

#### Secretarial Audit

Scope, Regulatory Compliances & Sector-wise Analysis

By

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#### **Evolution of Secretarial Audit**

Until 2000 –
 Securities related
 Audit (Clause 47C)

February 2000 –
 Corporate
 Governance (Clause 49)

Companies
 (Compliance
 Certificate) Rules,
 2001 (Section
 383A)

 Secretarial Audit Report for reconciliation of total admitted capital (CA or CS)

1



2



3



4



Annual Return
 Certification

 Due Diligence certificates for IPO, open offer, bonus issue, GDR issue, etc.  MCA Voluntary Guidelines, 2009  Secretarial Audit and Annual Return certification (Companies Act 2013)

5



6



7



8





#### Objectives

- Secretarial aims to achieve the following objectives:
  - Check and Report on statutory / regulatory compliances
  - Point out Non-Compliances and Inadequate Compliances
  - Suggest rectifications, tone up, enhance internal controls and compliance processes
- Incidentally the following benefits are accrued:
  - Protecting the interest of internal and external stakeholders namely Employees, Customers, etc.
  - Prevents actions by government, law enforcing agencies and regulatory bodies



#### Prescribed Scope

- Securities Contracts(Regulations)
   Act, 1956 & Rules
- Depositories Act 1996, Regulations & bye-laws
- Foreign Exchange Management Act 1999, Regulations & bye-laws
- Securities and Exchange Board of India Act, 1992
- Companies Act, 2013 & Rules
- Secretarial Standards issued by ICSI
- Corporate Governance Voluntary Guidelines, 2009 issued by MCA
- Corporate Social Responsibility Voluntary Guidelines, 2009 issued by MCA

- Listing Agreement
- Guidelines in Corporte Governance for Central public Sector Enterprises
- Corporate Governance Guidelines for Insurance Companies issued by IRDA in case of Insurance Companies
- Specific events / actions having a major bearing on the company's affairs with specific reference to Compliance with any of the aforesaid laws
- All other laws as may be applicable specifically to the company



#### Other Laws as May Be Applicable

- Compliance with business / industry related laws subject to audit
- ICSI Guidance
  - Examining and reporting whether adequate systems and processes are in place ensure compliance with general laws
    - Labour laws, competition law, environmental laws etc.
  - Secretarial Auditor may rely on the reports given by statutory auditors or other designated professionals
    - On financial laws like direct and indirect tax laws, etc.



## Discovery of Applicable Laws

#### Analyze

the business

#### Aggregate

all business related laws

#### Ascertain

other applicable laws

#### Assess

entity wide incidence of compliance

#### Assimilate

 all the above into the audit program





## Fragility of Scope

- Sections 139-148 come in Chapter V 'Audit and Auditors'
  - Ideally Secretarial Audit should have been included in this chapter
- Section 204 in Chapter XIII 'Appointment and Remuneration of Managerial Personnel'
  - No relevance to the Chapter
  - Scope of Secretarial Audit NOT defined
- Rule 8(4) of Chapter XII Rules (Meeting of Board & Powers)
  - To appoint Internal Auditors and Secretarial Auditor
  - Logically, the administrative intent is to equate Secretarial Audit with Internal Audit
- Rule 9 of Chapter XIII Rules (Appointment and Remuneration of Managerial Personnel)
  - Applicability to certain class of companies defined
  - Format of Secretarial Audit names (MR-3)
  - Scope is given in the Report format , and not even in the Rules
  - Format is liable to change at any point of time; and so is the scope



Act is silent on the period of office

Legislative intent and scope of Secretarial Audit is ambiguous!



#### **Audit Process**





## The Audit Program

# Stage 3 - Preparation of Audit Report

Finalisation of Audit report

Discussion with departments on draft report

Verification of records & preparation of working notes

Stage 2 – Identification & Compilation of Applicable Laws

Department wise checklist of documents

Identification of inapplicable laws

Stage 1 - Understanding

Detailed discussions and analysis of Regulatory Incidence

Preparation of Master Checklist



## Basic Documents Required for Audit

- All company law related documents
- Financial Statements, Auditor's Report, Director's Report
- Statements for borrowings and investments
- Disclosures / consents / declarations
- Filings with regulatory authorities
- Filings with quasi regulatory bodies
- Inspection reports by regulatory authorities
- Inspection reports by quasi regulatory bodies
- Relevant approvals / registrations / licenses
- All regulatory notices/correspondence
- Compliance certificates of departmental heads
- Internal audit / concurrent audit reports
- Any other document specific to each industry



Thorough preparation needed!



#### Powers & Duties u/s 143

- Right to access documents at all times and all places
  - Auditor of holding company possesses the right to access the documents of the subsidiary company also
- To report to the members regarding the accounts examined
- The auditor's report shall also state—
  - Whether he has sought and obtained all the information and explanations. If not, the details thereof and the effect of such information
  - Whether, in his opinion, proper books of account as required by law have been kept
  - Observations or comments on matters which have any adverse effect on the functioning of the company
  - Whether any director is disqualified from being apposed sub-section (2) of section 164
  - Whether the company has adequate internal control operating effectiveness of such controls

143(14) - All provisions of 143 applicable to Secretarial Auditor!



