

A journey from Listing Agreement to Listing Regulations



Makarand Lele
President
Institute of Company
Secretaries of India, The

India has become the new focus of global economy, while it is close to becoming the third largest global economy in the world. Developing world-class infrastructure, Global Manufacturing Hub, International Financial Service Centre and creating digital smart cities are prime targets of the Government as new engines of economic growth. "Make in India" - with commitment of smart single window governance is the invitation to all by our Hon'ble Prime Minister.

The International Monetary Fund (IMF) remains bullish on India's growth potential and has retained its GDP forecast for the country at 6.7 per cent in 2017 and 7.4 per cent in 2018. In its World Economic Outlook Update, 2018, it also estimated that the Indian economy would grow by 7.8 per cent in 2019, which makes the country the world's fastest-growing economy in 2018 and 2019.

"Stepping onto a new path is difficult, but not more difficult than remaining in a situation, which is not nurturing growth."

It is always easier to decipher a statute, especially once the reasons behind its enactment, particularly the broader social, political and economic reasons are understood.

Today we witness that corporations have grown enormously to a position of pre-eminence, such that their assets and revenues exceed the GDP of several countries put together. Such a powerful component of economy is creating enormous national wealth, this is not only a matter of satisfaction to the country as a whole but also a cause of severe concern to ensure that it operates in conformity with prescribed norms. There is a real possibility of expropriation of created wealth by those in operational control of enterprises. The financial and corporate frauds and scams in recent years in India have rekindled the thought on the need for high standards of corporate governance and stringent provisions to tackle fraud.

This prompted our lawmakers to statutorily address the rising demands for various sectors to reconcile and introduce stringent provisions which call for larger accountability and transparency from corporates.

- In 1992, the Parliament, while notifying SEBI Act, had amended erstwhile Section 21 of Securities Contracts (Regulation) Act, 1956 ("SCRA") delegating the powers of Government to SEBI, thereby giving power to SEBI to compel listing of securities by public companies.
- In 1995, the Parliament, by inserting section 11A to the SEBI Act, 1992 gave a mandate to SEBI to make Regulations for specifying "matters relating to issue of capital, transfer of securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies", for the protection of investors.
- In 2002, the Parliament empowered SEBI to specify the requirement for listing and transfer of securities and matters incidental thereto without prejudice to provisions of section 21 of SCRA.
- In 2004, with the insertion of section 12A in SCRA, the Parliament further empowered SEBI to issue directions to any company whose securities are listed or proposed to be listed on a recognized stock exchange in the interest of investors, or orderly development of securities market.

Further, Listing Agreement entered into by listed companies with the stock exchanges prescribes initial and continuous disclosure norms. The modifications to provisions of Listing Agreement are prescribed by SEBI. The Listing Agreement has been modified from time to time to align with the regulatory requirements arising out of the dynamic changes in the capital market.

The International Monetary Fund in its Financial Sector Assessment Program updates (FSAP) issued a report in 2013 giving a detailed assessment about India's Securities Market Development.

In the findings the report inter alia mentioned that "..... Mechanisms to ensure compliance with listing obligations, which include periodic reporting, are a responsibility of the Recognised Stock Exchanges (RSEs). Such mechanisms have limitations." The report recommended that enforcement of compliance with listing obligations by RSEs should be strengthened and SEBI along with the RSEs should review whether current arrangements to review material events should be strengthened.

It was also seen that in various international jurisdictions (viz. USA, UK, etc.) the securities market regulator directly or indirectly scrutinizes/ reviews continuous disclosures. In some jurisdictions, a specific division/ unit of the regulator reviews continuous disclosures, e.g., US SEC's Corporate Finance Division, UK FSA's Company Monitoring Team and Australian ASX's Issuer Unit wherein some basis is used for selection of cases for review.

Accordingly, SEBI constituted a Committee consisting of members from Stock Exchange(s) and SEBI for drafting an all-encompassing umbrella Listing Regulations providing listing conditions and disclosure requirements for various categories of securities.

