v. Union of India* vide its Judgment dated 11th May, 2010 has upheld the establishment of the National Company Law Tribunal and the National Company Law Appellate Tribunal, but has suggested certain amendments to be carried out in the Companies Act to make the NCLT and its Appellate Authority functional. In paragraph 56 of the Judgment, the Supreme Court tabulated the defects in Parts IB and IC of the Act and held that

(i) Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.

(ii) As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.

(iii) A 'Technical Member' presupposes an experience in the field to which the Tribunal relates. A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as 'experts' qualified to be appointed as Technical Members. Therefore Clauses (a) and (b) of sub-section (3) are not valid.

(iv) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as Technical Members.

(vi) In regard to category of persons referred in clause (g) of sub-section (3) at least five years experience should be specified.

(vii) Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in subsection (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal.

(viii) Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);

(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;

(c) Secretary in the Ministry of Finance and Company Affairs – Member; and

(d) Secretary in the Ministry of Law and Justice – Member.

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as postretirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(x) The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.

(xi) To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xii) The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.

(xiii) Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members.

Hon'ble Apex Court uphold the decision of the High Court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional and declared that Parts 1B and 1C of the Companies (Amendment) Act, 2002 as structured, are unconstitutional. However, Parts IB and IC of the Act, may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court.

Further the Supreme Court *i*n paragraph 18 of the Judgment support tribunalisation and stated that "the courts function under archaic and elaborate procedural laws and highly technical Evidence Law. To ensure fair play and avoidance of judicial error, the procedural laws provide for appeals, revisions and reviews, and allow parties to file innumerable applications and raise vexatious objections as a result of which the main matters get pushed to the background. All litigation in courts get inevitably delayed which leads to frustration and dissatisfaction among litigants. In view of the huge pendency, courts are not able to bestow attention and give priority to cases arising under special legislations. Therefore, there is a need to transfer some selected areas of litigation dealt with by traditional courts to special Tribunals. As Tribunals are free from the shackles of procedural laws and Evidence Law, they can provide easy access to speedy justice in a 'cost affordable' and 'user-friendly' manner. Tribunals should have a Judicial Member and a Technical Member. The Judicial Member will act as a bulwark against apprehensions of bias and will ensure compliance with basic principles of natural justice such as fair hearing and reasoned orders. The Judicial Member would also ensure impartiality, fairness and reasonableness in consideration. The presence of Technical Member ensures the availability of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision-making."

Supreme Court Judgement on – NCLT & NCLAT (2015)

Chapter XXVII of the Companies Act, 2013 consisting of section 407 to 434 deals with NCLT and Appellate Tribunal. Companies Act, 2013 replaces the High Court with a Tribunal to be known as NCLT, which will consists of Judicial and Technical members.

The Madras Bar Association had challenged constitutional validity of provisions in the Companies Act, 2013 relating to setting up of NCLT and NCLAT alleging that it has proceeded to enact sections which are plainly contrary to requirements laid down by the apex court in 2010. The bench relied on the 2010 verdict of the apex court saying "it had specifically affirmed the decision of Madras High Court which held that creation of NCLT and NCLAT was not unconstitutional. In view of this, it is not open to the petitioner even to argue this issue as it clearly operate as res judicata."

The Supreme Court in the matter of *R. Gandhi, President, Madras Bar Association v. Union of India vide its Judgment dated 14th May, 2015* upheld the constitutional validity of provisions of the Companies Act of 2013 relating to setting up of National Company Law Tribunal and National Company Law Appellate Tribunal but struck down provisions which permitted inclusion of civil servants of the level of Joint Secretary as technical members. The Hon'ble Supreme Court quashed Section 409(3)(a) and (c) and Section 411(3) of the Act providing for qualifications of technical members and held them to be invalid saying for appointment of technical members to NCLT, directions contained in 2010 judgment will have to be "scrupulously followed."

The Supreme Court held that the Apex Court's 2010 order holding that persons below the rank of a Secretary or Additional Secretary should not be appointed as a technical member to NCLT must not be tinkered with as it would have the potential of compromising with standards which it "so zealously sought to secure". It also held as invalid Section 412 of the new Act which contemplates selection by a committee consisting of two Judges and three Secretaries, saying this very issue stands concluded by the 2010 judgment which is now a binding precedent.

