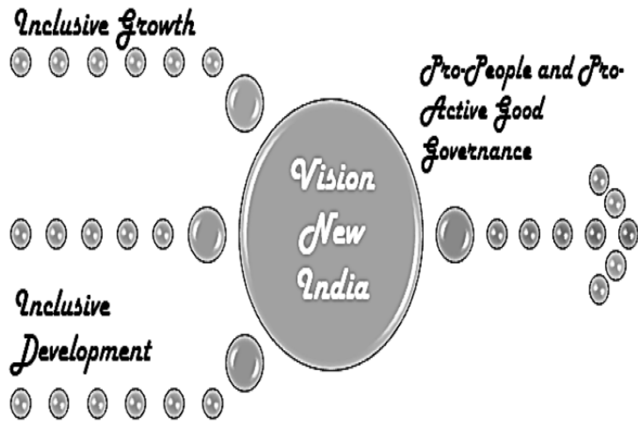
Theme Paper

PCS - A Value Driven Professional*

Backdrop

Indorsing the era of India Shining, India Rising, the government is vibrantly moving towards building a New India under its Vision 2022 with intensifying the strengths of Indian society and countering the challenges in the golden gate of India's growth and development. Vision New India, 2022 with Good – Governance at its heart, focusses on generating employment, eliminating corruption and poverty, making an advanced use of demographic position, removing infrastructure bottlenecks, promoting health and education, strengthening defense and security and eradicating social evils.



Therefore, prefiguring inclusive growth and development in deep alignment with Vision New India, 2022, the government is prudently moving towards Pro-People and Pro-Active Good Governance, wherein transparency and accountability are measured as vital elements of Citizen Friendly Good Governance.

In the process of urging people to embrace a New India, *where people are not driven by the system*, rather the system is driven by the people, government stands tall in removing the major irritants in the county's governance ecosystem such as corruption, and red-tapism with more vigor and direction.

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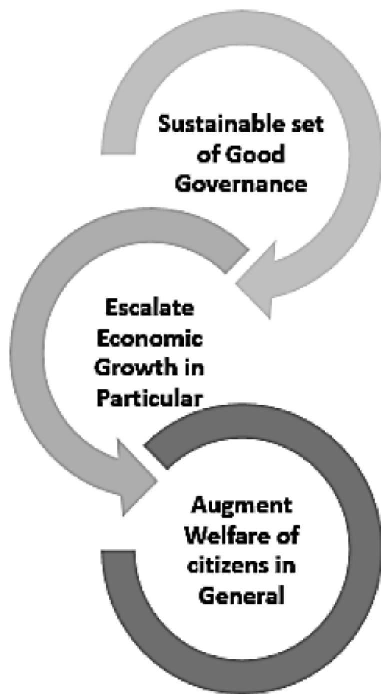
Among all irritants, the corruption impacts the common man severely and is a major roadblock to the transformation of India. Policymakers are addressing this issue at priority under the umbrella of governance and compliance. Well clear is from the fact that with reduction in the corruption levels, as reported in ***Transparency International's Corruption Perceptions Index 2017*** ranking India 81 amongst the 180 countries surveyed in the row of cleanest countries.[1] India is strong in its way to reduce corruption, be it social, economic, and settling down transparency at its best under the firm principles of good governance and compliance.

Henceforth in the regime of reforming the governance outlook, India is perceiving promising perspectives of transformation in its economy, governance, management, and welfare of citizens at parity. Evidently, the phenomenon of inclusive India has many pillars of its upkeep, including a sustainable set of good governance norms as one of the vital support in escalating economic growth in particular and augmenting welfare of citizens in general.



Recently, Prime Minister Narendra Modi, while addressing the CPSE conclave, expressed a strong desire in seeking the participation from industry and professionals and called for their professional expertise in a big way realizing to resolve New India.[2] In the way of leading India as one of the progressive economies of the world, the focus has been made on corporate governance, human resource management, financial re-engineering, innovations, and technology under Vision 2022 for New India.

On one hand, where governance, research and innovation are called as the spirited features of emerging India, on the similar end, active contribution of all stakeholders in nation-building and in the nation's economy has been asked under 5 P formula, namely *Performance, Process, Persona, Procurement* and *Prepare*.

Considering the fact, that all spheres of governance in general and corporate governance in specific, are getting their due share of contribution towards nation building, accountability and transparency in almost every government initiative towards young and vibrant India.

When India is transforming while witnessing the new set of policy reforms including GST, Direct Tax Code, IBC, Companies Amendment Bill, 2017, NCLT, Company Secretaries, being governance professionals are the 'Face of the Wave' in aptly enforcing the transformed compliance framework, along with promoting high standards of governance at par with global standards.

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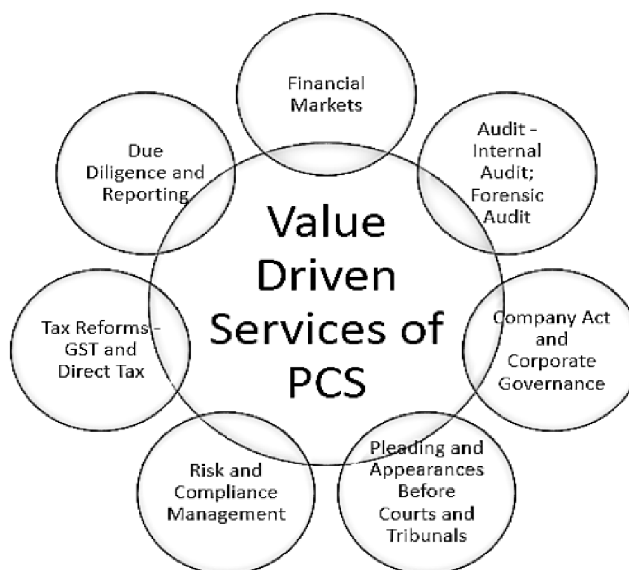
1. India's ranking in corruption perceptions index falls to 81, The Live Mint, February 22, 2018.
2. Prime Minister Addresses CPSE Conclave, April 9, 2018, Press Information Bureau, Government of India.

Company Secretary as a Value Driven Professional

Capturing the moment of inauguration of Golden Jubilee year of The Institute of Company Secretaries of India, Hon'ble Prime Minister Narendra Modi asserts that Company Secretaries decides the Corporate Culture of India and he felt utmost contented of the fact that Company Secretaries ensures in all the ways that the companies in India follow the laws and regulations, do not mishandle the accounts, and are honest in their work.[3]

This indeed speaks well for contemporary professional excellence, the Company Secretaries oblige in the service of nation as a Value Driven Professional.[4]

In the environment where government is directing on establishing premium practices of governance in general and of corporate governance in specific, Company Secretaries both in practice and employment are providing their value added professional expertise in the varied face of contemporary transformation including Financial Markets, Capital Market, Secretarial Audit, Forensic Audit, Due Diligence and Reporting, IBC, Valuation, RERA, GST, Direct Tax, Internal Audit, Risk and Compliance Management, Insolvency Professionals before NCLT and NCLAT, and many alike.



John Milton once quoted that *time would surely run fast, but if channelized with hard work and dedication, it would fetch the age of gold*. Indeed, with our dedication and hard work in last 50 years, when the profession of Company Secretaries has fetched gold in their services to the nation, ensuing golden era of governance and compliance at par, it would take a treatise to discuss and deliberate the arena of value driven services provided by Company Secretaries both in practice and employment.

3. PM addresses Company Secretaries at the inauguration of the golden jubilee year of ICSI, Press Information Bureau, Government of India, October 4, 2017.
4. Also see, Jain N.K., Company Secretary: A Value Creator, The Institute of Company Secretaries of India.

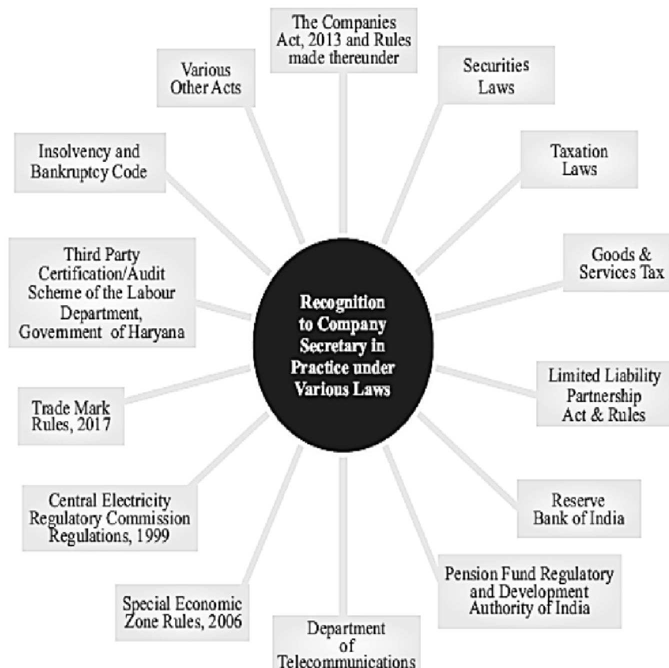
Therefore, this theme paper discusses briefly the role of Company Secretaries in Practice as the Value Driven Professional in the revolutionized age of governance reforms of New India. This includes the focus on:

- PCS: Regulatory Regime & Compliances in Capital and Financial Markets
- PCS and Propounding areas of Practice
- PCS *vis-à-vis* Companies Act & Corporate Governance
- PCS as an Investment and Financial Planner
- Professional Risk Management and Indemnity Insurance
- PCS and Appearance at Tribunals & Quasi-judicial authorities
- PCS and Transformative Regime of Taxation in India
- Changing Dimensions Governance: An era of Opportunities and Challenges

Let us discuss the above-stated roles one by one:

PCS: Regulatory Regime & Compliances of Capital and Financial Markets

The Government of India has taken significant initiatives to strengthen the economic credentials of the country and make it one of the strongest economies in the world. India is fast becoming home to start-ups focused on high growth areas such as mobility, e-commerce, and other vertical-specific solutions - creating new markets and driving innovation.[5]



Owing to higher infrastructure spending, increased fiscal devolution to states, and continued reforms in fiscal and monetary policy, the Indian economic outlook has strengthened. The Government of India is striving to move steadily to minimise structural and political bottlenecks, attract higher investment and improve economic performance. Indian economy is expected to register a 7.5 percent growth rate in 2018.

Among others, the financial sector consisting financial markets and capital market, plays a significant role

5. See, Domestic Investment in India, Indian Economy: A Snapshot, The Indian Brand Equity Foundation.

in the economic empowerment and global growth of the country. In order to continue the strong benefits of the robust financial sector to the dynamic growth of Indian economy, a balanced and vigil regulation is the need of the hour to ensure the transparent run of these sectors while avoiding any tantamount of fraud and malpractices injurious to the interest of investors, stakeholders and country as a whole is equally vital. Henceforth, the vigil on the day to day affairs of financial sector in the form of a robust regulatory regime for the new and balanced financial market of New India, has made us witness multi-fold reforms ensuring a poised regulated financial sector and growing Indian economy at par.

SEBI (LODR) Regulations
Secretarial Audit for Listed entities and material unlisted subsidiaries
Due Diligence of Banks under RBI Circular, Forensic Audit and Reporting
BRICS Interbank Co-operation Mechanism
Negotiable Instrument (Amendment) Act, 2015
Debt Recovery Tribunals
Capital for Public Sector Banks (PSBs)
Indra-Dhanush Plan - related to (i) Appointment (ii) Bank Board Bureau (iii) Capitalization (iv) De-stressing PSBs (v) Empowerment (vi) Framework of Accountability (vii) Governance Reforms

The agenda in ratio has been picked up with significant reforms in the financial sector. To list few are SEBI (LODR) Regulations, Secretarial Audit for Listed entities and material unlisted subsidiaries, Due Diligence of Banks under RBI Circular, Forensic Audit and Reporting, BRICS Interbank Co-operation Mechanism, Negotiable Instrument (Amendment) Act, 2015, Debt Recovery Tribunals, Anti-Money Laundering (AML)/ Combating the Financing of Terrorism (CFT), Capital for Public Sector Banks (PSBs), wherein under the Indra-dhanush Plan, action is related to (i) Appointment (ii) Bank Board Bureau (iii) Capitalization (iv) De-stressing PSBs (v) Empowerment (vi) Framework of Accountability (vii) Governance Reforms by the Government and alike.[6]

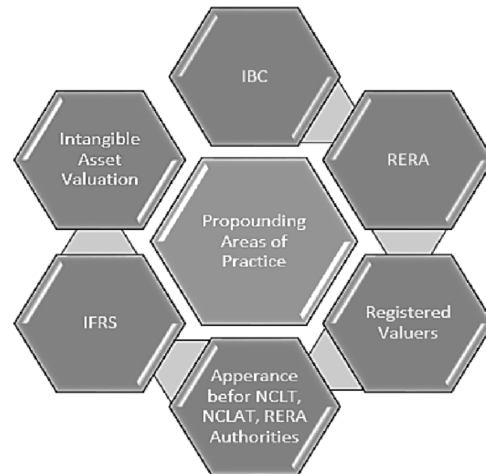
Aligning the motto, where good governance has been kept as utmost priority for the welfare of the citizens, in spite of variation in the contents, each one of these initiatives is also focused on one line agenda of increased accountability and governance in the financial services sector. To make them successful in the definite time, a directed implementation is much required and with this the role of PCS has been increased multi-fold. Right from filing the compliance certificates of listed companies to giving the Due Diligence Certificates to the Banks under RBI Circular, a PCS performs functions for the robust financial market of the country. Indeed the spirited role of practicing company secretaries with the responsibility of executing these initiatives along with removing the challenges is making them to lead the nation towards inclusive growth and all-compassing emergence of New India.

PCS and Propounding areas of Practice

With the wave of transforming and reforming India under the performance for anti-corruption and transparent practices in all sphere of transactions, India is witnessing various new as well as amended regulations in all the field, be it economic growth and social inclusion.

6. Major Initiatives, Department of Financial Services, Ministry of Finance.

Among others, the major sectors of economic growth seem to be the concern of the government as evident from the fact that economic growth and economic development is the foundation of social inclusion and gamut of opportunities for all with equality and parity.



As Ibrahim Babangida once said that *'our approach to economic development must be modern, focused and in tune with the global trend'*, henceforth, we observe the enactment of various reforming regulations marking an era of evolving economy of new India. To list few are Insolvency and Bankruptcy Code of India, 2016, Real Estate (Regulation and Development) Act, 2016[7], Forensic Audit, NCLT, and Registered Valuer. The segment of these reforms not only confirm an advanced era of sustainable governance, rather it also opens the gateway of golden opportunities for the governance professionals, both in practice and employment. Right from working as the insolvency professionals under the IBC Code, to appearing before NCLT and RERA and also to be recognized as 'Registered Valuers' under the Companies (Registered Valuers and Valuation) Rules 2017[8], Company Secretaries are set to improve transparency and governance in the country.

PCS vis-à-vis Companies Act & Corporate Governance

Hon'ble Prime Minister, Shri Narendra Modi while inaugurating the Golden Jubilee year of the Institute of Company Secretaries of India expressed that Company Secretaries are the one who determines the corporate culture of India. Indeed with ensuring *'the application of best Management Practices, Compliance of Laws in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders'*, Company Secretaries places good governance in the corporates and determine the corporate culture in the larger interest and growth of nation as a whole.

Though Corporate Governance is coined in late 90's as the voluntary measure to be adopted by the Indian Companies, yet with the growing time and its significance in demarcating success, transparency and compliance in the corporates, noteworthy changes happened with the initiative of SEBI in the form of Clause 49 of the Listing Agreement to be complied by companies listed on stock exchange including mandatory codes to be followed by companies pertaining to board of directors, audit committees and various disclosures with respect to related party transactions, whistleblower policies etc. The final assent to Corporate Governance practices in the effective management of the company can be seen as introduction to significant provisions in the Companies Act, 2013 in form of independent directors, women directors on the board, corporate social responsibility and mandatory compliance of Secretarial Standards issued by Institute of Company Secretaries of India as per Section 118 of Companies Act, 2013.

7. See, Thought Leadership (2017), The Institute of Company Secretaries of India.
8. Srivats K.R. (2017), Company Secretaries recognized as 'Registered Valuer', Business Line, The Hindu.

The standard of corporate governance has been further strengthened with the enactment of The Companies (Amendment) Act, 2017, which seeks to expand the term related party, defines subsidiary and associate company, independent directors, simplify the provisions of private placement process and deals with provisions like ratification of auditor and audit committee, financial statements and annual returns, remuneration to management, simplification of company incorporation and alike. In toto, the new amendment aims to improve corporate governance and the ease of doing business in India along with ironing out existing policy inconsistencies.

PCS as Investment and Financial Planner

In the highly volatile world, one needs to save his worth for his future along with meeting his present need viable and objective. In this context financial planning not only provide direction and meaning to financial decisions, rather it also gives clarity to life. With the availability of various plans for investment and venture, one needs to make a directional and purpose-oriented investment to secure the future and to avoid any chance of losing money. In this regard, a Practicing Company Secretary, having huge exposure in the compliance and governance mechanism of banking laws, share market structure, laws about listing and insurance etc. is an apt professional providing effective consultancy as the investment and financial planner. As an Investor and Financial Planner, a PCS serves the following pursuits[9]:

- Investment Planning for Retirement
- Investment Planning for Executives
- Investment Planning for Home Makers
- Financial Planning for Young Investors
- Financial Education for Middle Income Group
- Financial Education for School Children
- Financial Literacy for Self Help Groups

Professional Risk Management and Indemnity Insurance

In the emergent regulatory environment, higher business accountability and increased focus on transparency and compliance have led the enterprises to pursue a broad range of governance, risk and compliance initiatives across the organization. Additionally, the optimum coordination of risk and compliance beneath governance goes hand in hand with the potential advancement of business, integrating the growth of Indian Economy. In this perspective, Practicing Company Secretaries give their value driven services in the Professional Risk Management in general and Indemnity Insurance for specific industries, certifying the growth, future prospects and contribution to the emergent economy of New India.

9. Rao Ahalada V, (2017), Emerging Areas of Practicing Company Secretaries – Four Square Audit, The PCS Day, 2017.

PCS and Appearance before Tribunals & Quasi-judicial authorities

There is well known principles ***"Justice Delayed, Justice Denied"*** which means that substantial delay in justice would make no sense for judgment-creditor in availing his rights and privileges adjudged by a court of law. On one hand where there are lakhs of cases pending in the courts, it becomes essential to provide alternative mechanism for resolving the cases to serve justice in its best means. India has several specialized Courts and Tribunals to reduce the burden of pending cases. These special Courts and Tribunals specialize in certain area/laws and ensure that the citizens are not overly inconvenienced in the resolution of minor disputes. Therefore, with the institution of Special Courts and Tribunals in India including the Special Courts and Tribunals under Companies Act, 2013 in specific, the governance professional being the professionals with specialized knowledge are the persons appearing before the tribunals and quasi-judicial authorities in order to facilitate the discharge of responsibility of adjudicating the matters involving intricate issues relating to the subjects.[10] There are various tribunals and quasi-judicial bodies, like Central Administrative Tribunal, Income Tax Appellate Tribunal, RERA Authorities, Cyber Regulation Appellate Tribunal, Intellectual Property Appellate Board, Labour Courts, Industrial Tribunals and National Tribunals under the Industrial Disputes Act, 1947, National Company Law Tribunal and alike, where a Practicing Company Secretary is eligible to appear. Along with the power and procedures of these tribunals and quasi-judicial bodies, there are some principles to be followed for appearance too.

A PCS need to bewell-versed with all of these. ***For example the Dos and the Don'ts of Appearance before NCLT is as below***:

DO's

- Ensure that the dress code is followed not only for company secretary in practice who is going to appear before NCLT but also, by a person accompanying him as an assistant.
- Carry all papers, documents, reference materials etc. If, possible carry extra copies of material, for submission to NCLT and the opponent. Reach at the place of hearing before time.
- Study the case thoroughly. Know the weak and strong points of the case.
- Prepare a list of points on which arguments would be addressed to the Court.
- Study the decided case laws.
- Wherever possible, study the cases decided by the member of NCLT in similar matters earlier. This will facilitate to know the mind of members of NCLT, how he decides or interprets situation, whether he is strict etc.
- Note down important dates, case citation and important event. If possible memorize the same. Even if everything is memorised keep one printed copy of summary. Always

10. See, Grover Purshottam, National Company Law Tribunal — A Single Window Institution For Corporate Justice, 7th PCS Conference, ICSI

make photocopies of judgment relied upon by you. Also prepare page numbered paper book of those judgment.

- Decide what you are going to speak before NCLT and what points to be covered and emphasized.
- One must be able to counter any matters or points raised by the members of the NCLT or opposite party. Since this situation will have to be dealt extempore for which you must be thorough about your client's case. If you are not well prepared for case, request for time to submit your representation in a short time.
- Prepare for eventualities like if judgment comes against your client, opposite party asking for adjournment etc.
- Maintain the decorum of the office of NCLT.
- Maintain your independent view.
- During the hearing, wherever possible make the atmosphere humorous and to appreciate the Court on any given opportunity for its dexterity.
- Supply photocopies of extracts of sections of various Acts on which reliance has been placed during arguments for convenience of the court while the Court is writing the judgment.
- While addressing the arguments to NCLT, be polite and soft and at the same time firm and confident. While arguments, do not leave an impression that you are unsure" on law and /or facts.

Don'ts

- If you are not aware of any matter, do not speak lie or imagining anything. Rather inform NCLT clearly and seek time to clarify the point from your client.
- Do not forget to carry relevant papers, materials and documents.
- Do not forget to be in dress code
- Do not speak in language other than official language of NCLT.
- Do not speak in between while member of NCLT or other party is speaking.
- Never use words or language derogatory or insulting to others.
- Even if you know things better, do not impress upon NCLT that you are superior.
- Do not look at the pocket of client or benefits to client.
- Never promise to client on outcome of the case before NCLT.

PCS and Transformative Regime of Taxation in India

Aptly believed that "Development is something you can't teach; but you can inspire it". Under the footprint of this saying, the Government of India is heading towards the transformation in the country with a vision to establish New India by 2022. Tax is an important aspect of the fiscal policy of any country. Like other developed and developing countries, India also levy tax from its people on various financial activities they undertake so that smooth and equitable functionality of the county can take place.

In order to efficaciously implementing these initiatives, India is witnessing a plethora of reforms in the contemporary governance. Inter-alia, the recent rollout of Goods and Services Tax is momentously perceived as one of the big ticket indirect tax reform since independence, building India as a progressive and inclusive economy worldwide. In addition, the reforms in direct tax are also in pipeline.

With the various objectives of simplifying the tax, the emerging mechanism of information technology, reduction in the price of goods and services, trending opportunities for professionals, and other enhancement of government initiatives like make in India, ease of doing business, uniform taxation, one market and alike are all directed to provide an excellent progression of Indian economy at global fora.

Well established is the fact that when it comes to the directed, goal oriented and rightly spirited implementation of legal reform in the country, the Company Secretaries are the apt professionals to ensure the qualified and proficient application of each and every provision of the reform. In the gamut of GST as well as other tax reforms, professional excellence of the Company Secretaries would surely pave the way for optimum realization of opportunities under the reformative tax regime while remarkably tackling the challenges of this momentous reform in the taxation system of the country.

Changing Dimensions of Governance and Opportunities : The Concluding Remark

Indeed with the detailed deliberation upon the contemporary areas of governance and the role of PCS in ensuring the directed implementation of governance reforms, one could conclude that PCS are serving their professional excellence as a value driven professional towards nation building and growth prospects under good governance, compliance and risk management, Further, the emphasis on their expertise related to appearing, advising, filing and arbitrating under various laws and regulations is aligning their role as the Value Driver Professionals of contemporary times, confirming the best of their professional excellence in the propounding areas of practice including GST, Direct Tax Code, IBC, Companies (Amendment) Bill, 2017, Forensic Audit, Class Action Suit, Valuation and alike.

With this brief discussion on PCS as a Value Driven Professional, it is obvious to assert that PCS was, PCS is and PCS would be serving the nation with their professional excellence towards Reforming, Performing and Transforming New India.

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Secretarial Audit

Mikil Nitinbhai Gohel*

Meaning of Secretarial Audit

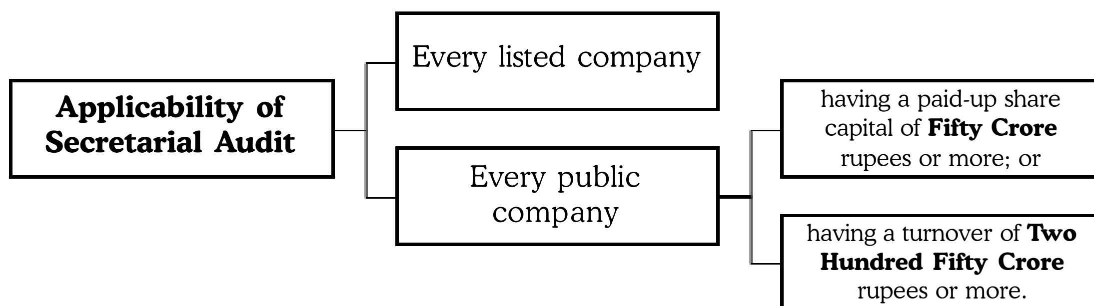
'Secretarial Audit' is introduced by recently enacted Companies Act, 2013. It is a process to check compliances made by the Company under Corporate Law & other laws, rules, regulations, procedures etc. It is a mechanism to monitor compliance with the requirements of stated laws and processes. Periodically examination of work is necessary to point out errors & mistakes and to make a robust compliance mechanism system in an organization.

Every company needs to comply hundreds of Laws, rules, regulations. These laws are complex and non-compliances would attract major risk to company. Periodically inspecting the records of company gives exact information whether, and if so, to what extent Company has complied with the laws applicable to the Company.

Secretarial Audit gives comfort to the regulators, stakeholders and management that company has disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes

To which Companies Secretarial Audit is mandatory?

As per section 204 of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, following companies are required to obtain 'Secretarial Audit Report' from independent practicing company secretary;



- "Turnover" means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. [Section 2(91)]

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

- Secretarial Audit is also mandatory to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies.

Is Secretarial Audit applicable to Private Limited Companies?

Section 2(71) of the Companies Act 2013 defines a "Public Company as one

- Which is not a Private Company
- Has a minimum paid up share capital of five lakh rupees or such higher paid up capital as may be prescribed.

The proviso to the definition states that "Provided that a Company which is a subsidiary of a Company, not being a Private Company, shall be deemed to be public Company for the purpose of this Act even where such subsidiary Company continues to be a Private Company in its articles.

By this definition, it can be inferred that secretarial Audit would be applicable to a private company which is a subsidiary of a public Company, and which falls under the prescribed class of companies.

As per Section 204 (4) of the Companies Act 2013, if a Company or any officer of the Company or the Company Secretary in practice, contravenes the provisions relating to secretarial audit, the Company, every officer of the Company or the Company Secretary in practice, who is in default, shall be punishable with fine.

Benefits of Secretarial Audit

Secretarial Audit can be effective multi pronged protection to secure the regulator, create trust amongst the shareholders, the creditors and other stakeholders in Companies, assure FIIs/FIs/SFCs/SIDCs/Banks and introduces self – regulation and professional discipline in Companies, it is a mechanism of risk alleviation and will allow companies to effectively mark compliance risk issues. It helps the organizations to develop their corporate image. Secretarial Audit promotes monitoring compliances with the provisions of law through a legal compliance management programme which can provide positive results to the stakeholder of a company:

A. *Promoters* : Secretarial Audit confirms the promoters of a company that in charge of its management are managing its affairs in accordance with the requirements of laws and the owners" stake is not being disclosed to unintended risk.

B. *Non executive / Independent Directors* : Secretarial Audit provides ads to the Non-executive/ Independent Directors that proper mechanisms and processes are in place to secure compliance with laws applicable to the Company, thus decreasing any risk from a regulatory or governance perspective.

C. *Government authorities / regulators* : It also helps to diminish the responsibility of the regulators in ensuring compliances and they can take timely actions upon the offenders.

D. *Investors* : It helps the investors in taking knowledgeable investment decision, as it estimates the Company in terms of compliance and governance standards being followed by the Company.

E. *Other Stakeholders* : It is an adequate due attention exercise for the prospective investors or joint venture partners. Further Financial Institutions, Banks, Creditors and consumers can measure the law abiding nature of Company management.

