BoardMatters Forum
India

BoardMatters Quarterly

Insights for boards and audit committees

Volume 7 | April 2016

In this issue

This edition of the BoardMatters Quarterly takes a look at recent regulatory developments, while analyzing their import for board members. Two separate articles on internal financial controls and on the Companies (Amendment) Bill 2016 (the Bill) – which was recently introduced in the Lok Sabha – assess the relevant implications for board members. The board agendas continue to expand in response to the critical challenges stemming from regulatory, technological and radical shifts in the market. A feature on this topic discusses the priorities that board members will have to navigate through in 2016. In the interview section, Mr. Subodh Bhargava, who is on the boards of many leading organizations, shares his view on a wide variety of issues confronting the boards today.

Internal control: key considerations for the board

Today's business environment has high risk, is intensely regulated and also faces increased investor activism. The directors, including independent directors, carry the burden of ensuring that adequate controls are in place to efficiently and intelligently manage risks, ensure compliance and optimally execute business and financial processes to gain strategic advantage. This article assesses the salient features of an internal control system, the differences between operating and financial statement controls, and directors' responsibility with respect to internal controls under the Companies Act 2013 (2013 Act).

05 Companies Bill 2016: an update

The Ministry of Corporate Affairs (MCA) constituted a Companies Law Committee (the Committee), which submitted its report in February 2016. Considering the suggestions made by the Committee, the Bill was recently introduced in the Lok Sabha. This article provides an update on the key changes pertaining to independent directors (IDs), multi-layering of investment companies, related party transactions, and loans and advances.

09 Top board priorities for 2016

Organizations are faced with many critical challenges – including rapidly changing technology, environmental risks, regulatory and legal requirements, major shifts in markets, ethical breaches, and big data and cybersecurity issues – that threaten their long-term success and sustainability. Directors have a unique opportunity to step forward and proactively oversee the development and implementation of effective long-term strategies in response to these challenges. This feature identifies the key priorities that boards need to balance in 2016.

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In conversation with Mr. Subodh Bhargava

This section features Mr. Bhargava's views on a variety of issues of relevance to board members. These include the considerations prior to accepting a board appointment, evaluation of board performance, boards' role in crisis management and the responsibility of managing risks – whether it lies with the board or the executive management.

Building a better working world

Internal control: key considerations for the board

Today's business environment is high risk, intensely regulated and has increased investor activism. The directors, including independent directors, carry the burden of ensuring that adequate controls are in place to efficiently and intelligently manage risks, ensure compliance and optimally execute business and financial processes to gain strategic advantage. In this article, ***Dolphy D'Souza*** *discusses the salient features of an internal control system, the difference between operating and financial statement controls, and directors' responsibility with respect to internal controls under the Companies Act 2013 (2013 Act).*

Internal control: fulcrum of modern businesses

Today's businesses face burgeoning regulations and an increased pressure to perform, which are exacerbated by challenging economic conditions and a relentless appetite of investors for higher valuations. This has led to a considerable increase in governance responsibilities, as companies and the board of directors around the globe are confronted with increased business and regulatory risks. Amidst such an environment, a robust internal control system can help organizations efficiently and intelligently manage risks, and optimally execute business and financial processes to gain strategic advantage.

What exactly is internal control?

The internal control system would typically include all policies and procedures (internal controls) adopted by the management of an entity to assist in achieving the management's objective of ensuring, as far as practicable, the orderly and efficient conduct of its business, including adherence to management policies, safeguarding of assets, the prevention and detection of fraud and error, accuracy and completeness of the accounting records, and the timely preparation of reliable financial information. Internal control is a process/set of processes designed to facilitate and support the achievement of business objectives. Any system of internal control is based on a consideration of significant risks in operations, compliance and financial reporting. It includes a focus on objectives such as improving business effectiveness, as also compliance and reporting objectives. Briefly, an internal control system:

- Facilitates the effectiveness and efficiency of operations
- Helps ensure the reliability of internal and external financial reporting
- Assists in compliance with laws and regulations
- Helps safeguard the assets of the entity

Process vs. internal control relating to financial reporting and those required for effectiveness and efficiency of operations

Consider the following example:

Example	Process description	Control description
When new contracts are entered into, the credit manager documents that the customer meets the credit rating criterion of the organization. The CFO will approve the contract/ credit rating after examining the underlying documentation and support provided by the credit manager. At the end of each quarter, the financial controller estimates the provision required for doubtful debts. At the end of each quarter, the CFO reviews the estimates of the financial controller.	**Process 1**: When new contracts are entered into, the credit manager documents that the customer meets the credit rating criterion of the organisation.	**Operating control**: The CFO will approve the contract/credit rating after examining the underlying documentation and support provided by the credit manager. Only after such an action, the contract can be signed.
	Process 2: At the end of each quarter, the financial controller estimates the provision required for doubtful debts.	**Financial statement control**: At the end of each quarter, the CFO reviews the estimates of the financial controller with respect to the provision for doubtful debts.