"We are of the opinion that this again does not constitute any valid or legal justification having regard to the fact that this very issue stands concluded by the 2010 judgment which is now a binding precedent and, thus, binds the respondent equally. "The prime consideration in the mind of the bench was that it is the Chairperson, viz. Chief Justice of India, or his nominee who is to be given the final say in the matter of selection with right to have a casting vote," it said while maintaining the 2010 verdict which had held that a selection committee must consist of four members.

The Supreme Court directed the Centre to ensure that the bodies are adequately manned and start functioning at the earliest. "Since, the functioning of NCLT and NCLAT has not started so far and it's high time that these Tribunals start functioning now, we hope that respondents shall take remedial

measures as per the directions contained in this judgment at the earliest, so that NCLT and NCLAT are adequately manned and start functioning in near future ".

The court said the only step which is left to make the Tribunals functional is to appoint NCLT's President and members and NCLAT's Chairperson and members. The Madras Bar Association had challenged constitutional validity of provisions in the 2013 Act relating to setting up of NCLT and NCLAT alleging that it has proceeded to enact sections which are plainly contrary to requirements laid down by the apex court in 2010. The bench relied on the 2010 verdict of the apex court saying "it had specifically affirmed the decision of Madras High Court which held that creation of NCLT and NCLAT was not unconstitutional. In view of this, it is not open to the petitioner even to argue this issue as it clearly operate as res judicata."

Rejecting the lawyers body's argument that the setting up of NCLT and NCLAT should be held unconstitutional for the same reasons as was done in the case of National Tax Tribunal (NTT), the bench said the two situations are different. "The NTT was a matter where power of judicial review hitherto exercised by the High Court in deciding the pure substantial question of law was sought to be taken away to be vested in NTT which was held to be impermissible. "In the instant case, there is no such situation. On the contrary, NCLT is the first forum in the hierarchy of quasi- judicial fora set up in the Act, 2013. The NCLT, thus, would not only deal with question of law in a given case coming before it but would be called upon to thrash out the factual disputes/aspects as well," Supreme Court said.

The bench added that NCLAT which is the first appellate forum provided under the Act, 2013 to examine the validity of the orders passed by NCLT, will have to revisit the factual as well as legal issues and "therefore, situation is not akin to NTT". "We would like to point out that apart from giving other reasons for limiting the consideration for such posts to the Secretary and the Additional Secretary, there was one very compelling factor in the mind of the Court viz. gradual erosion of independence of judiciary, which was perceived as a matter of concern," the Apex Court said.

Powers of NCLT

The NCLT has been empowered to exercise the following powers:

- Most of the powers of the Company Law Board
- All the powers of BIFR for revival and rehabilitation of sick industrial companies;
- Power of High Court in the matters of mergers, demergers, amalgamations, winding up, etc.;
- Power to wind up companies;
- Power to Review its own orders.
- The Tribunal and the Appellate Tribunal can formulate their own procedures and regulations for dealing with the cases and since the cumbersome procedures prescribed in the Civil Procedure Code will not be automatically applicable to the proceedings before the Tribunal or the Appellate Tribunal, protracted delays can be avoided and speedy decisions can be made.
- Tribunal and Appellate Tribunal will have the power to punish the contemnors, the orders of the Tribunal will receive the seriousness it deserves and such orders will be effectively implemented and this power to punish contemnor will act as a deterrent. Besides, this will avoid filing of affidavits to the Tribunal in a casual and lackadaisical manner.
- Power to order repayment of deposits
- Allow issue of redeemable preference shares
- Order in case of Reduction of share capital by companies
- Order in case of Variation of class rights
- Order in case of Refusal to register transfer of shares by companies
- Order redemption of debentures
- Order convening general meeting
- Order investigation of affairs
- Order in case of prevention of oppression and mismanagement
- Order in case of class action suit

Enhanced Role of Company Secretaries

The establishment of NCLT/NCLAT shall offer various opportunities to Practicing Company Secretaries as they have been authorized to appear before the Tribunal/ Appellate Tribunal. Therefore, Practicing Company Secretaries would for the first time be eligible to appear for matters which were hitherto dealt with by the High Court viz. mergers, amalgamations, reduction of share capital and winding up proceedings under the Companies Act.

Practising Company Secretaries have been permitted to act as Liquidator in case of winding up of company by the Tribunal and can be appointed as a Technical Member of NCLT.