F. *Benefits to the Company itself* : Companies with an adequate compliance management programme have a minor chance of receiving penalties, both commercial and by way of imprisonment.

- Companies that invest in business and personal values and an effective compliance management plan within their work culture usually enjoys employee and customer loyalty and public admiration for their brand, which can translate into better market capitalization and shareholder returns.

- Honor for the Company as a good corporate citizen. The Secretarial Audit gives an inbuilt mechanism.

Skills required to conduct Secretarial Audit

The purpose of the Secretarial Auditor's Report is to initiate evaluation and form an impression and to report to the shareholders as to whether, and if so, to what extent, the Company has complied with the laws covering various statutes, rules, regulations, about the boarding process, existence of compliance management system.

This needs an understanding of the corporate laws and economic laws applicable to the company. Thus, for serving Secretarial Audit, a Company Secretary in practice is required to have proficient knowledge of all corporate laws. To be able to give a useful report, a Company Secretary in Practice is expected to have the following:

Skills required to conduct Secretarial Audit

Knowledge	Team	Documentation & Backup	Reliance Upon Management Representations and Declaration
The Third Party Supporting and Evidence	Adhering to the Timelines	Honesty and Fairness	Maintaining Audit Diary

1. *Knowledge* : While handling the Audit, the secretarial auditor should have the knowledge of exact nature and activities of the Company, about the laws which are relevant to the Company. He should have a knowledge of the existence of compliance system, Board process and procedures, selection and evaluation process for the Board.

2. *Team* : Secretarial Auditor is needed to assure that he has a team of appropriately

trained staff, who can assist the preparation of the report. Most importantly they should be informed of the basic audit requirements and ethics. Relevant legislative and administrative updates should be shared and interacted with the team to build and keep the expertise.

3. *Documentation & Backup* : He is expected to develop a standard and checklists which will help in the evaluation process. He is expected to keep proper records of documents and checklists filed through the course of the audit.

4. *Reliance Upon Management Representations and Declaration* : He may rely upon the authority representation letter or declaration up to a specific extent.

5. *The Third Party Supporting and Evidence* : It would perpetually be helpful to check filling made by the Company at MCA and other authorities separately. Confirmation and enquiries can also be made with the other statutory and internal auditors and consultants and Independent Directors of the Company.

6. *Adhering to the Timelines* : The plan set to conduct the audit process should be stringently adhered to in order to gain the confidence of the client and raise the expertise level of the team.

7. *Honesty and Fairness* : A Company Secretary in Practice has the professional responsibility to provide a fair and objective view. Company Secretary in Practice should be independent of the company being audited. The Secretarial Auditor is required to assure that activities of the client company are in accordance with the applicable procedure and that backing evidence kept by the company is certified.

8. *Maintaining Audit Diary* : The Audit exercise needs to be planned and performed professionally and verifications done by the team members should be recorded daily. Such keeping of diary would help in keeping audit trail that would come in beneficial to assure the quality of audit.

Who can be Appointed as Secretarial Auditor?

Only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the Company.

Appointment of Secretarial Auditor

As per Rule 8 of the Companies (Meetings of Board and its powers) Rules, 2014, Secretarial Auditor is required to be appointed by means of resolution passed at a duly convened Board meeting and resolution for appointment shall be filed with Registrar of Companies within 30 days in E-form MGT-14.

It is advisable for Secretarial Auditor to get the letter of engagement from the company. Secretarial Auditor should formally accept the letter of engagement.

Further, as a prudent corporate practice, it is advisable that change in the Secretarial Auditor during the year is reported to the members in the Board's Report.

Scope of Secretarial Audit

A secretarial auditor has to check compliances by the company under the following laws and rules made there-under;

(i) The Companies Act, 2013 (the Act) and the rules made there-under;

(ii) The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the rules made there-under;

(iii) The Depositories Act, 1996 and the Regulations and Bye-laws framed there-under;

(iv) Foreign Exchange Management Act, 1999 and the rules and regulations made there-under to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

(v) The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 ('SEBI Act'):-

a. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;

b. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;

c. The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

d. The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;

e. The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;

f. The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;

g. The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and

h. The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;

(vi) Secretarial Standards issued by The Institute of Company Secretaries of India.

(vii) The Listing Agreements entered into by the Company with Stock Exchange(s), if applicable;

(viii) Other laws as may be applicable specifically to the company.

Thus the scope of Secretarial audit is not limited to the corporate laws applicable to company but it extent to all laws applicable to Company.

Format of Secretarial Audit Report also requires Reporting on Whether

- The Board of Directors of the Company is duly constituted with proper balance of Executive Directors, Non-Executive Directors and Independent Directors.
- The changes in the composition of the Board of Directors that took place during the period under review were carried out in compliance with the provisions of the Act.
- Adequate notice is given to all directors to schedule the Board Meetings, agenda and detailed notes on agenda were sent at least seven days in advance, and a system exists for seeking and obtaining further information and clarifications on the agenda items before the meeting and for meaningful participation at the meeting.
- Majority decision is carried through while the dissenting members? views are captured and recorded as part of the minutes.
- There are adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

Moreover, Secretarial Auditor is required to report and provide details of specific events and actions occurred during the reporting period having major bearing on the affairs of the Company in pursuant to above referred laws/ rules & regulations. Few events were also given as example in the format of audit report.

However in case of financial laws like tax laws and Customs Act etc., Secretarial Auditor may rely on the Reports given by Statutory Auditors or other designated professional.

Power to Secretarial Auditor

The Companies Act, 2013 has empowered secretarial auditor and has given him all rights and powers as given to statutory auditor. As per section 204 of the Companies Act, 2013, the secretarial auditor company shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor.

Punishment for Default

Sub-Section 4 of Section 204 of the Companies Act, 2013, provides that if a company or any officer of the company or the company secretary in practice, contravenes the provisions of section 204 of the Act, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

Moreover, as per sub section (15) of section 143 of the Companies Act, 2013, if a secretarial auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed. Failure to do so shall attract a fine which shall not be less than 1 lakh rupees but which may extend to 25 lakh rupees.

Professional Responsibility and Penalty for Incorrect Audit Report

Section 448 of Companies Act, 2013 deals with penalty for false statements. the section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,

(a) Which is false in any material particulars, knowing it to be false; or

(b) Which omits any material fact, knowing it to be material,

he shall be liable under section 447.

Section 447 deals with punishment for fraud which provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten 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 three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

In terms of Section 448, a Company Secretary in Practice is liable to attract penal provision if, he makes statement in the Secretarial Audit Report which is false is any material particulars, knowing it be false or omits any material fact knowing it to be material.

Besides, the Company Secretary in Practice shall be liable for professional or other misconduct mentioned in First or Second Schedule or in both the Schedules to the Company Secretaries Act, 1980 and where held guilty, be liable for the following actions:

(i) where found guilty of professional or other misconduct mentioned in the First Schedule:

  (a) reprimand;
  (b) removal of name from the register of members upto a period of three months;
  (c) fine which may extend to one lakh rupees.

(ii) where found guilty of professional or other misconduct mentioned in the Second Schedule:

  (a) reprimand;
  (b) removal of name from the register of members permanently or such period as may be thought fit by the Disciplinary Committee;
  (c) fine which may extend to five lakh rupees.

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Secretarial Audit

R S Shanmugam*

Introduction

Conducting Secretarial Audit is the exclusive domain of the Company Secretaries in whole-time Practice (here in after referred to as CSP). Companies Act, 2013 for the first time in the history of Indian Corporate Sector has mandated Secretarial Audit of all listed companies and Public Companies having paid up share capital of Rs.50 crore or more and Public Companies having annual turnover of Rs.250 crore or more. This has been enforced with effect from 01-04-2014.

Recognising the significant role played by Company Secretaries in the past three years, particularly in ensuring high level of Corporate Governance of the listed companies and other public companies covered under the scope of Secretarial Audit, the SEBI Board at its meeting held on 28th March 2018 accepted majority of the recommendations of the Kotak Committee on Corporate Governance, which included extending Secretarial Audit to all Unlisted Material Subsidiaries of listed companies under the SEBI (LODR) Regulations 2015. This is intended to strengthen group oversight and improving compliance at the group level. It is now the responsibility of Company Secretaries to live up to the expectations of the regulators in ensuring Corporate Governance of all public companies and their Material Subsidiaries at high level.

Action Plan for Conducting Secretarial Audit

CSP before commencing secretarial audit of a company should draw up a detailed action plan after collecting all relevant information from the company, identify and list out the applicable laws to the company and include in the action plan statutory compliances required under each statute, rules and regulations framed there under which are applicable to the company.

Mode of Ensuring Good Corporate Governance

While conducting Secretarial Audit of a company, if the CSP finds non-compliance of any applicable provision of law he should guide the management and the persons in charge for maintenance of records to ensure due compliance with the applicable provisions of law by rectifying the defect and make good the deficiency. In case of non-compliance on maintaining any record or submission of any report or returns under a particular statute, the CSP should

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

advise and guide the persons in charge of maintenance of such records to make good the deficiency and advise the management to prepare and submit the returns even if the time limit prescribed under the statute is exceeded, paying the applicable penalty or seeking condonation of delay for submission of such reports or returns.

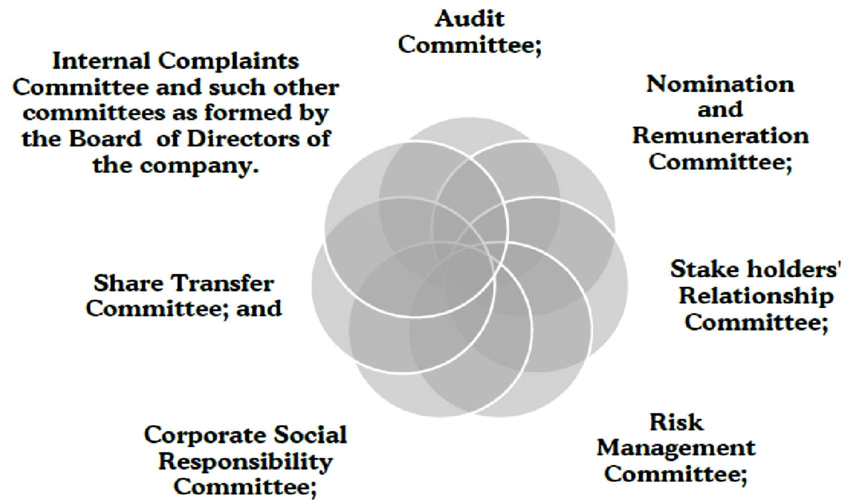
The aim of the CSP should always be to ensure good corporate governance and not merely to point out the deficiency or default. Of course if the management does not heed to his advice to make good the deficiency, the CSP should give appropriate observation by way of qualification or adverse remark in his report in Form MR-3 u/s 204(1) of the Companies Act, 2013, which is attached to the Board's Report to the shareholders of the company u/s134(3) of the Act. The Board of directors of the Company is also obliged to give proper explanations/ comments on every qualification, reservation, adverse remark or disclaimer u/s 134(3)(f)(ii) of the Act. As such the CSP while conducting secretarial audit of a company should endeavor his/her best to avoid or reduce the possibilities of making any adverse remark in his report, by his professional advice and guidance which will ensure good Corporate Governance.

Audit under the Companies Act

Management of a company is in the hands of the board of directors of the company. CSP should verify to ensure that the board comprises proper combination of directors including whole-time directors and independent directors in accordance with the provisions of the Companies Act, 2013 and in the case of listed companies as per the SEBI (LODR) Regulations 2015. CSP should verify the annual declarations furnished by all the directors of company which include (i) Declaration by all the directors under section 164 of the Companies Act, 2013 in form DIR-8 that they do not suffer any disqualification to be a director of the company and none of the companies where the director is and has been a director for the past three years have incurred any default in filing annual returns or financial statements or failed to repay deposits or interest thereon or failed to redeem any debentures on due dates or pay interest thereon on due dates or failed to pay dividend declared by the company; (II) Declaration by all the directors of the company furnishing interest of each director in other companies, firms and/or entities and the names of his/her relatives and his/her related parties in Form MBP-1 under section 184(1) of the Act and (iii) Declaration under section 149(7) of the Companies Act, 2013 by all the Independent directors of the company that each Independent Director has duly satisfied the criteria of independence as provided in sub-section (6) of Section 149 of the Act.

After verifying the declarations, CSP should verify the Minutes of the first board meeting of the Company held in the financial year beginning 1st April to ensure whether the directors have taken note of these declarations furnished by all the directors and they are duly recorded in the Minutes of that board meeting.

If the CSP finds any director's declaration is missing or omitted to be obtained or recorded in the minutes, Secretary of the Company or the person in charge of maintaining secretarial / statutory records of the company should be asked to make good such deficiency. CSP should also verify to ensure that the following Committees formed by the Board of Directors of the company comprise directors/persons in accordance with the applicable provisions of law / the regulations framed there under:



CSP should verify whether Minutes of the meetings of each of the committees are duly recorded, signed by the Chairman of the respective Committee and placed before the immediate following board meeting and the board of directors of the company have taken note of the same.

Upload of Policies on Company's Website

CSP should verify if the various policies framed by the company in accordance with the applicable provisions of law, such as Nomination and Remuneration Policy, Risk Management Policy, Policy on dealing with Related Parties / transactions with Material subsidiaries, Whistle blower policy Policy on Preservation of documents, Policy on Prevention of Harassment to Women, and such other policies which are approved by the board of directors of the company are properly uploaded on the company's website.

Similarly, CSP should check if the terms and conditions for appointment of Independent Directors / the appointment letters issued to them bearing their acknowledgement / acceptance of their appointment are uploaded in the company's website as per clause IV (6) of the Code for Independent Directors; the Company and the directors have duly complied with the provisions of Schedule IV u/s 149(8) of the Act and the Independent directors conducted at least one meeting in a financial year without the presence of any other director or managerial person from the company.

Audit Committee/Board Meetings through Video Conferencing

CSP should verify whether the various committee meetings and board meetings are conducted after serving due notice of such meetings to all the directors and respective member directors of each committee. CSP should verify if the company conducted board meetings through Video Conferencing (VC) or through any Audio Visual (AV) means, such meetings are held in due compliance with the provisions of Section 173(2) and Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2013 with reference to notice of meeting stating the availability of such facility, chairman of the meeting recording 'Roll Call' of the directors participating in the meeting through VC OR AV at the commencement of the meeting and at the close of the meeting and that the same are recorded in the minutes of the meeting. CSP

should verify the Minutes of such meetings to ensure that In such meetings conducted through Video Conferencing or other Audio Visual Means, no item of business stated in Rule 4 of the said rules (detailed hereunder) are transacted :

1. • Approval of Annual Financial statements ;
2. • Approval of Board's Report ;
3. • Approval of Prospectus ;
4. • Consideration by audit committee of financial statements / consolidated financial statements to be approved by the board u/s 134(1) of the Act ;
5. • Approval of matter relating to amalgamation, merger, demerger, acquisition or takeover of the company's business.

CSP should verify whether the company has held one Board meeting in each quarter during the financial year and the gap between two board meetings do not exceed 120 days. He should also check whether any director has absented from attending all the meetings of the Board held during a period of 12 months.

If a director has not participated in any board meeting held during the said period even through Video Conferencing or through other Audio visual means, he would vacate office as director of the company and the board should record such vacation u/s167 of the Companies Act, 2013. Alternately, if any director of a company absented from attending all the board meetings of the company held during the 12 month period, but has participated in any board meeting through Video Conferencing or through Audio Visual Means and the presence of such director is duly recorded in the minutes of the meeting in accordance with the provisions of Rule 3 of the aforesaid rules, the director will not suffer any disqualification. If the company has not complied with any of these rules in recording the proceedings of the meetings conducted through Video Conferencing or through other Audio Visual means, CSP should guide the company to set right the records so that there is no deviation from the prescribed procedure. But such corrections should be done well in time before finalizing the minutes of the meetings. All the tape recordings of the Video Conferencing or other Audio Visual means should be preserved properly in accordance with the rules.

Related Party Transactions

CSP should verify the Minutes of the Audit Committee Meetings and note down the Omnibus approval, if any, granted by the Audit Committee at the beginning of every financial year for entering into contract for transactions with the related parties in the normal course of business and the conditions and limits prescribed for each such transaction and the approvals granted by the Board for the actual amount of transactions entered into with the related parties as recorded in the Minutes of every audit committee meeting and board meeting. If any deviation is noticed either in the aggregate amount of the transaction with the related parties or the price or rate at which the transactions with related parties have taken place whether at Arm's length or otherwise, CSP should advise the management to get it approved by the board and, if necessary by the shareholders of the company at the general meeting.

Compliance of CSR

If the provisions of Section 135 of the Act are applicable to the Company, CSP should check if the CSR Committee formed by the board has recommended to the board to discharge the company's responsibility for spending the amount earmarked for CSR activities specified in Schedule VII in accordance with the Policy framed for discharge of Corporate Social Responsibility of the company and the amount actually spent by the company towards discharge of that responsibility. If the amount spent for CSR activities is less than the amount earmarked for that purpose, board should explain the reasons for not spending that amount in Board's report to the shareholders of the Company. CSP should also verify and if he finds the amount spent are for activities other than those specified in Schedule VII, CSP should give his observation in his Report in FORM MR-3.

Alteration of Memorandum or Articles of Association

If the company carried out any alteration of its Memorandum or Articles of Association during the year, CSP should note down and verify the details of such alterations to ensure compliance of various provisions of the Act consequent upon such alteration. If the company issued further shares by way of private placement or Employees Stock Option Scheme or Employees Stock Purchase Scheme or Rights Shares or Bonus issue, complete verification and checking of the Minutes of the Board Meetings, and general meetings should be done. Details of share certificates issued, Return of allotment filed with ROC/ Form PAS-3, etc. should be verified.

If the company has purchased its own shares under the buy-back scheme during the year, share certificates returned by persons holding shares in physical form, amount paid as per the valuation certificate issued by a Chartered Accountant, to all those shareholders who responded to the company's offer for buy-back, record maintained and returns filed with the ROC as per Rule 17 of the Companies (Share Capital and Debentures) Rules, 2014 should be verified to ensure that all those share certificates returned by shareholders are physically destroyed and extinguished within seven days from the last date of completion of buy back as per section 68(7) of the Companies Act, 2013 and the requisite returns, including Forms SH-8 - Letter of Offer for buy-back before issue to the shareholders together with Declaration of Solvency in Form No. SH-9 signed by two directors including the Managing Director and on completion of buy-back return in Form SH-11 attaching a certificate (Form SH-15) signed by two directors

including the Managing Director of the company are properly filed and record of the same are maintained in form SH-10.

Debentures / Preference Shares issued by the Company

CSP should verify the resolutions passed for issue of debentures or preference shares redeemable after the specified period or convertible partly or fully into equity shares of the company, whether the applicable provisions of Section 55 of the Act and Rule 9 of the Companies (Share Capital and Debentures) Rules, 2014 for issue of preference shares and Section 71 and Rule 18 of the said rules for issue of debentures have been duly complied.

Companies accepting Deposits from Members/Public

CSP should verify the resolutions passed at the general meeting and board meeting by the Companies eligible to accept deposits from public u/s 76 of the Act and other companies which can accept deposits only from its members u/s 73 of the Act, whether the company has duly complied with the provisions of the Act and the rules prescribed under the Companies (Acceptance of Deposits) Rules, 2014 in getting the Circular in form DPT-1 to be issued to the public / members for accepting deposits duly approved by the board of directors, signed by all the directors present at the board meeting, and the circular had been filed with the Registrar of Companies and uploaded in the Company's website before issue of the same to members of the company or to the public, as the case may be. CSP should also verify if all the requisite returns are duly filed by the Company, record of all deposits are maintained as per Rule 14 of the aforesaid rules and Deposit Repayment Reserve Account is maintained by the Company as per Sec.73(2)(c) of the Act. If any deficiency is noticed in maintaining the records or DRR A/c, CSP should advise the company to make good the deficiency. However, if any default is observed in repayment of deposit or payment of interest on deposits on due dates, CSP should make suitable remarks in his report in Form MR-3.

Compliance of SEBI Regulations

In the case of listed companies, CSP should verify if the company has complied with all the applicable regulations of SEBI, including the SEBI (LODR) Regulations with regard to advance intimation of the date of the board meeting, General Meeting, Book closure dates, and the reports to be furnished to the listed stock exchanges after the meetings within the stipulated time. CSP should verify to ensure that Quarterly reports on unaudited financial results of the company duly approved by the board and signed by the authorized director, together with the limited review report of the statutory auditors are duly filed with the stock exchanges. Apart from that, CSP should check if the company submitted quarterly compliance report on corporate governance, half-yearly reports and annual reports in the prescribed format to stock exchanges.

Compliance of RBI Regulations under FEMA

If the company has non-resident body corporate shareholders, CSP should verify the details of their investment in the share capital of the company, whether under the automatic route or under the approval route; verify the Foreign Inward Remittance Certificates together with the KYC certificates issued by the remitting bank from abroad and the returns and reports uploaded in the E-BIZ portal of RBI, and whether RBI or the AD Bank has acknowledged such returns allotting UIN (Unique Identification Number) on receipt of such returns or reports from the

company. If any transfer of shares or securities of the company held by persons resident outside India had taken place, CSP should verify if the applicable provisions of the RBI Regulations under Notification No. FEMA.20(R)/2017-RB dated November 07, 2017 or its earlier Notification No.FEMA/20/200-RB and FEMA/24/200-RB both dated May, 3 2000 have been duly complied with.

Compliance of Other Applicable Statutes

CSP should examine the applicability of the provisions of other Acts under the State or Central legislation to the company and make sure that the company has duly complied with the provisions of those legislations during the period under review. Form No. MR-3 in which the Secretarial Auditor is required to give Secretarial Audit Report expects the CSP to list out his observations, adverse remarks or qualifications based on his audit of the Secretarial functions of the company.

Powers and Responsibilities of CSP

Companies Act, 2013 has armed CSP with equal powers as that of a Statutory Auditor of a company while conducting secretarial audit of a company. CSP is also shouldered with equal responsibility for reporting an offence of fraud, if any, committed or has been or is being committed by the employees or by the officers of the company. Sec.143 of the Act enumerates the powers and duties of auditors while conducting audit of a company. Clause (b) of Sub-section (14) of Section 143 of the Companies Act, 2013 states that the provisions of Section 143 of the Act applies to the Company Secretary in Practice, conducting Secretarial Audit under section 204 of the Act. Therefore, as per Sub-section (12) of Section 143 of the Act, if the secretarial auditor finds that an offence of fraud has been or is being committed by the employees or officers of the company, CSP should report the same in the manner prescribed in Sec. 143(12) and Rule 13 of the Companies (Audit and Auditors) Rules, 2013. If the amount involved in the fraud is less than rupees one crore, CSP should report the matter to the Chairman of the Audit Committee and to the board of directors of the company within two days of his knowledge of the fraud and if the amount exceeded rupees one crore, he should also send a report to the Central Government as per the procedure prescribed under Rule 13 of the aforesaid rules.

As such, CSP should be vigilant enough while conducting Secretarial Audit to identify any malpractice or corruption or fraud committed by any of the employees or officers of the company and report the same to the authorities concerned in accordance with the provisions of Sub-section (12) of Section 143 read with Rule 13 of the Companies (Audit and Auditors) Rules, 2013. Timely detection of any malpractice may lead to prevention of fraud before it is committed. Prevention of fraud is better than taking action of reporting of fraud after its commitment. If the CSP is attentive enough to recognize the red flags of fraud and can identify the fraud indicators and take timely action, possibility of committing any fraud could be avoided/reduced. For instance, if the company has issued duplicate share certificates to the promoters or to the promoter group or to some group of shareholders, without observing the prescribed procedure such as lodging FIR complaint with the Police, News Paper advertisement, taking indemnity bond and affidavit of the claimant shareholder(s), possibility of multiple share certificates for the same shares circulating in the market could happen which will lead to defrauding gullible investors and causing loss to them and serious consequences to the company. As such CSP, by his ever vigilant attitude can prevent any such fraud happening in the Secretarial department. If CSP

notices any such fraud having already been committed by anyone in the company he/she should not hesitate to report the same in the prescribed manner.

Sub-section (15) of Section 143 of the Act states that if the company secretary in practice do not comply with the provisions of sub-section (12) of Section 143, with reference to reporting of fraud, the CSP shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty five lakh rupees.

Conclusion

CSP conducting secretarial audit of a company by exercising his professional skill with proper care can certainly ensure high level of Corporate Governance of public companies and listed companies which will ultimately benefit all stakeholders.

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SEBI relies on Secretarial Audit Reports of 'suspected shell companies' for identifying grave lapses in Related Party Transactions

Gaurav N. Pingle*

Introduction

With an objective to curb black money in the Indian economy, the Government in the recent past has taken adequate measures and regulatory actions against the companies, promoters and directors. The Ministry of Corporate Affairs released the list of disqualified directors and also a list of de-registered companies. On the other hand, SEBI directed stock exchanges to take action against 331 listed companies. The objective of SEBI in taking action against such listed companies was to protect the interest of the investors and market, punish errant promoters / directors of the company, etc.

This article gives a judicial and regulatory background of imposing trading restrictions on 331 'suspected shell companies' (with necessary reference to the SEBI communication and SAT order). Then, there is a detailed case-study based discussion, wherein SEBI has called upon and relied on the Secretarial Audit Report of 'suspected shell companies' for indentifying the compliance level for related party transaction.

Basic Provisions relating to Secretarial Audit Report

Pursuant to sub-section (1) of section 204 of the Companies Act, 2013, every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board's Report (made in terms of sub-section (3) of section 134 of the Act), a Secretarial Audit Report, given by a company secretary in practice, in a prescribed form. Sub-section (2) of section 204 of the Act states that it shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company. Sub-section (3) of section 204 of the Act provides that the Board of Directors, in their report (made in terms of sub-section (3) of section 134), shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report under sub-section (1) of section 204 of the Act.

Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 relates to Secretarial Audit Report. Form MR – 3 relates to the format of such report. The secretarial auditor is required to report based on the books, papers, minute books, forms and returns filed and other records maintained by the company. In the Report, the Practicing Company Secretary is required to state that during the audit period, the company has proper board process and compliance mechanism in place to the extent. The Secretarial Audit Report

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can be qualified by the Practicing Company Secretary in case of non-compliance of provisions of the relevant law.

SEBI's action in imposing trading restrictions on suspected 'shell companies'

On August 7, 2017, the Indian Capital market regulator – SEBI directed stock exchanges to take action against 331 listed companies. In a letter, SEBI stated that Ministry of Corporate Affairs has identified a list of 331 listed companies as suspected 'Shell Companies' for initiating necessary action under securities laws. SEBI directed stock exchanges to take following measures:

(i) Trading in such securities shall be placed in Stage VI of Graded Surveillance Measures ('GSM') with immediate effect, whereby trading shall be permitted only once a month under trade to trade category,

(ii) Shares held by the promoters and directors in such listed companies shall be allowed to be transferred by depositories only upon verification by concerned exchanges,

(iii) Promoters of the company shall not be allowed to transact in the security except to buy until verification of credential/fundamental by Exchanges is complete,

(iv) SEBI further directed the stock exchanges to initiate a process of verifying the credentials/ fundamentals of such companies,

(v) SEBI directed stock exchanges to appoint an independent auditor to conduct audit of such listed Companies. and if necessary, even forensic audit,

(vi) On verification, if the stock exchanges do not find any appropriate credentials/ fundamentals about existence of company, the stock exchanges shall initiate proceedings for compulsory delisting against the company.

SAT's (interim) breather to suspected 'shell companies'

Securities Appellate Tribunal granted[1] stay on SEBI's communication directing stock exchanges to place J. Kumar Infraprojects Ltd. and Prakash Industries Ltd. ('Appellants') in Stage VI of GSM. SEBI's referred Supreme Court's ruling in NSDL Vs SEBI[2] and submitted that the communication was an administrative direction issued to Stock Exchanges and therefore SAT had no jurisdiction to entertain appeals. SAT interpreted SEBI's communication and stated that "*Communication is not a general direction given by SEBI to the three stock exchanges in the interests of investors or securities market as contemplated under Section 11(1) of SEBI Act, but a specific direction given in respect of only 331 listed companies which MCA suspected to be shell companies*". SAT held that the SEBI's communication which prejudicially impairs the rights and obligations of Appellants, its promoters and directors would fall in the category of 'quasi judicial order' and hence appealable before SAT under section 15T of SEBI Act.

