Message from the President

Udai Diwas, 01 January, 2015

Leniency Programmes under Anti-Trust Laws

Participation of Directors in the Board Meeting through Video Conferencing

Vigil Mechanism and its Effectiveness

Circulars, Notifications, Orders, Amendment, Rules under Companies Act, 2013, Press Release (since last issue of e-CS Nitor)

Views/Suggestions solicited on Report of the Financial Sector Legislative Reforms Commission (FSLRC)

14th ICSI National Awards for Excellence in Corporate Governance, 19 December, 2014

Meeting with Shri P Radhakrishnan, Hon’ble Minister of State for Road Transport and Highways

CS R. Sridharan, President, ICSI, CS Sutanu Sinha, Chief Executive and Officiating Secretary & Dr. S. K. Dixit, Joint Secretary - PD-I, PP & Coordination meeting with Shri P Radhakrishnan, Hon’ble Minister of State for Road Transport and Highways

ICSI Convocation 2014

Shri Ashishkumar Chauhan, MD and CEO, BSE Limited, Chief Guest lighted the lamp. CS R Sridharan, President, ICSI, CS Sutanu Sinha, Chief Executive and Officiating Secretary and CS Gopal Chalam, Regional Director, ICSI-WIRC were present at the Convocation ceremony.

ICSI Events

• 14th ICSI National Awards for Excellence in Corporate Governance on 19th December, 2014 at 3.00 p.m. at Hotel The Ashok, New Delhi.
• Udai Diwas on 1st January, 2015 at Chennai.
Dear Member,

Declaring an inflection point, particularly when the underlying forces at work have been operating for some time, is a major claim. What justifies it, we believe, isn’t just the growing pace and scale of these forces, but the ways in which they are coming together to change the dynamics we are accustomed to experiencing on both the demand and the supply side of the global economy.

-Richard Dobbs, Sree Ramaswamy, Elizabeth Stephenson, and S. Patrick Viguerie

As the year 2014 folds up it brings cheers to all of us. The Central Statistical Office (CSO) pegged GDP growth for the September 2014 quarter at 5.3%, which is indeed a pleasant surprise to the markets, the highest growth rates achieved in sectors - community, social and personal services (9.6 percent) and financing, insurance, real estate and business services (9.5 percent). At the same time, Retail inflation for India measured by Consumer Price Index (Urban and Rural), fell to 4.4 per cent, a record low in November 2014. This was the third consecutive month that it fell to a record low.

Another much awaited policy initiative is that the Cabinet Committee on Economic Affairs has approved raising of FDI cap in Insurance sector to 49% from 26% and with the cabinet approving the amendments to Insurance Laws (Amendment) Bill now would be taken by Parliament. Earlier this year, while presenting the Budget, Hon’ble Finance Minister Shri Arun Jaitley had said that the Insurance sector is investment starved. Several segments of the Insurance sector need an expansion. Further, Companies (Amendment) Bill, 2014 proposes certain amendments in the light of ease of doing business.

As India ushers in for another round of well growth oriented period, it is necessary for us to understand futuristic trends, so as to align development of profession in the years ahead. Acceleration in the scope, scale,
content and economic impact of technology will bring in new age of artificial intelligence, exquisite consumer gadgets, seamless flow of communication and boundless information which will be hik ing up the business model and waves of these changes will affect the dynamics of services sector in unimaginable ways.

With the increase in expectations of business and industry, the role of Company Secretaries as knowledge professionals is also increasing, requiring them to imbibe the necessary skills, aptitude and attitude including integrity, intelligence, perseverance etc. to identify the leader within themselves.

Recently, I came across thought provoking article of Uniliver’s CEO Paul Polman about Capitalism in McKinsey Quarterly and I would like to give excerpts of the same …“Capitalism needs to evolve, and that requires different types of leaders from what we’ve had before. Not better leaders, because every period has its own challenges, but leaders who are able to cope with today’s challenges. Most of the leadership skills we talk about—integrity, humility, intelligence, hard work—will always be there. But some skills are becoming more important, such as the ability to focus on the long term, to be purpose driven, to think systemically and to work much more transparently and effectively in partnerships. There are enormous challenges, but business leaders thrive on them and are well placed to solve them, as they also offer enormous opportunities.”

My advance New Year greetings to you and I conclude with a poem by Alfred Tennyson-

“Hope
Smiles from the threshold of the year to come,
Whispering 'it will be happier'…”

Regards,

CS R. Sridharan
President
president@icsi.edu

UDAII DIWAS (January 1, 2015)

The Company Secretaries Act, 1980 (No. 56 of 1980) was passed on 10th December 1980. This day became the first mile stone in the development of the profession. The Central Government appointed 1st day of January, 1981 as the date on which the Act came into force vide its Notification No. S.O. 989 (E) and published in the Gazette of India Extraordinary dated 27th December, 1980. The Council of the Institute has decided to celebrate 1st January, 2015 as “Udai Diwas”, through Regional Councils and Chapters. A mega programme will be organised at Chennai. The details will be intimated to you shortly.

