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Decoding Impact of Corporate Governance Committee's recommendations on 'Composition & Role of Board of Directors'

October 7, 2017 12:07 pm | By : Gaurav N. Pingle



With an objective of enhancing the Corporate Governance standards of listed entities in India, SEBI formed a Committee under the Chairmanship of Mr. Uday Kotak. The Committee consisted of officials from the Govt., Industry, Professional Bodies, Stock Exchanges, Academicians, Lawyers, Proxy Advisors, etc. The terms of reference of the Committee were to make recommendations to SEBI on following issues:

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Ensuring independence in spirit of Independent Directors and their active participation in functioning of the company;
Improving safeguards and disclosures pertaining to Related Party Transactions;
Issues in accounting and auditing practices by listed companies;
Improving effectiveness of Board Evaluation practices;
Addressing issues faced by investors on voting and participation in general meetings;
Disclosure and transparency related issues, if any;
Any other matter, as the Committee deems fit pertaining to corporate governance in India.

The Committee submitted its Report on October 5, 2017. SEBI has invited public comments on the Report, in a prescribed format, by Nov. 5, 2017. This article is an analysis of recommendations on "Composition & Role of Board of Directors" referred to in SEBI's Corporate Governance Committee Report.

Minimum number of directors & composition of Independent Directors:

The Committee has suggested that the listed entity shall have at least 6 directors. In accordance with the provisions of Companies Act, 2013, a public company shall have minimum 3 directors. The recommendation is beyond the provisions of the Companies Act, 2013. Further, the Committee has suggested that every listed entity, irrespective of whether the Chairperson is executive or non-executive, may be required to have at least half its total number of directors as Independent Directors. In my view, having minimum number of directors as 6 is interlinked with the other proposed provision of minimum number of Independent Directors. The Committee further proposes that every listed has at least 1 independent woman director on its board of directors. Considering the above discussion, according to the Committee, the ideal composition of the board of directors would be 6 directors, of which 3 are non independent directors (executive or non-executive), 1 independent women director and 2 independent directors (men or women).

Attendance of Board Meetings: The Committee suggests that if a director does not attend at least half of the total number of board meetings over 2 Financial Years on a rolling basis, his/her continuance on the board should be ratified by the shareholders at the next Annual General Meeting. In relation to the provisions of Companies Act, 2013, a director vacates his office if he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board of Directors. It is noteworthy that the Committee Report



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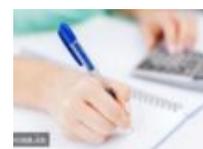
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refers to 'financial years' (i.e. two FYs), whereas the Companies Act, 2013 refers to '12 months'. Post implementation, in my view, there would be some interpretational issues;

Approval for Non-Executive Directors on Attaining a Certain Age: The Committee has recommended that the provision requiring Special Resolution should be inserted for listed entities for the appointment/continuation of Non-Executive Directors on attaining the age of 75 years for the relevant term. It has further clarified that all shareholders should be permitted to vote on such a resolution. It is interesting to note that suggestion relates to only non-executive director and not independent directors. Therefore, the intention would be to obtain shareholders' approval for appointment or re-appointment of non-independent directors / promoters who are non-executive directors and have attained the age of 75 years. In relation to this, under Section 196 of Companies Act, 2013, approval of shareholders by special resolution is required for appointment or re-appointment of Managing Director, Whole-Time Director or Manager above the age of 70 years;

Updation of Knowledge of the Board Members: Considering the dynamic business and legal environment, the Committee has rightly proposed a provision of updating the knowledge of board members. The updation of knowledge of directors would be relate to strategy, succession planning, budgets, risk management, environment, sustainability and governance, board evaluation, regulatory and compliance changes. The mandatory discussion of these agenda items with the board of directors would improve transparency and ensure accountability;

Separation of the Roles of Non-Executive: With an objective to provide better and more balanced governance structure by enabling better and more effective supervision of the management, the Committee has recommended separation of powers of the Chairperson and CEO/MD. The Committee has termed the Chairperson as leader of the board and CEO/MD as leader of the management. If this recommendation is accepted by the SEBI, then in future, there won't be a designation as "CMD – Chairman and Managing Director". The Committee has recommended that listed entities with more than 40% public shareholding should have separate roles of Chairperson and MD/CEO w.e.f. April 1, 2020;

Maximum Number of Directorships: The Committee has recommended that maximum number of directorships in listed entities should be reduced to 7. The recommendation further states that it would be irrespective of whether the person is appointed as an independent director or not. In relation to the number of directorships, the Cos. Act, 2013 provides that a

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person shall not hold office of director in more than 20 companies, of which maximum number of Public Cos. in which a person can be appointed as a director shall not exceed 10. The directors of the listed entity are now required to balance and harmonize the provisions of both laws – Company Law and SEBI Regulations.

In my view, the Committee has recommended some dynamic changes in Corporate Governance which, if accepted and codified by SEBI, would have a very big impact on India Inc. It will improve the accountability, transparency and disclosures of the board of director inter-se and the board of directors towards the shareholders of the Company. However, it is necessary to understand the implication of conflicting provisions under Companies Act, 2013 and SEBI Regulations. If there is apparent conflict, then even the Rule of Interpretation (“Stricter provision will prevail”) won’t apply. It is necessary to bring in harmony in both the legislations.

Gaurav N. Pingle is a Practising Company Secretary from Pune. He handles various assignments of Secretarial Audits, Due Diligence, Quarterly compliance audit of listed companies, routine compliance (under Companies Act & FEMA) for private companies, wholly owned subsidiaries, joint venture companies. As an Author, he religiously writes articles and columns on the current case laws, latest happenings in Corporate Laws and articulates his views, which are published in leading business and professional journals. Many of his articles have bagged the “Best Article” award. He is visiting faculty for the Company Law & Securities Laws at ILS Law College, Pune, Pune Chapter of ICSI, Thane Chapter of ICSI and also at various colleges in Pune, Mangalore, Udipi. (E): gp@csgauravpingle.com , (W): www.csgauravpingle.com .

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