SAT upheld Appellants' submission that letter addressed (dated June 9, 2017) by Ministry

1. J. Kumar Infraprojects Ltd. Vs SEBI & Ors. Appeal No. 174 of 2017, Prakash Industries Ltd. Vs BSE Limited & Ors. Appeal No. 173 of 2017. Order dated August 10, 2017.

2. (2017) 5 SCC 517.

of Corporate Affairs merely required SEBI to investigate as to whether 331 Companies. named therein which were suspected to be 'Shell Companies', were in fact 'Shell Companies' and whether the said companies had any credentials/ fundamentals. SAT observed that SEBI passed the order without any investigation, opined that "*Even if letter of MCA was considered by SEBI to be a direction given for implementation without investigation, very fact that SEBI took nearly 2 months to comply with the directions given by the MCA clearly shows that there was no urgency in issuing the impugned communication without even investigating the credentials/ fundamentals of those companies*".

Below case studies will help you understand the importance of Secretarial Audit Report in understanding and identifying the grave lapses in related party transactions by the 'suspected shell companies'.

(1) *SEBI relied on Secretarial Audit Report for flagging non-compliances of related party transactions* : After an opportunity of personal hearing was granted to Trinity Tradelink Ltd.[3] ('TTL'), following issues were before SEBI for consideration: (i) Whether there is prima facie evidence of misrepresentation including of its financials and/or its business and possible of violation of SEBI's Listing Regulations by TTL, (ii) Whether there is prima facie evidence that TTL is misusing the books of accounts / funds including facilitation of accommodation entries to the detriment of minority shareholders. SEBI observed that TTL had huge Trade Receivables and Trade Payables in FY 2015-16 & 2016-17, but TTL or its Authorized Representatives provided only a list of sundry creditors and debtors for FY 2016-17, without any supporting documents/ ageing analysis. SEBI referred the Secretarial Audit Report (in the Annual Report for 2015-16), noted that TTL entered into related party transaction for which prior board approval was not taken in manner prescribed in Rule 15 of Companies (Meeting of Boards and its Powers) Rules, 2014. SEBI opined that "*This prima facie raises concern as to whether the transactions were executed in the interest of shareholders*". As TTL failed to provide any documentary support for sales agreements/ contracts/ orders received, SEBI observed that "*There is a lack of documents to substantiate the transactions entered into by the company and establish the genuineness of those transactions. I also note that significant Related Party Transactions have been entered into without due process*". SEBI observed that there is prima facie evidence of misrepresentation of business/ financials as well as of misuse of funds/ company's books of accounts and stated that "*the directors and KMPs have prima facie failed to discharge their fiduciary responsibility. The company is also liable for the prima facie violations observed and it is imperative that in the interest of investors, the financials of the company be independently audited to establish their genuineness*". On the issue relating to misrepresentation by company and misuse of funds, SEBI stated that "*Persons who are in control of the company and the directors of the company are prima facie liable for action by SEBI and should not be permitted to exit the company at the cost of innocent shareholders*". SEBI transferred trading in securities of TTL to T – Group of BSE. SEBI also appointed independent auditor to conduct forensic audit.

(2) *SEBI directed Forensic Audit of 'shell company' based on misreporting of related party transactions & accommodation entries* : After an opportunity of personal hearing was granted to JMD Ventures Limited[4] following issues were before SEBI for consideration:

3. SEBI Order dated September 13, 2017, WTM/MPB/ISD/25/2017.
4. SEBI Order dated September 14, 2017, WTM/MPB/ISD/26/2017.

(i) Misrepresentation of financials and/or business of company, (ii) Misuse of books of accounts / funds including facilitation of accommodation entries, if any. Based on documents and oral submissions, SEBI observed misreporting of related party transactions and dealings of the company with or through directors leading to prima facie evidence that company has misrepresented its transactions. SEBI opined that *"there is prima facie evidence of misrepresentation of business/financials as well as of misuse of funds/ the books of accounts of the company. The directors & KMPs have therefore prima facie failed to discharge their fiduciary responsibility. The company is also liable for the prima facie violations observed and it is imperative that in the interest of investors, the financials of the company be independently audited to establish their genuineness"*. SEBI opined that persons who are in control of the company and the directors of the company are prima facie liable for action and should not be permitted to exit the company at the cost of innocent shareholders. SEBI permitted trading in securities of the company, however directed the stock exchange to appoint an independent auditor for forensic audit.

(3) *SEBI directed Forensic Audit based on unexplained trade receivables with related parties*: After an opportunity of personal hearing was granted to Jaisukh Dealers Limited[5] ('JDL'), following issues were before SEBI: (i) Misrepresentation including of financials and/or business of JDL, (ii) Misuse of the books of accounts / funds including facilitation of accommodation entries. SEBI perused financial statements and observed that value of inventory was overstated by Rs. 1.8 crores leading to the prima facie evidence that JDL has misrepresented value of its inventory of shares/financials. SEBI perused the financial statements, affidavit of director and JDL's submissions. SEBI noted that JDL has failed to provide explanation and clarify the reason for director's disclosure of self-declared income of Rs. 1 crore as earned from accommodation entries. SEBI opined that there is a strong suspicion of misuse of books of accounts/funds of JDL. The market watchdog, SEBI, noted that JDL did not submit any underlying contract and whether it had Related Party Transaction outstanding as Trade Receivables as on March 31, 2017. JDL also failed to provide Secretarial Audit Report, on which SEBI opined that *"Failure on the part of the company to provide documentary support despite specifically asking for the same indicates that the company is neither able to establish the genuineness of these transactions nor that the transactions were in the interest of the public shareholders"*. SEBI directed the stock exchanges to conduct forensic audit of JDL.

(4) *SEBI relied on Secretarial Audit Report for verifying related party transactions, observed grave lapses in broad approval process* : After an opportunity of personal hearing was granted to Newever Trade Wings Limited[6] ('NTWL'), following issues were before SEBI: (i) Misrepresentation including of financials and/or business of NTWL, if any, (ii) Misuse of books of accounts / funds including facilitation of accommodation entries, if any. SEBI noted that: (i) Non-executive director of NTWL had provided accommodation entries, directly or indirectly, (ii) NTWL had failed to submit any documentary evidence like business contracts/sale agreements with customers/suppliers, (ii) NTWL failed to submit full details of Loans & Advances granted during 2016-17 (i.e. signed contracts

5. SEBI Order dated October 11, 2017. WTM/MPB/ISD/61/2017.
6. SEBI Order dated September 21, 2017, WTM/MPB/ISD/ 34/2017.

between parties and corresponding bank statements showing movement of funds). SEBI referred Secretarial Audit Report for FY 2015-16, noted that NTWL had taken loans from companies in which directors are common, the company has granted interest free short term advances to related party but has failed to obtain approval in accordance with Rule 15 of Companies (Meeting of Boards and its Powers) Rules, 2014). While relying on Statutory Auditor's comment that NTWL has not established Internal Financial Control, SEBI opined that *"Prima facie evidence on the misrepresentation by the company and misusing of books/funds including facilitation of accommodation entries, the persons who are in control of the company and the directors of the company are prima facie liable for action by SEBI and should not be permitted to exit the company at the cost of innocent shareholders"*. Accordingly, SEBI directed independent forensic audit.

In the above 4 case laws, SEBI has directed forensic audit of a listed company by independent director. At this time, it will be pre-mature to comment on the outcome of the forensic audit, however, it is noteworthy that the Secretarial Audit Report issued by a Practising Company Secretary is considered by SEBI for the purpose of identifying: (i) Misrepresentation including of company's financials and/or its business, (ii) Misreporting of related party transactions and dealings of the company with or through directors, (iii) Failure to provide explanation and clarify the reason for director's disclosure of self-declared income as earned from accommodation entries, (iv) Loans from companies in which directors are common. The dependency of the Market watchdog / Securities Market Regulator itself is an indication that the Secretarial Audit and Secretarial Audit Reports is a value addition to all the stakeholders, including the regulators and Government. It is also worth appreciating the qualifications provided by respective Secretarial Auditor in the Report of the each company.

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Revamping Private Placement Mechanism – A Step Towards Enhancing Stringency

Megha Saraf*

Introduction

After the Companies Act, 2013 (the "Act, 2013") came into force, considering the practical problems in implementation, there were scope of further clarifications or modifications as the Act, 2013 left major loopholes in its text. Basis this, the Act, 2013 was referred to the Company Law Committee (CLC) for its review and recommendation. CLC recommended the changes in the Act and accordingly, the Companies (Amendment) Bill, 2016 was placed before the lower house. However, the same was further referred to the Standing Committee on Finance for its comments and recommendation. The Companies (Amendment) Act, 2017 (the "Act, 2017) received the consent of the President on 3rd January, 2018 which was framed on the recommendations of CLC as well as the Standing Committee. The Act, 2017 is now awaiting the appointed dates for the provisions. Section 42 is one of the provisions which has faced a complete revamp. This write up covers a crisp analysis on the changes made in this section.

Law prior to Amendment

Section 42 of the Act, 2013 read with Rule 14 of the Companies (Prospective and Allotment of Securities) Rules, 2014, prescribes the following requirements:

1. Obtaining approval from the shareholders of the Company by way of special resolution to approve the proposed offer;
2. Identifying prospective investors and sending Private Placement Offer Letter in Form PAS-4;
3. Accompanying offer letter by an application form serially numbered and addressed specifically;
4. Barring any offer under private placement unless past allotments under private placement are completed;
5. Subscribing securities only by way of banking channels such as cheque or demand draft and not by cash;
6. Capping the minimum value of such offer or invitation per person with an investment size of atleast Rs. 20,000/- of face value of the securities;

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

7. Opening a separate bank account in a scheduled bank for parking the amount received on application;

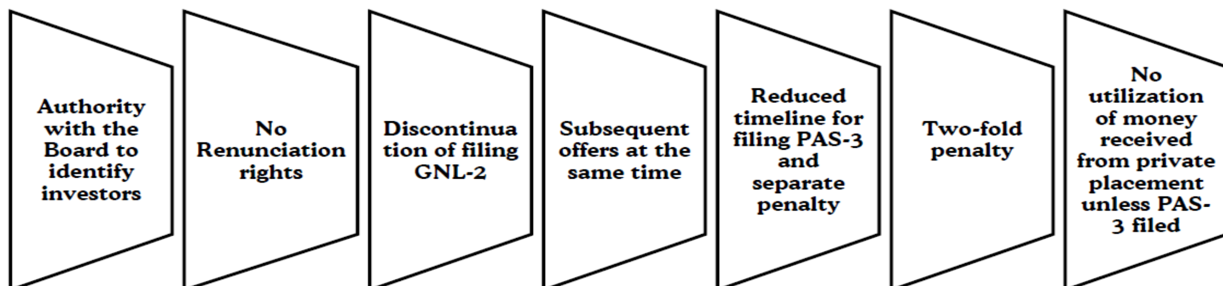
8. Allotting securities within 60 days of receipt of application money and in case the company fails to do so, then repayment of the application money within 15 days from the completion of the 60th day otherwise the companies are liable to pay interest at the rate of 12 percent p.a. from the expiry of the 60th day.

9. Barring use of any public advertisements, media marketing or distribution channels for identifying prospective investors and instead maintaining a record of offers in PAS-5 having pre-identified investors to whom the offer is to be made;

10. Filing of e-Form PAS-3 i.e. return of allotment with the Registrar containing the details of the security holders with relevant information within 30 days of circulation of Private Placement Offer Letter.

Law post Amendment

While the procedural requirements of making private placement of securities is majorly same to that of the provisions of the Act, 2013, as stated above, there are few significant changes into it as brought in by the Act, 2017. The changes are:



1. *Authority with the Board to identify investors* : While the Act, 2013, did not provide any clarity on the authority in order to identify the prospective investors, the same was implied that the authority lies with the Board as the Board is empowered to approve a proposal of issuance of securities. The same is now specifically stated and may be said to be only a clarificatory change.

2. *No Renunciation rights* : Where the Act, 2013 was silent on the right of renunciation in the hands of the investor, the Act, 2017, explicitly provides a clarity on the fact that the private placement offer letter and the application shall not carry any renunciation rights. Private placement being an issuance of securities to a specific pre-identified person only, this was implied that the offer would not carry the right of renunciation unlike rights shares which are offered to the existing shareholders.

3. *Discontinuation of filing GNL-2* : Under the Act, 2013, the Company was required to file complete information about the offer with the Registrar and with SEBI (if listed) within

30 days of circulation of the offer letter. However, the requirement of the same has been done away with under the Act, 2017. This will surely reduce the compliance burden of the companies. Consequential change in the rules is also expected w.r.t the same in due course.

4. *Subsequent offers at the same time* : In comparison to the Act, 2013, the Act, 2017, commends for more than 1 private placement offer at a time. The same is very pertinent especially in case of non-convertible debentures where the Company is required to make private placement based on negotiated terms and conditions with each investor. In such a case, such amendment is an enabling amendment.

5. *Reduced timeline for filing PAS-3 and separate penalty* : The Act, 2017 provides for filing the return of allotment within 15 days from the date of allotment compared to 30 days of that in Act, 2013, thereby, making it stringent for companies.

6. *Two-fold penalty* : The Act, 2017 provides for dual situations attracting penal provisions:

   a. In case, the Company defaults in filing return, then its promoters and directors shall be liable to a penalty upto Rs. 25 lac for such delay.

   b. In case, the company makes an offer or accepts monies in contravention of the provisions of the section 42, then its promoters and directors shall be liable for a penalty. The law makers have not prescribed any minimum amount of penalty but have kept it open-ended by extending it to the amount raised through the private placement, however, capping it to 2 crores. The said penalty shall be lower of the two as compared to that of Act, 2013, where higher of the two was to be levied. Further, the company shall also be required to refund the money raised to the subscribers with interest within 30 days of penalty imposed.

   Therefore, where on the one side the law has been made liberal w.r.t the penal provisions by imposing lower of the two penalty, however, on the other side, the provisions to refund money to the investors within 30 days have been kept stringent.

7. No utilization of money received from private placement unless PAS-3 filed: A very important and significant change which is rather a strange change brought in the Act, 2017, is that the company making the offer or invitation for subscription of securities through private placement is not allowed to utilise the money raised through private placement unless the return of allotment is filed with ROC. This creates an impractical situation for companies whose fund generation is primarily based on private placement of securities considering filing itself is a post facto event.

Conclusion

The proposed amendments in Section 42 seems to have met much of the recommendations/ expectations of the stakeholders. However, stalling the utilization of the funds received through private placement in an era where divestment of funds is a mouse-click away, mandatory holding back the funds merely for the sake of filing the form seems to be a retrograde change. Further, mere technical glitches w.r.t filing of forms by way of MCA server turning down etc. may become a hassle for companies.

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Corporate Governance Audit under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Ketaki Karandikar*

Introduction

The article is about how corporate governance audit is conducted, so that the reader could get a general idea of this audit. In order to limit this discussion, This article does not considered the recommendations of Uday Kotak Committee accepted, modified and rejected by the Securities and Exchange Board of India (SEBI), as the same are yet to be notified.

Significance

The purpose behind corporate governance audit is to see whether the listed entities are complying with the corporate governance norms as prescribed under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 [LODR]. Regulations 17 to 27 of the LODR are corporate governance provisions which are applicable to specified securities, viz.., equity shares and convertible securities as per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

However, some professionals while conducting corporate governance audit, refer the whole chapter applicable to specified securities. Here, we will be considering the main corporate governance requirements of LODR.

Outlook

Transparency and authenticity are core aspects of corporate governance. Clause 49 of the erstwhile Listing Agreement came into play with the very purpose. Investors like Institutional investors or bodies corporate understand the thick and thin of corporate governance provisions required to be adhered by listed entities. This is to be looked upon as building of an organization on the foundation of genuineness and goodwill.

But playing with words does not make layman understand what it actually is. Providing information to the auditors of the company and reporting the same in the Annual Report of the company do not make the entities transparent or genuine. Providing information for the sake of it, or because there are legal requirements do not suffice the purpose of corporate governance. Common people must make effort to look into the letter of law, and see whether the entity is following it in true sense.

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

Following is a checklist of documents for ready reference.

Documents required for Corporate Governance Audit

Following are not only documents but a brief summary of concerns of entities and auditors.

— *Notices, Agenda and Notes to Agenda of Meetings.*

This is a pure company law provision, but backbone of corporate governance as well as secretarial audit. Summarizations of minutes help auditor understand the working of the company and the method of its operations. Circulation of agenda and notice along with minimum information which will suffice the agenda points are necessary. For example, if the entity wishes to alter its archival policy in the ensuing board meeting, then the proposed draft shall be circulated to all the board members along with proposed resolution. The notes on agenda discloses whether the same has been circulated with annexure or not.

— *Attendance slips and proof of leave of absence granted to directors.*

This is essential for counting quorum of meetings. There are instances, where discrepancies can be found in attendance slips and attendance recorded in minutes. Same goes for leave of absence. Presence of two independent directors is required for fulfillment of quorum of audit committee meeting. Directors attending meetings by audio and/or video conference are required to be mentioned in attendance slips. Where the directors have asked for leave of absence in writing and are so granted, then proofs of the same are to be presented to the auditors. This can be verified by cross checking with minutes of the respective meetings.

— *Signed or Draft Minutes of Board meeting, committee meetings and general meetings.*

These are the most important documents from the point of view of audit. Minutes almost cover all check points of audit. There are instances, where extensive minutes provide significant particulars of conducting day to day operations of the company. While sometimes only agenda points of meetings are recorded for the sake of confidentiality. Auditor has to do a task of reading between the lines.

— *Resolutions passed by circulation by board and committees and their noting in subsequent meetings.*

If any resolution is passed by circulation then the document (email or any other correspondence) showing assents/ dissents of directors along with day and date are to be kept. If any director has dissented then such dissent shall be recorded in the minutes of subsequent meeting.

— *Adopted signed policies of the listed entity which are mandatory as per LODR.*

It is mandatory for listed entities to draft and adopt few basic policy documents. The same are also to be uploaded on the website of the company. Auditor has to look into the essentials of such policy and has to satisfy himself that the entity is adhering to it. Adopting policies for the sake of it, does not indicate seriousness on the part of the

entity. During the previous year, there was uncertainty on the part of many entities about drafting of Dividend Distribution Policy. There was lack of awareness on the part of auditors and entities regarding the standing of the entity in the list of Top 500 entities on market capitalization. Whether such policy is applicable to the company or not, if yes then what are to be its contents, such were the concerns. In such cases, it is the duty of the auditors to educate the entities. Such entities are also required to be observant as to provisions applicable to it.

— *Periodical disclosures made to the Stock Exchanges and their acknowledgements.*

Auditor has to check all the periodical disclosures and event based disclosures made to stock exchanges by listed entities. If any clarification is required from stock exchanges then whether the same have been complied with or not is to be confirmed. Regulation 30 of LODR and its corresponding Parts A and B of Schedule III are of crucial importance. Sometimes entities face problem interpretation. The regulation is about disclosure of events or information to be shared by listed entities. Compulsory cases are mentioned in Schedule III. In addition to them an entity has to define events or information which it wishes to disclose with the stock exchanges. A policy for the said purpose is required to be drafted and adopted by the entity and put on its website.

— *Disclosures by directors and senior management as per Code of Conduct lay down by the listed entity.*

Regulation 17 requires listed entities to lay down a code of conduct for board of directors and senior management of the company. Conformity to the code is required to be submitted by each individual to whom this code applies.

— *Fact sheets for sitting fees paid to non executive directors.*

The entity has to provide the details of payment of sitting fees to non executive directors. Ledger extracts or debit entries in entity's bank accounts would be sufficient.

— *Details regarding payment of remuneration to managing director and whole time director.*

Minutes of the nomination and remuneration committee, audit committee and board meeting are to be checked for this item. Fact sheet and working of remuneration shall be given by the entity. In case of appointment or reappointment of managing director or whole time director and any revision in their remuneration are to be reported to the stock exchanges along with their brief profiles. Auditor has to confirm that the same has been complied with.

— *Composition of Board, its committees and their terms of reference*

Auditor has to check the balance in board and committee constitution and whether the entity is working as per the terms of reference of all the committees.

The entity has to maintain a perfect balance of executive and non executive directors and the same is being maintained at all times. Usually half of the board comprising independent directors seems ideal for keeping balance. It also depends on the status of the Chairman of the board being executive or non executive director and belonging to

promoter. The condition of appointment of woman director on the board is fulfilled or not. After LODR came in to force, many entities failed to fulfill this condition within the timeline provided. General observation was that, the entities were appointing women director on the board for the sake of it.

Apart from the mandatory committees, constitution of Risk Management Committee is mandatory for the entities which fall in the list of top 100 listed entities determined on the basis of market capitalization as on previous financial year. Auditor has to check whether the entity falls under the top 100 listed entities. If yes, then whether it has formed risk management committee and if it has, then the same is serving the purpose behind forming the committee.

In case the entity has employee benefit schemes, then as per SEBI (Share Based Employee Benefits) Regulations, 2014, the entity has to form a compensation committee for looking after such schemes. Further, the powers of compensation committee can be performed by Nomination and Remuneration Committee (NRC) of the entity. The board has to delegate these powers to NRC and alter its terms of reference accordingly.

— *Directors of the company*

There are strict provisions regarding number of directorships on board, chairmanship and membership of committees of other listed entities. Directors shall disclose changes in their directorships held in other entities.

Auditor has to check whether the limit of directorships is not exceeded by the directors and maximum tenure of independent directors is as per the Companies Act, 2013. Independent directors shall hold at least one meeting of independent directors in a year. They are required to make evaluation of performance of non independent directors and the board as a whole. This is a step in the formal Board Evaluation made mandatory by SEBI.

Vacancy in the position of independent director is to be filled up within 3 months from the date of such vacancy or in the immediate next board meeting, whichever is later. If there is no disturbance to the required structure of independent directors then the entity need not fill up the vacancy. Other provisions like shareholding of non executive directors and senior management and their compliance to code of conduct on annual basis are to be checked.

— *Related Party Transactions (RPT)*

Foremost condition for a listed entity is to have a policy on materiality of related party transactions in place. Auditor has to go through the minutes of audit committee for proposed related party transactions and its omnibus approval to such transaction, if there is any. LODR defines material related party transaction, which prescribes criteria for determining materiality of transaction. Quarterly corporate governance report submitted by entities discloses whether there were any RPTs during the quarter. If any, then the same have been approved by audit committee and/ or shareholders of the company. This has to be verified by auditor with the minutes of the meeting of audit committee, board meeting and general meeting, if any. As these are just yes/ no questions, the dependability on auditor enhances.

— *Unlisted subsidiaries of listed entities*

Two types of concept are mentioned in LODR in case of subsidiaries. One is the definition of subsidiary as per the Companies Act, 2013. The other concept is material subsidiary. The same is defined on the basis of contribution of subsidiary of more than 20% in consolidated income or net worth. Here, the entity is also required to have a policy for determining material subsidiary. The minutes of subsidiaries placed before the board of meeting of listed holding entity and consolidated balance sheets are crucial to determine significant transactions entered into by subsidiaries and their material nature from the point of view of the listed entity.

Conclusion

The above mentioned list is not conclusive. Various points can be added to it. Auditing styles may vary from entity to entity. It is the test of our profession as well as that of entities. Corporate governance audit goes hand in hand with statutory audit and secretarial audit. There is a lot to learn for the entities and auditors. As mentioned in introduction, the recommendations of Kotak Committee are not considered in this discussion. It is so, because we are yet to see its repercussions. Entities are supposed to be transparent, but there is responsibility on the part of professionals as well to sustain the credibility of their profession.

References

1. SEBI (Listing Obligations and Disclosure Requirements) Regulations and notifications under it.
2. www.bseindia.com
3. www.nseindia.com

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SEBI - An Eagle Eye on Social Media

Nikita Snehil*

The Securities and Exchange Board of India ('SEBI') has on April 16, 2018, passed an interim order[1] finding two persons to be 'connected' for the purpose of insider trading, relying on their friendship status on Facebook. This article gives an analysis of the SEBI's order on insider trading and presents how SEBI investigates into the matter and determines the connections between the parties involved.

Facts of the case

The case pertains to insider trading in the shares of a diversified oil & gas company, Deep Industries Limited ('DIL'). DIL was awarded three contracts for hiring of mobile drilling rigs in the months of August, September and October 2015 (herein after refereed as Contract 1, Contract 2 and Contract 3 respectively) from ONGC Ltd., for which DIL made two public announcements with respect to receipt of the said contracts.

As per the information obtained from DIL by SEBI, the chronology of events leading to aforesaid two corporate announcements is as under:

Particulars	*Contract 1*	*Contract 2*	*Contract 3*
Date of Release of Tender for Work Contract by ONGC Ltd.	14.04.2015	03.03.2015	19.08.2014
Submission of Bids on ONGC's tender Website	05.05.2015	19.05.2015**	08.05.2015
Declaration of L1 Bidder/Matching to EDR of L1 Bidder	17.07.2015	18.08.2015	27.07.2015
Date of award	02.09.2015	28.08.2015	13.10.2015
Date of receipt of Notification of Awards of Work Contracts	02.09.2015	29.08.2015	13.10.2015
Date of communication by company to Exchange	03.09.2015	03.09.2015	14.10.2015
Date of Announcement by Exchange to Public	03.09.2015	03.09.2015	14.10.2015

1. https://www.sebi.gov.in/enforcement/orders/apr-2018/order-in-the-matter-of-insider-trading-in-the-scrip-of-deep-industries-limited_38713.html

* Manager, Vinod Kothari & Company. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.

**DIL vide its letter dated January 24, 2017 has mentioned 19.05.2015 as the date on which DIL has submitted Bid on ONGC's tender website. However, from the correspondences between DIL and ONGC submitted by DIL vide letter dated February 22, 2017 to SEBI, it was observed that the bid was actually submitted on ONGC's tender website on March 12, 2015.

Presence of 'unpublished price sensitive information'('UPSI')

Regulation 2 (n) of the PIT Regulations defines UPSI as-

"unpublished price sensitive information means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following: –

(i) financial results;

(ii) dividends;

(iii) change in capital structure;

(iv) mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions;

(v) changes in key managerial personnel; and

(vi) material events in accordance with the listing agreement.

NOTE: It is intended that information relating to a company or securities, that is not generally available would be unpublished price sensitive information if it is likely to materially affect the price upon coming into the public domain. The types of matters that would ordinarily give rise to unpublished price sensitive information have been listed above to give illustrative guidance of unpublished price sensitive information."

In deciding whether the said information constituted 'unpublished price sensitive information' ('UPSI'), SEBI relied on the value of these contracts in relation to DIL's revenue for the relevant period. The value of the two contracts for which the announcement was made on September 03, 2015, constituted a substantial 52.47% of the annual turnover of the company for the FY 2015-16 and 87.65% of the annual turnover for the FY 2014-15 i.e. immediately preceding financial year. Similarly, the value of the single contract for which announcement was made on October 14, 2015 constituted a substantial 53.40% of the annual turnover of the company for the FY 2015-16 and 89.21% of the annual turnover for the FY 2014-15 i.e., immediately preceding financial year.

Considering the magnitude of the value of these three orders, the information relating to bagging of these orders by DIL constituted price sensitive information and the same was likely to materially affect the share price of the company, once published. Further, the information in this regard was not generally available and was published only on September 03, 2015 and October 14, 2015, pursuant to which the share price witnessed an increase.

On this basis, SEBI is of the view that the publishing of such information was likely to materially affect the share price of DIL.

Period of UPSI

From the sequence of events and the information as discussed earlier, the UPSI came into existence and ceased to be UPSI on the following dates:

Contract	*UPSI came into existence*		*UPSI ceased to exist on*	
	Date	*Rationale*	*Date*	*Rationale*
Contract 1	17-07-2015	Date when bids were opened and DIL was declared as L1 bidder.	03-09-15	Dates when BSE and NSE disclosed the award of contracts on respective websites on receipt of intimation from DIL.
Contract 2	18-08-2015	Date when company responded to ONGC request to match the EDR of L1 bidder and submitted the revised bid.	03-09-15	
Contract 3	27-07-2015	Date when bids were opened and DIL was declared as L1 bidder.	14-10-15	

Thus, the period between July 17, 2015 and October, 14, 2015 is determined as the UPSI period ('investigation period').