Let us all celebrate this day!!
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Introduction

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency. In addition, agency decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The terms immunity, leniency and amnesty are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions. A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency program, which also includes internal agency processes, for example how the agency implements their leniency policy.¹

An increasing number of competition authorities operate leniency programmes (sometimes also called immunity or amnesty programme) as a key tool to detect cartel infringements. In criminal law, there is a provision for pardon, wholly or partly, in respect of offences perpetrated, if the guilty admits the offence and turns as an approver to bring home the guilt of others.

On the analogy of criminal jurisprudence, when a member of Cartel breaks the rank and make full, true and vital disclosures which results in bursting the ‘Cartel’, the Competition Commission of India (CCI) has been empowered to levy lesser penalty under the Competition Act, 2002. The scheme is designed to induce member of a Cartel to defect from the cartel agreement. The party making disclosure will, however, be subject to other directions of the CCI as per provisions of the Act.²

Rationale for Assessing Cartels in India

Competition law in India seeks to promote, maintain and sustain competition in market being beneficial to various stakeholders in society. ‘Cartel’ is presumed to have Appreciable Adverse Effect on Competition (AAEC). In case of ‘Cartel’, competitors agree not to compete on price, product, customers etc. Since in the case of a Cartel, direct competitors agree to forego competition and opt for collusion, the consumers and business houses lose the benefits of competition. Thus, cartels are inherently harmful. Further, competitors know that such an agreement is unlawful and it compels them to keep such agreement secret and consequently it is invariably not reduced to writing and it is often found to be in the form of arrangement or understanding. Moreover, the best evidence against ‘Cartel’ is usually in possession of the charged parties, which are not likely to easily part with and make available to the investigator or enquiring authority. These compulsions seem to have persuaded the law makers in India to prescribe that ‘Cartel’ is presumed to have appreciable adverse effect on competition.

* The views expressed are personal views of the author(s) and do not necessarily reflect those of the Institute.
Cartels are particularly a form of anti-competitive activity. Their purpose is to increase prices by removing or reducing competition and as a result they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have an adverse effect on the wider economy as they remove the incentive for businesses to operate efficiently and to innovate.

Cartels are agreements between enterprises (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice.

Enterprise is defined in section 2 (h) of the Competition Act, 2002 as to means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space". A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets.

**International Cartels** - An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

**Import Cartels** - Import cartels comprise enterprises (including association of enterprises) that get together for the purpose of imports into the country.

**Export Cartels** - An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In terms of provisions of the Competition Act, 2002 cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements.

**Cartels to be void** - Agreements between enterprises engaged in identical or similar trade of goods or provision of services (commonly known as horizontal agreements), including cartels, of four types specified in the Act are presumed to have appreciable adverse effect on competition and, therefore, are anti-competitive and void.

**Common Features of Cartel** - Usually cartels function in secrecy. The members of a cartel, by and large, seek to camouflage their activities to avoid detection by the authorities. Perpetuation of cartels is ensured through retaliation. If any member does not abide, the other cartel members retaliate through temporary price cuts to take business away or can isolate the non abiding member. Another method, known as compensation scheme, is resorted to in order to discourage indiscipline. Under this scheme, if the member of a cartel is found to have sold more than its allocated share/it would have to compensate the other members.

**Conditions Conducive to Formation of Cartels** - Small number of firms in an industry, high concentration, barriers to entry, low technological advancement, homogeneous product, strong ability of competing firms to exchange information on price and other terms of sale, uniformity in cost or efficiency, severe punishment which can be inflicted on the cheater, and effective trade association etc. make it conducive for firms to cartelize and to continue as such on a long term basis. The less fear of detection and punishment also encourages firms to cartelize.
If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion
- Possibility of getting detected and punished
- Likelihood of cheating
- Quantum of benefits expected from cartelisation over and above penalties which can be imposed

LENIENCY PROGRAMMES

Leniency programmes are considered to be the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects. These programmes involve a commitment to a pattern of penalties designed to increase incentives to cartelists to self-report to the competition law authority.

In many countries there is a concept of Marker systems in leniency programmes. A marker system is a system whereby an entity can claim a position in the queue of all those seeking to make a disclosure. The catch is that this is done without providing all the information that would be necessary to complete the application. In other words, certain basic information has to be given at the time the marker is claimed. Such information may include information related to the parties to the cartel, the duration and nature of illegality, the product markets and territorial markets affected, and any parallel leniency applications. However, the detailed information on the financial position of the enterprise making the application and other such information can be submitted later. Countries which have introduced marker system in their leniency programme include Australia, Brazil, Bulgaria, Canada, Cyprus, Czech Republic, European Commission, France, Germany, Romania, Turkey, UK, and U.S.