In this example, the credit manager's documentation of the credit rating and the financial controller's estimation of the doubtful debts are process steps. They do not have any preventive or detective action steps. However, the CFO's action of reviewing and approving the credit rating and the estimates are control steps because they will prevent or detect a fraud or error from taking place. The review and approval of credit rating ensure that business is conducted in an orderly manner and that the company does not assume huge financial risks. On the other hand, the review and approval of estimates on the provision for doubtful debts, is a financial statement control because it ensures that the financial statements are not misleading.

Directors' responsibility under the Companies Act 2013

In the case of a listed company, the directors' responsibility statement shall state if the directors had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively [Sec 134 (5) (e)]. For the purpose of this clause, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to the company's policies, safeguarding of its assets, prevention and detection of frauds and errors, accuracy and completeness of the accounting records, and the timely preparation of reliable financial information. This section has cast an onerous responsibility for internal controls on the directors of a listed company by extending them beyond financial statement controls. The responsibility includes control over orderly and efficient conduct of business, typically referred to as operating controls.

In the case of all companies, the board of directors report shall include the details in respect of adequacy of internal financial controls with reference to the financial statements [Rule 8 (5) (viii) of the Companies (Accounts) Rules, 2014]. Therefore the rigour for a non-listed company is much lower compared to a listed company, since for non-listed company the directors' responsibility is only restricted to financial statement control.

The provisions of the 2013 Act applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, apply to the consolidated financial statements. As such, it appears that the directors will be required to report on the adequacy and operating effectiveness of the internal financial controls over financial reporting, even in the case of consolidated financial statements. In the case of components included in the consolidated financial statements of the parent company, reporting on the adequacy and operating effectiveness of internal financial controls over financial reporting would apply for the respective components only if it is a company under the 2013 Act, and not to foreign components.

The directors, including independent directors, will have to take adequate steps to ensure that the assertions they make in the directors' report or directors' responsibility statement with respect to internal control are genuine and based on adequate work performed and evidence. Typically, the directors would ask the internal auditors to conduct a comprehensive exercise and report to them on the design and operating effectiveness of controls and the remedial action to be taken in the case of negative findings. The statutory auditor's reporting on internal controls relating to financial statements will serve as a pressure point on the directors to consider the reporting requirements on internal controls seriously.

In contrast to the directors' responsibility, the *Guidance Note on Audit of Internal Financial Controls Over Financial Reporting and the Companies (Amendment) Bill, 2016* have restricted the auditors reporting only to internal controls over financial reporting. It may be noted that the directors' report or auditor's opinion on internal control does not assure, for example, the future viability of the entity.

Companies Bill 2016: an update

*The Companies Act 2013 (2013 Act) is an important legal reform for the Indian corporate sector. However, its application has presented many practical challenges. To address these challenges, the Ministry of Corporate Affair (MCA) constituted a Companies Law Committee (the Committee), which submitted its report in February 2016. Considering the suggestions made by the Committee, the Companies (Amendment) Bill 2016 (the Bill) was recently introduced in the Lok Sabha. **Vishal Bansal** provides an update on the key changes pertaining to independent directors (IDs), multi-layering of investment companies, related party transactions, and loans and advances.*

Independent directors

Section 149(6) of the 2013 Act prescribes the criteria for the selection of IDs. One of the criteria is that IDs should not have/have had any pecuniary relationship with the company, its holding, subsidiary or associate company, or promoters or directors during the two immediately preceding financial years or during the current financial year. Even a minor pecuniary relationship may render a person ineligible for appointment. In contrast, under the SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015, only "material" pecuniary relationships disqualify a person for appointment as an ID. The Companies Amendment Bill 2016 (the Bill) also proposes the introduction of materiality for determining whether pecuniary relationships impact independence. In accordance with the Bill, remuneration as director or transaction not exceeding 10% of the person's total income or such amount as may be prescribed will not impair independence.