# Powers & Duties u/s 143 (Contd...)

- Special rights provided to the Comptroller and Auditor-General of India
- Branch audit made compulsory
- Every auditor shall comply with the auditing standards.
  - The Central Government may prescribe the standards of auditing
  - Until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

ICSI needs to take the lead in getting the Government prescribe new Auditing standards







## Relevant Auditing Standards of ICAL

- Agreeing the Terms of Audit Engagement (SA 210)
- Audit Documentation (SA 230)
- Auditor's Responsibilities relating to fraud in Financial Statements (SA 240)
- Consideration of Laws & Regulations in Audit of Financial Statements (SA 250)
- Communication with those Charged with Governance (SA 260)
- Communicating Deficiencies in Internal Control (SA 265)
- Materiality in Planning and Performing an Audit (SA 320)
- The Auditor's Responses to Assessed Risks (SA 330)
- Audit Evidence (SA 500)
- Audit Sampling (SA 530)
- Subsequent Events (SA 560)
- Written Representation (SA 580)
- Using the work Another Auditor (SA 600)
- Using the work Internal Auditor (SA 610)



# **Fraud Reporting**

- Rule 13 of Companies (Audit and Auditors) Rules, 2014
  - Reporting of frauds by auditor
  - The provisions shall apply, mutatis mutandis, to a secretarial auditor during the performance of his duties under section 204
  - Amendments passed by Lok Sabha seeks to cap the materiality of frauds for reporting purposes
- Non compliance by an Auditor shall be punishable with fine
  - Not be less than Rs. 1 lakh which may extend to Rs. 25 Lakh



Good news!
(No imprisonment)



#### Secretarial Audit Periodicity

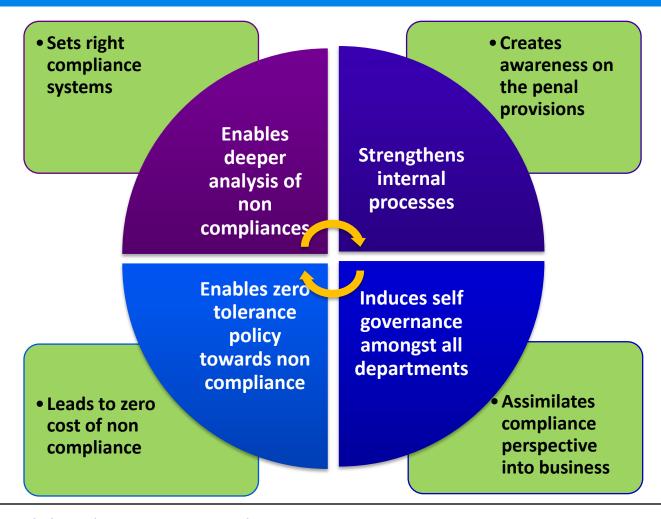
- Extremely difficult to conduct a full fledged Secretarial Audit of any regulated entity in a short time span
  - Especially after January
- It is recommended that Secretarial Audit be carried out periodically (Quarterly/ Half Yearly)



No 11<sup>th</sup> hour fire fighting please...
CS runs a very high risk!



#### **Value Creation**



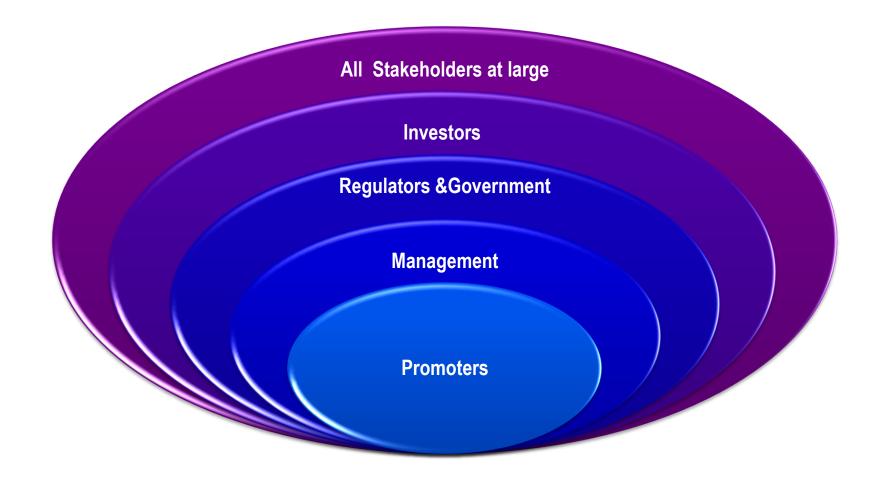


#### Secretarial Audit Report

- The Report shall be in Form No. 'MR-3'
  - Prescribed in "Companies (Appointment and Remuneration Personnel) Rules, 2014."
- Secretarial Audit Report is placed before audit committee and then before the Board
- Annual Secretarial Audit Report approved by Board is published in Company's Annual Report



# The Beneficiaries





# Compulsions on the Board

- Section 447
  - ".... any person who is found guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud but which may extend to 3 times the amount involved in fraud"
- If the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.
- Fraud in relation to affairs of a company includes
  - an act, omission, concealment of any fact or
  - abuse of position committed in any manner, with into undue advantage from, or to injure the interests of, t shareholders or its creditors or any other person,

Applies to Directors as well...