In the U.S., this program is arguably the most significant policy development in the fight against cartels since the Clayton Act instituted private treble damages in 1914. The 1993 revision of the Corporate Leniency Program of the U.S. Department of Justice’s Antitrust Division gives a member of a cartel the opportunity to avoid government penalties if it is the first to fully cooperate and provide evidence. The widespread usage of the leniency program in the U.S. soon led to the adoption of similar programs in other countries. In 1996, the European Commission (EC) instituted a leniency program and a decade later 24 out of 27 EU members adopted the leniency programmes. Today, leniency programs are found across the globe from Canada to the United Kingdom to Japan to South Africa to Brazil.

Essential elements of an Effective Leniency Programme/Policy

OECD Report on Leniency Programmes observed that the key to an effective leniency programme is that there should be a high degree of predictability, transparency and certainty, together with a low burden of proof, heavy penalties and an emphasis on priority.

The US Department of Justice identifies six key components of an effective leniency policy, as under:

1. transparency and predictability of the operation of the policy
2. maximum possible reward for those who qualify
3. the benefits of the policy should be limited to the first to qualify
4. the policy should provide full protection for cooperating corporate executives
5. the cooperation requirements of the policy should be clear and not related to the value of the evidence
6. the policy should provide for prompt notification to the applicant of the outcome of their application.

Prof. Richard Whish at the ICN Curriculum Module observed that:
1. There should be severe sanctions for members of a cartel who do not report them to a competition authority.
2. It should be clear that there is a high degree of likelihood that participants in cartels who do not report them to a competition authority will be discovered and punished.
3. The leniency programme itself should be transparent and predictable so that firms understand precisely how the process of making an application to a competition authority will work.

LENIENCY PROGRAMME IN INDIA

Section 46 of the Competition Act, 2002 provides that “The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

1. not complied with the condition on which the lesser penalty was imposed by the Commission; or
2. had given false evidence; or
3. the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.”

Conditions to avail Benefits of Leniency Provisions

The applicant must:

i. provide the information before the receipt of the report of investigation directed under section 26 of the Act.
ii. cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the Commission.

iii. provide vital disclosure in respect of violation under subsection (3) of section 3 of the Act.

iv. provide all relevant information, documents and evidence as may be required by the Commission.

v. co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission.

vi. not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.

vii. The reduction in monetary penalty will depend upon following situations:-

- the stage at which the applicant comes forward with the disclosure,
- the evidence already in possession of the Commission,
- the quality of the information provided by the applicant,
- the entire facts and circumstances of the case.

**Procedure for Grant of Lesser Penalty**

- The applicant can make application as per the contents specified in the Schedule either orally, or through e-mail or fax to the designated authority

- The Commission shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant but mere acknowledgement shall not entitle the applicant for grant of lesser penalty

- The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority

- Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.

- Lack of continuous cooperation entitles Commission to reject the application after providing due opportunity of hearing to that applicant.

- After rejection of the priority status of first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission.

**Quantum of Immunity under Leniency Provisions**

The quantum of immunity available under leniency provisions in comparison to penalty prescribed under clause (b) of the section 27 of the Act is as under:-

- Benefit of reduction in penalty upto or equal to 100% is available to the applicant if he is the first to make a vital disclosure enabling the Commission to form a prima-facie opinion regarding the existence of a cartel on the basis of evidence submitted.

- Benefit of reduction in penalty upto or equal to 100% is available even if the matter is under investigation but without disclosures made by the applicant; the Commission or the Director General did not have sufficient evidence to establish such a contravention.
- Benefit of reduction in penalty upto or equal to 100% will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission.

- The second or third applicant in the priority status may also be granted benefit of reduction in penalty to the tune of 50% and 30% of the full leviable penalty respectively on making a disclosure by submitting evidence, which provide a fillip to the already available evidence with the Commission or Director General for establishing the existence of the cartel.

**Leniency Programmes – International Position**

**United Kingdom**

The two principal national legislation dealing with cartel activity in the United Kingdom are the Competition Act 1998 and the Enterprises Act 2002 (both amended by the Enterprise and Regulatory Reform Act 2013). The Office of Fair Trading (OFT) has been closed on March 31, 2014 and the responsibility for cartel enforcement is taken over by the Competition and Markets Authority (CMA) on April 1, 2014.

The following is the types of leniency provided under OFT leniency programme:

- **Type A immunity**: First to come forward and no pre-existing investigation
- **Type B immunity**: First to come forward but there is a pre-existing investigation
- **Type C leniency**: Not first to come forward but can ‘add significant value’

**Canada**

In Canada the Competition Act, 1985, Competition Rules 1985 and Competition Rules 2005 regulates cartel activity and controlled by Competition Tribunal and Competition Bureau. The process involved in availing the leniency programmes is as under:

- **Requesting a Leniency Marker**: A "leniency marker" is the acknowledgement given to a leniency applicant (Applicant) that records the date and time of an applicant's application to the Leniency Program. It establishes the applicant's position in line in relation to other individuals or organizations seeking to participate in the Leniency Program. The leniency marker guarantees the applicant's position in line, subject to the applicant meeting all of the other criteria of the Leniency Program.