Section 149(6) also prescribes that a person cannot be appointed as an ID if any of his or her relatives has or had a pecuniary relationship or transaction exceeding a prescribed value with the company; its holding, subsidiary or associate company; or its promoters or directors during the two immediately preceding financial years or during the current financial year. The Bill proposes to clarify this requirement by prescribing separate limits for holding of security/interest, indebtedness, provision of guarantee/security and other pecuniary relationships.

Section 149(6) also prohibits the appointment of an individual as an ID if the person or that person's relative is or was a KMP or an employee in the company or its holding, subsidiary or associate company during any of the preceding three financial years. The Committee was of the view that a person's independence is likely to be impacted only if a relative held a significant position such as director or KMP during the preceding years. Accordingly, the Bill proposes that the fact that a relative was merely an employee during the preceding three financial years will not impact independence. However, no change in the prohibition is proposed with regard to a person's own employment.

The proposed changes are likely to somewhat ease the burden of ensuring independence. However, no change is proposed with regard to highly onerous obligations on IDs, including taking executive responsibilities. Consequently, IDs will continue to be required to approve related party transactions (RPTs), conduct one separate meeting without attendance of

non-independent directors, protect whistle-blowers, safeguard the interest of all stakeholders — particularly the minority shareholders — and perform the delicate act of balancing the conflicting interests of stakeholders. Given that the responsibilities of IDs have become highly onerous, companies may still find it extremely challenging to hire good-quality IDs.

Multi-layering of investment companies

The 2013 Act prohibits a company from making investment through more than two layers of investment companies. The Bill proposes to delete this requirement. We welcome the proposal as it will improve the ease of doing business. Many conglomerates need multi-layered investment structures for genuine reasons such as fund-raising, creating sector-specific sub-groups and private equity investment. Companies will have greater flexibilities in raising finance where PE investors want to invest in specific businesses or group of entities, instead of investing at the ultimate parent level.

Related party transaction

The requirements concerning RPTs have been a matter of significant debate since their introduction in the 2013 Act. The Bill proposes the following key changes:

a) Under the existing definition of the term "related party," an associate company is a related party for the investor in that company. However, for the associate company, the investor is not a related party. The Bill proposes an amendment to fix this anomaly and requires that both associate company and investor be related to each other.

b) Under Section 177 of the 2013 Act, the Audit Committee is required to pre-approve all RPTs and subsequent modifications thereto. In contrast, Section 188 requires the board and/or shareholders to pre-approve only specific RPTs. Section 188 also contains two exemptions from the approval process: transactions entered into by the company in its ordinary course of business and on an arms' length basis, or they do not exceed the prescribed materiality threshold.

   The Bill does not prescribe any changes to the Audit Committee pre-approval requirements. However, it clarifies that if the Audit Committee does not approve a transaction not covered under Section 188, it will make its recommendations to the board. It is also clarified that Audit Committee pre-approval requirements will not apply to transactions between a holding company and its wholly owned subsidiary company, except that this exemption will not apply to transactions referred under Section 188.

c) Section 188 of the 2013 Act requires RPTs to be approved by a resolution of disinterested shareholders if they do not meet the exemption criteria. The 2013 Act states that no member of the company will vote on such resolution if such member is a related party. The Bill proposes an amendment whereby in a company where 90% or more members are relatives of the promoter or are related parties, all shareholders will be entitled to vote on the resolution.

In our view, that the Audit Committee and IDs should have responsibility for reviewing RPTs and not approving them. The MCA may consider making appropriate changes in the law in this regard.

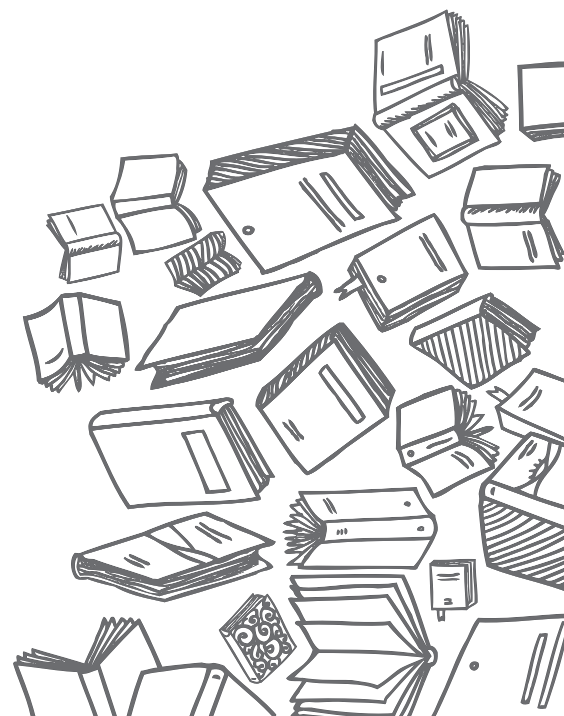
Loans and investments

In accordance with Section 185 of the 2013 Act, a company cannot provide loan, guarantee or security to any of its directors or to any other person in whom the director is interested. The practical implication of this section is that a company cannot give loan to even its subsidiary, associate or joint venture companies. This created significant issues for many groups. The MCA tried addressing these concerns through rules/notifications. However, they were not comprehensive. There was also a concern that rules may be overriding the 2013 Act.