Conclusion

In view of vast opportunities emerging with the establishment of National Company Law Tribunal, the Practising Company Secretaries should utilize this opportunity and provide services in assisting the Tribunal in dispensation of justice and speedier disposal of matters like merger, amalgamation, restructuring, revival and rehabilitation of sick companies and winding up of companies.

Source :

1. *Union of India* vs. *R. Gandhi, Madras Bar Association* (Civil Appeal No. 3067 of 2004, Supreme Court Judgement dated May 11, 2010).
2. *Madras Bar Association* vs. *Union of India & Anr.* (Writ Petition (C) No. 1072 of 2013, Supreme Court Judgement dated May 14, 2015).
3. Millenium Post, New Delhi, May 15, 2015.

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New Insider Trading Norms - A Regulatory Initiatives Tool for Better Corporate Governance

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"A 'no' uttered from deepest conviction is better and greater than a 'yes' merely uttered to please, or what is worse, to avoid trouble." – and "You must be the change you wish to see in the world . . ."
– Mahatma Gandhi

Ethics is a set of principles or standards of human conduct that govern the behavior of individuals or organizations. Using these ethical standards, a person or a group of persons or an organization regulate their behavior to distinguish between what is right and what is wrong as perceived by others. It is not a natural science but a creation of the human mind. For this reason, it is not absolute and is open to the influence of time, place and situation.

Ethics & Corporate Governance are not just moral or compliance issues. Ethics is at the core of corporate governance, and management must reflect accountability for their actions on global community scale. Corporate ethics is a form of applied or professional ethics that examines ethical principles and moral or ethical problems that arise in a business environment. In the context of decision-making, ethics are personal standards of right and wrong.

Business ethics is regarded as a concept which generally refers to application of ethical values, principles and morals in the areas where corporations make major profits. Business ethics is not only associated with individual but to the whole of corporation. A company that wishes to be in business for a long time, will be indulging in good business practices and be ethical in its business ethics.

Good corporate governance is not just a matter of prescribing particular corporate structures and complying with a number of hard and fast rules. Good corporate governance ultimately depends upon ethical corporate culture which governs the behavior of an organization.

Generally speaking, Corporate Governance is an ethical environment in which all business processes are undertaken (Knell, 2006).

In bygone times, kings used to keep food testers who ate the food prepared for the king before it was offered to him. This was royal clinical research to find out if the food was poisoned. The practice did not raise eyebrows because the king was regarded as the most important person in the kingdom, and his life was more precious than that of anyone else. It was the ethics of the time.

In India, ninety five percent of corporations have a code of business conduct and ethics. The principles of Corporate Governance help in decision making for investors, stakeholders and corporations (Bhat, 2006-2007).

Disclosure Standards and Corporate Governance

Dissemination of information is a key management function in an organization. A company is required to make specified disclosures at the time of issue and make continuous disclosures as long as its securities are listed on exchanges. The standards for these disclosures, including the content, medium and time of disclosure, have been specified in the Companies Act, Issue of capital and disclosure requirements regulations, Listing Agreement, Regulations relating to insider trading and takeovers etc.

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* *The views expressed are personal views of the author(s) and do not necessarily reflect those of the Institute.*

These disclosures are made through various documents such as prospectus, quarterly statements, annual reports etc. and are disseminated through media, web sites of the company and the exchanges. Disclosure standards in the Indian Regulatory jurisdiction are at par with the best in the world - a feedback from several global organizations, both regulatory and market participants.

SEBI - Gatekeeper of Good Corporate Governance in India

If Indian securities market is a model for others, it is natural that it leads in the area of corporate governance also. The securities market reflects and regulates corporate governance standards. Many jurisdictions use securities market as a tool to improve corporate governance.