- Directors report
  - It needs to be affirmed in the Directors Responsibility Statement that they have "devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively" - S 134(5)(f)

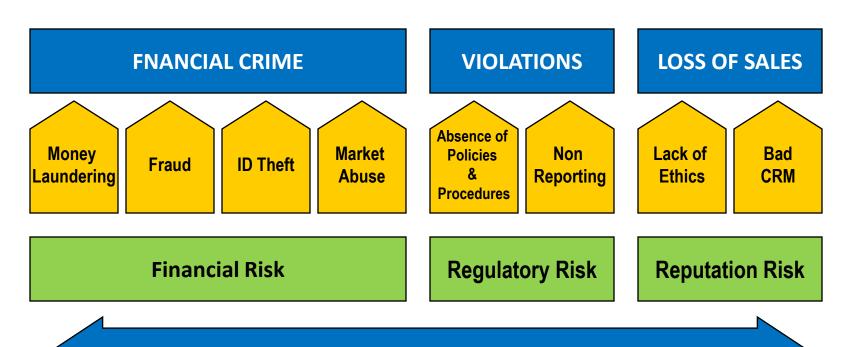


# Compliance Processes and Systems

For a Regulated Entity



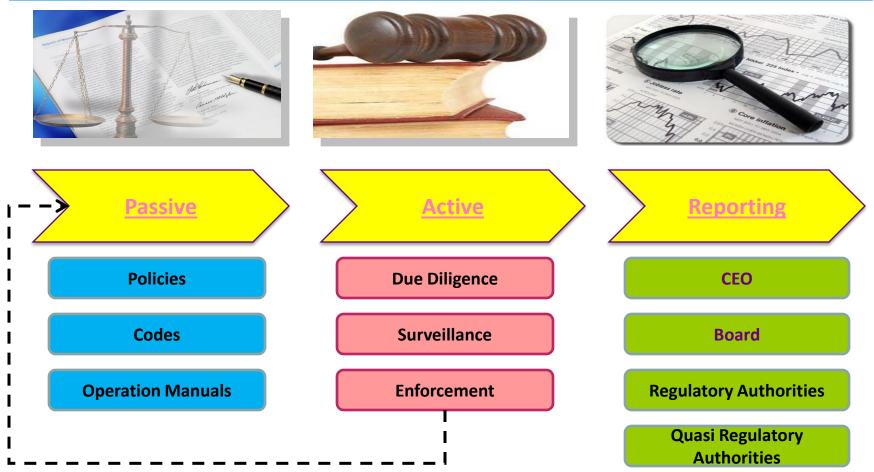
#### **Compliance Business Interface**



**ENTERPRISE-WIDE RISK FRAMEWORK** 



#### Compliance Management – An overview







# **Passive Compliance**

- Policies
  - Internal Policies
  - Anti corruption Policies
  - Policies framed for compliance with specific laws
- Codes
  - Code of Conduct for employees
  - Code of Conduct of Directors
- Operation Manuals
  - Compliance Manual
  - Standard Operating Manuals for various transactions
  - ISO Manual







#### **Active Compliance**

- Due Diligence
  - Compliance Tests (Periodic)
  - Review of various data
- Surveillance/ Monitoring
  - Workplace harassment
  - Insider Trading
  - Anti Money Laundering
  - Customer Complaints
  - Fraud
  - Deviations from Policies
- Enforcement
  - Company Law Compliance
  - Regulatory diktats
  - Fthics
  - Compliance with all Policies
  - Governance Standards







## Reporting as an Arm of Compliance

#### CEO

- MIS Reports on compliance
- Compliance Committee ATRs
- Suspicious Transactions
- Reports under Vigil Mechanism
- Reports under Internal Policies

#### Board

- Compliance Certificate
- Periodic Compliance Test Report along with Exceptions
- Regulatory circular along with implementation status

#### Regulatory Authorities

- SEBI, RBI, IRDA, FMC
- FIU India
- TRAI, DGCA, DGDC, FSSI

#### Quasi Regulatory Authorities

- Stock Exchanges
- Depositories
- Self Regulated Organisations

#### PERHAPS A LITTLE LESS TRANSPARENCY...



Regulatory
Inspections Defending the lapses



## **Compliance Testing**

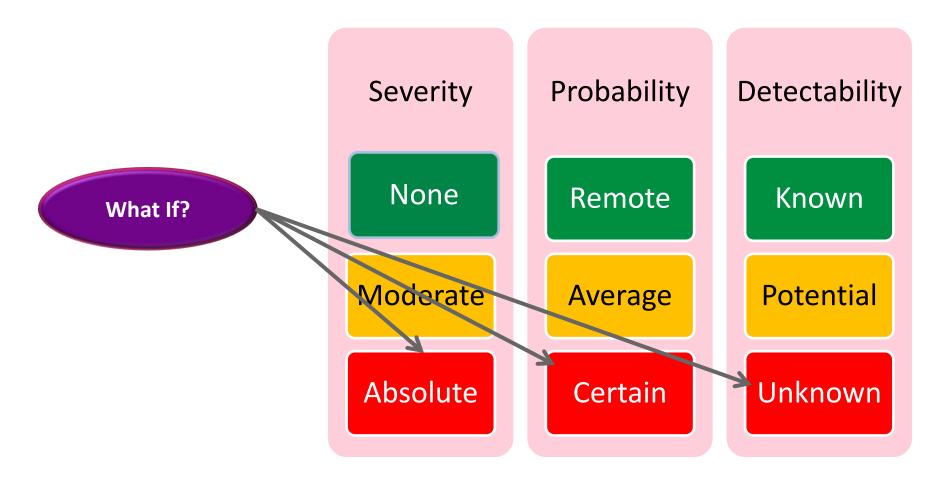
- Certifications as to Compliance with
  - Company Law
  - Business related Laws
  - Regulatory requirements
  - Best practices
- Compliance process involves
  - Collection of certifications from the respective departments
  - Due diligence exercise
  - Rectification of errors
- Internal audit
  - Addressing deficiencies in controls