- **The Proffer**: After receiving a leniency marker, an applicant must provide the Bureau with a statement known as a proffer. In a proffer, an applicant describes in detail the illegal activity, its role in the offence for which leniency is sought, and the effect of the illegal activity in Canada. The applicant must also outline all of the supporting evidence and witnesses that it can provide at that point in time as part of its cooperation under the Leniency Program. The Bureau considers a proffer to be complete on receipt of sufficient information to make a leniency recommendation to the Public Prosecution Service of Canada (PPSC).

**Japan**

The cartel activities in Japan is regulated by Japan Fair Trade Commission (JFTC) and provides for the following immunity under its leniency programme.

1. **Full immunity from surcharges** is offered to the entrepreneur who is the first among the entrepreneurs that committed the violative activities to apply for leniency before the JFTC’s investigation is initiated.

2. Japan has a system whereby the JFTC has some discretion to bring criminal charges at the Prosecutor General against an entrepreneur and its employees engaging in cartel activities.
(3) Under the Japanese leniency programme, a total maximum of three entrepreneurs, including those who apply for leniency after an investigation is initiated, can receive immunity from or reduction of surcharges.

(4) To heighten the incentive to provide the JFTC with information as early as possible, a marker system has been introduced.

(5) To apply for leniency, the applicant must transmit by facsimile a written report providing the necessary information. It is sufficient, however, for applicants to report detailed information orally rather than in writing.

(6) The application form must be completed in Japanese. If relevant materials are written in foreign languages, the key points of these materials should be selected out and translated into Japanese. As for parts other than the key points of the materials, applicants are only required to prepare a Japanese translation of such parts if so requested by the JFTC.

Malaysia

Section 41 of the Malaysian Competition Act 2010 of Malaysia provides for a leniency regime with a reduction of up to a maximum of 100% of any penalties that would be otherwise imposed. In essence, the leniency program is designed to encourage those who are involved in cartel practices to whistle blow by cooperating with the Commission in identifying the infringement. The cartel activities are controlled by Malaysia Competition Commission.

Section 41 of the Malaysian Competition Act states that there shall be a leniency regime, with a reduction of up to a maximum of one hundred percent of any penalties which would otherwise have been imposed, which may be available in the cases of any enterprise which has—

(a) admitted its involvement in an infringement of any prohibition under sub-section 4(2); and

(b) provided information or other form of co-operation to the Commission which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.

(2) A leniency regime may permit different percentages of reductions to be available to an enterprise depending on—

(a) whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission;

(b) the stage in the investigation at which—

(i) an involvement in the infringement was admitted; or

(ii) any information or other co-operation was provided; or

(c) any other circumstances which the Commission considers appropriate to have regard to.

Singapore

The cartel activities in Singapore are controlled by Competition Commission of Singapore (CCS). The following are the highlights of the leniency programme provided.
Eligibility for leniency application

The Leniency Programme offers different levels of benefits to businesses depending on:

- Whether the business is the first to come forward with information about the cartel; and
- Whether CCS has already commenced investigations when the undertaking comes forward.
- Total immunity from financial penalties

Reduction of up to 100% in the level of financial penalties: If a business is the first to come forward to CCS seeking leniency and it satisfies all the requirements but it only comes forward after CCS has started an investigation, such business undertaking does not qualify for total immunity but it may still qualify for a reduction of up to 100% of the financial penalty. The extent of the reduction depends, amongst others, on:

  - The stage of the investigation at which business came forward;
  - The evidence that is already in CCS’ possession; and
  - The quality of the information provided by business.

Reduction of up to 50% in the level of financial penalties: If a business is not the first to come forward, it may still be granted a reduction of up to 50% of the financial penalty if it come forward before CCS issues a notice of proposed infringement decision under section 68(1) of the Act.

Quality of Information provided by the leniency applicant: Regardless of whether applying for immunity, reduction of up to 100% or reduction of up to 50% in the level of financial penalties, a business will have to, at a minimum, provide information and evidence to CCS which would allow CCS to commence an investigation or add significant value to an ongoing CCS investigation.

Leniency Plus: In addition to the leniency programme, CCS also operates a leniency plus programme. Leniency plus incentivises businesses that are co-operating with CCS in a cartel investigation in one market (the first market) to inform CCS about their participation in a completely separate cartel in another market (the second market). To qualify for leniency plus a business would have to satisfy CCS:

  - That the information and evidence provided by the business relating to the cartel in the second market, is in fact a completely separate cartel from the cartel in the first market; and
  - That the business is the first to come forward to CCS with information and evidence about the cartel in the second market and would thus qualify for immunity from financial penalties or a reduction of up to 100%.

If CCS is satisfied of the above, the business is granted leniency (either immunity or a reduction of up to 100%) in relation to the cartel in the second market and it is also be granted a reduction in the financial penalties imposed against it in the investigation in the cartel in the first market, this reduction in financial penalties is in addition to any reduction it has received for its co-operation in the investigation in the first market.