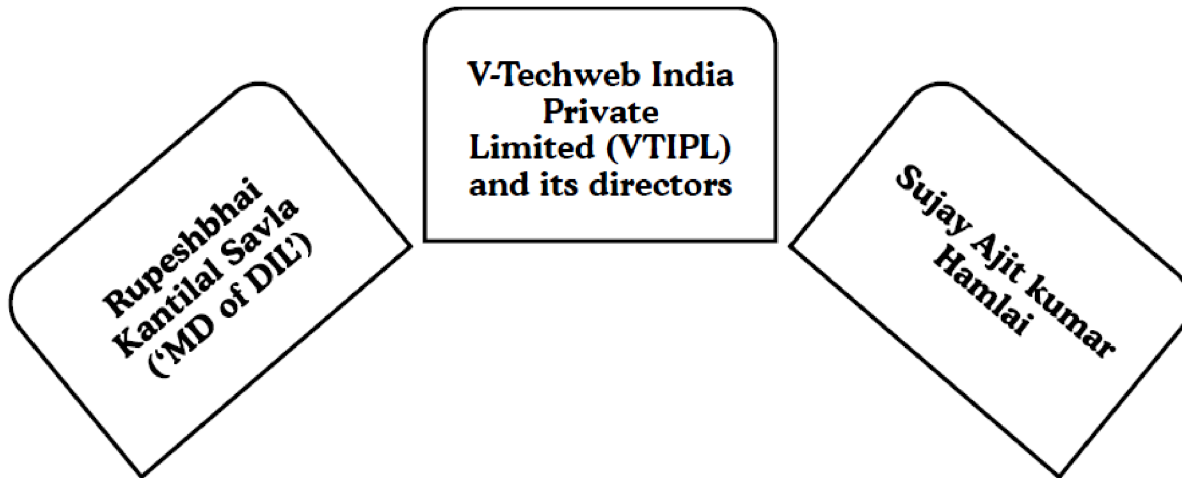
Determining connections between the accused parties

The definition of Connected Person as per Regulation 2(1)(d)(i) of the PIT Regulations, 2015, is as follows:

"*connected person means,-*

any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access."

Based on the examination report of NSE and investigation conducted by SEBI, the following three entities have been identified as Insiders that traded in the shares of DIL during the investigation period:



(a) *Rupeshbhai Kantilal Savla ('MD of DIL')* : Of these three persons, Mr. Savla was held to be an insider by virtue of him being the Managing Director of DIL (being the MD he falls within the category of Connected Person as defined in Regulation 2(1)(d)(i) of PIT Regulations, 2015, during the relevant period, which was calculated as July 17, 2015 to October 14, 2015.

(b) *V-Techweb India Private Limited (VTIPL) and its directors* : The MD of DIL and Sheetal Rupesh Savla (wife of the MD of DIL and also one of the promoters of DIL) were acquainted to the two directors of VTIPL viz., Ajay Ajitkumar Hamlai and Sujay Ajitkumar Hamlai, Radhika Hamlai (wife of Ajay Hamlai), through Facebook. Hence, the MD of DIL and Sujay Hamlai, alongwith their spouse (immediate relatives) were acquainted with each other though Facebook.

While the MD of DIL had admitted to SEBI that he has social acquaintance with Sujay Ajithkumar Hamlai and his brother Ajay Ajithkumar Hamalai, Sujay Ajithkumar Hamlai on the other hand had only replied that he doesn't have business relationship with DIL, its group companies, its promoters/its directors and remained silent about any association other than business relationship.

(c) *Sujay Ajit kumar Hamlai*

Sujay Ajitkumar Hamlai and his brother Ajay Ajitkumar Hamlai were associated with DIL by virtue of their connection with the MD of Dil through social media. As per SEBI, by virtue of the association and frequent communication via social media, they are reasonably expected to have access to the UPSI of DIL at the relevant period. Therefore, as per the provisions of Regulations 2(1)(d)(i) and 2(1)(g) of the SEBI (PIT) Regulations, 2015, Sujay Ajitkumar Hamlai and Ajay Ajitkumar Hamlai are connected persons and consequently are insiders w.r.t DIL.

Trade while in possession of UPSI

The accused parties have also traded in the shares of DIL during the period of UPSI.

In arriving at the quantum of gains made by these connected persons, SEBI calculated the difference between number of shares bought valued at closing price on which UPSI became public and the value at which shares were bought.

Considering the trading pattern of the MD of DIL, Sujay Ajitkumar Hamlai and V-Techweb India Private Limited in DIL during the period of UPSI, the three accused have made a gain of Rs. 1.34 crores, Rs. 13.99 Lakhs and Rs. 36.79 lakhs respectively each through trading in the shares of DIL while in possession of UPSI. Further, the accused have not traded in the shares of DIL, three months before and after the UPSI period.

Reliance on Facebook

In an attempt to fortify their findings on the relation between the MD of DIL and Sujay Ajitkumar Hamlai, SEBI has surprisingly, relied upon the 'likes' history and friendship status shown on Facebook (a social media application) between both the accused and their respective wives.

While observing the definition of 'Connected Person' under the SEBI (PIT) Regulations, 2015, SEBI in its interim order has stated that it believes that the accused are 'reasonably expected' to have access to the UPSI of DIL during the relevant period and noted the following:

> *"The perusal of the provision shows that the association of the person can be direct or indirect and the association can be in any capacity which can include frequent communication with its officers by virtue of which such associated person can be reasonably expected to have access to unpublished price sensitive information.*
>
> *The provision, inter alia, provides for the yardstick for insiders by stipulating that insider can be by way of their association in any capacity or it can be by way of frequent communication with its officers which can also be in their social capacity as evident in this case by frequent interactions including likes on the social media."*

Interim Order passed by SEBI

The interim order, which is in the nature of a show cause notice, has asked the three connected persons to deposit the amounts (amount gained by the parties together with the interest of 12% p.a.) in an escrow account and has asked them to reply to the allegations imposed by SEBI and to explain why such amounts should not be formally disgorged.

SEBI has also questioned them as to why they should not be debarred from accessing capital markets/prohibited from dealing in securities for a specified period.

SEBI's similar stand in another case while determining connected persons

SEBI in its Order[2] dated February 4, 2016, in the matter of trading in the shares of Palred Technologies Limited, has also relied upon the same social media application (i.e., Facebook),

2. https://indiacorplaw.in/wp-content/uploads/2016/02/1454682584239.pdf

where the connection between the two accused parties was detected because they had common friends on social media. However, in the instant case, mutual friendship was only one of the factors determining the connection between the accused parties unlike the instant case.

Conclusion

The crux of the instant case is the SEBI's reliance on the Facebook to determine the relation between the accused. It is pertinent to note that the said social media application connects millions of people all over the world and it is not necessary that the person having friendship status on Facebook are in reality connected to each other. At times, the likes exchanged by people on Facebook are only due to certain admiration of the pictures/events or a random response to a certain happening. On the other hand, many persons are connected via Facebook only due to certain factors such as being from the same professional field/ school/ college or due to some other reason – where the connections are only on casual basis and the parties may not even know each other personally/professionally.

Therefore, such reliance of SEBI on the social media applications can rarely be reliable indicators of connections. Such reliance will not only set precedents for the other regulatory bodies but may also lead to serious allegations and/or conclusions in case of *bonafide* persons.

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Challenges for a Practising Company Secretary as an Insolvency Professional

Dr. M. Govindarajan*

Introduction

The Insolvency and Bankruptcy Code ('Code' for short), billed as the biggest economic reform in India after the Goods and Services Tax, is a rare example of a speedy rollout and implementation of a much-needed law. The Code provides for the setting up of an Insolvency and Bankruptcy Board of India ('Board' for short) with 10 members including representatives from the Reserve Bank of India and the Central Government to regulate insolvency procedures in India. The Board is the regulator of the mechanism of insolvency resolution process. The Board has given various powers to regularize the process.

Insolvency Resolution Process

The insolvency resolution process has various stages as detailed below-

- Initiation of insolvency resolution process by financial creditor or operational creditor or by corporate applicant himself;
- Admission of application by Adjudicating Authority;
- Appointment of Interim Resolution Professional by Adjudicating Authority;
- Constitution of Committee of Creditor by the Interim Resolution Professional;
- Appointment of Resolution Professional by the Adjudicating Authority on the recommendations of the Committee of Creditors;
- Managing the affairs of the corporate debtor on getting approval of the Committee of Creditors by Resolution Professional;
- Preparation of Information Memorandum by Resolution Professional for submission of Resolution plan by prospective resolution applicant;
- Verify the resolution plans and to submit the same before the Committee of Creditors for its approval by Resolution Professional;
- Approval of the Resolution plan by Committee of Creditors;

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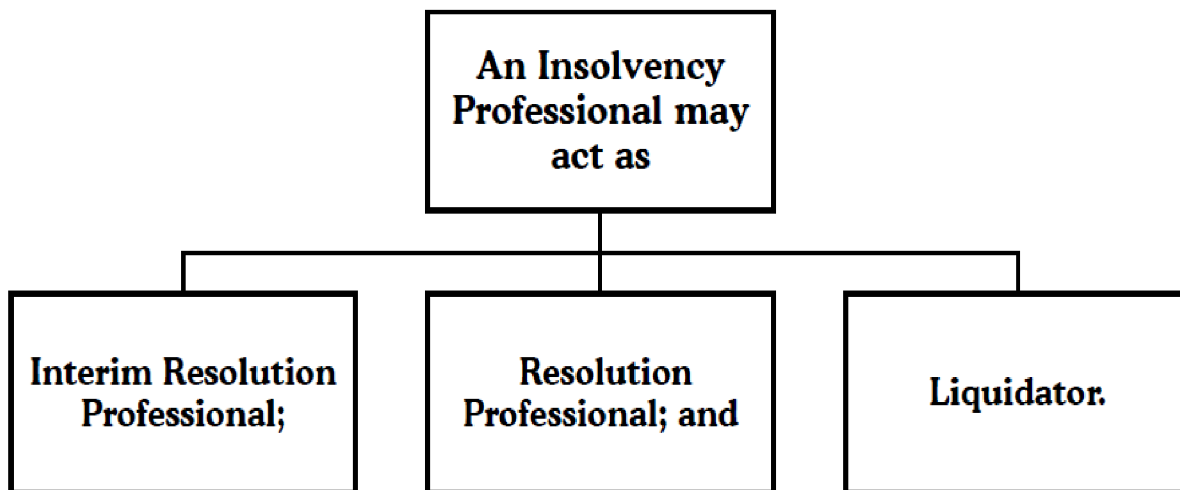
* FCS. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.

- Submission of approved resolution plan by Committee of Creditors before Adjudicating Authority;
- Approval of Resolution Plan by Adjudicating Authority.

Insolvency Professional

Insolvency Professional plays a vital role in the corporate insolvency resolution process. The Board, for this purpose, made 'Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The Regulations prescribes the eligibility, qualifications and experience, the procedure for getting certificate of registration, code of conduct for insolvency professionals.

A Practicing Company Secretary is eligible to act as an insolvency professional under the Code. This Code gives a wide area for the practicing Company Secretary. But at the same time there are challenges and risks in taking this assignment.



Functions of Interim Resolution Professional

The Adjudicating Authority appoints an interim resolution professional ('IRP'for short) as proposed by a financial creditor or the corporate applicant, within 14 days from the insolvency commencement date. If no IRP is proposed in the application by an operational creditor the Adjudicating Authority makes a reference to the Board and the Board recommends an IRP within 10 days of receipt of such reference from Adjudicating Authority. The IRP holds office up to 30 days from the date of his appointment.

The functions of IRP are as detailed below-

- Immediately on the appointment of IRP, the management of the affairs of the corporate debtor vest in him;
- The powers of the board of directors of the corporate debtor are suspended and exercised by the IRP;

- The IRP manages the operations of the corporate debtor as a going concern;
- He takes control of assets of the corporate debtor;
- Within 3 days of his appointment, he makes a public announcement, inviting all the potential creditors to file claims against the debtors for their dues;
- Within seven days of his appointment, the IRP appoints two registered valuers to determine the liquidation value of the corporate debtor;
- The IRP constitutes the Committee of Creditors on the basis of claims received against the corporate debtor;
- The IRP files a report on the constitution of the Committee of Creditors with the Adjudicating Authority on or before the expiry of thirty days from the date of his appointment and convenes the first meeting of the Committee of Creditors within seven days of such filing.

Functions of Resolution Professional

The Committee of Creditors in its first meeting either to appoint IRP as the Resolution Professional or to replace the IRP by another insolvency professional as Resolution Professional. His functions are as below-

- The Resolution Professional conducts the entire resolution process and manages the operations of the corporate debtor during the Corporate insolvency resolution process;
- The Resolution Professional convened the meeting of Committee of Creditors. He presides over the meetings and the Committee of Creditors decides the matters by a vote of 75% of the voting shares;
- The Resolution Professional prepares an Information Memorandum and submits to each member of the Committee and potential resolution applicants;
- The Resolution Professional may, based on the complexity and scale of operations of the corporate debtor, specify the eligibility criteria for potential resolution applicant with the approval of the Committee;
- He invites resolution plans from prospective eligible resolution applicants;
- The Resolution Professional examines each plan to confirm that it provides for and/or meets the following requirements-
  - — It has identified sources of funds to pay the insolvency resolution process costs. This payment will be paid in priority to any other creditor;
  - — It provides for at least liquidation value due to the operational creditors in priority to any financial creditor. This payment is to be made before the expiry of 30 days from the date of approval of the resolution plan by the Adjudicating Authority;
  - — It provides for at least the liquidation value due to dissenting financial creditors.

This payment is to be made before any recoveries are made by the financial creditors who voted in favor of the resolution plan;

— It provides for-

- the term of the plan and its implementation schedule;
- the management and control of the business of the corporate debtor during the implementation period; and
- adequate means for supervision of the plan;

— It does not contravene any of the provisions of the law for the time being in force;

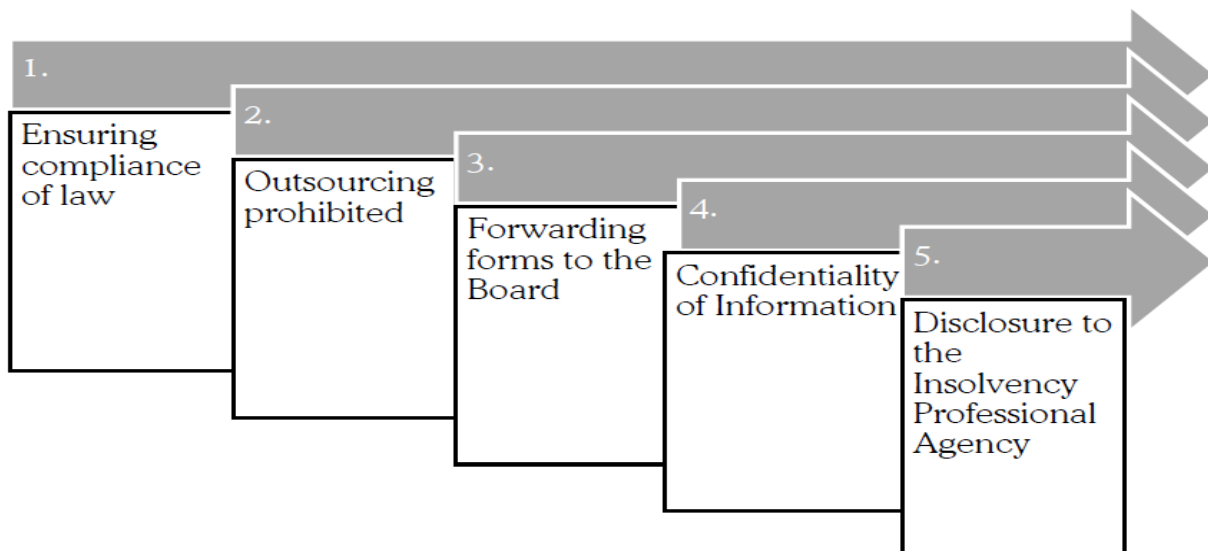
— It includes a statement as to show it has dealt with the interests of all stakeholders including financial and operational creditors of the corporate debtor.

- The Resolution Professional presents the resolution plans that conform to the criteria specified in the Code and prescribed by the Committee of Creditors;
- The Resolution Professional submits the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority for its approval.

If the Adjudicating Authority is satisfied that the resolution plan, as approved by the Committee of Creditors, meets the requirements specified in the Code and regulations, it approves the resolution plan.

Other obligations to be fulfilled by Insolvency Professionals

The Board also issued various circulars directing the insolvency professionals to comply with the obligations contained the said circulars.



Ensuring compliance of law

The Insolvency professional has to ensure the compliance of the provisions of law relating to insolvency resolution process. Vide Circular No. IP/002/2018, dated 03.01.2018 the Board directed that while acting as an interim resolution professional or resolution professional or a liquidator of a corporate person an insolvency professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person under going any process under the Code complies with the applicable laws. It is also clarified that the insolvency professional will be responsible for the non compliance of the provisions of the applicable laws if it is on account of his own conduct.

Outsourcing prohibited

The insolvency professional is expected to do his work as himself and not to delegate to others or outsource his work to others. Vide circular No.IP/003/2018, dated 03.01.2018 the Board observed that few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to resolution applicants. This requirement amounts to outsourcing the responsibilities or an insolvency professional to other persons. Further this adds to cost of the resolution applicant and delays in submission of resolution plans. The Code read with regulations do not envisage such a certification from third persons. The Board directed that the insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code.

Forwarding forms to the Board

The Board has specified forms for publishing public pronouncements and brief particulars of invitation of resolutions plan on the websites. Vide Circule No. IP/(CIRP)/006/2018, dated 23.02.2018 the Board directed that the resolution professional shall send the forms to the Board for publishing the same on the website www.ibbi.gov.in. He shall ensure that the form is complete and accurate and complies with the provisions of the Code and regulations made there under. He shall be liable for consequences for deficiencies in the forms.

Confidentiality of Information

The Code of conduct for the insolvency professional insists that he shall keep the information confidentially in the process and he should not disclose the same to others. Vide Circular No. IP (CIRP)/007/2018, dated 23.02.2018 the Board instructed that the disclosure of information except as provided for in the Code or the Rules or regulations or circulars issued there under is restricted. Unauthorized access to or leakage of such information has the potential impact the process under the Code. The insolvency professional except to the extent provided in the Code and the rules, regulations or circulars issued there under-

- shall keep every information related to confidential; and
- shall not disclose or provide access to any information to any unauthorized person.

Disclosure to the Insolvency Professional Agency

Vide Circular No. IP/005/2018, dated 16.01.2018 the Board directed that the Insolvency professional shall disclose the following to the Insolvency Professional Agency to which he is a member within the time as specified-

- disclose his relationship, if any, with the-
  - — corporate debtor;
  - — other professionals engaged by him;
  - — financial creditors;
  - — interim finance provider (s); and
  - — prospective resolution applicant;
- disclose the relationship, if any, of the other professional(s) engaged by him with-
  - — himself;
  - — the corporate debtor;
  - — financial creditor(s);
  - — interim finance provider(s);
  - — prospective resolution applicant(s).

The insolvency professional shall provide a confirmation to the Insolvency Professional Agency to the effect that the appointment of every other professional has been made at arms' length relationship. He shall ensure timely and correct disclosures by him and the other professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the insolvency professional and other professionals as per the provisions of law.

To facilitate monitoring of both their performance and compliance of statutory requirements, and in the interest of transparency and accountability, the IBBI, in consultation with IPAs, has devised the format of ANNUAL COMPLIANCE CERTIFICATE to be submitted by the IPAs to the IBBI and to be displayed on its website within 45 days of the closure of the financial year. For the financial year 2017-18 the insolvency professionals has to file Annual compliance report by 15th May, 2018.

Challenges

On admission of the petition, an IRP is appointed and is required to step in to take complete control over the management of the corporate debtor and take control and custody of its assets, receive, collate verify the creditor claims, constitute the Committee of Creditors and comply with such other tasks.

While the process defined aims for a smooth functioning, there are many challenges that the IRP faces while working towards the resolution process. In most of the cases, the IRP works alongside a company which has been through several ordeals of revival procedures under different laws, and has exhausted its resources hence the formulation of a resolution plan might in certain cases take more time than expected.

The IRP also faces challenges while working around incomplete records, pending compliances and un-cooperative officers of the corporate debtors. Also, since only individuals

-- entities being excluded as of now -- are permitted to act as insolvency professionals, it becomes extremely stressful for individual resolution professionals who face infrastructural and logistical challenges to perform their duties. The IRPs or RPs have to approach the tribunals and wait for their directions thereby making it difficult for them to adhere to the prescribed timelines.

The IRPs and RPs are also beleaguered as they require the working capital in order to run the business of such debtor as a going concern. The IRPs or RPs have to struggle to raise resources to tackle the day to day requirements of the corporate debtor.

As a matter of stark reality, there have also been instances where the IRPs failed to muster up the resources even for a basic thing as convening the first meeting of the Committee of Creditors. Once the Committee of Creditors is formed, any major decision of the IRP or IP regarding the finances of the corporate debtor is subject to the discretion of the Committee of Creditors.

In many instances the IPs or IRPs have approached the creditors even for meeting the operational requirements of the corporate debtor. In one of the cases, the respective IRPs had approached the existing lenders of the company to infuse more funds in order to keep the firm's operations, to clear the dues and pay off the salaries of the employees.

In some of the cases, there were issues where illegible or ill-advised persons submitted applications as resolution applicants (RA). Thus, the Code was further amended to address this issue and armed the IP or IRP to do a background verification of the RA and that the Ordinance was another step in this direction. The recent Ordinance has further enhanced the eligibility requirements as to who can act as RA.

The IRP or RP has to ensure that even claims of the operational creditors (OC) are adequately addressed since they are not entitled to vote in the meetings CoC, which comprise of financial creditors, and thereby ensuring that the OC are not sidelined or cornered in entire resolution process. The IRP's and RP's are tasked with the responsibility of creating a consensus between the financial creditors and the operational creditors in terms of their claims and the company's ability to pay.

RPs, who may not be well versed with running a business, are also required to understand the specific business of the corporate debtors, its reasons for financial troubles and accordingly the need to arrive at a settlement with the creditors qua their debts. The ordinance read with the recent amendments to the Code, requires the IP or RP to verify the credibility of the resolution applicant, thereby adding another item to its already bulging compliance list.

Fee Structure

How do the costs of an insolvency professional work? The intention is for these fees and expenses to ultimately be paid out of the insolvent debtor's estate. The costs of an insolvency professional get priority in the liquidation process. Any corporate resolution plan that is agreed between creditors and debtor must necessarily make provision for the payment of the insolvency professional. The costs of a resolution professional need to be approved by the creditors' committee.

These provisions are similar to those in other parts of the world, including the UK and US, where the costs of the insolvency process are paid out in priority to most other costs, and rightly ensure that insolvency professionals do not face the risk of non-payment for a service they are providing. However, the Code does not specify how the costs of insolvency professional are to be borne in the early stages of a proceeding. The regulations on the corporate insolvency resolution process state that the costs of the resolution professional will be decided and initially borne by the creditor or debtor who initiates the corporate insolvency resolution process. If these costs are later ratified by the creditors' committee, the creditor or debtor who filed the application will be reimbursed.

While market practice around the fees of insolvency professionals is yet to develop most insolvency professionals tend to charge a significant chunk of their fees upfront, first when they consent to act as a resolution professional, and second when the application is admitted. This means that any creditor who files an application under the Code faces the prospect of having to fund the costs of a resolution professional upfront with the risk that the creditors' committee may or may not ratify these costs as a later stage. The time period between filing an insolvency application and the first meeting of the creditors' committee could, even with the stringent timelines under the Code, be a few months. While this may not be a daunting prospect for financial creditors with deep pockets, it would be for an employee or a small trade creditor. Such creditors also have the added disadvantage that they would not be part of the committee of creditors that decides whether or not to ratify the insolvency professional's fees.

It could not be said that the fees being charged by insolvency professionals are unjustified. Because of the wide-ranging responsibilities and liabilities under the Code, it is understandable that their fees will be significant. It is likely that with time insolvency professionals will develop fee structures suitable to different types of debtors and creditors. However, two measures can be taken to mitigate the impact for small creditors of having to bear the burden of the initial costs of insolvency resolution. First, the regulations should allow the creditors' committee very limited grounds for not ratifying the initial costs of the resolution professional. As the creditors' committee can, in any event, choose to appoint a new resolution professional, it must be required to ratify and share the initial costs of the professional. Not doing so would be penalizing the creditor applicant for initiating a process from which all creditors stand to benefit.

In some cases the admission of the application is being challenged by the aggrieved party before the National Company Law Appellate Tribunal. There may be chances for allowing the appeal by the Appellate Tribunal. In the meantime the Interim Resolution Professional began to work in the insolvency process. When the appeal is allowed, the Appellate Tribunal itself directed to pay the fee to the Interim Resolution Professional for his work done up to the date of the order of the appeal.

Short time frame

The time frame for this process is very short. There is 8 months to get to this. Ninety days extension is permissible on application by the Resolution Professional by filing an application before the Adjudicating Authority. The time schedule to be followed by the insolvency professional is detailed in the table below:

Description of transaction	*Time limit*
Filing of application	(-) 14 days
Admission of application/CIRP Commencement date/ Declaration of Moratorium	0 Days
Adjudicating Authority to appoint Interim Resolution Professional	14th day
Public announcement by Interim Resolution Professional	16th day
Appointment of Registered valuer to calculate liquidation value	21st day
Creditors to submit claims	37th day
IRP to constitute Committee of Creditors and submit report	44th day
First Committee of Creditors meeting	51st day
Preparation of Information Memorandum	65th day
Submission of Resolution Plan	150th day
Committee of Creditor approval of resolution plan	-
Application for approval by the Adjudicating Authority	-
Initiation of Liquidation Process/Close of IRP	180th day

Some superhuman capabilities are required in order to perform the entire process in the above short span of time. That role as well is actually managing the affairs and operations of the company are much more challenging for the insolvency professionals. Professionals brought in by lenders to handle the transition in insolvency proceedings are finding themselves reeled in situations they had not bargained for. The insolvency professionals have to face threats of violence and handling angry mobs to pacifying borrowers have become part of their job.

Disciplinary Action

The insolvency resolution professionals are subjected to disciplinary action if it is found that there is violation of the provisions of the Code, rules and regulations. Vide Circular No. LA/010/2018, dated 23.04.2018 the Code does not define 'disciplinary proceeding'. Section 219 envisages issue of show cause notice following an inspection or investigation and section 220 envisages constitution of a disciplinary committee for consideration of the inspection or investigation report. Various regulations made under the Code envisage issue of show cause notice based on findings of an inspection or investigation or on material otherwise available on record. They also envisage constitution of disciplinary committee for disposal of show cause notice.

A show cause notice is issued after application of mind to the material available on record

or on consideration of the inspection or investigation report. The disciplinary committee disposes of the show cause notice by a reasoned order in adherence to principles of natural justice. The reasoned order carries the determination of contravention, if any, of the provisions of the Code, the rules and regulations, or guidelines, directions or orders issued by the Insolvency and Bankruptcy Board of India. The Board clarified that-

- a disciplinary proceeding is considered as pending against an insolvency professional from the time he has been issued a show cause notice by the Insolvency and Bankruptcy Board of India till its disposal by the disciplinary committee; and
- an insolvency professional who has been issued a show cause notice shall not accept any fresh assignment as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee under the Code.

Insurance

The insolvency professionals are concerned about two likely risks. First, they may not complete the job within the stipulated 180/270 days. Second, disgruntled bidders and ousted promoters in insolvent companies would drag them to court even after a resolution is reached. Therefore to protect the interests of the insolvency professionals insurance is highly required. “Insurance for insolvency professionals and their teams is a rather new concept in India. Based on recent developments of corporate insolvency resolution process timelines extending beyond 270 days, insurance policies also need to provide cover during this longer tenure. Risks faced by the insolvency professional are real and insurance cover is a norm in international markets,” said Ashish Chhawchharia, Partner, Restructuring Services, Grant Thornton.

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Bird's eye view of difficulties faced by Resolution Professionals and Road Ahead

Jagdish Ahuja*

Introduction

Insolvency & Bankruptcy law is about 2 years old in India since its inception in May 2016 but with major provisions of the Insolvency and Bankruptcy Code 2016 ("IBC") coming into force in December 2016 and it will not be out of place to state that today NCLT is flooded with the cases filed against defaulting companies. The law is gaining its popularity due to its innovative and time-bound resolution framework.