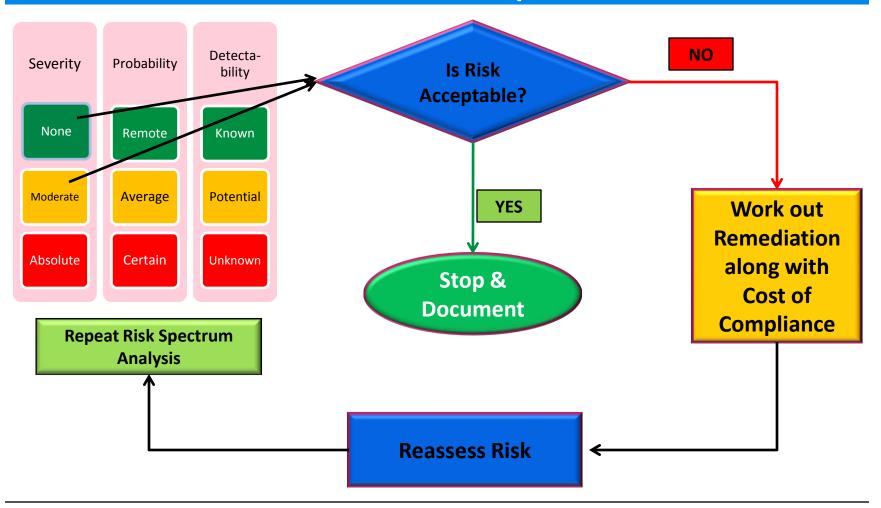


# Compliance Risk Spectrum



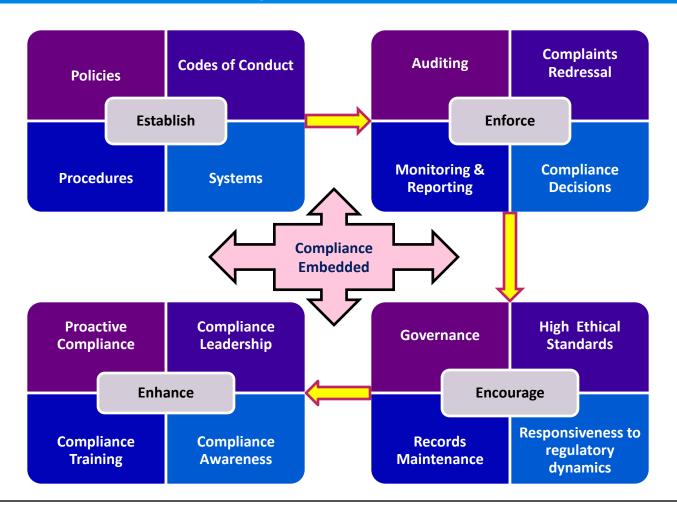


## Assessment of Compliance Risk



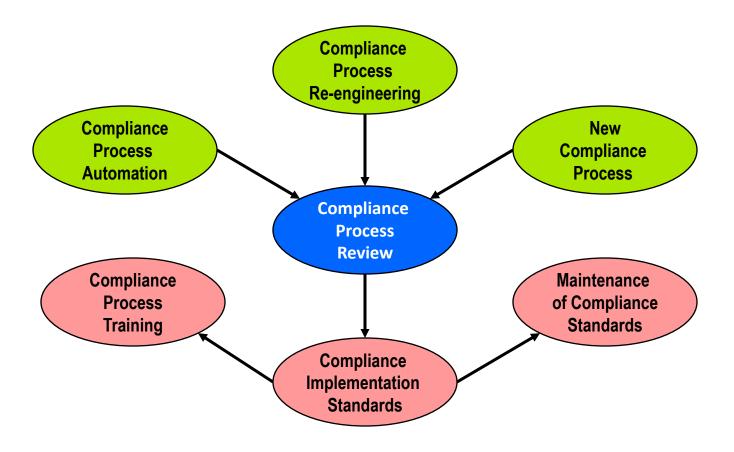


# **Compliance Vision**





# **Dynamic Review Process**





#### Pharma

- Pharmacy Act, 1948
- Drugs and Cosmetics Act, 1940
- Homoeopathy Central Council Act, 1973
- Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954
- Narcotic Drugs and Psychotropic Substances Act, 1985
- Biological Diversity Act, 2002
- Poisons Act 1919
- Food Safety And Standards Act, 2006
- Insecticides Act 1968



#### **Technology**

- The Copyright Act, 1957
- Trademarks Act, 1999
- Patents Act, 1970
- The Information Technology Act, 2000
- Policy relating to Software Technology Parks of India and its regulations
- Semiconductor Integrated Circuits Layout Design Act 2000
- Semiconductor Integrated Circuits Layout Design Rules 2000



#### Infrastructure – Indicative Laws

#### Power

- Electricity Act, 2003
- Central Electricity Regulatory Commission
- Regulations issued by State Electricity Regulatory Commission

#### Airports

- International Civil Aviation Organization
- Regulations issued by Director General of Civil Aviation
- Airports Authority of India Act, 1994
- Regulations issued by Airports Authority of India
- Aircraft Act, 1934
- Aircraft Rules, 1937

#### Roads

- National Highways Act 1956
- National Highways Authority of India Act, 1988
- Regulations issued by National Highways Authority of India.