United States of America

The Department of Justice, Antitrust Division gives a leniency applicant a "marker" for a finite period of time to hold its place at the front of the line for leniency while counsel gathers additional information through
an internal investigation to perfect the client’s leniency application. While the marker is in effect, no other company can "leapfrog" over the applicant that has the marker.

_Type A Leniency:_ Leniency is granted to a corporation reporting illegal antitrust activity before an investigation if the following six conditions are satisfied:

- At the time the corporation comes forward, the Division has not received information about the activity from any other source.
- Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.
- The corporation reports the wrongdoing with completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.
- The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
- Where possible, the corporation makes restitution to injured parties.
- The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the corporation does not meet all above of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

_Type B Leniency:_ A company qualifies for leniency even after the Division has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, if the following conditions are satisfied:

- The corporation is the first to come forward and qualify for leniency with respect to the activity.
- At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.
- Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.
- The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.
- The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
- Where possible, the corporation makes restitution to injured parties.
- The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation’s role in the activity, and when the corporation comes forward.

References

2. Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program- Joseph E. Harrington, Jr. - Department of Business Economics & Public Policy - The Wharton School - University of Pennsylvania

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Participation of Directors in the Board Meeting through Video Conferencing

Chittaranjan Pal*
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Section 173 of Companies Act, 2013 deals with Meetings of the Board. It is provided that the first Board meeting should be held within thirty days of the date of incorporation. There shall be minimum of four Board meetings every year and not more one hundred and twenty days shall intervene between two consecutive Board meetings. The Act enables participation of directors through video conferencing in order to enhance the participation of directors, to address quorum related issues with respect to director residing abroad etc. The procedural aspects relating to participation of directors through video conferencing are dealt under Rule 3 and Rule 4 of Companies (Meeting of Board and its Powers) Rules 2014.

As per the explanation to rule 3 of Companies (Meetings of Board and its Powers) Rules, 2014 ‘video conferencing or other audio visual means’ means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

**Participation through video conferencing is permitted under Section 173(2)**

Section 173(2) states that the directors may participate either in person or through video conferencing or other audio visual means as may be prescribed which are capable of recording and recognising the participation of directors and of recording and storing the proceedings of such meetings along with date and time. However, Central Government may prescribe certain matters that shall not be dealt with in a meeting through video conferencing.

Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides for the requirements and procedures required for convening and conducting Board meetings through video conferencing or other audio visual means.

**Video/Audio Visual connection (Rule 3(1))**

Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.

**Duty of the Chairman/Company Secretary (Rule 3 (2))**

The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care:

(a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(b) to ensure the availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

(c) to record the proceedings and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;

* The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
(e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

(f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting. Differently abled persons may request the Board to allow a person to accompany him/her.

Notice of the Meeting (Rule 3(3))

The notices of the meeting shall be sent to all the directors in accordance with the provisions of sub-section (3) of section 173 of the Act. The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

Director to communicate his intention to participate through video conferencing (Rule 3(3))

A director intending to participate through video conferencing mode or audio visual means shall communicate his intention to the Chairman or the company secretary of the company. If the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangement in this behalf. The director, who desire, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year. In the absence of any such intimation from the director, it shall be assumed that the director will attend the meeting in person.

Chairman’s Roll call at the commencement/Conclusion/ Recommencement of meeting (Rule 3(4) and 3(5))

At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio visual means shall state, for the record, the following namely:

(a) name;
(b) the location from where he is participating;
(c) that he has received the agenda and all the relevant material for the meeting; and
(d) that no one other than the concerned director is attending or having access to the proceedings of the meeting at the location mentioned in (b) above.

After the roll call, the Chairperson or the Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairman and confirm that the required quorum is complete. The roll call shall also be made at the conclusion of the meeting and at the re-commencement of the meeting after every break to confirm the presence of a quorum throughout the meeting.

Place of the Meeting (Rule 3(6) and Rule 3(7))

With respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place. The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode if they have given their consent to this effect and it is so recorded in the minutes of the meeting.
Other Procedures (Rule 3(8) to 3(12))

- Every participant shall identify himself for the record before speaking on any item of business on the agenda.
- If a statement of a director in the meeting through video conferencing or other audio visual means is interrupted or garbled, the Chairperson or company secretary shall request for a repeat or reiteration by the director.
- If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.
- From the commencement of the meeting until the conclusion of such meeting, no person other than the Chairperson, directors, Company Secretary and any other person whose presence is required by the Board shall be allowed access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board.
- At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, dissented from the decision taken by majority. The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means.
- The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board. Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed. After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson.

Participation through Video Conferencing counted for Quorum

Under Section 174(1), the participation of directors by video conferencing or by other audio visual means shall be counted for the purposes of quorum.