The objective is to simplify various laws, come up with an efficient resolution plan and try to resolve disputes in a time bound manner. This is also expected to go a long way in improving India's rank in ease of doing business index.

The law is so complex and dynamic at the same time that one can never be updated without keeping tab on the latest amendments, circulars & notifications and of course on the case laws being decided in NCLT, NCLAT & also by Hon'ble Supreme Court on a day to day basis.

This article is an attempt to understand the challenges being faced by IPs while acting as IRP/RP of a corporate Debtor.

Difficulties faced by RP

1. The first and foremost issue is non-cooperation by Promoters. Once the case is admitted by NCLT, you become IRP of the Corporate Debtor entity and all powers of the Board of Directors are vested in you as IRP. This give rise to ego clash with promoters as they are reluctant to easily give up control of the undertaking they have been managing for decades. Moreover, employees of the corporate debtor are loyal and use to receiving commands from promoters only and this give rise to non-cooperation with IRP/RP. There are case laws to suggest that in a few cases, IRP had to seek NCLT intervention to force promoters to co-operate with IRP in CIRP process.

2. The co-operation is crucial in the light of the fact that IRP is appointed only for a short tenure of a month's time or till the conclusion of first CoC meeting and within this short tenure he is expected to play challenging role such as inviting and collating all creditors claims, run the entity as a going concern, releasing public announcement within three days of admission of case, orgainse CoC meeting, etc.

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

3. RP will also have to face umpteen hurdles working around incomplete records, pending statutory or regulatory compliances, workers/ labour issues of the corporate debtor.

4. Many times it is difficult for a IP who is required to have manifold expertise in the field of finance, law, management and business administration at the same time, to discharge his duties as RP. It is advisable that RP is backed or associated with a good IPE or has his own team with expertise in varied fields. It is equally difficult for a RP to take control of the assets and finances of the entity especially when it is spread over various locations.

5. Another challenge is with respect to timely constituting CoC in the light of the fact that very often there is delay in claim submission by operational and financial creditors.

6. It becomes an herculean task for a RP to invite and collate claims within 14 days of his appointment which may run into hundreds or thousands of such claims and verifying the same within 7 days of the receipt. Moreover, in the absence of financial information and lack of support from promoters or employees, it is very difficult for a RP to cross verify such claims received from creditors. In case of IDBI Bank vs. Jaypee Infratech, NCLT Allahabad (August 2017), upon the request of the IRP, the honorable Court granted temporary exemption to the IRP from serving a mandatory notice for the first CoC meeting to all the FCs, particularly those who had made fixed deposit with the company, since they were very large in numbers (more than 99%) but not significant in value (less than 2%)[1].

7. If cash flow of the corporate debtor entity is dry, it is difficult for a RP to arrange for interim finance without the consent of the committee of creditors with 75% voting, to run the entity as a going concern.

8. It is suggested that an IRP should act only on the basis of certified copy of the order from NCLT. The actions such as publishing of public announcement should only be initiated once the certified true copy of the NCLT order admitting the case has been provided.

9. There has been very strict reporting requirement/compliance applicable to Resolution Professionals. This is substantiated from the following developments:

   a. As per IBBI recent circular dated 23rd April, 2018, it will be deemed that a disciplinary proceeding is pending against an IP from the time IP has been issued a show cause notice by IBBI till its disposal by the Disciplinary Committee of IBBI.

   b. In a recent case, the Disciplinary Committee of IBBI has issued an ex-parte interim order against an IP which states that IP has inserted the requirement of the certificate of CA in the Expression of Interest (EoI) without the approval of CoC and also that the IP has sought approval of the EoI only from one of the creditors.

   c. Regulation 16 of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 deals with monitoring of members. As per the said Regulation, a professional member shall submit information, including records of ongoing and concluded engagements as an IP to the Insolvency Professional Agency at least twice a year.

1. EY – The Insolvency & Bankruptcy Code – Select Judgements February 2018.

d. IBBI has recently imposed a penalty on RP for conducting corporate insolvency resolution process of a Steel company. Penalty equivalent to one tenth of the total fee payable to the RP for the said case has been imposed.

10. In many cases, it is noticed that RPs are dragged in futile legal battle by making them one of the respondents in the case. Such futile legal cases, can be a source of headache and may deter RPs in discharging their duties.

11. A few months back in Aug 2017, there was newspaper headline saying 'Insolvency professionals face threats, draw staff ire while evaluating plans for debt-laden companies' In one such case, the IRP found himself in a tough position after he reached factory, to take stock of things at the company. As soon as he reached its premises, he was surrounded by about 200 angry workers, who said they had not been paid by the company for 18 months. For the IRP, thankfully the situation did not blow out of proportion as he was able to calm the tempers.[2]

12. There always remains dilemma as to who will settle the fees of IRP. In case of OC appointed IRP, the fees payable to IRP is only to the extent ratified by CoC.

13. The IBBI has recently stipulated amongst the other things that the minimum net worth of an IPE should be Rs.1 crore. This will deter small practitioners and force them to come together to get recognition. This seems to be an attempt by the legislature to ensure the credibility of companies or partnerships or LLPs seeking to be recognised as an IPE. This new amendment is expected to eliminate non-serious IPE entities.

14. IBBI revised its guidelines entrusting more responsibilities on the RPs and setting stricter time lines. The regulator has directed RPs to provide evaluation matrix to prospective resolution applicants and appoint two registered valuers to arrive at liquidation value and fair value of the company. The RP is also directed to submit resolution plan approved by the committee of creditors to the Adjudicating Authority at least 15 days before the expiry of the maximum period – which is 270 day from the time of being admitted. The regulator has also said that the applicant should be given at least 30 days to submit resolution plan from the issue of invitation.[3]

15. Recently, in a historical development, Hon'ble Supreme Court has directed deletion of adverse remarks made against a RP by the NCLAT questioning his competence without any reasons and despite the CoC voting in favor of his appointment as the liquidator for the liquidation of the corporate debtor. This is expected to bring cheers to the IP community and encourage others to be impartial and independent in discharging duties as RP.

Conclusion – The Road Ahead

Thus it can be noticed from the above that the role of RPs in the entire CIRP is tight rope walking. The success of RPs will largely depend on his practical skill of application of knowledge.

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2. Economic Times dated 24th Aug 2017.
3. Economic Times Dated 7th February 2018.

Thus if one wants to successfully practice insolvency matters it is only possible by forming teams of professionals such as CA/CS/CMAs/Lawyers, etc.

So far very few company secretaries are engaged in the matters pertaining to NCLT practice despite the fact that this is supposed to be a hard core area for them. However, with the advent of Insolvency and Bankruptcy regime, many aspiring Company Secretaries will now have one more opportunity to demonstrate their skill in NCLT practice. The IP assignments are expected to turn company secretaries into multi-taskers and his scope of work is expected to increase by leaps and bound.

Abbreviations Used

1. NCLT: National Company Law Tribunal
2. NCLAT: National Company Law Appellate Tribunal
3. IP: Insolvency Professional
4. IRP: Interim Resolution Professional
5. RP: Resolution Professional
6. CoC: Committee of Creditors
7. IBBI: Insolvency & Bankruptcy Board of India
8. CA: Chartered Accountant
9. CS: Company Secretary
10. CMA: Cost & Management Accountant
11. EOI: Expression of Interest
12. OC: Operational Creditor
13. FC: Financial Creditor
14. IPE: Insolvency Professional Entity
15. LLP: Limited Liability Partnership

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The Insolvency and Bankruptcy Code, 2016

Pawan Barodiya*

Introduction

In India, there was no single law which could deal with Insolvency and Bankruptcy proceedings. Under the previous law i.e. Sick Industrial Companies (Special Provision) Act, 1985, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institution Act, 1993, and Companies Act, 2013, provision relating to Insolvency and Bankruptcy for Companies were dealt with, though not effectively and efficaciously, hence were considered to be inadequate.

The Central Government proposed "The Insolvency and Bankruptcy Code 2015" which was introduced by the Finance Minister Shri. Arun Jaitely in Lok Sabha on 21st December, 2015 and the same was referred to a Joint Parliamentary Committee of both the Houses of Parliament for examination. The Committee presented its report to Lok Sabha on 28th April, 2016 and laid the same in Rajya Sabha on the same day.

After the recommdation by the Joint Parliamentary Committee, the Code was passed by the Lok Sabha on 5th May, 2016 and by Rajya Sabha on 11th May, 2016 and assented by the President on 28th May, 2016. Now, it is known as the "The Insolvency and Bankruptcy Code 2016". Further, the Government has amended or aligned the Code time to time with other Act/ Laws.

The Insolvency and Bankruptcy Code, 2016 extends to the whole of India except Part III (Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms) which shall not extend to the State of Jammu and Kashmir.

The provision provides the applicability of the code to:

- any Company incorporated under the Companies Act, 2013 or under any previous Company Law;
- any other Company governed by any Special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such Special Act;
- any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;

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

- such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;
- personal guarantors to corporate debtors; (Updated after amendment IBC (Amendment Act, 2018).
- partnership firms and proprietorship firms. (Updated after amendment IBC (Amendment Act, 2018);
- individuals. (Updated after amendment IBC (Amendment Act, 2018).

Objective

The objective of the Insolvency and Bankruptcy Code is to promote the ease of doing business and amending the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto. The code provide establishment of the Insolvency and Bankruptcy Board of India for regulation of insolvency professionals, insolvency professional agencies and information utilities.

Applicability

The provisions of this Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of default is Rupees One (1) Lakh. However, the Central Government may specify the minimum amount of default of higher value which shall not be more than Rupee One (1) Crore by notification.

Constitution of the Board

The Central Government has established the Board "The Insolvency and Bankruptcy Board of India" under the provision of section 188 of the Insolvency and Bankruptcy Code, 2016.

The Board shall consist of the following Members who shall be appointed by the Central Government

- Chairman;
- three (3) Members from amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio;
- one (1) Member to be nominated by the Reserve Bank of India, ex officio;
- five (5) other Members to be nominated by the Central Government, of whom at least three (3) shall be the whole-time Members.

The Chairperson and the other Members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and

have special knowledge and experience in the field of law, finance, economics, accountancy or administration.

Corporate Insolvency Resolution Process

1. *Initiation of Corporate Insolvency Resolution Process*

   A financial creditor, an operational creditor or the corporate debtor, as the case may be, file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred under the provisions of section 7, 9 and 10 respectively of the Insolvency and Bankruptcy Code, 2016.

   Note:

   (a) Adjudication Authority mean National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

   (b) Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the Code shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

2. *Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditors*

   A Financial Creditor either by itself or jointly with other financial creditors may file an application in Form 1 for initiating corporate insolvency resolution process against corporate debtors before the Adjudicating Authority under the provision of section 7 of the Code.

3. *Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditors*

   An Operational Creditor may deliver a Demand Notice in Form 3 of unpaid operational debtor copy of an invoice in Form 4 demanding payment of the amount involved in the default to the Corporate Debtors. The Corporate Debtor has a period of ten days from the receipt of demand notice to inform the operational creditors of the existence of a dispute regarding the debt claim or the repayment of debt. After the expiry of the period of ten (10) days from the date of delivery demand Notice, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application in Form 5 before the Adjudicating Authority for initiating a corporate insolvency resolution process under the provisions of section 9 of the Code.

4. A Corporate Applicant (Corporate Debtor) may make an application in Form 6 to the Adjudicating Authority under the provisions of the section 10 of the Code.

5. The Adjudicating Authority shall ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the Financial Creditor, Operational Creditor and Corporate Debtors within fourteen (14) days of the receipt of the application.

Accordingly, we can say that the Adjudicating Authority within 14 days of receipt of application by order accept or reject the application. However, before the rejecting the application, the Adjudicating Authority shall give notice to the applicant to rectify the defect within seven (7) days of receipt of such notice. The corporate insolvency resolution process shall commence from the date of admission of the application. The Adjudicating Authority shall communicate to the Financial Creditor/ Operational Creditors and the corporate debtor within seven (7) days of admission or rejection of such application, as the case may be.

6. *Time-limit for Completion of Insolvency Resolution Process*

   The corporate insolvency resolution process shall be completed within a period of one hundred and eighty (180) days from the date of admission of the application to initiate of process. The resolution professional can file an application to the Adjudicating Authority for extension the period of the corporate insolvency resolution process beyond one hundred and eighty days but not exceeding ninety (90) days.

7. *Moratorium*

   The Adjudication Authority will declare moratorium period for prohibiting all of the following :

   (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

   (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

   (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

   (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

   The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period. Further, the abovesaid provisions not apply to such transactions notified by the Central Government in consultation with any financial sector regulator.

   According to above, we can say that the purpose of moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the process envisaged during the insolvency resolution process and ensuring that the Company may continue as a going concern while the creditors take a view on resolution of default.

8. *Public Announcement of Corporate Insolvency Resolution Process*

   A Public announcement of corporate insolvency resolution process for the corporate

debtor shall contain the information includes Name and address of the corporate debtor under the corporate insolvency resolution process, name of the authority with which corporate debtor is registered, the last date for submission of claims and date on which corporate insolvency resolution process will be closed etc.

9. *Appointment and Tenure of Interim Resolution Professional*

   The Adjudicating Authority shall appoint an interim resolution professional within fourteen (14) days from the insolvency commencement date under section 7, 9 and 10. Where the corporate insolvency resolution process has been initiated in respect of a corporate debtor in the application by a financial creditor or the corporate debtor itself, the insolvency professional whose name has been proposed in the application shall be appointed by the Adjudicating Authority.

10. *Management of Affairs of Corporate Debtor by Interim Resolution Professional*

    After appointment of the interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the Board of Directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional. The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

11. *Committees of Creditors*

    The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors. The committee of creditors shall comprise all financial creditors of the corporate Debtor. All decisions of the committee of creditors shall be taken by a vote of not less than 75% of voting share of the financial creditors after considering its feasibility and viability, and such other requirements as may be specified by the Board. (Updated after IBC Amendment, 2018.)

12. *Appointment of Resolution Professional*

    The first meeting of the committee of creditors shall be held within seven (7) days of the constitution of the committee of creditors. The committee of creditors either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

13. *Resolution Professional to Conduct Corporate Insolvency Resolution Process*

    The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period. In case of appointment of a new resolution professional in place of the interim resolution professional, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

14. *Replacement of Resolution Professional by Committee of Creditors*

    At any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under the provision of the Code is required to be replaced. The Committee of creditors may replace him with another resolution professional.

15. *Preparation of Information Memorandum*

    The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan. Further, A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person is an un-discharged insolvent and as described in the section 29A of the said Code. (Updated after IBC Amendment, 2018).

16. *Submission of Resolution Plan*

    A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum and the resolution professional shall examine such resolution plan. The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority (NCLT).

17. *Approval of Resolution Plan*

    If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as referred under the provision of the Code, then the Adjudication Authority shall by order approve the resolution plan. If Adjudicating Authority is felt that the resolution plan does not meet the requirements of the Code, it may reject the resolution plan or order for Liquidation.

    The approved plan shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Appeal

Any person aggrieved by the order of the Adjudicating Authority may appeal to the National Company Law Appellate Tribunal (NCLAT) within thirty (30) days. All appeals from the orders of the NCLT will be heard by NCLAT. Appeals from the NCLAT will be heard by the Supreme Court of India.

Fast Track Corporate Insolvency Resolution Process

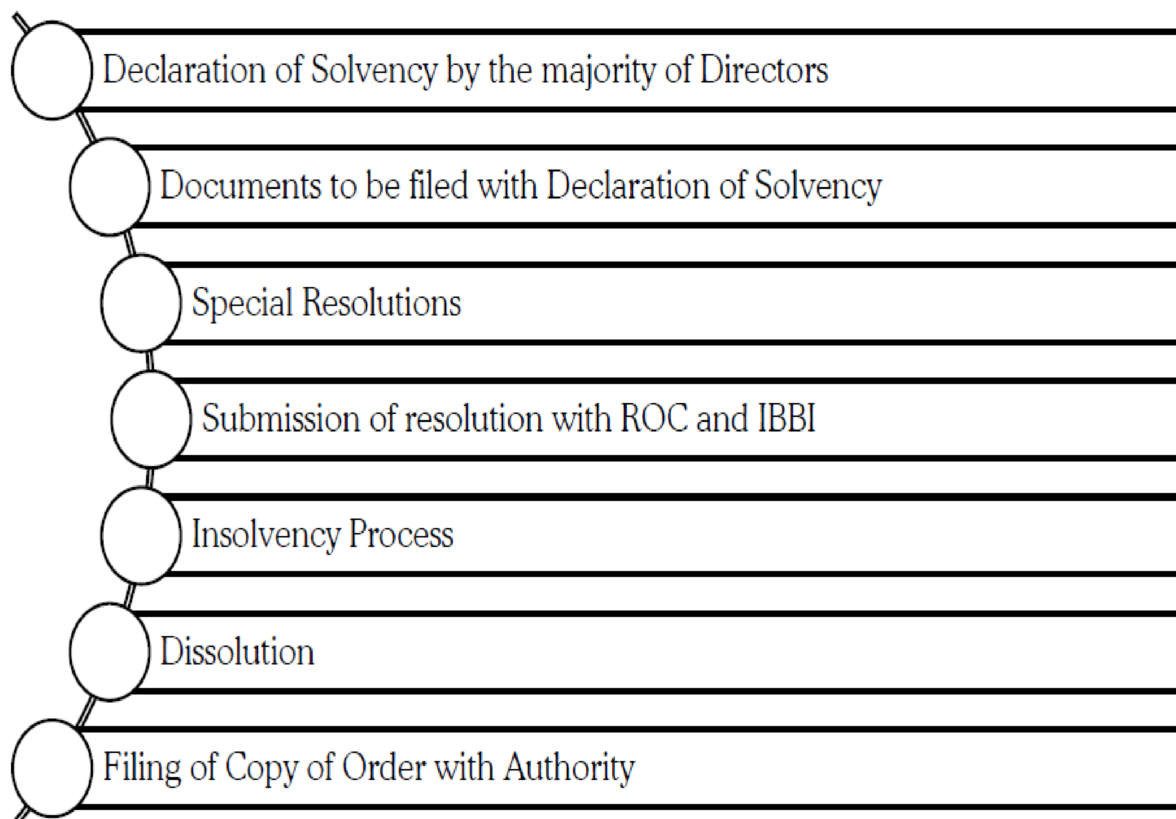
A new concept “Fast Track Corporate Insolvency Resolution Process” has been introduced. The Code provides that the Fast Track Corporate Insolvency Resolution Process shall be completed within a period of ninety days (90) from the insolvency commencement date. The resolution professional can file an application to the Adjudicating Authority for extension the period of the fast track corporate insolvency resolution process beyond ninety days but not exceeding forty-five days (45).

Further, the Resolution Professional shall appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor and the resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value. The Resolution Professional shall submit the resolution plan approved by the committee of creditors to the Adjudicating Authority, at least 15 days before the expiry of the maximum period permitted for the completion of the corporate insolvency resolution process. (Updated after amendment dated)

Voluntary Liquidation of Corporate Persons

The Code provides provisions for initiation of Voluntary Liquidation proceedings by the corporate person which has not defaulted on any debt due to any person. The Code also repealed the provision of Part II of Chapter XX of Companies Act, 2013, which deals with Voluntary Winding Up. The section 304 to 323 (Voluntary Winding Up) of the Companies Act, 2013 has been omitted with effect to the applicability of this Code and section 59 of the Code provides provision for Voluntary Liquidation of Corporate Persons.

A Corporate person who intend to liquidate or wound up itself and has not committed any default may initiate voluntarily liquidation proceeding. Voluntary liquidation proceeding of a corporate person registered as Company shall meet the following conditions:



1. *Declaration of Solvency by the majority of Directors*

   A declaration of solvency from majority of the Directors of the Company in Form of an affidavit stating that they have made a full inquiry into the affairs of the Company and they have formed an opinion that either the Company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation and the Company is not being liquidated to defraud any person.

2. *Documents to be filed with Declaration of Solvency*

   The above declaration shall be accompanied with the audited financial statements and record of business operations of the Company for the previous two years or for the period since its incorporation, whichever is later. Further, a report of the valuation of the assets of the Company prepared by a registered valuer also needs to be submitted with declaration.

3. *Special Resolutions*

   Within four weeks of a declaration, a Members special resolution in favour of the voluntary liquidation of the Company and appointment of an insolvency professional as the liquidator has to be passed. Further, if the Company owes any debt to any person, creditors representing two-thirds in value of the debt of the Company shall approve the resolution passed within seven days of such resolution.

4. *Submission of resolution with ROC and IBBI*

   The Company also has to notify the Resolution with Registrar of Companies and the Insolvency and Bankruptcy Board of India within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

5. *Insolvency Process*

   The voluntary liquidation proceedings in respect of a Company shall be deemed to have commenced from the date of passing of the resolution subject to approval of the creditors. The provisions of sections 35 to 53 of Chapter III and Chapter VII of the Code shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.

6. *Dissolution*

   Once the affairs of the corporate debtor have been wound up and its assets completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the corporate debtor and the corporate debtor shall be dissolved by the order of the adjudicating authority.

7. *Filing of Copy of Order with Authority*

   A copy of an Order shall be forwarded to the Authority (Concerned Registrar of Companies in case of Company and Registrar of LLP in case of LLP) with which the corporate person is registered within fourteen days from the date of such order.

Advantages of the Code

The code seeks to provide an effective legal framework for timely resolution of insolvency and bankruptcy. It would also improve ease of doing business in India. Some of most important advantages are as under:

- *Speedy Process* : The code creates time-bound processes for insolvency resolution of Companies and Individuals. These processes will be completed within 180 days.
- *Reduction of work of Court* : The number of pending cases with Court is too high and now the matters in respect to insolvency and bankruptcy transferred to NCLT. Accordingly, The NCLT and the NCLAT will reduce the work of overburdened Courts.
- The speedy disposal of cases will save time, energy and money of the parties.

Hence, we do hope that not only the corporate would obtain its benefits but stakeholders would also be benefitted.

Scope of Company Secretary

The Insolvency and Bankruptcy Code 2016 has given various opportunities to the professionals in the area of Corporate Insolvency Resolution Process, Liquidation Process and Individual insolvency resolution process. A Company Secretary who has been in practice for 15 year can immediately register as “Insolvency Professionals” for a period of 6 Months and a Company Secretary (employment/ in practice) having 10 year of experience as Member of the Institute can register himself / herself subject to passing of Limited Insolvency Examination.

Conclusion

The passing of the Insolvency and Bankruptcy Code was a step towards improving the ease of doing business by bringing all aspects of Insolvency and Bankruptcy matters under one roof. It is aimed to provide a speedy and efficient disposal of the matters. Further, it will also reduce the work of overburdened Courts. It would take India from among relatively weak insolvency regimes to becoming one of the world's best insolvency regimes. This is considered as the biggest economic reform.

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Four A's of Professional Skills

Raveena Agrawal*

Introduction

The Professional skill development is not a new concept, but it is becoming increasingly important. The Prime Minister envision is to make India the skill capital of the world, where a skilled Indian workforce can cater to the labour force requirements in other countries. Trends are already in this favour, with a survey conducted by the UN Department of Economic and Social Affairs (DESA) showing that India's population living abroad is the largest in the world with 16 million people living outside the country in 2015. Indian economy is now diversifying from being largely agro-based to a manufacturing and service-based economy and is expected to grow at 7.2 per cent in 2018 and 7.4 per cent in 2019. These ambitious plans to transform the Indian economy are highly dependent on availability of jobs and quality of skilled workforce. Qualified and skilled human resources are most important propellant for economic advancement of our nation - Sandeep Sinha.

Statistical Analysis

India adds 12 million people to its workforce every year and there are as many as 711 million people falling under the working age group of 15-59 years. Numerous reports from the Government of India identify that a significant proportion of this population requires additional or new skills. Statistics also show that 47 per cent graduates in India are not employable due to lack of English language knowledge and cognitive skills. As the former President Pranab Mukherjee said in a recently organised CII event in Kolkata, "We often boast about India's demographic dividend. But the question that arises is what we do with this if we cannot skill them, if we cannot educate them and cannot enhance their employability "

Professional Meaning

The term professional is thrown around quite a bit these days, perhaps too much. But what exactly does it mean to be a professional? A professional is a member of a profession or any person who earns their living from a specified professional activity. The term also describes the standards of education and training that prepare members of the profession with the particular knowledge and skills necessary to perform their specific role within that profession. In addition, most professionals are subject to strict codes of conduct, enshrining rigorous ethical and obligations. Professional standards of practice , code of conduct and ethics for a particular field are typically agreed upon and maintained through widely recognized

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professional associations, such as the ICAI, ICSI." It's not that we're ungrateful; it's that, as humans, we need to keep moving. We're like sharks: if we don't swim, we sink." – Jerry Kennedy

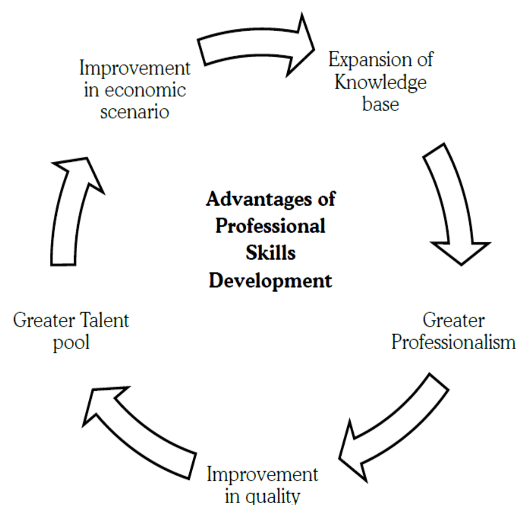
Why Professional skill development ?

"You may be a brilliant developer, a highly skilled net admin, or a crackerjack DBA -- but if you're unprofessional, your career is likely to fall short"- Alan Norton

The continuing pace of change in business and management means that what we learned in our initial training courses soon becomes dated and irrelevant. The advent of the Digital age and rapid technological disruption has ensured that the shelf life of skills is lower than it ever has been.It has been estimated that the half-life of skilled knowledge is about seven years. Furthermore, the amount of knowledge and skills continues to increase. Business and management has become knowledge intensive: we have entered the skill based economy.

In this new world, it is impossible to know all that there is to know, yet access to the skilled and knowledge base is increasingly readily available. So what will make us developed skill specialist, rather than poor ones, is that our knowledge is more relevant, and more current, and is applied more efficiently and effectively.

If we do not respond to this challenge, we face the prospect of becoming irrelevant. If, as skill professionals, we assume that our old time-served competences will last a lifetime, we will find ourselves becoming candidates for redundancy. We need to learn continually as we work. This requires a skill set all of its own, a skill set we need to learn for ourselves as teachers and mentors, and a skill set we need to instil into our learners for their future benefit. Skill development would also improve the employment scenario in India. By developing focussed skills of individuals, there would be a larger pool of talent for activity-specific jobs, which would help in creating specialists. "This can help provide better quality and easier timeline for product delivery to customers, driving the sector further towards industry status,"-Vinay Mehta

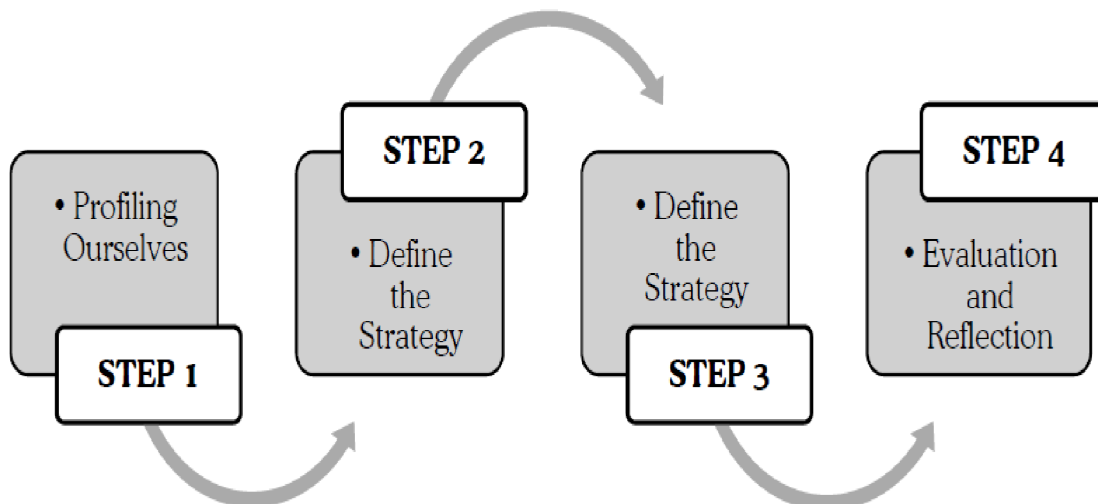


How to improve Professional Skills

Believing in your potential and calling upon your courage to change will fuel your professional growth and help you accomplish goals - John Manning

There are a host of professional skills that you need working as a Professional. While we can not cover all of them we have identified some key skills which included 4A's (Attestation, Advocacy, Audit, Appearance) that will serve you well in a remote and rural context which are helpful for professionals.