## Finance (i)

#### Banking

- Reserve Bank of India Act, 1934
- Master Circular issued by RBI and other applicable Circulars
- The Bankers Books Evidence Act, 1891
- The Banking Companies (Legal Practitioner Clients' Accounts) Act, 1949
- The Banking Regulation(Companies) Rules, 1949
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Regional Rural Banks Act, 1976
- The Deposit Insurance and Credit Guarantee Corporation Act, 1961
- Negotiable Instruments Act, 1881
- Banking Regulation Act, 1949
- Credit Information Companies Regulation Act, 2005
- Payment and Settlement Systems Act, 2007
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Foreign Exchange Management Act, 1999



## Finance (ii)

- Capital Market
  - Listing Agreement
  - Listing of Debt Securities
  - Securities and Exchange Board of India Act, 1992
  - Various SEBI Regulations
  - Securities Contracts (Regulations) Act, 1956 & Rules
  - Depositories Act 1996, Regulations & bye-laws
  - National Stock Exchange of India: Rules, Bye-laws
  - Bombay Stock Exchange: Rules, Bye-laws
  - National Securities Depository Limited : Bye-Laws
  - Central Depository Services (India) Limited: Bye laws



## Finance (iii)

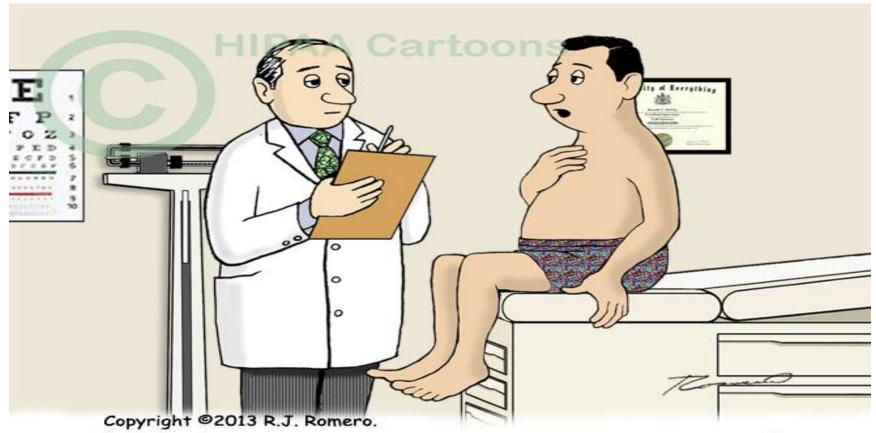
- Insurance
  - Actuaries Act 2006
  - Insurance Act, 1938
  - IRDA Act 1999
  - All Regulations of IRDA
- Commodities Futures
  - Forward Contracts Regulation Act 1952
  - Forward Contracts Rules 1952
  - Byelaws and Rules of all Commodities Exchanges



# Vigil Mechanism & Whistle Blower Policies

A Compliance Perspective





"I've been getting annoying pangs of conscience when faced with ethical dilemmas. Got anything for that?"



## Why Vigil?

- To provide for
  - Adequate safeguards against victimization of employees and directors
  - Direct access to the chairperson of the Audit committee or the director nominated to play the role of audit committee
- To be appropriately communicated within the organization
- Repeated frivolous complaints filed by a director or an employee
  - ACB may take suitable action against the concerned director or employee including reprimand



## Whistle Blower Policy Evolution

 The Law Commission of India recommended adoption of Public Interest Disclosure (Protection of Informers) Act, 2002  SC directive for protection of whistleblowers. CVC authorised to act on complaints from whistleblowers  Administrative Reforms commission II recommended that a legislation should cover corporate whistleblowers

2003



2004



2007



- CII Task Force on Corporate Governance recommends making Whistle Blower Policy mandatory under clause 49
- SEBI make it mandatory for listed companies to have a whistle Blower mechanism
- Whistleblowers Protection Act 2011 passed in 2014.
- Section 177 of the of Companies Act, Introduced

2009



2010



2014





## Vigil Mechanism -Applicability

- Every listed company [Section 177(9)]
- Companies specified under Chapter XII Rules
  - Companies accepting public deposits
  - Companies with borrowings in excess of Rs. 50 Cr.
- Companies that are required to constitute ACB shall operate through the ACB
  - Members with conflict of interest shall recluse themselves
- Other Companies
  - The Board shall nominate a director to play the role of ACB
  - Other directors and employees may report their concerns.