There was a need to enhance the enforceability of regulatory provisions contained in the Listing Agreement and also to comply with the mandate of Parliament given in section 12A of SCRA and section 11A of SEBI Act. One of the major requirements was to converge it with the Companies Act, 2013 and promote good governance and removing ambiguity by providing ease of reference.

As we know that, SEBI has been the pillar of Indian capital market. SEBI as the nodal agency for capital market regulation in India is continuously bringing out new regulations and guidelines for keeping pace with the development of international capital markets and one of the steps moving forward ahead was SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations) notified on September 2, 2015 which came into effect from December 01, 2015.

Further, the International Monetary Fund in its FSAP Report issued in 2017 gave a detailed assessment about India's Securities Market Development, the extracts of the same are reproduced below:

“SEBI has made significant changes to its regulatory programs that directly address many findings and recommendations contained in the detailed IOSCO (International Organization of Securities Commissions) assessment published in 2013. SEBI has significantly expanded its regulatory programs, expanded its on-site inspection program and developed a risk-based matrix.”

The regulatory environments of stock exchanges and listed companies in all global regions are evolving to guide, support and help companies to develop and put into place effective corporate governance systems to ensure company management is acting on behalf of shareholders and stakeholders by creating company value and producing accurate and timely reports upon which investors can base informed decisions. Such measures create fair and transparent securities markets in which investors may have confidence.

India has also faced some challenges in line with other countries, in terms of aligning corporate governance with an evolving business environment. Following several public and high-profile governance lapses, the Securities and Exchange Board of India (SEBI) appointed the “Kotak Committee” to review corporate governance principles. The committee recently proposed a set of tougher corporate governance norms aimed at increasing transparency, strengthening board independence and board composition, and enhancing disclosures.

The Securities and Exchange Board of India (SEBI) released on 9 May 2018, the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 in order to adopt and give effect to several recommendations that were proposed in a Report given on 5 October 2017 by the Kotak Committee formed on 2 June 2017. SEBI also issued a circular on 10 May 2018 for implementation of certain recommendations of the Kotak Committee.

The Kotak Committee made a set of 81 recommendations to the SEBI on the following issues with an aim to support in improving standards of corporate governance of listed companies in India:

1. Improving the role, composition and effectiveness of the board and its committees, including evaluation practices;
2. Ensuring independence in the spirit of Independent Directors and their active participation in the functioning of the company;
3. Improving safeguards and disclosures pertaining to Related Party Transactions
4. Improving transparency in accounting and auditing practices by the listed companies;
5. Addressing issues faced by investors on voting and participation in general meetings;
6. Enhanced monitoring of group entities;
7. Disclosure and transparency related issues, if any.

These Amendments reflects SEBI's acceptance of 42 recommendations made by the Kotak Committee, out of which 14 recommendations were accepted with modifications either to scope of its application, or expected timeline for its implementation. SEBI decided to refer eight recommendations to various agencies (i.e., government, professional bodies, other regulators, etc.), considering that the matters involved relate to them.

Though SEBI aims to put into effect these Corporate Governance Amendments from 1 April 2019, it has provided a phased timeline from 1 October 2018 to 1 April 2020 for most of the amendments, so that the companies are able to adjust to new governance environment as well as overcome any implementation challenges.

These amendments pave a way for aligning best practices followed globally and bring in a renewed focus on improved corporate governance by way of better structure, more rigorous checks and balances and greater independence of all key gate-keepers including boards and auditors.