In India Securities and Exchange Board of India acts as developer and regulator of capital market in India. As the regulator for the securities market, the Securities and Exchange Board of India (SEBI) has been continuously focusing on the following areas to improve corporate governance:

A. Ensuring timely disclosure of relevant information,

B. Providing an efficient and effective market system,

C. Demonstrating reliable and effective enforcement, and

D. Enabling the highest standards of governance.

SEBI is concerned with the dynamic substance of corporate governance practice. Kautilya says in Arthasastra: "*To be good is noble; to tell the people how to be good is nobler."* SEBI is engaged in such a nobler endeavour. SEBI has setout corporate governance provisions that are intended to drive in minimum standards of corporate governance among listed companies in India. This is issued as a part of listing agreement that each listed company signs with the stock exchange under the title 'Clause 49'. Clause 49 remains the most significant corporate governance reform and established a new corporate governance regime. Some other role which SEBI performs as part of reforms in the direction of Corporate Governance are:

1. To regulate the market by creating rules for functioning of various products.
2. To approve/amend the laws of stock exchanges.
3. To inspect the books of accounts and call for periodical returns from recognized stock exchanges.
4. To inspect the books of accounts of intermediaries.
5. To compel certain companies to list their shares in one or more stock exchanges.
6. To educate investors.
7. To prosecute and judge directly the violation of certain provisions of the companies Act.
8. To prohibit and prevent insider trading
9. To frame rules for merger and takeover of Companies.
10. To regulate issue of capital and debt in primary and secondary market.
11. To prevent unfair trade practice and market manipulation.

SEBI also drafts regulations in its legislative capacity, conducts investigations and authorize enforcement action in its executive function, passes ruling and orders in its judicial capacity. There is also an appeal process to ensure fairness and accountability through Securities Appellate Tribunal (SAT). SAT was formed in 1995 to act as a forum of justice to appeal against the order passed by SEBI Board or the adjudication Officer (AO) appointed under the SEBI Act, 1992.

Insider Trading and Corporate Governance

"I *am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live by the light that I have. I must stand with anybody that stands right, and stand with him while he is right, and part with him when he goes wrong." – Abraham Lincoln*

Corporate governance is founded on four pillars i.e. righteousness, truth, perseverance and social justice. The companies which trade in securities are listed either in the NSE or the BSE which are the registered stock exchanges in the country. They have to regulate their activities in stock exchanges in accordance with the norms prescribed by SEBI. A listed company has to deal with its investors in a righteous and just manner. It is the duty of the company to protect its investors from any potential frauds.

Mark Twain said: *"In the welfare of the subject, lies the welfare of the King." If the stake holders are the subjects, the corporate is the king.*

In any good legal system, in dealing with any form of wrong or misconduct, it is critical that the law draws a clear line making it evident as to what the treatment of persons falling on either side of the line will be. Unless the law and its implications are set out in a clear, specific and predictable manner, it would not be possible to provide a just and transparent regulatory system that is respected and adhered to.

Insider trading – essentially the wrong of trading in securities with the advantage of having asymmetrical access to unpublished information which when published would impact the price of securities in the market – has been attracting regulatory attention worldwide. While jurisdictions across the world are unambiguously unanimous in the resolve to fight insider trading by ensuring a level-playing field for trading in the securities market primarily on the ground that it erodes investor confidence in the market and the integrity of price discovery, legal treatment of what precisely should be the measure to determine whether an act of trading by an insider is illegal varies across jurisdictions.

In October 2011, a U.S. district judge ordered a 11-year prison sentence, forfeiture of $53.8 million and a fine of $10 million on hedge fund manager Raj Rajaratnam, who allegedly benefited by trading on insider information in the U.S.

In India, insider trading is not only a tort i.e. a civil wrong but also a crime. The SEBI Act, 1992, does not define the term by itself although it refers to the term —insider trading in many provisions. However, using the powers to make regulations and in discharge of its functions, SEBI has made regulations prohibiting insider trading in the form of the PIT Regulations, 1992, which have defined various terms such as —connected person, —dealing in securities, —insider, —price sensitive information, —unpublished, to name a few, to build up a framework of the prohibition on insider trading and made further amendments in 2002.

The object of the SEBI (PIT) regulations, 1992, measures was to prevent and curb the menace of insider trading in securities. However, the PIT Regulations, 1992 had their challenges in their drafting, interpretation and reach. Besides, the felt need to ensure a clear regulatory policy that is not only easily comprehendible but is also comprehensive led to this Committee being set up under the chairmanship of Justice N. K. Sodhi, Former Chief Justice of the High Courts of Kerala and Karnataka and a Former Presiding Officer of the Securities Appellate Tribunal. The High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 submitted its report to SEBI on December 7, 2013.