Matters not to be dealt with in a Meeting through Video Conferencing or other Audio Visual Means (Rule 4)

Rule 4 prescribe restriction on following matters which shall not be dealt with in any meeting held through video conferencing or other audio visual means:

(i) the approval of the annual financial statements;
(ii) the approval of the Board’s report;
(iii) the approval of the prospectus;
(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any; and
(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Recognition of participation of directors through video conferencing with adequate control on the technology related matters, would not only reduce the cost to the company, but also would enhance the quality of discussions and rationality in decisions.
Vigil Mechanism & its Effectiveness

Pradeep Soni*

Company Secretary, NTECL

Introduction

Efficient, Transparent, and Impeccable Corporate Governance is vital for stability, profitability, and desired growth of the business of any organization. The importance of such corporate governance has now become more intensified, owing to ever-growing competition and rivalry in the businesses.

Though a Company adopts various preventive measures which lay down the principles and standards including Fraud Prevention Policy, Ethical Norms, Corporate Disciplinary Rules, Code of Conduct for Directors and Senior Management Personnel etc. those govern the actions of the against improper activity; but history shows that these measures were insufficient to prevent fraud and scams.

According to EY’s India fraud Survey 2012, 58% of the companies surveyed witnessed fraudulent activities in 2011. 62% of these indicated that whistle-blowing tips helped in detection of the fraudulent activities. Further 65 per cent of senior executives surveyed also agree that they need to do more to improve their anti-fraud and anti-bribery procedures, including the use of forensic data analytics.

Therefore, it is required to mandate the provision for vigil mechanism under law. A Vigil mechanism provides a channel to the employees to report to the management concerns about unethical behavior, actual or suspected fraud or violation of the Codes of conduct or policy. The mechanism provides for adequate safeguards against victimization of employees to avail of the mechanism and provide for direct access to the Chairman/ CEO/ Chairman of the Audit Committee in exceptional cases.

Whistle Blower Practices / Vigil Mechanism in UK and US

UK

Public Interest Disclosure Act 1998

Public Interest Disclosure Act 1998 (PIDA) provides that if workers bring information about a wrong doing to the attention of their employers or a relevant organization, they are protected in certain circumstances. The law that protects whistle-blowers is for the public interest - so people can speak out if they find malpractice in an organization. Blowing the whistle is more formally known as 'making a disclosure in the public interest'.

Further Workers who 'blow the whistle' on wrongdoing in the workplace can claim unfair dismissal if they are dismissed or victimized for doing so. An employee's dismissal (or selection for redundancy) is automatically considered 'unfair' if it is wholly or mainly for making a protected disclosure.

US

Sarbanes-Oxley Act, 2002

The Sarbanes-Oxley Act, passed in 2002, is aimed primarily at public accounting firms who participate in audits of corporations. It was passed in response to a number of corporate accounting scandals that occurred between 2000-2002. This act set new standards for public accounting firms, corporate management, and corporate boards of directors.

*The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
Section 806 stipulates protection for employees of publicly traded companies who provide evidence of fraud and bare the Company to take action that may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. The Act is federal law to prevent fraud against stakeholders.

**Vigil Mechanism in India**

**Regulatory Framework:**

The section 177 (9) & (10) of the Companies Act, 2013 inter-alia provides that :-

a) Every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed.

b) The vigil mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

c) Provided that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board’s report.

Rule 7 of The Companies (Meetings of Board and its Powers) Rules, 2014 mandates to establish vigil mechanism for two class of Companies i.e. : 1. Companies which accept deposits from the public; and 2. Companies which have borrowed money from banks and public financial institutions in excess of Rs. 50 crore.

Effective October 1, 2014, Clause 49 of the Listing Agreement, inter alia, provides for a mandatory requirement for all listed companies to establish a mechanism called “Whistle Blower Policy” for employees to report to the management instances of unethical behaviour, actual or suspected, fraud or violation of the company's code of conduct.

**Vigilance System in PSUs**

*Chief Vigilance Officer :*

Government appoints the CVO for every PSU for prevention of corruption, malpractices, fraud, bribe cases etc.; and action against these types of practices.

The Vigilance department of the PSU is also empowered to initiate investigations on its own and act on complaints received from public / employees, with regard to violation of Company's rules and procedures and code of ethics in the conduct of business.

*Right to information Act, 2005 :*

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. The object of the Act is as under:

1. To bring accountability
2. To reduce corruption
3. To impact policy decisions and
4. To ensure better governance.
Guidelines issued by Department of Public Enterprises (DPE):

The DPE acts as the nodal agency for all Central PSEs and assists in the formulation of policy pertaining to performance improvement and evaluation, financial accounting, personnel management and in related areas. Corporate Governance Guidelines, 2010 issued by DPE provides that the company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud, or violation of the company's General guidelines on conduct or ethics policy.

Main Ingredient of Whistle Blower Policy

The Whistle Blower Policy should be formulated with such provisions which can build and strengthen a culture of transparency and trust in the organization and provide employees with a framework / procedure for responsible and secure reporting of improper activities within the company and to protect employees wishing to raise a concern about improper activity / serious irregularities within the Company.

The policy should not absolve employees from their duty of confidentiality in the course of their work. It is also not a route for taking up personal grievances.