## Vigilant Person/Whistleblower/Tipster

- Finds that another director or employee or an outsider reports to the management
  - Conducts that may inappropriately affect the image, credibility or financials of the Company
  - Without expecting any reward in return
- The matter so reported by any employee or director of the company shall be considered to be 'VIGILANCE'



## Whistle Blowing – Clause 49

- Vigil Mechanism for Directors and Employees
  - To report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy
- Should also provide for adequate safeguards against victimization of Directors / Employee who avail of the mechanism
  - Also provide for direct access to the Chairman of the Audit Committee in exceptional cases.
- The details of establishment of such mechanism shall be disclosed by the company on its website and in the Board's Report.





## Awe – Inspiring!!!



"I'm sensing confidence, boldness, and moral sensibility. You're not going to turn out to be a whistleblower, are you?



## Advantages

- Enables employees to express serious concerns having grave impact on business
- Provides
  - A channel to the employees and Directors to report their concerns about
    - unethical behavior
    - actual or suspected fraud
    - violation of the codes of conduct etc.
  - Adequate safeguards against victimization
  - Direct access to the Chairman/ CEO/ ACB Chairman in exceptional cases



## Disclosures about Vigil Mechanism

- Appropriate publicity be given to all stake holders
- Educative sessions for employees
- Mandatory
  - Website
  - Board Report





## **General Types of Offences**

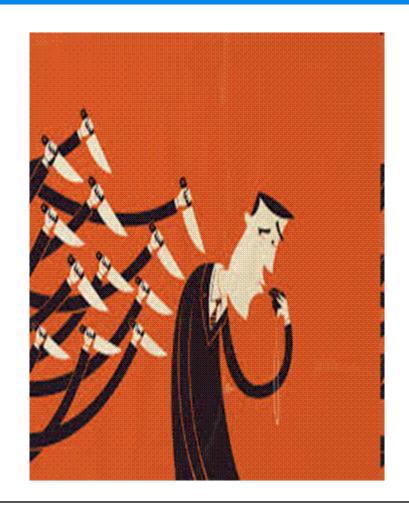
- Forgery or alteration of documents
- Unauthorized alteration or manipulation of computer files
- Fraudulent financial reporting
- Pursuit of a benefit or advantage in violation of the company's interest
- Misappropriation/misuse of Company's resources, like funds, supplies, or other assets
- Authorizing/receiving compensation for goods not received/services not performed
- Fraudulent Insurance Claims

- Authorizing or receiving compensation for hours not worked
- Improper use of authority
- Release of Proprietary Information
- Kickbacks
- Theft of Cash/Assets
- Theft of Goods/Services
- UnauthorizedDiscounts/approvals/sanctions
- Falsification/Destruction of Company Records
- Work Place Harassment



## Compliance Officer as Whistle Blower

- Compliance Officer most exposed to the risk
- Always sandwiched between the regulator and promoter
- Prone to industry apartheid
- Career comes to grinding halt once the whistle is blown
- Threat to life
- Protection from the regulator only on paper





#### Whistleblower Protection Act – A Farce?

- A whistleblower is NOT defined
  - Instead he is defined as a "Complainant"
- Applicable to Government establishments ONLY
- Mechanism to
  - Investigate alleged corruption and misuse of power by public servants
  - Protect anyone who exposes alleged wrongdoing in government bodies, projects and offices.

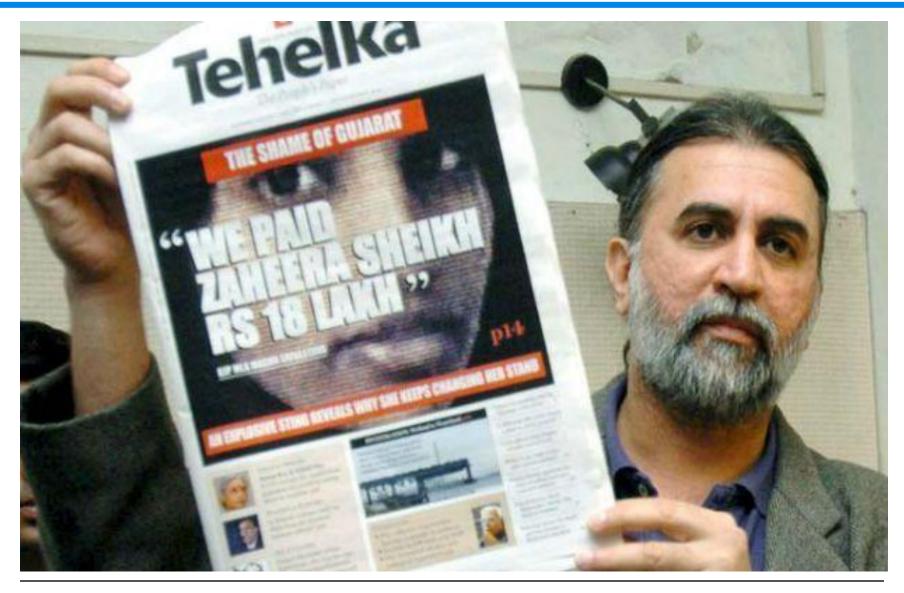




## Prevention of Sexual Harassment

A Compliance Perspective







#### Sexual Harassment

- Laws against harassment
  - The Sexual Harassment of women at workplace (Prevention, Prohibition and Redressal) Act, 2013.
    - Rules, 2013.
  - Indian Penal Code, 1860.