The Committee has made a range of recommendations to the legal framework for prohibition of insider trading in India and has focused on making this area of regulation more predictable, precise and clear by suggesting a combination of principles-based regulations and rules that are backed by principles. The Committee has also suggested that each regulatory provision may be backed by a note on legislative intent.

SEBI had issued and notified the SEBI (Prohibition of Insider Trading) Regulations, 2015 on 15th January, 2015 based on recommendations of Sodhi Committee. These Regulations are effective from 120th day of the date of notification i.e. on and from 15th May, 2015, by repealing SEBI (Prohibition of Insider Trading) Regulations 1992.

The new regulations strengthen the legal and enforcement framework, align Indian regime with international practices, provide clarity with respect to the definitions and concepts, and facilitate legitimate business transactions.

With respect to the new Insider Trading Regulations, 2015 most of the regulations are similar to the recommendation made by Mr. Sandeep Parekh in his working paper titled 'Prevention of Insider Trading and Corporate Good Governance' submitted in January 2003 in which Prof. Parekh has made certain good suggestions under the sub-heading "Prophylactics and corporate good governance".

(The extract from the report begins)

The 2002 amendments to the Regulations provide extensive suggestions and also extensive regulations couched in the language of corporate good governance. Most of the good governance provisions are provided for as mandatory provisions. Briefly, the good governance regulations provide for:

a) Officer, director and substantial shareholder to disclose their holding on certain events or at certain intervals.

b) Appointment of a compliance officer.

c) Setting forth policies and procedure to restrict the possibility of abuse of insider trading.

d) Monitoring and pre-clearance of trades by the designated persons.

e) Restrict trading by such insiders within a certain period of time i.e. before corporate announcements, buybacks etc. are made.

f) The company has to convey all the significant insider activity and corporate disclosure in a uniform publicly accessible means to the public and to the stock Exchange.

g) Chinese walls within a firm to prevent one part of the firm which deals in sensitive information from going to other parts of the firm which have an inherent conflict of interest with such other parts.

h) Minimum holding period of securities by insiders.

I) No selective disclosure to analysts. Wide dissemination of information.

Regulatory Provisions for Insider trading in India - A snapshot

1. Companies Act, 2013

Section 195 (1)states that no person including any director or key managerial personnel of a company shall enter into insider trading: However, nothing contained in this sub-section shall apply to any

communication required in the ordinary course of business or profession or employment or under any law.

Who is an insider?

Explanation.—For the purposes of this section,—

(a) "insider trading" means—

(i) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or

(ii) an act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;

(b) "price-sensitive information" means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

Further section 195 (2) states that if any person contravenes the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both.

Powers delegated to SEBI under Companies Act 2013

Section 458.(1) states that the Central Government may, by notification, and subject to such conditions, limitations and restrictions as may be specified therein, delegate any of its powers or functions under this Act other than the power to make rules to such authority or officer as may be specified in the notification.

The powers to enforce the provisions contained in section 194 and section 195 relating to forward dealing and insider trading shall be delegated to Securities and Exchange Board for listed companies or the companies which intend to get their securities listed and in such case, any officer authorised by the Securities and Exchange Board shall have the power to file a complaint in the court of competent jurisdiction.

2. SEBI (Prohibition of Insider Trading) Regulations, 2015

Some of the salient features of the regulations are set out below:-

- While enlarging the definition of "insider", the term "connected person" has been defined more clearly and immediate relatives are presumed to be connected persons, with a right to rebut the presumption. The term "immediate relative" would cover close relatives who are either financially dependent or consult an insider in connection with trading in securities.
- Insiders would be prohibited from communicating, providing or allowing access to UPSI unless required for discharge of duties or for compliance with law.