These are major components of an ideal Whistle Blower Policy:

1. Preface / Preamble:
   This describes the object and requirement of the Policy.
2. Definitions:
   Define the various phrase / words incorporated in the Policy.
3. Eligibility:
   Person(s) who can make application under the Policy.
4. Guiding Principles:
   Principle of natural justice
5. Role and Disqualification of Whistle Blower:
   Function, powers and liability of Whistle Blower
6. Procedure for handling of cases:
   How and Where one can give application/complaint. What shall be entertained and what will be rejected.
7. Investigation:
   Appointment of investigator(s), tenure, term of investigation and submission of final report.
8. Protection:
   Protection of Whistle Blower and direct access to superior authority in exceptional cases.
9. Action:
   Action on report submitted by investigator(s).
10. Reporting and Review:
    Periodical report by Competent Authority and review by Audit Committee.
11. Retention of Documents:
   For five years.

12. Amendments:
   Modification or amendment in provision(s) of the Policy.

13. Directors’ Report:
   Disclosures in the Directors’ Report.

**Role of Effective Vigil Mechanism**

In detailed, an effective Vigil Mechanism:

1. encourages employees to bring ethical and legal violations they are aware of to an internal authority so that action can be taken immediately to resolve the problem;

2. minimizes the organization’s exposure to the damage that can occur when employees circumvent internal mechanisms;

3. brings the confidence amongst the employees that organization is serious about adherence to codes of conduct;

4. detects the system failures and existence of corruption or malpractices;

5. helps to prevent the abasement of authority, breach of contract, manipulation of company data, pilferage of confidential / proprietary information, criminal offence, corruption, bribery, theft, conversion or misuse of the Company’s property, fraudulent claim, and any other unethical biased favoured or imprudent act; and

6. provides safeguard to Whistle Blower.

**Steps for Effective Whistle Blower Policy**

A Policy can be effective only if the following steps are taken:

- Introduction and education of Policy
- Creation of awareness amongst all employees
- Policy should not contain much stringent or impractical provision(s) but it shouldn't be too liberal. The provision shall be enforceable
- Policy should be aligning with Mission, Vision, Core Value and object of the Company
- Get Endorsement from Top Management
- Publicize the Organization’s Commitment
- Investigate and Follow Up
- Assess the Organization's Internal Whistle-blowing System

**Conclusion**

In view of above, now the days, Vigil Mechanism or Whistle Blower system has become a powerful tool for making the processes and systems even more robust and sustainable to deliver the services in the stringent form & manner expected by the people.
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***
Circulars, Notifications, Orders, Amendments, Rules under Companies Act, 2013, Press Release

(since last issue of e-CS Nitor)
The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, today approved the introduction of the Companies (Amendment) Bill, 2014 in Parliament to make certain amendments in the Companies Act, 2013.

The Companies Act, 2013 (Act) was notified on 29.8.2013. Out of 470 sections in the Act, 283 sections and 22 sets of Rules corresponding to such sections have so far been brought into force. In order to address some issues raised by stakeholders such as Chartered Accountants and professionals, following amendments in the Act have been proposed:

1. Omitting requirement for minimum paid up share capital, and consequential changes. (For ease of doing business)

2. Making common seal optional, and consequential changes for authorization for execution of documents. (For ease of doing business)

3. Prescribing specific punishment for deposits accepted under the new Act. This was left out in the Act inadvertently. (To remove an omission)

4. Prohibiting public inspection of Board resolutions filed in the Registry. (To meet corporate demand)

5. Including provision for writing off past losses/depreciation before declaring dividend for the year. This was missed in the Act but included in the Rules.

6. Rectifying the requirement of transferring equity shares for which unclaimed/unpaid dividend has been transferred to the IEPF even though subsequent dividend(s) has been claimed. (To meet corporate demand)

7. Enabling provisions to prescribe thresholds beyond which fraud shall be reported to the Central Government (below the threshold, it will be reported to the Audit Committee). Disclosures for the latter category also to be made in the Board’s Report. (Demand of auditors)

8. Exemption u/s 185 (Loans to Directors) provided for loans to wholly owned subsidiaries and guarantees/securities on loans taken from banks by subsidiaries. (This was provided under the Rules but being included in the Act as a matter of abundant caution)

9. Empowering Audit Committee to give omnibus approvals for related party transactions on annual basis. (Align with SEBI policy and increase ease of doing business)

10. Replacing ‘special resolution’ with ‘ordinary resolution’ for approval of related party transactions by non-related shareholders. (Meet problems faced by large stakeholders who are related parties)

*(Source: PIB Press Release dated 02 December, 2014)*
11. Exempt related party transactions between holding companies and wholly owned subsidiaries from the requirement of approval of non-related shareholders. (corporate demand)

12. Bail restrictions to apply only for offence relating to fraud u/s 447. (Though earlier provision is mitigated, concession is made to Law Ministry & ED)

13. Winding Up cases to be heard by 2-member Bench instead of a 3-member Bench. (Removal of an inadvertent error)

14. Special Courts to try only offences carrying imprisonment of two years or more. (To let magistrate try minor violations).