Furthermore, there are no formulations to arrange rules and standards to prompt professionals for professional development and no pre-defined parameters' results which can be suitable for all kinds of situations. So, professional development doesn't involve a formulated plan of skill improvement, but includes approval circumstances which are experienced in advance to be evolving (Holly, 1989) In this regard, professionals need to know requirements and act accordingly in order to meet the complex demands of preparing their students in profession for the 21 st century. It is emphasized that all professionals could have an ability to become competent and some of them, proficient; but a few of them would become expert (Eisenhart & Behm,). However, what is missing is the route by which we might achieve its objectives. In this case four step approach is used:



we each have our own preferred learning styles but the simplest places learners into one or more of three categories:

Visual - those who learn best through their eyes and what they see and read.

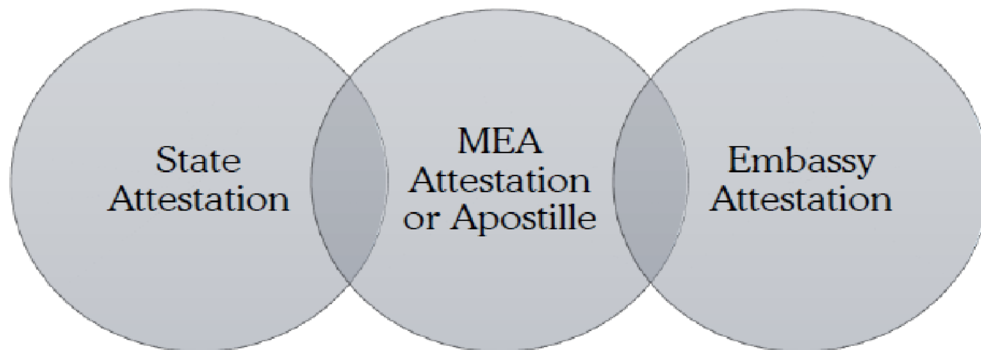
Auditory - those who learn best by hearing things, either on tape or in discussion.

Tactile - those who learn best by 'doing', such as taking their own notes or participating in demonstrations and hands-on projects.

Four A's of Professional Skills

A brief overview for the improvement of 4A's of Professional Skills (Attestation, Advocacy, Audit, Appearance) are:

1. Attestation



The act of attending the execution of a document and bearing witness to its authenticity, by signing one's name to it to affirm that it is genuine. The attestation is the method of checking the authenticity of a document & declaring its authenticity by attaching it with the sign of the verifying personnel. The process requires the submission of original documents as well as a xerox of the same to authorized employees for verifying and required sign/stamp on guided area.

The process of attestation arises from the venerable human tradition of seeking independent verification of recorded events. Historians are always more confident of an event when they have multiple sources verifying its occurence.

An attestation is a declaration by a witness that an instrument has been executed in his or her presence according to the formalities required by law. It is not the same as an Acknowledgment, a statement by the maker of a document that verifies its authenticity.

Broadly speaking, an attestation is a third party recognition of a documented agreement's validity. Ideally, the person or party acting as the witness of the signing has no professional or personal association with either of the signatories, and in some states this criterion is enforced by state probate law. The idea of document attestation is a sign or a symbol in itself for verifying the authenticity of a certificate.

Significance

Today authenticated documents are necessary whether you are preparing to admit your kid in a school or moving abroad. Since there are thousands of people who travel abroad for employment/immigration or for any different reason, one of the important things you need to do is documentation and attestation (Personal, Educational Or Commercial Documents). Attestations are particularly associated with agreements

of great personal and financial significance, especially legal documents involving wills or power of attorney. Attestations are also used when a witness is filing a police report. The witness signs to confirm that their statement is valid, and another person signs as attestation that the first signature was authentic.

Attestations are most commonly associated with wills and trusts. In this situation, an attestation generally verifies:

- That the testator (the person signing the will) is of sound mind
- That the testator executed the will voluntarily as an expression of his or her intentions
- That the testator signed the will and that the party performing the attestation witnessed the signing

The form and application of attestation clauses to legal documents is prescribed by state probate law in the country. While attestation clauses may vary somewhat from state to state, the essential function and intent of the attestation is generally consistent.

Types of Attestation

There are three primary kinds of attestations:

(1) *State Attestation* : State attestation is needed prior to Ministry of External Affairs (MEA) attestation, wherever based on the type of certificate, appropriate state attestation is needed. For instance, in the event of educational certificates, attestation from State Education Department is expected. In the case of personal certificates, General Administration Department of the involving state should attest the document earlier to attestation by the MEA.

(2) *MEA Attestation or Apostille* : MEA attestation is prepared simply after attestation by those appropriate state authorities. An Apostille is a kind of attestation in which certificates are legalized in an appropriate form that is admissible in all countries that relate to the Hague Convention. Basically, Apostille is a global attestation that is admissible in nearly 92 nations, and most of the western world acknowledges Apostille. Apostille stamp is a computer generated sticker stamp in a square shaped, fixed on the opposite of the certificate by the MEA, Government of India. It has a different ID number, by which any associate nation of The Hague convention can verify its legitimacy online.

(3) *Embassy Attestation*: Embassy/Consulate attestation is prepared later the MEA attestation

2. Audit

The word "AUDIT" has Latin origins (audio, audire, means listening). An audit is a systematic and independent examination of books, accounts, statutory records, documents and vouchers of an organization to ascertain how far the financial statements as well as non-financial disclosures present a true and fair view of the concern. Auditing and Assurance Standards (AAS) 1 by ICAI:

"Auditing is the independent examination of financial information of any entity, whether profit oriented or not, and irrespective of its size or legal form, when such an examination is conducted with a view to expressing an opinion thereon". It also attempts to ensure that the books of accounts are properly maintained by the concern as required by law. Auditing existed primarily as a method to maintain governmental accountancy, and record-keeping was its mainstay. From the time of ancient Egyptians, Greeks, and Romans, the practice of auditing the accounts of public institutions existed.

It wasn't until the advent of the Industrial Revolution, from 1750 to 1850, that auditing began its evolution into a field of fraud detection- and financial accountability.

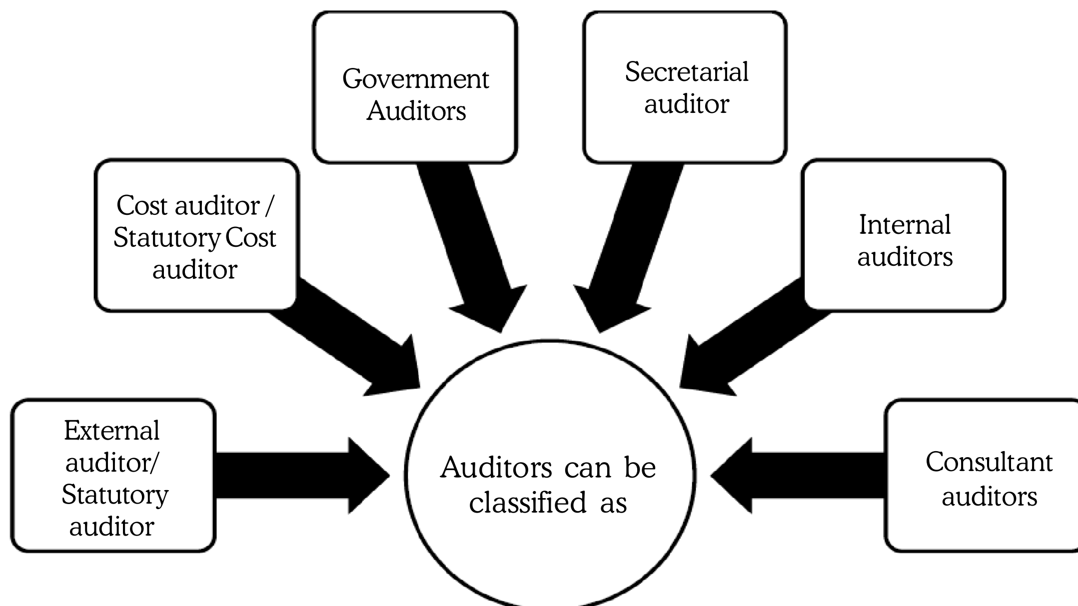
In the early 20th century, the reporting practice of auditors, which involved submitting reports of their duties and findings, was standardized as the "Independent Auditor's Report."

Auditors

An auditor is a professional that accumulates and evaluates evidence to report on the degree a company's assertions that they comply with an established set of procedures or standards (criteria).

While it takes a highly trained accountant to work as an auditor, there are different types of auditors with different aims. An efficient auditor must have certain qualities besides Professional qualification. It is essential for him to carry out the audit efficiently and smoothly.

Auditors of financial statements & non-financial information (including compliance audit) can be classified as:



1. *External Auditor / Statutory Auditor* is an independent firm engaged by the client subject to the audit, to express an opinion on whether the company's financial statements are free of material misstatements, whether due to fraud or error.

2. *Cost Auditor / Statutory Cost Auditor* is an independent firm engaged by the client subject to the Cost audit, to express an opinion on whether the company's Cost statements and Cost Sheet are free of material misstatements, whether due to fraud or error.

3. *Government Auditors* : Government Auditors review the finances and practices of federal agencies. These auditors report their finds to congress, which uses them to create and manage policies and budgets.

4. *Secretarial Auditor* : Statutory Secretarial auditor is an independent firm engaged by the client subject to the audit of Secretarial & applicable laws / Compliances of other applicable laws, to express an opinion on whether the company's Secretarial records and Compliance of applicable laws are free of material misstatements, whether due to fraud or error and inviting heavy fines or penalties.

5. *Internal Auditors* : Professional internal auditors provide independent and objective audit and consulting services focused on evaluating whether the board of directors, shareholders, stakeholders, and corporate executives have reasonable assurance that the organization's governance, risk management, and control processes are designed adequately and function effectively. Professional internal auditors also use Control Self-Assessment (CSA) as an effective process for performing their work.

6. *Consultant Auditors* : Consultant auditors are external personnel contracted by the firm to perform an audit following the firm's auditing standards. The consultant auditor may work independently, or as part of the audit team that includes internal auditors.

Forms of Audit

1. *Information technology audit* : information systems audit, is an examination of the management controls within an Information technology (IT) infrastructure.

2. *Financial audit* :Financial audits are performed to ascertain the validity and reliability of information, as well as to provide an assessment of a system's internal control. The opinion given on financial statements will depend on the audit evidence obtained.

3. *Integrated audits* : Such an audit is called an integrated audit, where auditors, in addition to an opinion on the financial statements, must also express an opinion on the effectiveness of a company's internal control over financial reporting, in accordance with PCAOB Auditing Standard No. 5.

4. *Performance audits* : Performance audit refers to an independent examination of a program, function, operation or the management systems and procedures of

a governmental or non-profit entity to assess whether the entity is achieving economy, efficiency and effectiveness in the employment of available resources.

5. *Quality audits* : Quality audits are performed to verify conformance to standards through review of objective evidence. A system of quality audits may verify the effectiveness of a quality management system.

6. *Project audit* : A project audit provides an opportunity to uncover issues, concerns and challenges encountered during the project lifecycle.

7. *Regulatory audits* : The aim of a regulatory audit is to verify that a project is compliant with regulations and standards.

8. *Energy audits* : An energy audit is an inspection, survey and analysis of energy flows for energy conservation in a building, process or system to reduce the amount of energy input into the system without negatively affecting the output(s).

9. *Operations audit* : An operations audit is an examination of the operations of the client's business. In this audit the auditor thoroughly examines the efficiency, effectiveness and economy of the operations with which the management of the entity (client) is achieving its objective.

10. *Forensic audits* : It refers to an investigative audit in which accountants with specialised on both accounting and investigation seek to uncover frauds, missing money and negligences

Essential Features of Audit

From the definitions, the essential features of auditing can be described as follows:

- Systematic process
- Three-party relationship
- Subject matter
- Evidence
- Established criteria
- Opinion

Reasons for Auditing:

1. To ensure accountability
2. To provide reliability
3. It offers assurance
4. Provides a complete report

5. Gives chance to get feedback

6. Can help to boost credit rating and value

3. Advocacy

Advocacy is an activity by an individual or group which aims to influence decisions within political, economic, and social systems and institutions. Advocacy can include many activities that a person or organization undertakes including media campaigns, public speaking, commissioning and publishing research or conducting exit poll or the filing of an amicus brief. Lobbying (often by lobby groups) is a form of advocacy where a direct approach is made to legislators on an issue which plays a significant role in modern politics. Research has started to address how advocacy groups in the United States and Canada are using social media to facilitate civic engagement and collective action. Advocacy is a process of supporting and enabling people to:

- Express their views and concerns.
- Access information and services.
- Defend and promote their rights and responsibilities.
- Explore choices and options

Forms of Advocacy

There are several forms of advocacy, each representing a different approach in a way to initiate changes in the society.

1. *Social justice advocacy* : The initial definition does not encompass the notions of power relations, people's participation and a vision of a just society as promoted by social justice advocates. For them, advocacy represents the series of actions taken and issues highlighted to change the "what is" into a "what should be", considering that this "what should be" is a more decent and a more just society (ib., 2001.). They:

2. *Budget advocacy* : another aspect of advocacy that ensures proactive engagement of Civil Society Organizations with the government budget to make the government more accountable to the people and promote transparency.

3. *Bureaucratic advocacy* : people considered "experts" have more chance to succeed at presenting their issues to decision-makers. They use bureaucratic advocacy to influence the agenda, although at a slower pace.

4. *Express versus issue advocacy* : These two types of advocacy when grouped together usually refers to a debate in the United States whether a group is expressly making their desire known that voters should cast ballots in a particular way, or whether a group has a long term issue that isn't campaign and election season specific.

5. *Health advocacy* : supports and promotes patients' health care rights as well as enhance community health and policy initiatives that focus on the availability, safety and quality of care.

6. *Ideological advocacy* : in this approach, groups fight, sometimes during protests, to advance their ideas in the decision-making circles.
7. *Interest-group advocacy* : lobbying is the main tool used by interest groups doing mass advocacy. It is a form of action that does not always succeed at influencing political decision-makers as it requires resources and organization to be effective.
8. *Legislative advocacy* : the "reliance on the state or federal legislative process" as part of a strategy to create change.
9. *Mass advocacy* : any type of action taken by large groups (petitions, demonstrations, etc.)
10. *Media advocacy* : "the strategic use of the mass media as a resource to advance a social or public policy initiative" (Jernigan and Wright, 1996). In Canada, for example, the Manitoba Public Insurance campaigns illustrate how media advocacy was used to fight alcohol and tobacco-related health issues.

Why is Advocacy Important?

Advocacy in all its forms seeks to ensure that people, particularly those who are most vulnerable in society, are able to:

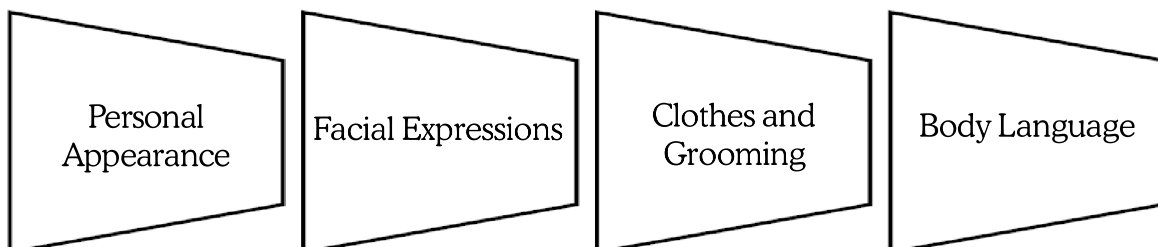
- Have their voice heard on issues that are important to them.
- Defend and safeguard their rights.
- Have their views and wishes genuinely considered when decisions are being made about their lives.

4. Appearance

The way you look plays a significant role in your success.

"The problem with appearance is that it translates to performance," Nicole Williams, career expert appearance.

Appearance is the way that someone or something looks, an impression given by someone or something. Every professional institute has set up and defined a policy that establishes appearance standards and dress code for professionals by which they could easily be held accountable for demonstrating that your requirements are “legitimate and non-discriminatory.”



1. *Personal Appearance*

   Personal appearance is an often disregarded part of communication and presentation skills.When you are speaking in public you may be representing your organisation or just yourself, but it is still you in the front line. First impressions are very important- they can be about attitude as well as dress.

   Visual impact is at least as important as verbal impact, people will very quickly make assumptions based on your facial expressions, the clothes you wear, how well groomed you are and your body language.

2. *Facial Expressions*

   Little can be done to alter your face but a lot can be done about the expression that is on it! It is your duty - to yourself as well as to the organisation that you represent - to convey a calm, friendly and professional exterior, despite how you may feel inside. Try to smile and appear optimistic.

3. *Clothes and Grooming*

   Only you can answer this question. Due to the nature of the work, some organisations are happy for people to be casually dressed, whilst others may expect smarter attire. It is important to be suitably dressed within expected limits.

   Nobody expects you to be packaged into something you are not, but your appearance is a reflection of your own self-esteem and you should aim to present yourself to your best possible advantage. Whilst you might be casually dressed when working within your organisation, a more formal approach may well be preferable when representing your organisation at an external meeting. Good grooming and a tidy appearance is preferable, whether casually or more formally dressed.

4. *Body Language*

   Understanding body language is one of the most important aspects of personal presentation. The image conveyed by the physical self should support and enhance what is being communicated verbally. If the visual image differs widely from the spoken message, it is often the non-verbal account that is believed.

   Awareness of your body language, of how you behave under pressure, what signals you are unconsciously giving, how nerves and stress affect you physically, can help you understand how you 'come across' to others. It can also explain how the wrong impression is sometimes given and how confusion can occur.

   Our gestures are part of our personalities, a part of how we express ourselves. Hand and arm movements can add emphasis, aid explanation and convey enthusiasm. Listeners can become so side-tracked by the sight of someone constantly playing with their hair, tapping on the table with a pen, etc., that they no longer listen to the spoken word. These negative signals can break down the communication process.

Conclusion

To realize your potential you must look beyond the end of yourself, realizing that where you end is most likely where you actually begin.- Craig D. Lounsbrough. Skill initiatives taken by government alone will not suffice the requirement of skilled manpower. In order to address skill development issues, two fundamentals need to be in place: skill development and job creation. Clearly, employers need to work with education providers so that students learn the skills they need to succeed at work, and governments also have a crucial role to play. But there is little clarity on which practices and interventions work and which can be scaled up. Most skills initiatives today serve a few hundred or perhaps a few thousand young people; we must be thinking in terms of millions to meet the future requirement. Surpassing the initial hiccups of economic growth, the Indian economy seems to be on the road to recovery.

The shift from traditional audits to future audits will not happen because auditors choose to do so. The main driver of future big data application by auditors is client-side demands. As the authors of Deloitte's 2017 Global Human Capital Trends report write, "Ninety percent of companies are redesigning their organizations to be more dynamic, team-centric, and connected. These changes require not just new operating models, but a different type of leadership to mobilize and execute these models."And, as people live longer and careers stretch toward 60 years or longer, employees will need more on-the-job continuous training to stay ahead of the curve.

Working with professionals is a pleasure, and everyone is fortunate to work with some truly exemplary ones. There have been a few who liked to be treated as professionals without having to work and act like one. Don't feel bad if you need some work in one or more areas of professional skill development. Demeanor that is less than professional can lead to an image problem for you and your organisation. Recognize any shortcomings you might have and begin working on your professional image today.

" India is one of the world economy's brightest spots. We have low inflation, a low balance of payments current account deficit, and a high rate of growth. This is the result of good policy, not good fortune." – Shri Narendra Modi at Bloomberg Economic Summit.

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Ethics, Ecology and Economics : The Emerging Convergence

Om Prakash Dani* & M S Srinivasan**

A very important development in the corporate world is the growing convergence of what we may call as 3Es: Ecology, Ethics and Economics. This convergence has crucial significance for the higher evolution of the corporate world and humanity as a whole. This article examines this convergence in the light of deeper and a more integral vision of life.

The Economics of Ecology

Until recently and for a long time, it was believed that progress in ecological sustainability involves a certain amount of loss in economic performance. But at present there is a growing consensus, based on the facts and experience, this trade-off is not inevitable and in fact, sustainability ensures economic viability in the long term.

In an interesting article in Harvard Business Review (HBR) “The Sustainable Economy” Von Choinad with Co-authors Fick Ridge and sustainability consultant Jib Elison provide the big picture emerging in the landscape of sustainability. They talk about three major trends which has the potential to make “the lowest priced T-shirt also did the least damage to the planet” The first trend is the attempt to quantify in monetary terms the value of the ecosystem services like the forest, water; second is the growing environmental sensitivity of investor community; the third is the evolution of standard indices and ratings for the companies and consumers for making the right eco-friendly decision. Let us briefly examine these trends as described in more detail by Choinad et al in their article in HBR.

Is it right to put monetary value on “priceless” natural resources like rain forests? This is a major objection raised by idealistic minds. But from a corporate perspective the problem with this attitude is that these natural resources are regarded as “free” and the negative impact of using, consuming or destroying these natural wealth are not incorporated in the accounting system, which means the cost of the product do not reflect its true impact on the environment. A product which causes maximum damage to the environment may be cheaper than the one which inflicts minimum damage. At present there are many initiatives and programmes all over the world for assessing the true value of natural resources and some companies are making the attempt to internalise them into their account books. For example Gund Institute of ecological Economics, with funding from US National Science Foundation, has developed a

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

web-based tool which can help users in assessing the value of ecosystem services on multiple scales. Puma, a sports footwear and apparel company announced in April 2011 that it would begin issuing an environment profit and lost loss account that will account for the full economic impact of the brand on the ecosystem and commissioned Price Water house Coopers to help develop their EPIL statement.

The second trend is what is now called as Socially Responsible Investment, SRI. Investor community is awakening to the long term implications of sustainability. In general, investor community tend to rate companies on the basis of short-term financial measures. Investors are beginning to realise that companies that falter in the domain of ecological sustainability can't prosper in the financial front in the long run, though they may show good returns in the short-term.

A positive outcome of this awakening is that a growing number of progressive investors look for the environmental and social performance of the firm in many fronts like water use, carbon emission, stance towards labour, supply chain management practices.

The third trend is the emergence of comprehensive indices and ratings for companies and consumers to make the right choices, like for example Value Chain Index, VCI which provides valuable data for companies to make comparison of products based on their impact in every stage of the value-chain, from raw material to the finished product on a range of environmental and social indices like land use, water, energy, carbon, toxics, social welfare. The VCI is a great help to companies for making nuanced comparison among products or vendors and arrive at the most environmentally and socially benign choice. A similar uniform and comprehensive rating for guiding consumer choice has not yet emerged, but may come up in the future. There are some examples in some specific areas like for example Energy Star rating in appliances which is very popular among consumers. Similarly the electrical goods industry in US has created a much more comprehensive rating format which accounts for more than 50 environmental factors.

When all these three trends converge, grow and become reasonably well established in the corporate environment, and as a result funds and consumer choice gravitate more and more towards the environmentally and socially beneficial companies and products, then sustainability gets aligned with profit and market forces.

There is one more trend, which can further reinforce this alignment, making ecology entirely compatible with economics. Many companies are finding that ecological practices have immediate economic benefit. This is now quite well known in corporate circles. Practices like recycling waste or reducing the consumption of energy or water saves money. But some progressive companies are going beyond such adhoc practices and making sustainability into a profitable enterprise.

In another article in Harvard Business Review “Making Sustainability Profitable”, Krut Haanes and co-authors, give many examples of companies in the emerging markets in Latin America, Africa, Middle East Asia, South Pacific, which are able to build a profitable business around sustainable products and practices. For example in Egypt, Ibrahim Aboulesh founded Sekiem, Egypt's first organic farm for producing organic cotton, which was more elastic than its conventionally grown counterpart. Ibrahim has evolved a business model which is at once sustainable and profitable and has generated healthy revenues. Sekiem is now one of the Egypt's largest organic food producers with an annual growth of 14%.

Benefits of Goodness

More or less similar developments are happening in "Business Ethics". After so many corporate scams and scandals, ethics and "integrity" are now considered by many business leaders as important as or even more important than bottom-line and an indispensable part of corporate governance. For example, Pramod Bhasin, former president and CEO of GenPack, India states "For an enterprise to be successful in the long term it has to be founded on a strong platform of integrity and values" and when asked "how do leaders face up to scenarios where there could be a clash between values and pragmatism, especially in the face of competitive pressures" Bhasin answers simply "The choice is easy if you really understand that integrity is not negotiable."

Some business leaders with deeper moral sense know intuitively that ethics pays in the long run. V.V. Raghavan, a former senior partners Ernst and Young states "If you are able to run any enterprise without selfish motive and with selfless service, then I believe that success will follow" and says further "What I mean is that my effort and involvement in doing something is not determined by return, and I know by my own experience this works". But is there any empirical support for these beliefs and assertions? Interestingly, a recent research on leadership has found a correlation between character and financial performance, which means ethics and economics!

KRW International, a Minneapolis based leadership consultancy firm conducted a study to determine the impact of character on performance, especially on financial performance measured in terms of four moral values: Integrity, Responsibility, Forgiveness and Compassion. Reporting on the study in Harvard Business Review. Fred Kiev of KRW International states. "The researchers found that CEO's whose employees gave them high marks for character had an average return on assets of 9.35% over a two-year period. That's nearly five times as much as those with low character ratings had: their RON averaged only 1.93%."

At the organisational level also, there are now many studies which indicate that companies which are governed by some higher values at the social or moral level financially outperform those which are focused exclusively on the bottom-line. For example, in their book: "Firms of Endearment: How world-class Companies Profit from Passion and Purpose" Raj Sisodia talks about companies with humanistic profiles, which are loved by their employees, customers, communities and suppliers and invests a lot of money and effort in fulfilling their social and environmental responsibilities. When the financial performance of these companies are analysed, these companies not only did all the good things but also delivered extraordinary returns to their investors, outperforming the market by a nine to one ratio for ten years. Similarly, since 2007 an organisation called Ethisphere has produced an annual list of the world's most ethical companies. Collectively, the selected companies have outperformed the SP500 every year since the inception of the program in 2007, by an average of 7.3% annually. (6)

A good example of such corporate goodness in the environmental and social sphere with astounding financial performance is the Brazilian company Natura. The company works in close collaboration with suppliers, rural communities, local government and NGOs to develop way to sustainability extract raw materials, create jobs and to build jobs in the communities Natura trains managers to identify social and environmental challenges in the community, they operate and turn them into business opportunities, granting bonuses to managers on the

basis of their social and environmental performances. From 2002 to 2011, Natura's revenues grew by 463% and its net income by 3722%.

The Integral View

Let us now briefly examine the deeper significance of these trends in the light of a more integral vision. This converge between ecology, ethics and economics is in sync with one of the central motifs of the ancient Indian epic, Mahabharata: Dharma is the foundation of Artha. In the popular conception it means morality or righteousness, Dharma, is the foundation of Wealth, Artha. However this motto of Mahabharata is based on a deeper and broader vision of Dharma.

In Indian, thought Dharma is a profound term with a multidimensional significance at various levels – physical, social, moral, and psychological. In general, Dharma means the Laws or laws of Nature that hold together all creation and in terms of ethics, Dharma is all the values, principles and standards of conduct which are derived from these laws. At the physical level, the discoveries of modern ecology are part of the Dharma of our material Mother or in other words the material and biological dimensions of Mother Nature. But in the Indian thought Nature is not only physical but also psychological and spiritual. The physical, psychological and spiritual energies within our individual human being and in the universe are derived from and are part of the corresponding energies of universal Nature.