- The regulations would bring greater clarity on what constitutes "unpublished price sensitive information" ("UPSI") by defining what constitutes "generally available information" (essentially, information to which non-discriminatory public access would be available). A list of types of information that may ordinarily be regarded as price sensitive information has also been provided.
- Trading in listed securities when in possession of UPSI would be prohibited except in certain situations provided in the regulations.
- Insiders who are liable to possess UPSI all round the year would have the option to formulate pre-scheduled trading plans. In such cases, the new UPSI that may come into their possession without having been with them when formulating the plan would not impede their ability to trade. Trading plans would, however, be required to be disclosed to the stock exchanges and have to be strictly adhered to.
- Conducting due diligence on listed companies would be permissible for purposes of transactions entailing an obligation to make an open offer under the Takeover Regulations. In all other cases, due diligence would be permissible subject to making the diligence findings that constitute UPSI generally available prior to the proposed trading. In all cases, the board of directors would need to opine that permitting the conduct of due diligence is in the best interests of the company, and would also have to ensure execution of non-disclosure and non-dealing agreements.
- Trades by promoters, employees, directors and their immediate relatives would need to be disclosed internally to the company. Trades within a calendar quarter of a value beyond Rs. 10 lakhs or such other amount as SEBI may specify, would be required to be disclosed to the stock exchanges.
- Every entity that has issued securities which are listed on a stock exchange or which are intended to be so listed would be required to formulate and publish a Code of Fair Disclosure governing disclosure of events and circumstances that would impact price discovery of its securities.
- Every listed company and market intermediary is required to formulate a Code of Conduct to regulate, monitor and report trading in securities by its employees and other connected persons. All other persons such as auditors, law firms, accountancy firms, analysts, consultants etc. who handle UPSI in the course of business operations may formulate a code of conduct and the existence of such a code would evidence the seriousness with which the organization treats compliance requirements.
- Companies would be entitled to require third-party connected persons who are not employees to disclose their trading and holdings in securities of the company.

Insider Trading Regulation- A new tool towards good governance

(A) Strengthening the Legal and Enforcement Framework

(i) The definition of Insider has been made wider by including persons connected on the basis of being in any contractual, fiduciary or employment relationship that allows such person access to unpublished price sensitive information (UPSI). However directors, employees and all other persons in the deeming category covered under 1992 regulations would continue to be covered. Insider will also include a person who is in possession or has access to UPSI. Now, immediate relatives will be presumed to be connected persons, with a right to rebut the presumption. In 1992 regulations, definition of connected person was largely position based.

(ii) In the case of connected persons the onus of establishing, that they were not in possession of UPSI, shall be on such connected persons.

(iii) Clear prohibition on communication of unpublished price sensitive information (UPSI) has been provided except legitimate purposes, performance of duties or discharge of legal obligations.

(iv) Considering every investor's interest in securities market, advance disclosure of UPSI at least 2 days prior to trading has been made mandatory in case of permitted communication of UPSI.

(v) UPSI has been defined as information not generally available and which may impact the price. The definition of UPSI has been strengthened by providing a test to identify price sensitive information, aligning it with listing agreement and providing platform of disclosure. Earlier, the definition of price sensitive information had reference to company only; now it has reference to both a company and securities.

(vi) Generally Available Information will be the information that is accessible to the public on a non-discriminatory platform which would ordinarily be stock exchange platform.

(vii) Companies by law would be entitled to require third-party connected persons to disclose their trading and holdings in securities of the company.

(viii) In line with Companies Act, 2013, prohibition on derivative trading by directors and KMPs on securities of the company has been provided.

(B) Aligning insider trading norms with International Practices

(i) The requirement of communication of UPSI in the case of legitimate business transaction has been recognized in law and a carve-out with safeguards has been provided. [Reference to A (iii) and (iv) above]

(ii) Disclosure of UPSI in public domain has been made mandatory before trading, so as to rule out asymmetry of information in the market, as prevalent in other jurisdictions. [Reference to A (iv) above]

(iii) A provision of Trading Plans on the lines of U.S. has been introduced for insiders with necessary safeguards. Such a plan has to be for bona fide transactions and has to be disclosed on stock exchange platform in advance.

(C) Clarity in the Definitions and Concepts

(i) With important provisions, clarificatory notes have been inserted in the regulations itself.

(ii) Clarity has been brought to the definition of UPSI by aligning it with listing agreement and making the definition inclusive.

(iii) To provide clarity, Generally Available Information has been defined as information that is accessible to public on a non-discriminatory platform such as stock exchange.

(iv) Clarity about timing of disclosure of UPSI has been provided and the trading window norms have been made uniform to other connected persons.

(D) Facilitating Legitimate Business Transactions

(i) To facilitate legitimate business transactions, unpublished price sensitive information (UPSI) can be communicated with safeguards. [reference to A (iii) & (iv) above]

(ii) Insiders who are liable to possess UPSI all round the year would have the option to formulate pre-scheduled trading plans. Trading plans would, however, to be disclosed on the stock exchanges and have to be strictly adhered to. Trading plans shall be available for bona fide transactions.