The Major highlights of the amendments are as under:

- Top 500 companies to appoint at least one woman independent director by April 01, 2019 and Top 1000 companies to appoint one woman independent director by April 01, 2020 on its Board of Directors. The current regulations
-

- require that there must be one woman on board, irrespective of her being an independent or executive director.
- Top 1,000 listed companies to have minimum six directors from April 01, 2019 and for top 2000 listed companies by April 01, 2020.
 - A person will not hold directorship position in more than eight listed entities from April 1, 2019 and in not more than seven listed firms from 2020.
 - A person will not serve as an independent director in more than seven listed entities.
 - A person who is serving as a Whole Time Director/Managing Director in any listed entity will not serve as an Independent Director in more than three listed entity.
 - Any person or entity belonging to the promoter group of the listed entity and holding at least 20 per cent stake in the listed firm will be deemed to be a related party.
 - Besides, shareholder approval will be needed for making royalty or brand payments to related parties exceeding 2 per cent of consolidated turnover.
 - These amended regulations also cover issues in accounting and auditing practices by listed companies in order to improve effectiveness of board evaluation practices.
 - Companies are now required to disclose details about utilisation of funds raised through qualified institutional placement (QIP) and preferential issues in their annual reports.
 - Companies will have to make disclosure about auditor credentials, audit fees and any material change in such fee as well as detailed reasons for resignation of auditor.
 - Top 100 listed entities by market capitalization, determined as on March 31st of every financial year, shall hold their annual general meetings within a period of five months from the date of closing of the financial year.
 - The approval of shareholders will be required every year in cases where the annual remuneration payable to a single non- executive director exceeds 50 per cent of the total annual remuneration payable to all non-executive directors.
 - The shareholders' approval will be needed if the annual fee payable to executive director, who is part of promoter entity, exceeds Rs 5 crore or 2.5 per cent of the net profits of the listed entity.
 - Approval is also required in case there is more than one such director and the aggregate annual fee to such directors is more than 5 per cent of the net profits of the listed entity.
 - The quorum for every board meeting of top 1,000 listed firms, from April 1, 2019 and of the top 2,000 listed entities from April 1, 2020 will be one-third of its total strength or three directors, whichever is higher, including at least one independent director.
 - Special Resolution would be must for appointment of non-executive directors over the age of 75 years.
 - With effect from October 1, 2018, all credit ratings obtained by the entity for all its outstanding instruments, updated immediately as and when there is any revision in any of the ratings.
 - Top 500 listed companies also need to have a Risk Management Committee for cyber security.

Redefining the role of Company Secretary- From Compliance to Commitment



India is blessed with democracy, demographic dividend, demand (3Ds). India is a young country with more than 65% under the age of 35; we are a nation ready for rapid and responsible economic development. The energy, enthusiasm and enterprise of Gen Y are India's greatest strength for competing in the world market.

Instances of fraud and misconduct have become too common, largely demoralising the investor sentiments, at this economic juncture, we need men and women who are daring and who can dream big and make sacrifices for the sake of economic good. We need professionals who are committed to a good value system, they who walk the talk in demonstrating their values and beliefs. We need professionals with integrity. Without this, no governance model would ever work. Integrity guides light in hours of darkness, confusion and self- doubt, and when faced with a moral dilemma. A value system builds confidence, provides peace of mind, and enhances energy and enthusiasm during trials and tribulations. As rightly said:

"It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change."
–Charles Darwin

The role of the company secretary in the governance of organisations has become more prominent as a result of ongoing regulatory developments and changing societal expectations. Role of company secretary in corporate governance has been recognised worldwide by major jurisdictions. Dynamism and globalization requires board of a company to be competent enough to handle the pressure of compliance under various jurisdictions. Company Secretary is a competent officer to ensure compliances; this is the reason that today appointment of a Company

Secretary is being made mandatory in various jurisdictions. Singapore, Malaysia, Maldives, Hong Kong, Kenya are some of the countries which have made the appointment of a Company Secretary mandatory for companies.

It is pertinent to note that in line with international best practices, SEBI has made it mandatory for listed entity to appoint a Company Secretary as Compliance Officer.