Just like there are laws or ecology which governs the physical or biological Nature, there is an inner ecology which governs the moral, psychological, spiritual dimensions of Nature. The ethical and spiritual values, ideals, principle and the disciplines discovered by great sages, saints and seers of the world are part of this inner ecology of consciousness. The Indian science of Yoga is the most comprehensive, scientific and systemic discipline for attuning our inner being with the higher moral and spiritual dimensions of universal Nature and its higher laws, which govern the inner worlds of consciousness. Based on this vision of Dharma, the ancient Indian epical wisdom taught that when our human life, - individual and collective, inner and outer- is governed by the moral and spiritual values derived from the deeper, inner and higher laws of consciousness of universal Nature, Dharma. It leads to inner growth as well as outer prosperity and wellbeing.

Thus, in the Indian thought Nature is not an inanimate energy but a conscious-force with a physical, psychological, and spiritual dimension. And we human beings are part of Nature not only physically but also in our consciousness. This idea holds the key to the next step in the evolution of environmentalism and also humanity as whole. The present convergence between ecology, ethics and economics when it gets fully established, will lead to a decisive upward shift in the evolution of the corporate world and in the collective consciousness of the society from the mind-set of the industrial revolution-which regarded Nature as a free reservoir of resources which can be exploited, polluted, robbed or "mastered" as one likes and that old, traditional management paradigm of "get things done" without any regard for ethics and values - to a more benign attunement with Nature with an emphasis on ethics and values in management.

But, for a decisive march into the future, we have to proceed further and take the next step towards psychological and spiritual sustainability. First step is to regard Nature as a conscious Force which can respond to our aspirations. The second step is Yoga. What is ecology to

physical Nature, Yoga is to the moral, psychological and spiritual Nature, within us and also in the universe. Yoga is the science for understanding and exploring our inner ecology of consciousness and attuning our inner being and outer life with the ecology of the inner universal and divine dimensions of Nature.

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Exploration of Opportunities of Practice with Special Reference to GST, NCLT/NCLAT Labour Laws and other Areas

Prof R. Balakrishnan*

Introduction

All those company secretary professionals who intent to embrace practice (young company secretaries) and for those who are already in practice, there are numerous areas of practice available and the professionals have to decide in which field, they would like to excel. As far as various compliance related areas are concerned, one can practice under the provisions of Companies Act, Foreign Exchange Management Act, Direct taxation – i.e. Income Tax, GST, Arbitration and Conciliation, Labour laws and Economic and Competition laws. If one wants to excel under Financial market services, opportunities exists and one can also excel into Information Technology and Cyber laws. One could also look into various management consultancy services, valuation of stocks, shares, debentures and other security instruments under various regulations. The bottom line is, opportunities are enormous and one needs to be selective and concentrate on their own area of practice where they want to attain excellence.

In the recent past, there have been two new developments have taken place, which have opened the gateways for Company Secretaires:-

(1) Areas of practice emerging under GST

(2) Area of practice at National Company Law Tribunal and its Appellate Tribunal.

This article makes an attempt to bring out the areas of practice which have emerged for company secretary practicing professional in these areas.

Opportunities under GST

Since the GST has come into place replacing almost all the indirect tax laws such as Central Excise, Service Tax, VAT and other laws, the opportunities for practicing professionals in all probability will grow for following reasons:-

- The GST Law being a new one, more and more new assesses will get covered
- Since GST is in initial stages, the learning experience would bring new opportunities in forthcoming years
- The GST being comprehensive approach, there would be still enough room for further expansion

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

If the practicing CS professional venture into the area of GST, the PCS could play a very vital role as facilitator for the regulators of GST and as well as for the assesses.

Though one may feel that GST law appears to be a simple law, it is not so and in reality the GST law requires an in-depth understanding and the professional need to have a good analytical skills to interpret the various definitions and taxability of goods and services. It is very important for the goods / service provider as well as goods / service receiver to know whether the supply provided or received is taxable under the GST or not. Further there are various players in the market such as service / goods receiver, importer, exporter and job worker etc. As we are all aware that these various assesses come from a heterogeneous background i.e. rural areas, urban areas, illiterate, corporate, individuals etc. - imparting legal opinions on ticklish issues of tax, interpretation of judicial pronouncements, providing professional advice would call from expert professional like company secretaries who are well versed in corporate and tax laws and the company secretaries could ensure timely compliance for their assesses wherever one renders the professional service / advice.

We could briefly summarize the areas of practice opened today for company secretary professionals under GST as under:

Area of Practice under GST for Company Secretary

- Strategic adviser / Advisory services
- Aspects relating to tax planning
- Aspects relating to timely procedural compliance
- Aspects relating to record keeping
- Representation of clients with the regulators
- Services relating to vetting

Strategic adviser / Advisory services

To start with a Company Secretary being an expert in corporate laws, he or she could interpret the GST law comprehensively and provide a complete and correct guidance to all the business entities – corporate to individuals – relating to their supply of goods / rendering services as to exactly what business model would suit them for doing their business effectively. CS professional would be able to do this aspect excellently well due to their communication ability and skills.

Aspects relating to tax planning

Practicing company secretaries could advise the impact of laws; alternatives which are available, which would help a proper tax planning for the clients since the practicing professional understand the impact of laws thoroughly.

Aspects relating to timely procedural compliance

This would include the procedure relating to registration, ensuring making periodical

payments and thereafter ensuring the filing of periodical returns (monthly, quarterly, half-yearly and annually) etc. As the company secretary being a compliance officer under Companies Act and also under SEBI regulations, Listing Obligations and Disclosure Requirements, he or she could assist in ensuring proper compliance under the GST laws.

Aspects relating to record keeping

Like in any other laws, one has to ensure keeping and maintaining of up to date books and records relating to their business and GST laws are also no exception to this aspect. Company secretaries are being well versed in the aspect of maintenance of books and records, he or she could well render the book and record keeping for their clients for maintaining updated, systematic records of input tax credit for goods and services and the proper utilization of the input tax credits and other related matters.

Representation of clients with the regulators

The company secretaries could render the services of representation with various regulatory authorities, appearing before them and represent the clients for assessment, dispute settlement, advance ruling and any other legal issues. As we are all aware, company secretaries have their legal bent of mind and he or she can provide better services in the representation areas. It is needless to mention that clause 86(20) of the Model GST law contains a provision that a company secretary is also one of the professional who can appear before various authorizes under the Goods and Services Tax Law including Appellate authorities.

Services relating to vetting

Practicing company secretary professional could be able to assist in drafting the various legal agreements and documents and also vetting of such documents / agreements since company secretary possess an extensive knowledge in this area. The legal documents, agreement could be of replies to show cause notices, various representations for assessments, appeals, appellate forums and representation in front of adjudicating authorities. Company secretary professional also could provide opinion on various matters and clarifications.

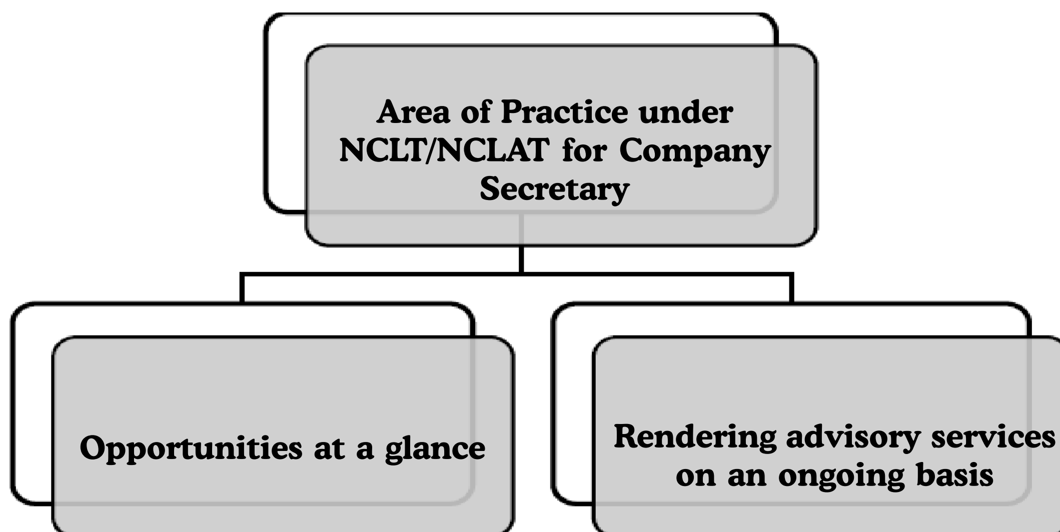
Opportunities under NCLT / NCLAT

The National Company Law Tribunal (NCLT) and its appellate body, National Company Law Appellate Tribunal (NCLAT), both are in operation from June, 2016 onwards. The field of practice due to these bodies in operation now throws open enormous opportunities to practicing company secretaries in the field of advocacy which calls for the skills of legal drafting, interpretation of the provisions correctly, pleading / arguing the matter with the National Company Law Tribunal.

Practicing Company Secretaries are authorized to appear before the Tribunal/Appellate Tribunal as provided in section 432 of the Companies Act, 2013 amongst other professionals such as cost accountants, chartered accountants, legal practitioners or any other person to present his case before the NCLT / NCLAT as the case may be. Practicing Company Secretaries would for the first time empowered to appear for all company law matters which were hitherto dealt with, by the High Court (s) earlier. The areas of practice for practicing company secretaries in practice under the NCLT / NCLAT would be under the provisions of the Companies Act

involving merger and amalgamations (under section 230 read with 232 of the Companies Act, 2013 and the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, Compromise and arrangement, revival & rehabilitation of sick companies, reduction of capital, winding up proceedings under the Companies Act, 2013, private liquidators and many other related areas. It is needless to mention at this juncture, in view of the enormous opportunities emerged due to the establishment of NCLT / NCLAT, the practicing company secretaries should standardize their competencies with the global benchmarks to provide value added services in assisting the NCLT / NCLAT in dispensation of justice and speedier disposal of matters like merger, amalgamation, restructuring, revival and rehabilitation of sick companies and winding up of companies and other related matters. Incidental to the advocacy, there are various other areas of practice which have emerged for the practicing Company Secretaries and are also opening up about which, we will discuss below.

In addition to appearance in NCLT / NCLAT, the practicing company secretaries could also appear and represent at various regulating authorities under multiple regulations such as appearance before Registrar of Companies (ROC) and Regional Director (RD) of central government on company law related matters, at the consumer forums for grievances filed, appearance before Securities Appellate Tribunal against orders passed by Security Exchange Board of India, appear before Central Excise authorities, Customs Authorities for excise and customs related matter, Income Tax Authorities, Appellate Tribunals for direct tax disputes, Telecom Disputes Settlement and Appellate Tribunal and such other bodies constituted by relevant regulators.



Opportunities at a glance

After the establishment of NCLT / NCLAT it has been noticed that the corporates, in order to achieve the phenomenal growth, are resorting to restructuring of their operations – let it be financial – technological – marketing – merger – demerger - amalgamation – takeover – joint venture – strategy alliance etc. Sick industrial companies also getting revived through

restructuring activities. Restructuring is nothing but repositioning themselves in such a way, so that a better growth, profitability and higher market shares is achieved. The practicing company secretary professionals can add value to business by rendering multiple services to corporate

Let us look into the major areas where the practicing company secretary could render services

Rendering advisory services on an ongoing basis

As per the provisions the Companies Act, 2013, the company not only has to comply with the provisions of the Companies Act but also have to ensure that the company complies with all other applicable laws to the company. Section 205 of the Companies Act, 2013 spells out as one of the functions of the company secretary that the company secretary has to ensure that the company complies with other laws applicable to the company. Even in a medium size corporate, approximately eighty to hundred laws applicable – such as labour laws, direct taxation and indirect taxation laws, custom and central excise laws, FEMA regulations, compliance with RBI directives, laws relating to purchase, sale and contracts, safety and environmental laws, specific laws applicable for a particular industry such as chemical industry, drug industry etc.

This being one of the vast area involving multiple laws, practicing company secretary would be an apt professional who is recognized as an expert under section 2(38) of the Companies Act, 2013 which says that an "expert" includes – amongst others - a Company Secretary.

The professionals could assist in drafting various policies for an organization such as corporate social responsibility (CSR) policy, code of conduct and ethics policy, whistle blower policy, strategic risk management policy, dissemination of market information policy (to ensure compliance relating to insider trading and avoid abuse), safety, health and environmental (SHE) policy, quality policy and integrated management system policy and such other policies which are the need of the organization and aid them to revise the policy as and when required.

Various accounting standards are being introduced by the Institute of Chartered Accountants of India, cost and management accounting standards are being introduced by the Institute of Cost Accountants of India and similarly, more secretarial standards are expected to be introduced by the Institute of Company Secretaries of India. The practicing company secretaries could assess the preparedness status of the company in which they are associated with and advise them to take necessary steps at the stage of draft introduction of the standards so that when the standards become effective, the organization could comply with the standards without any difficulty and they need not start looking for preparation since they are already equipped to meet the standards.

Enormous opportunities in Labour laws

As per the provisions of section 205 of the Companies Act, 2013 compliance of all applicable laws are to be ensured and it is one of the functions spelled out in the Act itself that the company secretary needs to ensure that the company complies with other laws applicable to the company.

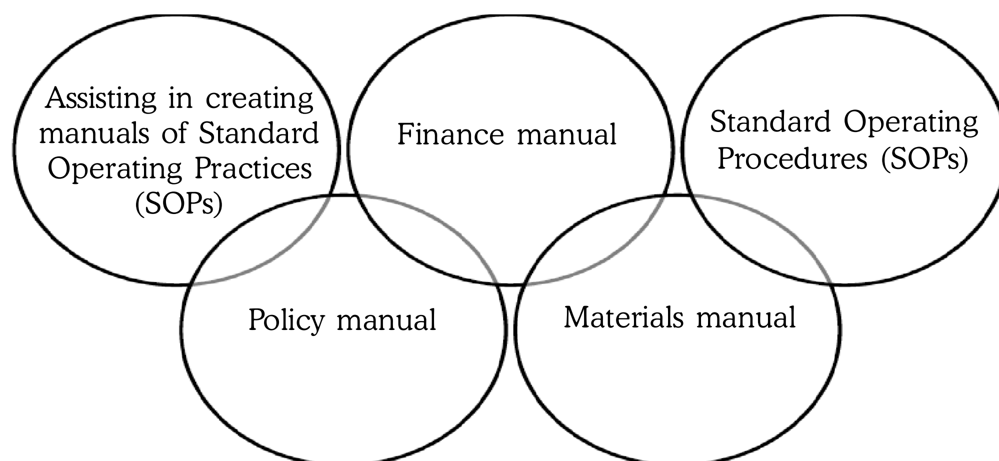
In case of manufacturing organizations, it is very important to ensure the adherence of various labour laws applicable to the specific organization. Starting from Factories Act, compliance followed by Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Equal Remuneration Act, Workmen Compensation Act, Industrial Disputes Act, Trade Union Act, Industrial employment standing orders and even Contract Labour Act – etc. and also various labour welfare related laws such as Maternity Act, Labour Welfare Act, Employees State Insurance Act and as well as laws relating to retirement benefits such as Gratuity Act, employees provident funds and miscellaneous provisions act, compliance has to be ensured. There are various returns involved ranging from monthly, quarterly, half-yearly and annual filings and as well as timely payment against certain labour laws. Even in non-manufacturing organizations – they are governed under the Shop and Establishment Act and of course lesser compliance as compared to manufacturing organizations would be called for.

In case of organizations who employees ex-partite (Foreign national) those organizations are required to comply with the Registration of Foreigners Act read with the Registration of Foreigners rules which involves, to get the resident permit for them during the foreigners' employment and visa period and various other compliance during their stay / employment in India. In case of extension of employment, obtaining visa for them in India itself (foreigner need not travel to their home country for the purpose of obtaining visa – which can be done in India itself) and other related matters.

Under the labour laws, there is a great opportunity for the practicing company secretaries in assisting and helping the organizations to find out the number of applicable laws at the first place. The companies where no company secretary is required to be employed or company secretary is not employed, there is a vast scope since the laws are innumerable.

If one desires to excel in the area of labour laws, ample opportunity is thrown open to them since day in and day out the employers are required to deal with the employee related issues and there are various compliance required to be made either in the form of filing returns, making payments, maintaining records and registers complying with various conditions etc.

Other Opportunities



Assisting in creating manuals of standard operating practices (SOPs)

One would agree that practicing good governance is the differentiating factor in competition and competitors. The various litigations arise due to non-compliance. Arising out of this is, the requirement of timely compliance by corporate in respect of all applicable laws. Since the company secretaries are expert in corporate laws, they could aid in assisting for better compliance methodologies for timely compliance in an organization. The manual for all operational areas along with standard operating procedures would be of immense importance and the company secretaries could undertake the creation of manual for the organization and also bring out standard operating procedures for each of its operations / activities.

By way of illustrations, some of the manuals are discussed below – however, the requirement of the manuals and procedures would differ from organization to organization about which the management of the organization and the company secretary professional could have a better understanding of the exact requirement and accordingly work on it.

Policy manual

The manual spells out the policy decisions, resolutions, and guidelines of the organization. It would spell out the scope and limitations within which the policies would operate. It is much helpful for people who are implementing the policies since the manuals would spell out course of action to be adopted while implementing the policy.

Finance manual

The finance manual would spell out the company's financial policies in line with the applicable accounting standards along with the systems and procedures, limits of authority at each level, approval procedures etc.

Materials manual

Similar to financial manual, the material manual would spell out the procurement policy, source of procurement, systems and procedures to be followed along with various authority levels etc.

More such manuals relating to other field such as human resource department manuals, quality manuals, safety health and environmental manuals etc. could also be brought out.

Standard operating procedures (SOPs)

In respect of each activity the laid down standard operating procedures spelling out the activity from the beginning to the end along with procedures to be followed and even specifying the formats etc. in line with the manuals which are already in place would be much helpful in carrying out the operations in each of the department and also from compliance point – nothing is left out.

Various Certifications

Certification process

The practicing company secretary professional could also advise the management to go for certification process such as:-

- EMS – environmental management system ISO 1400
- QMS – quality management system ISO 9001
- OHSAS- occupational health and safety management system 18000
- GVC – corporate governance rating system

These certifications would also ensure the systematic way of working and it gives a long run benefit to the corporate. For example, the products and services rendered by a company who is QMS certified, the customer would be willing to accept their product without any inspection process believing that the quality stated by them is correct and their products and services are accepted by the customer as it is without any further checking at their end. Eventually, these companies stand out in crowd and have a better recognition. Ultimately, the value addition for these certified companies would be of appreciation of values with strong belief becomes their behavior and consistent group behavior become the culture of the company and the consistent culture make the company's reputation better in the market place and the company attains its best character in the market.

Since the practicing company secretaries are well versed in various corporate laws, they would be in a better position to assist, bring out required documents and ensure for the certification process for the corporate.

Further Areas of Practice

Advice / suggestion on utilization of optimum resources

There are always risks of losing the talented and resourceful high value employees when an organization constantly over-utilizes its resources, as they are stressed out and overworked. On the other way, under-utilized resources pose a huge burden to the organization's bottom line. When the right employees with the right skill set are at the right places they become a great asset to the organization. Ideal situation would be of an optimum mix of the right experience and skills are what determine success or failures of an organization. Since practicing company secretaries are possessing extensive knowledge since they deal with multiple corporate, they would be in a position to identify the non-value adding services in an organization, duplication of operations, excessive loss / wastage etc. and they could suggest to management, the simplification procedures, combining the operations, avoiding the duplications and suggest optimum utilization of resources which in the long run would be beneficial to the organization. The practicing company secretary professionals could apply the principles eliminating the unwanted non value adding activities, combining the operations where required, simplification procedures – arising out of this, the required advice / suggestions on restructuring areas where needed.

Identification and assessment of non performing / distressed assets, cash Position carry out due diligence and advise the turnaround feasibility

Continuous improvement is an ongoing phenomenon and for being successful and maintain sustainability, the organizations need to be working through Creativity, Cooperation, Reliability, Integrity and above all Embracing Diversity. The practicing company secretaries

being multi-talented and having a vast knowledge and expertise, could render services to corporate in identifying the distressed assets / non-performing assets, analyze its cash position and suggest various methods of bringing improvement by carrying out necessary due diligence such as bringing down the wastage in case of process industry, avoiding the duplication of work and operations, combining the operations and activities, eliminating the non-value adding services etc. Restructuring or turnaround need not be only at the time when the company is not performing well, even otherwise in a normal time also, various restructuring / turnaround activities could be undertaken such as – for example

- kaizen activities – involving small changes bringing bigger benefits,
- concept of 5-S, a Japanese concept which works on the principle of "there is a space for everything" and everything has its own place".
- Autonomous maintenance – performed by operator
- 5 why – Questioning methodology to get to know problem and understand the route cause and arrive at a solution
- Taghuchi – statistical improvement of quality methodology
- SPC - statistical process control for improvement
- Team bonding programs – structural team bonding plan and bring the awareness of team work concept in the organization

Basically, everything could be located within few seconds without wasting time for searching which is seen in most of the places including in our own house. The practice of 5S helps in improving our efficiency in doing the things in a better way and also in a speedy manner. Above all, the place – let it be office place, shop floor, or even one own home – if it is kept spic and span – neat and clean, then and everyone would love to work in such an environment and their performance would be much better – delivery would be with increased efficiency and in an efficient manner and in the long run, the company is benefited

Various services which could emerge CS being "Expert" (Sec 2(38) of Companies Act, 2013)

The definition of "expert" is spelled out in section 2 (38) of the Companies Act, 2013 stating that an "expert" includes an engineer a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force.

Company Secretaries could be Administrator / Receiver

By virtue of this, subject to the field of experience and expertise, the practicing company secretaries could take up the assignment of an interim / company administrator under section 258 of the Companies Act, 2013 since administrator can be appointed by the National Company Law Tribunal from the data bank maintained by the Central Government in case of Revival/ Rehabilitation of a company consisting of names of company secretary and other professionals.

Company Secretaries to be a Liquidator

It may be worth mentioning here that the new Act of 2013 has done away with, the earlier position allowing only government officers to act as Official Liquidators.

For the purpose of winding up of a company by the National Company law Tribunal (NCLT) at the time of passing of the order of winding shall appoint an official liquidator or liquidator from the panel maintained by the Central Government for this purpose consisting the names of chartered accountants, advocates, company secretaries, cost accountants or firms or bodies corporate having such chartered accountants, advocates, company secretaries, cost accountants and such other professionals as may be notified by the Central Government or from a firm or a body corporate of persons having a combination of such professionals as may be prescribed and having at least ten years' experience in company matters. The section 275(1) and (2) spells out this in the Companies Act, 2013.

By virtue of the expertise and having proficiency in company law related matters, the practicing company secretary could act as an official liquidator as and when the relevant rules are notified and NCLT becomes fully functional

Professional Assistance to Company Liquidator (for CS young starters)

There is a is a good opportunity for the young (starter) practicing company secretary professional who are inclined to take up the practice in NCLT / NCLAT to have a real time experience by working with a Company Liquidator appointed by the Tribunal who may, with the sanction of the National Company Law Tribunal, appoint one or more professionals including company secretaries to assist him in the performance of his duties and functions under the Companies Act, 2013 as provided under section 291 of the Companies Act, 2013. This would give a good exposure to greater extent to the emerging young company secretaries, interested in going for practice.

Company Secretaries could be appointed as Registered Valuer

As per sub-section (1) of section 247, where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company. The valuation area would be another wide scope for the practicing company secretaries to act as registered valuer since valuation is called for many occasions such as - further issue of shares, for valuing assets involved in arrangement of non-cash transactions involving Directors, for valuing whereas, property and assets of the company under a scheme of corporate debt, for valuing equity shares held by minority shareholders, for valuing assets for submission of report by liquidator, for report on the assets of the company for preparation of declaration of solvency under voluntary winding up, for valuing the interest of any dissenting member of the transferor company who did not vote in favour of the special resolution, purchasing of minority shares and many other event based instances.

Company secretaries as an "Arbitrator"

Practicing Company Secretaries who are inclined to taken up the position of arbitrator due to their legal expertise in corporate laws, they could formulate a better strategy in arbitral proceedings while advising the client but for this purpose, the practicing company secretaries need to develop thorough knowledge about the Civil Procedure Code, 1908 and Indian

Evidence Act, 1872 as many a times the proceedings are conducted in accordance with these laws though it is not compulsory as per the Act.

However, given the competence of the company secretaries it is not a difficult task.

Company Secretary could act a Negotiator for settlement

Company secretary being an expert knowledge possessor in corporate laws, he could bring about settlement through negotiation between the disputed parties and he can act as a negotiator. Many would prefer to settle the matter without getting into the legal hassle since the legal proceedings not only involves enormous amount of time but also it is costly. Company secretary, could even take the legal help such as filing winding up petition in case of (bad) debt recovery for companies and bring the concerned parties for negotiation table and assist the companies in recovering their debts which is a great value addition to companies.

Company Secretary could act as a Technical Members of NCLT

There is also an opportunity for practicing company secretaries to act as Technical members of NCLT. The required qualifications prescribed for this position is that among other qualifications, practice as a company secretary for at least fifteen years, (15 years) or being a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies is a qualification for appointment as technical member of the National Company Law Tribunal.(Section 409 of the Companies Act, 2013)

Conclusion

Considering the vast and enormous opportunities various fields under Companies Act, Labour laws, GST related matters, the Practicing Company Secretaries should get their competencies set with very high standards right from understanding the applicability of provisions / acts / rules at a given situation, correctly interpreting the law to the advantages of their clients to whom they render service in compliance with applicable laws while providing value added services and assisting them for required timely advice, ensuring compliance involving filing of returns and records, making the timely payment, maintaining necessary registers and records as specified and representing the matters with the various regulatory bodies for speedy disposal / dispensation of justice in all relevant matters including scheme of restructuring, merger, amalgamation, compromise and arrangement, revival and rehabilitation of sick companies and winding up of companies etc.

Coming to GST laws, the opportunities will grow further and further since the law is quite new due to which more new assesses will board the tax wagon and as the law is still under implementation / modification / corrective measure process, the regulators are also in a learning process from experience and more new opportunities would arise in future. Further, with comprehensive approach on the matter of GST, there will be still enough room for further expansion of the GST net. The GST law practice would be a very good opportunity for practicing company secretaries since they can play a proactive role and act as a facilitator to regulators and as well as the assesse.

Unless the practicing company secretaries improve upon their skills relating to drafting the documents, petitions, submissions, joinder, and rejoinder for the requirements of the Tribunals and also get familiarized with the pleading skills, it would be difficult to handle and represent the mattes with the judiciary. One has to continuously learn the skills on an ongoing basis

In a nutshell, we could summarize that the role of practicing company secretaries in the corporate world is going to be manifold and phenomenal with multiple areas of practice. Let us sharpen our skills with continuous improvement keeping in face with the amendments from time to time and try our best to "deliver first time right" and prove our metal in excelling the areas of governance and compliance by adopting values like creativity by embracing diversity with cooperation coupled with reliability and establish our integrity.

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Principles & Practice of Corporate Ethics (Responsiblity & Sustainability)

Dr. K. Dileep Kumar*

Introduction

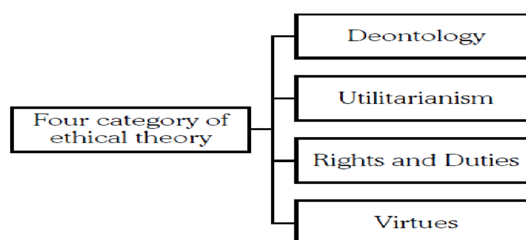
Modern corporate governance rightly demands a comprehensive, interdisciplinary approach to the management and control of companies. Therefore, corporate professionals of today and tomorrow need to practice with a sense of responsibility the evolving principles of good corporate governance across the globe on a continual basis. Excellence can be bettered through continuous up-gradation of research and interaction between the relevant practices and control of respective disciplines of accounting, finance, law and management functions to deliver the highest quality of good corporate governance. In this context the corporate world looks upon Company Secretaries to provide the impetus, guidance and direction for achieving world-class ethical business practices and strategic corporate governance.

The word "ethics" is derived from the Greek "ethos" (meaning "custom" or "habit"). Ethics is not limited to specific acts and pre-defined moral codes, but it encompasses the whole gamut of moral ideals and behavioural pattern, that is, every person's philosophy of life.