(iii) Principle based Code of Fair Disclosure and Code of Conduct has been prescribed.

(iv) In given cases, certain circumstances which can be demonstrated by an insider to prove his innocence have been provided.

(v) Repeated disclosures have been removed so as to ease compliance burden and to align with Takeover Code. Disclosure of any change of 2% for persons holding more than 5% shares or voting rights has been removed as they are prescribed under Takeover Code.

Enhanced Role of Compliance officer

Compliance officer is a any senior officer, designated so and reporting to the board of directors or head of the organization in case board is not there, who is financially literate and is capable of appreciating requirements for legal and regulatory compliance under these regulations and who shall be responsible for :

i. compliance of policies, procedures,
ii. maintenance of records,
iii. monitoring adherence to the rules for the preservation of unpublished price sensitive information,
iv. monitoring of trades and
v. the implementation of the codes specified in these regulations

under the overall supervision of the board of directors of the listed company or the head of an organization, as the case may be;

Trading plan – a onerous responsibility on the Compliance officer

The Concept of Trading Plan is newly introduced in SEBI (Prohibition of Insider Trading) Regulations 2015.

Since the prohibition on trading when in possession of UPSI is a stringent one, it is quite possible that certain persons particularly those in senior management and those who are promoters may perpetually be in possession of some UPSI or the other rendering such persons incapable of trading in securities throughout the year. This would be so because at any point of time such persons may be involved in some decision-making or the other and be privy to confidential information that could affect the discovery of price if such information were to become generally available. It is important to reconcile the need to maintain the prohibition on trading in securities when in possession of UPSI with the need to provide a regime in which compliance-conscious insiders are able to put in place a compliant mechanism to trade in securities where they are insiders.

There are conditions attached the trading plans which are prescribed under the regulations. The role of compliance officer in monitoring the trading plan is also the highlight of these regulations.

Intimation of trading plans to compliance officer

Regulation 5 states that an insider shall be entitled to formulate a trading plan and present it to the compliance officer for approval and public disclosure pursuant to which trades may be carried out on his behalf in accordance with such plan. This provision intends to give an option to persons who may be perpetually in possession of unpublished price sensitive information and enabling them to trade in

securities in a compliant manner. This provision would enable the formulation of a trading plan by an insider to enable him to plan for trades to be executed in future.

By doing so, the possession of unpublished price sensitive information when a trade under a trading plan is actually executed would not prohibit the execution of such trades that he had pre-decided even before the unpublished price sensitive information came into being.

The Compliance officer shall review and approve the trading plan and notify the same to the stock exchanges

Penalty for Insider trading

Any contravention of these regulations shall be dealt with by SEBI in accordance with the SEBI Act, 1992. Section 15G of the Act stipulates the penalty for insider trading which states, if any insider who,–

(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; or

(ii) communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or

(iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information.

shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

Thus violation of the provisions of the regulations attract huge monetary penalty and may lead to criminal prosecution.

Further, Section 24 of the SEBI Act, 1992 provides as under:

- Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made there under, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine which may extend to twenty-five crore rupees or with both.
- If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.

Earlier a person alleged of Insider trading can resort to consent order mechanism. But now he cannot do so as the SEBI (Settlement of Administrative & Civil Proceedings) Regulations, 2014 specifically set out that defaults involving insider trading and communication of unpublished price sensitive information cannot be settled under these regulations.

Conclusion

Unfortunately with the unearthing of large frauds, even though India is not unique in this, the concept of corporate good governance has been lost. But with the concerted effort of the market, the regulator and the government working in tandem to improve corporate governance in India, the new Insider trading regulation is one of the steps towards better Corporate Governance and appreciated by the general public as it provides a stringent set of regulations in consonance with the International practices. This new regulation ensures a fair level playing field in the securities market and to safeguard the interest of the investors, and this move by SEBI will facilitate further economic buoyancy in the Indian Capital Market.

References

1. http://www.mondaq.com/india/x/19011/Corporate+Finance/Corporate+Governance+Insider+Trading

2. http://www.academia.edu/4220805/Ethics_Management_Insider_trading_a_menace_to_corporate_governance

3. http://www.sebi.gov.in/cms/sebi_data/attachdocs/1292908617539.pdf

4. www.sebi.gov.in

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Circulars, Notifications, Orders, Amendments

No.A-12023/04/2013-Ad.IV
Government of India
Ministry of Corporate Affairs

'A' Wing, 5th floor,
ShastriBhawan,
New Delhi-110001
Dated, the 10th August, 2015.