***
The Financial Sector Legislative Reforms Commission (FSLRC) was set up by the Government of India in March 2011 with a view to rewriting and cleaning the financial sector laws to bring them in tune with current requirements. The Commission submitted its report to the Government on March 22, 2013.

The Ministry of Finance, Government of India has invited the comments/suggestions on the recommendation of the Commission.

We shall highly appreciate to receive the same on academics@icsi.edu for submitting to Ministry of Finance.

You may download the report by clicking on the following links:

Presentation Ceremony of
14th ICSI National Awards for Excellence in Corporate Governance
by
Shri D.V. Sadananda Gowda
Hon’ble Minister for Law & Justice

The Ashok
Conventional Hall  Ground Floor, Diplomatic Enclave,
50-B, Chanakyapuri, New Delhi - 110021

December 19, 2014
at 5.00 P.M.
Panel Discussion : 4.00 P.M.

www.icsi.edu
14th ICSI National Awards for Excellence in Corporate Governance

VISION
“To be a global leader in promoting good corporate governance”

MISSION
“To develop high calibre professionals facilitating good corporate governance”

The Institute of Company Secretaries of India is committed to promoting good corporate governance and has played a pivotal role in creating awareness on various issues impinging upon corporate governance. One of the important initiatives of the Institute to promote good Corporate Governance is the ICSI National Awards for Excellence in Corporate Governance which was instituted in the year 2001 to promote good governance practices among the corporate and to recognise those Companies worthy of being exemplified. The underlying objectives of the Awards are:

- Implementation of best practices in corporate governance;
- Recognizing leadership efforts of corporate boards in practising good corporate governance principles in their functioning;
- Recognizing implementation of innovative practices, programmes and projects that promote the cause of corporate governance;
- Enthusing the corporate in focusing on best governance practices in corporate functioning.

AWARDS

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<td>ICSI Lifetime Achievement Award will be conferred on an eminent corporate personality for translating excellence in Corporate Governance into reality</td>
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<td>A certificate of recognition to other top five companies</td>
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THE PARTICIPANTS

All Listed entities and unlisted companies are invited to participate in the Award.

THE EVALUATION PROCESS

1. Evaluation of Responses to First Questionnaire
2. Evaluation of Responses to the Second Questionnaire
3. Feedback from Independent Directors
4. Media Reports & Information collected from websites
5. Regulatory response on the credentials of the company

PARAMETERS

- Board Structure and processes
- CSR and Sustainability
- Parameters
- Transparency and Disclosure Compliances
- Stakeholder value Enhancement

SOURCE DOCUMENTS FOR EVALUATION

- Directors’ Report;
- Auditors’ Report;
- Secretarial Audit Report;
- Report on Corporate Governance;
- Management Discussion and Analysis Report;
- Business Responsibility Report;
- Sustainability Report;
- Balance Sheet and Profit & Loss Account including Notes to the Accounts;
- Responses of Companies to the Questionnaires;
- Feedback from Independent Directors;
- Website of the respective companies;
- Important inputs about the companies available in Press/ Media;
- Industry norms and Investor perception.
14th ICSI National Awards for Excellence in Corporate Governance

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Former Chief Justice of India

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SECRETARY TO THE JURY

“Although social change cannot come overnight,
we must always work as though it were a possibility in the morning”

Dr. Martin Luther King, Jr.
Invitation

December 19, 2014

The Ashok
New Delhi

The institute in order to promote and foster the culture of good corporate governance among Indian companies, instituted in the year 2001, the ICSI National Awards for Excellence in Corporate Governance, to recognize those companies worthy of being exemplified.

We are pleased to inform you that the presentation ceremony for the 14th ICSI NATIONAL AWARDS FOR EXCELLENCE IN CORPORATE GOVERNANCE is scheduled to be held on December 19, 2014 at The Ashok, New Delhi at 5.00 P.M.

Shri D.V. Sadananda Gowda, Hon’ble Minister for Law & Justice will grace the occasion as Chief Guest.

The presentation ceremony shall be preceded by a panel discussion by distinguished panelists on the topic “Make in India: Are we governance ready?” at 4.00 P.M.

We cordially invite you to join us for:

Welcome Tea : 3.00 P.M.
Panel Discussion : 4.00 P.M. to 5.00 P.M.
Presentation of Awards : 5.00 P.M. to 6.00 P.M.
High Tea : 6.00 P.M. onwards

With Kind Regards,

CS R. Sridharan
President

CS Sanjay Grover
Chairman, Corporate Laws &
Governance Committee of the Council
Safeguarding and caring for your well being

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Articles / Reviews invited for e-CS Nitor

We invite the members to contribute articles/checklist/reviews/points of view or any other relevant material pertaining to the Companies Act, 2013 for inclusion in the coming issues of e-CS nitor through e-mail at: ecsnitor@icsi.edu. The article should ordinarily have 1500 to 2000 words.
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