Ethical Principles or Theory

Companies being legal entities incorporated by individuals (human beings) for conducting business, profession or vocation which is detached from another business or individuals with respect to accountability is a group of legal entities set up, called a corporation or a corporate body bestowed with privileges and obligations, such as the ability to enter into contracts, to sue and to be sued. The principles of Ethics, therefore, apply to humans per se or individually and, in turn, en masse or collectively to the legally constituted corporate entity.

The ethical theory is deployed by people for decision making process and lays emphasis on important aspects of dilemma so as to lead them to the most appropriate or correct resolution according to the guidelines within the ethical theory itself. Four broad category of ethical theory includes : deontology, utilitarianism, rights, and virtues.



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

- *Deontology* : a class of ethical theory which states that people should adhere to their obligations and duties when engaged in decision making where ethics are in play.
- *Utilitarianism* : is a normative ethical theory that places the locus of right and wrong solely on the outcome (consequences) of choosing one action/policy over the other.

  As such, it moves beyond the scope of one's own interest and takes into account the interest of others.
- *Rights and Duties* : If one has the right to free speech, then the others also have a duty not to stifle their speech; that does not entail that others have a duty to assist you in speaking freely. Rights of individuals tend to anchor moral authority to the individual concerned. Here, moral and legal rights may be distinguished.
- *Virtues* : this is currently one of the major approaches in normative ethics. It may be identified as the one that lays emphasis on the virtues or moral character, in contrast to the approach that emphasizes duties or rules (deontology) or that emphasizes the consequences of actions (consequentialism).

Ethical Practices

- *Beneficence* : The principle of beneficence guides the decision maker to do what is right and good. This priority makes an ethical perspective and possible solution to a dilemma acceptable and resolvable. This is also related to the principle of utility, which states that one should attempt to generate the largest ratio of good over evil possibility. This principle stipulates that ethical theories should strive to achieve the greatest amount of good because people benefit from the most good.
- *Least Harm* : This theory deals with situations in which no choice appears beneficial. In such cases, decision makers seek to choose to do the least harm possible and to do harm to the fewest people. This principle is mainly associated with the utilitarian ethical theory discussed below.
- *Utilitarian* : This is a normative ethical theory that places the locus of right and wrong solely on the outcome or consequences of choosing one action/policy over other. As such, it moves beyond the scope of one's own interest and takes into account the interest of others.
- *Autonomy* : This principle states that decision making should focus on allowing people to be autonomous; that is, to be able to make decisions that apply to their own workplace or lives. In other words, people should have control over their own selves as much as possible because they are the only people who completely understand their chosen type of work/life style. Each individual deserves respect because only he/she has had those exact life experiences and understands own emotions, motivations, and physical capabilities in an intimate manner. In essence, this ethical principle is an extension of the ethical principle of beneficence because a person who is independent usually prefers to have control over his own experiences in order to secure the lifestyle that he/she enjoys.
- Justice The justice ethical principle states that decision makers should focus on actions

that are fair to all those involved. This means that ethical decisions should be consistent with the ethical theory unless extenuating circumstances that can be justified and exist in the case. This also means that cases with extenuating circumstances must contain a significant and vital difference from other similar cases that justify the inconsistent decision.

Ethics for Business

Those who exercise principles of integrity in business are guided by a set of Core Ethics that influence their decisions and behaviour. People with integrity value virtues, including:

- Accountability
- Commitment to Excellence
- Concern for Others
- Fairness
- Honesty
- Integrity
- Law Abiding
- Leadership
- Loyalty
- Morale
- Keeping Promises
- Reputation
- Respect for others
- Trustworthiness

Corporate Ethics

Companies in the country have begun to fulfill their corporate social responsibility either voluntarily or in compliance with mandates or statutes, respecting social ethics and, thereby, setting up healthy and sensible corporate ethics on the following broad pattern:

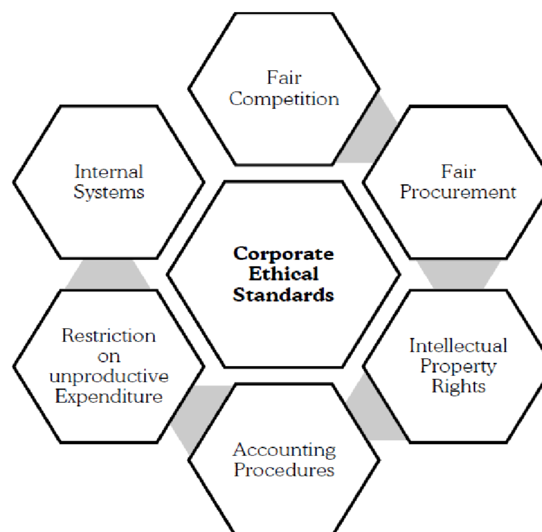
- Complying with the laws and rules of the country and regions where business is conducted and engaging in fair practices in the light of social ethics.
- Aiming to become a sensible corporate citizen, and striving for harmony with local society.
- Disclosing information in a timely fashion, and engaging in honest and transparent communications mode.

- Protecting the irreplaceable earth and contributing to the preservation of the environment.
- Respecting fundamental human rights and individuality, and building up a corporate culture with a broad vision which fosters the spirit of corporate ethics.

Corporate Ethical Standards

A code or a set of standards of ethics document may outline the mission and values of the business of the organization, and explain how professionals are expected to approach problems by deploying the ethical principles based on the organization's core values and the standards to which the professional is held accountable or responsible.

In this context, it is imperative and vital for each and every key managerial personnel, directors and employees to religiously follow the basic culture stipulated in the Corporate Ethics Policy and to build and live up to the guidelines for Corporate Ethical Standards that can be broadly accepted by society, as envisaged herein below:



- *Fair Competition* - carrying out business respecting the "fair, transparent and free competition" which is a fundamental rule of a freely competitive society.
- *Fair Procurement* - carrying out procurement operations in compliance with laws and regulations.
- *Intellectual Property Rights* - complying with the laws on intellectual property rights, and respect the rights of third parties; protecting and making full use of the company's intellectual property; respecting the originality and hard work of the staff in creating services and products that can be patented and protected.
- *Accounting Procedures* – adhering to the commercial codes, tax laws, rules and

regulations, systems and procedures for creating and maintaining financial, cost and inventory accounting records; and submitting reports there about properly and in a timely fashion.

- *Restriction on unproductive Expenditure* - not incurring expenditure on anything that goes against the intrinsic requirements with due diligence to the laws and regulations, social ethics, healthy commercial practices; and adherance to all domestic, applicable national and regional laws and regulations on spending.

- *Internal Systems* - creating and maintaining a culture of openness and mutual respect in the workplace where everyone's duties and efforts are valued equally; maintaining an environment where each individual can work, report, liaise and consult in a proper and timely fashion, without exceeding the bounds of their authority of duty; and behaving properly in such a way as to not impair either clients' or customers' or the company's interests.

Corporate Responsibilities

- *Linkage to Society* – have belief in the importance of the country's "culture" that has evolved alongside the development of world civilizations; and In order to develop it further, contribute to a range of activities within the society; contribute also to the improvement and development of the society through far reaching time-bound solutions into the ambit of everyday life, health, education, sports, scientific research, agriculture, rural uplift, technology, industry and many such other humanitarian areas.

- *Disengagement from Antisocial Forces* - not to establish contact with antisocial forces or organizations, not to give them room to intervene, and to prevent their influences on the company and its employees before they can occur.

- *Donations to Political Parties, etc.* - not to make political donations that contravene laws and regulations or are not within the bounds of social acceptability; to maintain healthy and fair relations with governmental, quasi governmental, competent authorities and political organizations.

- *Corporate Information* - to treat information handled in the course of business as inherent property of the company, and manage it appropriately; to protect information relating to the other companies, institutions and individuals obtained in the course of business, and which is collected, used and managed properly in accordance with the relevant laws and internal regulations; to prevent any risk of insider trading before it happens; to comply with the relevant laws and regulations, and manage important, unpublished internal information discretely and appropriately.

- *Corporate Property* - every director and employee shall use company assets for legitimate business purposes only; not to provide any benefit to others in exchange for any exercise of shareholders' rights.

- *Corporate Communications* – to publicly disclose mandatory corporate information in a proper and timely fashion, in order to avoid misunderstanding among shareholders

customers, employees, business partners, other local communities, groups, media and securities analysts.

- *Conservation of the Environment* - to proactively and continually work towards conservation of the Earth's environment which is the basis of a healthy and rich society; and through compliance with laws and regulations follow the accepted standards of Environmental Philosophy and Policies,

- *Healthy Working Environment* - create an environment where business can develop with respect to the fundamental human rights and the highest possible degree of accommodation for every individual's identity and uniqueness; to provide an environment that is healthy and safe, free from unfair discrimination and harassment, to nurture dedication to work; and to protect all directors' and employees' personal data in respect of the right of privacy.

Professional Ethics

Professionalism is the virtue, conduct, aim, value or quality that characterizes or marks a profession or professional person; it implies quality of workmanship or service. Having a reputation for excellence and being thought of as someone who exhibits professionalism under any circumstances can open doors for him/her in the individual's workplace or personal ambition.

Profession like that of Practicing Company Secretary is highly valued by organizations and such professionals are in short-supply. Set out below are the plausible Golden Rules of Ethics for Professionals: it is recommended to apply these Golden Rules of Professionalism and enjoy a reputable, professional and prosperous career in providing service to the client / organization:

- *Strive for excellence* : this is the first step to achieving greatness in whatever endeavor one undertakes; it is the quality that marks one's work to stand-out. Excellence is a quality of service which is remarkably good and so it surpasses ordinary standards, it should be made a habit to make a good impression on clients and colleagues.

- *Be trustworthy* : in today's society trust is an issue and one who exhibits trustworthiness is on a fast track to professionalism. it is all about fulfilling an assigned task, not letting down the client's expectations, it is being dependable and reliable when called upon to deliver service. In order to earn this trust, worthiness and integrity it must be sustainably proven over a time-span.

- *Be accountable* : It implies that one should be able to stand tall and be counted upon for all actions undertaken; this is also construed as a quality of being credible and responsible for actions performed and thier consequences - good or bad.

- *Be courteous and respectful* : Courteousness is more than being friendly, polite and well mannered with a gracious consideration towards others. It makes social interactions in the workplace run smoothly; avoid conflicts and earn respect. Respect is a positive feeling of esteem or deference for a person or organization; it is built over span of time and can be lost with one single inconsiderate action; continual courteous interaction is required to be maintained to enhance the respect gained.

- *Be honest, open and transparent* : Honesty is a facet of moral character that connotes positive and virtuous attributes such as truthfulness, straightforwardness, good conduct, loyalty, fairness, sincerity, openness in communication and generally operating in a manner for others to notice the perfection with which actions are performed; a virtue highly appreciated and valued by clients, employers and colleagues because it builds trust and personal reputation.

- *Be competent and improve continually* : Competence is the core ability of a professional to do a job properly, it is a combination of quality of knowledge, skill, acumen and behaviour used to perform. Competency grows through experience and to the extent one is willing to learn and adapt. Continuous self-development is a pre-requisite in offering professional service at all times.

- *Be ethical* : Ethical behavior is acting within certain moral codes in accordance with the generally accepted code of conduct or rules. It is always safe for a professional to "play by the rules" where the rule book is inadequate; and acting with a clear moral conscience is the right way to adopt.

- *High Integrity* : honorable action is behaving in a way that portrays "nobility of soul, magnanimity of person" derived from virtuous conduct and integrity in adherence to the dictum of "wholeness or completeness" of character in line with certain values, beliefs and principles with consistency in action and outcome.

- *Be respectful of confidentiality* : Confidentiality is respecting the set of rules or promises that restricts one from further or unauthorized dissemination of information. Over the course of one's career, information will come to be possessed in strict confidence – either from the organization or from colleagues; and it is important to be true to such confidentiality. One gains trust and respect of those confiding and enhances professional credibility within the organization.

- *Set Good Examples* : applying the foregoing rules helps one to improve traits of professionalism by imparting knowledge to those around and below the rank and file. One ought to show and lead by setting good exemplary life all along.

The Future

Demand for company secretaries is likely to grow with the strengthening of corporate governance laws : and all the recommended and approved Secretarial Standards and the Secretarial Audit provisions as are amended from time to time, and are fully implemented, there would be a sharp rise in demand for company secretaries.

The Secretarial Audit mandate is business-friendly, akin to regular health check-up programmes conducted by companies and enterprises for their personnel .It is a process to check statutory compliances made by companies under corporate and other laws, rules and regulations. The implementation thereof is expected to bring down litigations and mitigate risk of exposure to liabilities.

According to a survey the demand for company secretaries is expected to be five to seven times more than the current period at circa 2020. The need for more company secretaries will

arise in the years to come. The variegated expanse of work done by a company secretary helps not only the company but also refines the business values. The scope, duties and responsibilities of a company secretary is much higher now than in the past and it will certainly increase every year.

Role of Independent Directors

Ethical role of Independent Directors : Independent directors have a particular responsibility to safeguard the interest of shareholders and investors. They are to supervise the senior management and ensure that business ethics form part of the organizational culture. Schedule IV [Section 149(8)] enshrines a Code for Independent Directors in the form of guidelines on professional conduct. Adherence to these standards by independent directors and fulfillment of their responsibilities in a professional and faithful manner is designed to promote confidence of the investment community, regulators and companies

Guidelines of professional conduct : An independent director shall, in addition to various other provisions, (1) uphold ethical standards of integrity and probity; (2) act objectively and constructively while exercising his duties; (3) exercise his responsibilities in a bona fide manner in the interest of the company; (4) devote sufficient time and attention to his professional obligations for informed and balanced decision making process;

Role and functions : The independent directors are expected, in addition to various other provisions, (1) help in bringing an independent judgment to bear on the Board's deliberations, especially on issues of strategy, performance, risk management, resources, key appointments and standards of conduct; (2) bear an objective view in the evaluation of the performance of the board and management; (3) scrutinize the performance of management in achieving agreed goals and objectives; and monitor the reporting of the company's performance;

Duties : The independent directors shall, in addition to various other provisions, (1) undertake appropriate induction and regularly update and refresh their own skills, knowledge and familiarity with the company as a whole; (2) seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company; (3) strive to attend all meetings of the Board of Directors and of the Board committees of which he is a member; (4) participate constructively and actively in the committees of the Board in which they are chairpersons or members;

Manner of appointment : In addition to various other provisions, (1) Appointment process of independent directors shall be distinct from the company management; while selecting independent directors the Board shall ensure that there is appropriate balance of skills, experience and knowledge in the Board so as to enable the Board to discharge its functions and responsibility effectively. (2) The appointment of independent director(s) of the company shall be approved at the meeting of the shareholders.

Separate meetings : In addition to various other provisions, (1) The independent directors of the company shall hold at least one meeting in a year, without the attendance of non-independent directors and members of management; (2) All the independent directors of the company shall strive to be present at such meetings; (3) The meeting shall:

(a) review the performance of non-independent directors and the Board as a whole;

(b) review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

(c) assess the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably take mature decisions while perform their duties.

Evaluation mechanism : In addition to various other provisions, (1) The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated. (2) On the basis of the report of performance evaluation, it shall be determined whether or not to extend or continue the term of appointment of the independent director.

Company Secretary in Employment

A company secretary in whole-time employment has historically acquired more duties and varied responsibilities than in any other role under the umbrella of corporate governance. He or she is the person whom every board member values and knowing full well that the "go-to" person to answer their questions is the company secretary; and if they do not get an answer, he/she will guide them to a place where they can get the answers they need. The role of a company secretary is transitioning from being a support person to that of becoming one of the key governance personnel within a corporation.

The personal and professional attributes of a successful corporate secretary's would include:

- Officiating as a member of the Key Managerial Personnel and co-ordinate with the other incumbents
- Having a thorough understanding of the company's business
- Having basic knowledge of corporate and securities laws, at a minimum
- Having impeccable verbal communication and written composition skills and commanding an "executive presence"
- Being intuitive and sensitive to the thoughts and feelings of the board of directors, the managing director / chief executive officer / other key managerial personnel in matters of corporate ethics and ethos
- Staying in loop with current changes in corporate governance and giving the board and the managers a "heads up" about new developments
- Being able to create and achieve a consensus within multidisciplinary settings and the board / committee level
- Being able to navigate in and out of the bureaucratic thinking
- Being flexible, creative, detailed and accurate;
- Remaining calm under pressure and not losing sight of perspective at-large.

Company Secretaries in Practice

After obtaining a 'Certificate of Practice' from the Institute, members of the Institute can enter into Independent Practice. One can open an office in the vicinity and start practicing there. One can also apply to practicing solo or firms if they require a company secretary in their firm, just as a chartered / cost accountant or a Law firm would have.

Practicing Company Secretaries have been authorized to issue Certificate regarding compliance of conditions of Corporate Governance. They have also been recognized to appear before various Tribunals such as NCLT, NCLAT, Securities Appellate Tribunal, Competition Commission, Telecom Dispute Settlement, Consumer Redressal Forums, Tax Tribunals etc. The Reserve Bank of India has recognized the Practicing Company Secretaries to undertake Due Diligence Report for Banks.

Company Secretaries in Practice may also lend their expertise in the following specialist areas:

- Arbitration and Conciliation
- Capital Market and Investor Relations
- Compliance Officer for Public Issues
- Corporate Advisory Services.
- Corporate Restructuring
- Due Diligence
- Financial Management
- Foreign Collaborations and Joint Ventures
- Internal Audits
- Legal, Secretarial and Corporate Governance
- Merger, Acuisition and Amalgamation
- Project Planning

Thought Leadership

The recent upswing in the corporate world has enhanced the requirement for corporate personnel. There is a fabulous demand for professionals serving with corporate transparency and responsibility in managing their internal affairs.

Since higher or top management of the organization is usually busy in managing the general working of the organization, new and forthcoming challenges can only be solved by qualified and competent professional and the company secretary is one of such leaders of the professionals in handling these kinds of challenges.

With the increasing number of companies coming up in India, the scope of such personnel has increased enormously. A visionary look at the future of Company Secretarial Profession, one can expect it to be one of the most reputed and prestigious profession in the country with wide recognition and acceptability; the reason being the digital / electronic / on-line compliance requirements of companies will be much more time-bound, detailed and strict, day by day, demanding deployment of corporate governance ethics and transparency for which this profession has come into existence.

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Cartels and Whistle Blowers

Surendra U. Kanstiya*

Are you worried for being a part of cartel ?
There is a way out ….
"Come to us with vital disclosures
Get benefit of leniency programme
We assure immunity with confidentiality."

From an advertisement by the Competition Commission of India

Cartels

According to Section 2(c) of the Competition Act, 2002 (the Act), 'cartel' includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Proviso to section 27(b) of the Act prescribes heavy penalty for cartel formation. It states that in case any anti-competitive agreement referred to in section 3 has been entered into by a cartel, the Competition Commission of India (Commission) may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

Despite so harsh penal provisions, formation of cartel is a frequently happening economic activity. At the same time, cracking a cartel is an uphill task for the simple reason that the cartel is more of an informal and oral arrangement among the competitors. The best method of proving the existence of a cartel is to get information from the whistle blowers who are directly or indirectly involved with the cartel. And this is possible only when the informant is given an incentive in the form of relaxation in the penalty. Based on such information, the Commission can detect, investigate and break the cartel. Such mechanism known as plea agreements or negotiated settlements or leniency programme is found in the competition regimes throughout the world. This papers deals with the relevant provisions prescribed under the Act to deal with the cartels that are likely to have appreciable adverse effect on competition in India.

Power to impose lesser penalty

Section 46 of the Act empowers the Commission to impose lesser penalty in certain circumstances. The said section reads as under:

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

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,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) had given false evidence; or

(c) 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.

Lesser Penalty Regulations

The Commission has framed the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations) to deal with the leniency applications. The said Regulation were recently amended by the Competition Commission of India (Lesser Penalty) (Amendment) Regulations, 2017 [2017] 140 CLA (St.) 64. The Regulations permit an enterprise, who is or was a member of a cartel and an individual who has been involved in the cartel on behalf of an enterprise to submit an application for lesser penalty to the Commission. For seeking the benefit of lesser penalty, the applicant is required to :

(a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission ;

(b) provide vital disclosure in respect of contravention of the provisions of section 3 of the Act ;

(c) provide all relevant information, documents and evidence as may be required by the Commission ;

(d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission ; and

(e) not conceal, destroy, manipulate or remove the relevant documents in any manner, that may contribute to the establishment of a cartel.

The Commission's Discretion

The Commission exercises its discretion to grant reduction in monetary penalty based on the following factors :

(a) the stage at which the applicant comes forward with the disclosure ;

(b) the evidence already in possession of the Commission ;

(c) the quality of the information provided by the applicant ; and

(d) the entire facts and circumstances of the case.

The applicant(s) can be granted benefit of lesser penalty than leviable under section 27(b) and section 48, in the following manner:

First applicant : the first applicant may be granted benefit of reduction in penalty up to or equal to 100%, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima facie opinion regarding the existence of a cartel which is alleged to have contravened the provisions of section 3 and the Commission did not, at the time of application, have sufficient evidence to form such an opinion. The Commission may also grant benefit of reduction in penalty even when the matter is under investigation and the Commission or the Director General does not have sufficient evidence to establish such a contravention.

Subsequent applicant(s) : The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have contravened the provisions of section 3 of the Act. The reduction in monetary penalty to subsequent applicant(s) shall be in the following order :

(i) the applicant and individual marked as second in the priority status may be granted reduction of monetary penalty upto or equal to 50% of the full penalty leviable ; and

(ii) the applicant and individual marked as third or subsequent in the priority status may be granted reduction of penalty up to or equal to 30% of the full penalty leviable.

Leniency: Evolving Regime in India

First case decided by the Commission granting the leniency : Suo Moto Case No. 03 of 2014 [In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items] was the first case where the Commission granted leniency to the erring enterprise.

In this case, leniency application was filed by the applicant after commencement of the investigation by the Director General. The matter under this case was taken up by the Commission suo moto, on the basis of information received from the Central Bureau of Investigation, New Delhi. On investigation, it was found that three firms had shared the market by way of allocation of tenders floated by Indian Railways for Brushless DC fans. The anti-competitive conduct of the firms was established based on e-mail exchange amongst the firms, numerous calls amongst the key persons of these firms before and during the period of the tenders and admission by one of the firms under the lesser penalty provisions of the Act, which confirmed and revealed the existence and modus operandi of the cartel.

A penalty of Rs.62.37 lakhs, Rs.20.01 lakhs and Rs.2.09 crores was imposed on the firms M/s PQR, M/s KLM and M/s WXY, respectively in terms of proviso to Section 27 (b) of the Act. The Commission decided to impose penalty on M/s PQR and M/s WXY calculated at 1.0 time of their profit respectively in the year 2012-13 and on M/s KLM at the rate of 3 % of its turnover for the year 2012-13. The penalty was also imposed on persons-in charge of the three firms i.e., Mr. P of M/s PQR, Mr. K of M/s KLM and Mr. W of WXY at the rate of 10 % of the average of their income for the last three preceding financial years.

In this matter, the Commission had received an application under Section 46 of the Act read with Regulation 5 of the Lesser Penalty Regulations from M/s PQR. This application was received when the investigation in the matter was in progress and the report from the DG was pending. Considering the co-operation extended by M/s PQR in conjunction with the value addition provided by it in establishing the existence of cartel and the stage at which it had approached Commission, it was granted 75% reduction in the penalty than would otherwise have been imposed, had it not cooperated with the Commission. Accordingly, the penalty imposed on M/s PQR was reduced to Rs.15.59 lakhs and penalty imposed on Mr. P was reduced to Rs.11,648 only.

First full immunity granted by the Commission : Suo Motu Case No. 02 of 2016 [In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India] was the first case where the Commission granted full immunity to the erring enterprise.

This case was also taken up by the Commission suo motu, but it was triggered by the leniency application filed on 25th May, 2016 by M/s PECL (referred to as OP-3). The applicant stated that there existed a cartel amongst M/s EIL (referred to as OP-1), M/s INL (referred to as OP-2), and OP-3, which were all engaged in the business of, inter alia, manufacture and supply of zinc-carbon dry cell batteries, to control the distribution and price of zinc-carbon dry cell batteries in India. It was also disclosed that the Manufacturers were members of a trade association, namely, Association of Indian Dry Cell Manufacturers (referred to as AIDCM / OP-4) which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers.

Subsequently, on 26th August 2016, OP-1 also filed a leniency application. On 13th September 2016, the last party i.e OP-2 also filed a leniency application. Keeping in view the sequence in which they approached the Commission under Regulation 5 of Lesser Penalty Regulations read with Section 46 of the Act, it granted First Priority Status to OP-3, Second Priority Status to OP-1 and Third Priority Status to OP-2.

From the evidence collected in the case, the Commission found that the OP-1, OP-2 and

OP-3, facilitated by OP-4, had indulged in anticompetitive conduct of price coordination, limiting production/ supply as well as market allocation in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. It was observed that the conduct was continuing from 2008 and up till 23 August 2016 i.e. the date of search and seizure operations by the DG. Considering contravention of provisions of the Act, an amount of Rs.245.07 Crores, Rs.52.82 Crores and Rs.74.68 Crores was computed as leviable penalty on OP-1, OP-2 and OP-3, respectively, in terms of proviso to Section 27 (b) of the Act. The penalty was determined at the rate of 1.25 times of their profit for each year from 2009-10 to 2016-17. Also, penalty of Rs.1.85 Lakh was levied on OP-4 at the rate of 10% of average of its receipts for preceding 3 years. Additionally, penalty leviable on individual officials/ office bearers of the 4 OPs was computed at the rate of 10 percent of the average of their income for preceding 3 years.

However, keeping in view the stage at which the lesser penalty application was filed, co-operation extended in conjunction with the value addition provided in establishing the existence of cartel, the Commission granted OP-3 and its individuals, 100 % reduction in the penalty than was otherwise leviable. OP-1 AND OP-2, along with their individuals, were granted 30% and 20% reduction in penalty respectively. Pursuant to reduction, penalty imposed on OP-1 was INR 171.55 Crores and on OP-2 was Rs.42.26 crores. No penalty was imposed on OP-3.

Stakeholders' Survey by the Commission

Recently a nation-wide, cross-sector survey was designed and conducted by the Commission amongst three key stakeholder groups viz. enterprises, trade associations and government ministries/departments ('Cartel Enforcement and Competition : 2018)'. The questionnaires were sent to a total of 871 respondents across the stakeholder categories and 331 responses were received.

On leniency, the Commission opined that the lesser penalty provision helps penetrate the cloaks of secrecy and uncover evidence, which are vital for detection and conviction of a cartel. The law being relatively new, awareness of the provision amongst the stakeholders holds the key to its success in cartel enforcement. In this background, a specific question was addressed to the respondent enterprises and trade associations as to whether they were aware that the Act allowed for a reduction in penalties for enterprises who admit to their participation in a cartel and provide information and documents that helps the investigation.

The survey revealed that 80% of the respondent trade associations were aware of the provision regarding lesser penalty under the Act. However, the corresponding figure for enterprises was relatively low with 63% of respondents having provided an affirmative response. The survey also attempted to assess the state of compliance in India and the steps and measures adopted by the enterprises and trade associations to ensure compliance with the Act. The respondent enterprises and trade associations were asked whether they had a competition compliance programme in place in their organisations. 37% of the respondent enterprises and 60% of the respondent trade associations reported that they had a competition compliance programme. Of the enterprises, which had a compliance programme in place, majority cited 'implementation of the global policies of the group' as the primary reason for having the same. Evidently, most of the enterprises who have adopted compliance programme are Indian arms of multi-national companies which have been present in countries that have had a competition law for a fairly long period of time. The knowledge of the needs and benefits of

compliance programmes as well as the risks of not having one is transmitted from the parent companies to their Indian subsidiaries.

Role of Company Secretaries

The Commission's recent decision to permit individuals / whistle blowers to make application under Lesser Penalty Regulations should have a positive impact on the concerned parties. The move is in line with the global practices. According to the Report of ICN Annual Conference 2008 on Cartel Settlements, settlements are regarded by many as a "win-win" anti-cartel enforcement tool that can provide a multitude of benefits to enforcers as well as to settling cartel participants. However, by having a properly designed and constantly monitored compliance programme in the organization, the enterprises can avoid both, the contraventions of the law and the imposition of huge penalties. This is where the Company Secretaries, be in practice or employment, can play a vital role in impressing upon the Board of Directors to recognize the need for implementing a robust compliance programme.

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