To

1. Registrar Generals of All High Courts.
2. Secretaries to Government of India, All Ministries/Departments of the Government of India
2. All Chief Secretaries to the State Governments/Union Territories.
3. All RDs/ROCs/OLs in the Ministry of Corporate Affairs.
4. Secretary, Company Law Board, BIFR and AAIFR.
6. Registrar, Competition Appellate Tribunal.

Sub: Filling up of 02 (Two) posts of Technical Member in the National Company Law Appellate Tribunal (NCLAT) - Inviting applications for.

Sir,

I am directed to state that applications are invited in the format given in **Annexure-I** for two posts of Technical Member, National Company Law Appellate Tribunal to be constituted under Section 410 of the Companies Act, 2013. Both posts are Unreserved. The selected candidates will be required to serve at NCLAT Benches to be established anywhere in the country and the appointment carries All India Transfer liability.

2. **Qualifications**: The qualifications for the post as per provisions of Section 411(3) of the Companies Act, 2013read with judgment dated 14th May, 2015 of Supreme Court in WP (C) No. 1072/2013, is as under:-

"A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and professional experience, of not less than twenty-five years, in industrial finance, industrial management, industrial reconstruction, investment and accountancy."

3. A person shall not be eligible for appointment as Technical Member, NCLAT unless he/she has completed **the age of 50 (fifty years) [Section 413(4) of Companies Act, 2013]** as on the last date for receipt of applications.

4. **Terms of Appointment**: The Member(s) will draw pay in the pay scale of Rs. 80,000/- (fixed) plus other allowances as admissible. The pay scale and other service conditions are subject to revision in the event uniform pay scales and other service conditions for Appellate Tribunals etc. are laid down by the Central Government.

5. Every Member shall hold office for a period of five years from the date on which he/she enters upon his/her office, but shall be eligible for re-appointment for another term of 5 years. The term of appointment is, however, subject to the maximum age limit of sixty-seven years.

6. Rules relating to service conditions of Members, NCLAT are being notified shortly and the same shall be applicable to the appointed candidates. A copy of the rules shall also be displayed on website of the Ministry of Corporate Affairs.

7. Selected candidates will be required to produce a medical fitness certificate before joining.

8. Applications of persons already in Government Service should be forwarded through proper channel. The forwarding authorities should also certify (in the format given in Annexure-II) that the entries in the application have been verified from the records and found correct, and that no disciplinary/vigilance proceedings are either pending or contemplated against the applicant and that no major/minor penalties have been imposed on the officer during the last ten years. The forwarding authorities should enclose the up-to-date Confidential Report Dossiers of the applicant for the last five years. A person selected, if already in Government Service, may retain his/her lien with his/her parent cadre or Ministry or Department, as the case may be, while holding office as such for a period not exceeding one year.

9. Serving Members of the Company Law Board who are eligible for appointment as Technical Members, NCLAT under the provisions of the Act and interested to be so appointed may apply.

10. Applicants who had applied earlier in response to circular dated 20th December, 2013 need to apply afresh with reference to the eligibility criteria set out in the present advertisement.

11. Applications in the format given in Annexure-I duly completed should reach Shri NavneetChouhan, Director, Ministry of Corporate Affairs, Room No. 530, A' Wing, 5th floor, ShastriBhawan, New Delhi-110001 latest by 1st September, 2015. The application may also be downloaded from the Ministry's website at *www.mca.gov.in and Company Law Board's website at www.clb.gov.in*

Yours faithfully,

(Ashutosh Anand)
Under Secretary to the Govt. of India
Tele. No. 23389782

Copy to:

1. All officers at the Headquarters of the Ministry of Corporate Affairs, New Delhi.
2. E governance Cell, Ministry of Corporate Affairs with the request to upload the vacancy circular on the website of the Ministry.

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Proposed Coverage	The sessions will cover on the following areas: • Significance of Research, Scope and Sources of Research for Company Secretaries (CS) • Grooming Professionals towards Research • Research Methodology & Techniques • Drafting of Expert Opinion
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