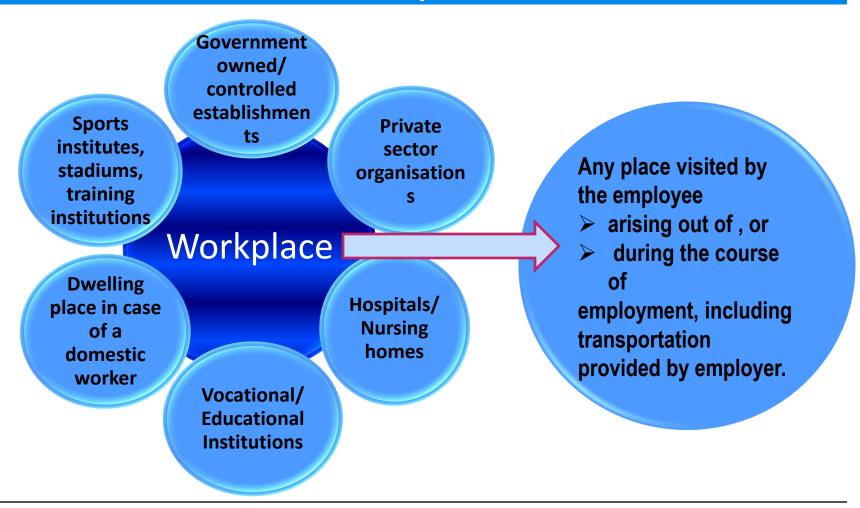


#### Definition

- Sexual harassment includes
  - Physical contact & advances
  - A demand or request for sexual favours
  - Making sexually coloured remarks
  - Showing pornography, or
  - Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.
- In order to constitute a Sexual Harassment, the act or behavior must be
  - Sexual in nature
  - Must be unwelcome
  - Must occur at workplace
- If the complainant had welcomed the respondent's conduct, the incident cannot be considered sexual harassment



## Workplace





## Internal Complaints Committee

- To be set up by the Organisation
  - Presiding Officer must be a senior woman officer employed at the workplace/organisation
  - Not less than two members from persons with experience in social work/law and committed to woman cause
  - One member who knows about issues of sexual harassment from NGO's working on women's causes
  - At least half of the members of ICC shall be women

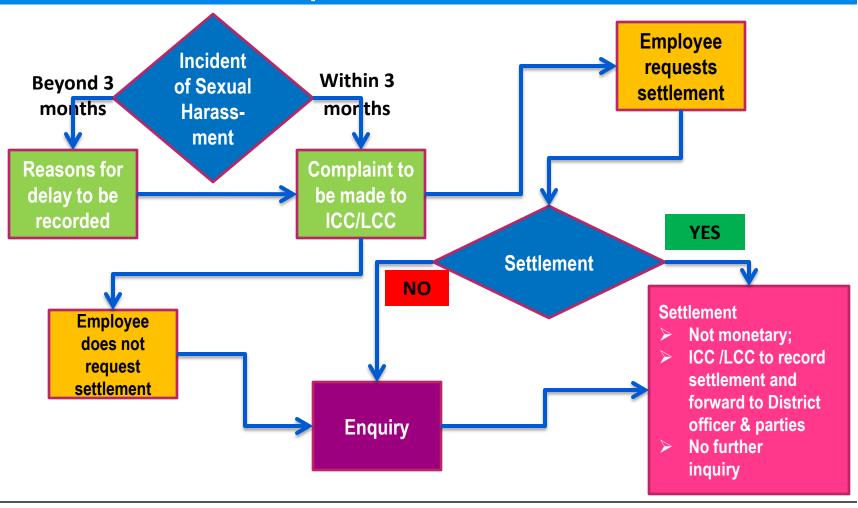


#### **Local Committee**

- To be set up by the District officer
  - Chairperson : A woman in social work committed to the cause of women
  - One member from women working in block, taluka, ward or municipality in the district
  - Two members of whom at least one shall be of women nominated from an NGO which is committed to social cause of women
  - Officer dealing with social welfare or women and child development in the District.



## **Complaint Procedure**





## **Duties of Employer**

- Provide a safe working environment at the workplace
- Display at any conspicuous place the penal consequences of sexual harassment
- Organize Workshops and Awareness Programs.
- Provide necessary facilities to the ICC/LCC for dealing with Complaints and Inquiry
- Make available the information to ICC/LCC as it may require having regard to Complaint
- Provide assistance to the women if she is so chooses to file a Complaint
- Treat Sexual Harassment as misconduct
- Monitor the timely submission of reports by the Internal Committee



## Penalty

- Where the employer fails to-
  - Constitute an Internal Committee
  - Contravenes or attempts to contravene or abets contravention of any provisions of the Act or any rules made there under
- Punishable with fine which may extend to Rs. 50000 /-
- If any employer commits any offence under this Act and is convicted of the same offence,
  - He shall be liable to twice the punishment, imposed on first conviction.
  - Cancellation, of his license or withdrawal, or non-renewal, or approval, or cancellation of the registration, as the case may be, by the Government or local authority required for carrying on his business or activity