The Bill proposes a completely new Section 185 to address practical challenges. Some of the key changes in the new section are as follows:

a) There will be a prohibition on providing loan to, giving guarantee or security for loans taken by, any director, director of the holding company or any partner or relative of any such director or any firm in which any such a director or relative is a partner.

b) A loan to other persons or parties in whom the director is interested can be given if (i) a special resolution is passed by the company in the general meeting and (ii) loans are to be utilised by the borrowing company for its principal business activities.



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Top board priorities for 2016

Organizations are faced with many critical challenges — including rapidly changing technology, environmental risks, regulatory and legal requirements, major shifts in markets, ethical breaches, and big data and cybersecurity issues — that threaten their long-term success and sustainability. Directors have a unique opportunity to step forward and proactively oversee the development and implementation of effective, long-term strategies responsive to these challenges.

As a result, the trend of expanding board agendas will continue in 2016. As boards balance multiple priorities, most will heighten their focus on the following:

Board effectiveness, composition and refreshment

It is a recurring question for directors and their organizations — how do good boards become great? Improving board effectiveness, making sure boards maintain the right combination of skills and experience, and enhancing transparency and accountability will characterize exceptional boards in 2016. Performing robust and thoughtful board self-assessments, with consideration of peer and individual director evaluations, will be critical for board effectiveness.

Effective boards will balance the viewpoints of tenured directors with the fresh perspectives of new members. These boards will make certain that the appropriate breadth of industry expertise is represented in the boardroom and that the composition of the board reflects the increasing convergence of sectors.

Boards will seek directors with a greater diversity of knowledge and experience in order to match boardroom talents with evolving business strategies reflective of the interconnected global economic environment and technological and demographic changes.

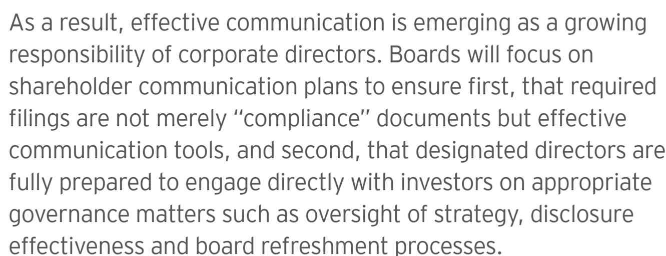
We recently found that among Fortune 100 companies with retirement-age policies, 19% of directorships are held by individuals within five years of reaching the board's designated retirement age.1 Since a significant number of directors are currently approaching retirement, boards will have an opportunity to review their oversight needs and engage in strategic director succession planning in the coming year.

Investor and stakeholder engagement

The day of the passive investor is behind us. Investors around the globe are increasingly asking tough questions on the issues that matter most to them. They want to understand the board's role in the oversight of enterprise risk, including emerging risks, strategy and execution. They want to know if boards are robustly evaluating their own performance and confirming that the right portfolio of skill sets aligned with company strategies are represented in the boardroom.

Investors will continue to seek meaningful communications and engagement with board leadership and committee chairs on issues such as company strategy, board composition (including diversity), director tenure, succession planning and executive compensation.

'Source: EY Center for Board Matters'



As a result, effective communication is emerging as a growing responsibility of corporate directors. Boards will focus on shareholder communication plans to ensure first, that required filings are not merely "compliance" documents but effective communication tools, and second, that designated directors are fully prepared to engage directly with investors on appropriate governance matters such as oversight of strategy, disclosure effectiveness and board refreshment processes.

Cybersecurity preparedness

The advent of new technologies and an ecosystem of digital interconnectedness significantly increase an organization's exposure to theft of its most valuable assets, which include confidential customer data and vital information such as intellectual property and strategic blueprints.