SEBI has recognised the significant role played by a Company Secretary as a Governance Professional under the SEBI Listing Regulations and recognised the role to be played by a Company Secretary under various provisions of the SEBI Listing Regulations, 2015, which are discussed below:

1. Regulation 6 provides that a listed entity shall appoint a qualified company secretary as the compliance officer.
2. Regulation 7 (3) requires that the listed entity shall submit a compliance certificate to the exchange, duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent, wherever applicable, within one month of end of each half of the financial year, certifying that all activities in relation to both physical and electronic share transfer facility are maintained either in house or by Registrar to an issue and share transfer agent registered with SEBI.
3. Regulation 16 (1) (d) provides that "Senior Management" shall mean Officers/Personnel of the listed entity who are members of its core management team excluding Board of directors and normally this shall comprise all members of management one level below Chief Executive Officer/ Managing Director/ Whole Time Director/ Manager (including Chief Executive Officer/Manager, in case they are not part of the board) and shall specifically include Company Secretary and Chief Financial Officer.
4. Regulation 24A mandates that every listed entity and its material unlisted subsidiaries incorporated in India shall undertake Secretarial Audit and shall annex with its Annual Report, a Secretarial Audit Report, given by a Company Secretary in Practice, in such form as may be specified with effect from the year ended March 31, 2019.
5. Regulation 40 (9) requires that the share transfer agent and/ or the in-house share transfer facility, as the case may be, produces a certificate from a practising Company Secretary within one month of the end of each half of the financial year, certifying that all certificates have been issued within thirty days of the date of lodgement for transfer, sub-division, consolidation, renewal, exchange or endorsement of calls/allotment monies.
6. Regulation 56 (1) (d) provides that a half-yearly certificate regarding maintenance of hundred percent asset cover in respect of listed non-convertible debt securities, by either a practising Company Secretary or a practicing Chartered Accountant, along with the half yearly financial results.
7. Schedule V, Clause E requires compliance certificate from either the auditors or practising Company Secretaries regarding compliance of conditions of corporate governance to be annexed with the directors' report.
8. As per Schedule V, Part C, Clause 10 (i), a certificate from a Company Secretary in practice that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as Directors of Companies by SEBI/ Ministry of Corporate Affairs or any such Statutory Authority.

The above mentioned recognition accorded to a Company Secretary will assure the investors that the directors will act in good faith in order to promote the objects of the company for the benefit of its members as a whole and in the best interest of the company, its employees, the shareholders, and the community for the protection of the environment.

So a Company Secretary not merely a compliance officer for looking after compliance only but also committed to protect the interest of the stakeholders at large.

This is not the end.....

"When you're finished changing, you're finished." -Ben Franklin

The role of company Secretary is changing. The skills and attributes of the best company secretaries are closest to those of the chairman: humanity, humility, high intelligence, and understanding of agenda, negotiation and resilience.

In today's scenario, the primary role of a Company Secretary is no longer restricted to mere adherence to compliances with the Companies Act and various regulations/guidelines related to SEBI / Stock Exchanges / and other allied statutes, rather the Company Secretary is instrumental in establishing good corporate governance practices and robust systems necessary for sustainability and a prosperous economy. Company Secretary is the extended arm of the regulators, as ethical and trustworthy professional whose professional judgment and competence will make a mark in the corporate sector.

Conclusion

As they say Rome was not built in a day. This regulation is also going through its teething phase. No doubt there are certain problems but at the same time it would not be incorrect to say that there is a resistance to embrace change. Laws, norms, rules are all evolutionary and with time the rough edges would smoothen.

To conclude, being transparent with regard to all transactions, and making all the necessary disclosures and decisions, complying with all the laws of the land, accountability and responsibility towards the stakeholders and commitment to conducting business in an ethical manner shall succeed in long run and SEBI is the harbinger to ensure this by bringing out legislative reforms, time and again with the need of the hour.

"A new dawn is ahead of us. The onus is on each one of us to herald this dawn with passion and commitment. Our future generation will then radiate in its sunshine."

References

www.sebi.gov.in

<http://www.imf.org/external/index.htm>

<https://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018>

<http://www.thelegaltrain.com/2013/10/company-secretarys-extended-role.html>

[https://www.ey.com/Publication/vwLUAssets/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018/\\$File/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018.pdf](https://www.ey.com/Publication/vwLUAssets/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018/$File/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018.pdf)