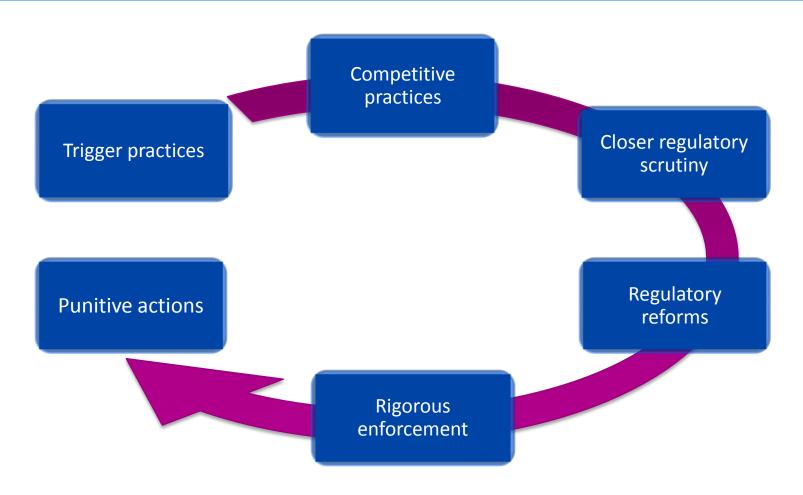


## **Evolving Regulatory Environment**

A birds eye view



## Regulatory Activism





## Happening...









- Vigorous enforcement of existing regulations
- Prime focus on protection of the interests of the investor and market stability
- Rigor on accuracy and timelines for submission of data
- Insistence on more transparent disclosures by intermediaries
- Wider scope for inspections
- Stricter enforcement of AML measures
- High monetary penalties



#### On the Anvil ...



- Competition compliance gaining importance
  - Exorbitant penalties await violation of Competition Act
- High penalties by SEBI
- SAT des not consider 'mercy' petitions
- FMC also becoming active
- IRDA getting to penalties mode
- Increased frequency of inspections
- Inspection by MC A?
- High penalties and imprisonment for tax evasion
- CFT and AML requirements being made more stringent



## Brace up for...

- Technology intensive business procedures and internal controls
- Strengthening and widening the ambit of internal audit
- Installing more robust internal control systems for complying with regulatory requirements
  - Thanks to Secretarial Audit!
- Very high standards in regulatory compliance
- If you a market leader, remember you have added exemplary responsibilities
- Conflicts of interest between pressure on bottom lines and cost of compliance





## The Dilemma of Costs





## Compliance Vs Profitability

- Key issues for business include -
  - Minimising compliance costs
  - Achieving required outcomes without reducing rate of return on capital
- 'Gartner Voice' research analysts have concluded that
  - "Organizations that choose individual solutions for each regulatory challenge they face will spend 10 times more on compliance projects than those that leverage each implementation for multiple requirements."
  - "Over the past few years...budgets that were dedicated to dealing with regulations were rising at a rate that was twice as fast as the IT budgets."
- Gartner study also found that firms that have embraced compliance as a core principle in business automation strategies have enjoyed -
  - 17% higher revenues
  - 14% higher profits
  - 18% higher customer satisfaction rates
  - 17% high customer retention levels
  - 96% reduction in financial loss from customer data theft
  - 50% reduction in data breaches, and related losses
  - 50% less spending on compliance annually



## **Gartner Recommendations**

- Combine compliance requirements and build synergistic solutions
  - The effort saves time and money as well as establishes a framework for responding to future requirements
- Understand, categorize and communicate the risks of noncompliance to your business
- Agree on a preferred risk profile
- Create an explicit link between compliance, performance management and value
- Manage compliance as a program, not a project
  - Regulatory compliance must be continuous
- Effective compliance requires organizational support, process control methodology and content control.
- To control compliance costs, look for commonality in compliance requirements
  - Use an investment approach for budgeting



## Compliance Benefit Analysis

**Cost of Compliance** 

**Policy** 

**Surveillance** 

**Enforcement** 

**Audit** 

**Awareness** 

Cost of Non-Compliance

**Fines & Penalties** 

**Business Disruption** 

**Productivity Loss** 

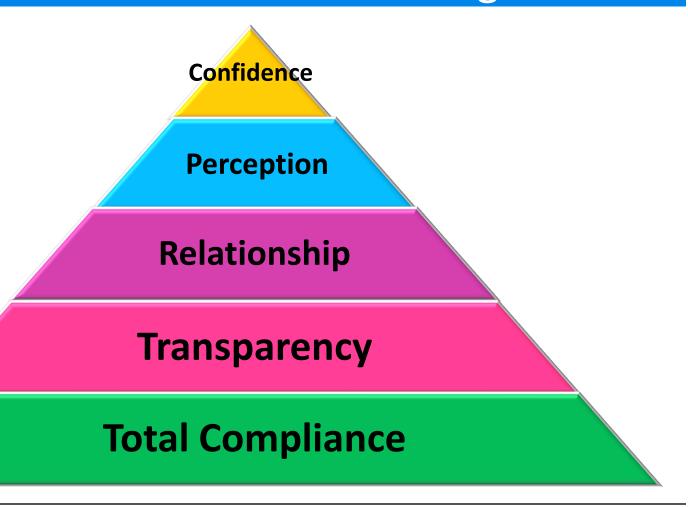
**Revenue Loss** 

27% Direct Costs 43% Indirect Costs 30%
Cost of
Opportunities
Lost

"The True Cost of Compliance" a Benchmark Study of 46 Multinational Organizations conducted by Ponemon Institute Inc, US - January 2011.



## How to Win Confidence of a Regulator?









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