Preparedness is the first line of defense. Yet only 7% of organizations claim to have a robust incident response program that includes third parties and law enforcement and is integrated with their broader threat and vulnerability management function.2

The emphasis for boards will be to make sure that companies are shoring up critical infrastructure, enhancing crisis response and mapping a strategy that emphasizes a good balance of preventive and responsive tactics. This means being able to efficiently guide an organization through the layers of risks and threats, and boards should appropriately set the risk appetite and be prepared to swing into decisive action to handle any incidents.

Boards accept that the risk of a cyber-breach needs to be continually managed, and adequate preparation that enables an organization to get back up and running quickly following an attack will be a key consideration for boards.

Knowing where the vulnerabilities lie is vital. Boards will continue to confirm that companies have a system and backup plan that facilitates data migration in a crisis. They will also need to make sure that their organizations firm up relationships with federal investigating authorities, who can move swiftly in response to attacks and minimize exposure and damage.

Oversight of Enterprise Risk Management (ERM)

As boards continue to focus on their roles in long-term value creation, effective oversight of ERM will be high on their agendas. Oversight of ERM will comprise operational, financial, strategic, compliance and reputational risks.

Board oversight will entail setting the "tone at the top" by promoting, assessing and monitoring risk culture and appetite.

Oversight of talent risk management

Boards recognize the crucial role they play in human capital matters as they relate to overseeing the management of three key risks: culture, talent and strategy. The business reason is compelling since talent and culture are arguably the biggest drivers of innovation, growth and the ability to outperform the competition. In recent conversations we have had with board directors, three out of four said that human capital strategy will be one of the top emerging risks that boards will face in 2016.

Boards will play an important role in ensuring that leadership stays focused on building the right talent strategy. Boards will focus on how to prepare for generational transitions in their organizations and anticipate the changing dynamics at the boardroom and management levels. As new and complex opportunities and risks emerge with evolving strategies and growth markets, having the right people to execute on strategies is an important imperative for success.

For many boards, talent management remains a big challenge. Failure to understand and mitigate human capital risks and complexities will impact strategy and value creation.

Boards will seek rigor from management about leadership development and want to know where the next level of talent will come from, especially with emerging risks, globalization and technological advances.

" Boards need to deepen engagement around strategic risks "

Mr. Subodh Bhargava is the Chairman of Tata Communications, TRF, GlaxoSmithKline Healthcare and Director on the boards of several companies including Tata Motors, Tata Steel , Larsen & Tubro and SunBorne Energy LLC.

In a conversation with EY, Mr. Bhargava shares his view on a diverse range of topics that occupy boards' attention. These span across evaluation of board performance, the role of the board with regard to addressing a crisis, approach to risk management and aspects he believes are essential to consider prior to accepting a board appointment.

What are the factors that you would consider important prior to accepting a board appointment?

I believe a number of factors are important.

First and foremost, the knowledge and perception about the value system and the track record of a corporate that lends confidence to it being a transparent and open organization are crucial. It is important that the organization is not faced with any allegations that can cause reputational damage.

Clarity around who the chairperson of the board is, is also a key consideration, because the chairperson plays an important role in guiding other board members and also the processes that help make the board function in a positive and efficient manner, making it an enjoyable experience being on the board.

I would also tend to consider the peers on the board as they bring substantial collective value to the board at their individual level

How do you view the performance evaluation process for board members?

I think this focus on evaluation is a valuable exercise. It enables the board to introspect over the quality of deliberations that the board members are engaging with, as well as the processes that are helping the boards' functioning. Such an evaluation would tend to assess the overall culture and character of the board.

To what extent can such evaluations be objective?

I think we are learning in terms of how we evaluate - for instance, the formats and questionnaires that are part of such an exercise are still evolving. This exercise was never done in the past but today many companies that are engaged in the process have understood the benefits of evaluation. I expect these to become more objective as the process matures.

How important is informal interaction among the board members?

I would not subscribe to anything on a bipartite basis. One cannot discuss informally or engage in silos. Such interactions have to be open and transparent where all board members and the executive management engage as a group. Definitely, any social interaction amongst the group lends homogeneity and better understanding of each other's views in formal discussions.

Do we have the right people on boards? Is this a question you see gaining currency, stem as it might from radical changes in the business environment or investor expectations around boards' skill sets and experience?

In my view, anybody who has been in a senior management position brings requisite knowledge to the board. I also believe that boards need a balance of not only general management but also a fair bit of domain familiarity, though not domain expertise per se. I personally am not comfortable with domain expertise on the boards as that tends to lead to back seat driving. If at all it is required, such domain experts could function in their capacity as advisors to the chairperson of the board or the CEO. However, domain familiarity of different functions such as marketing and finance and processes is useful.

Which are the emerging risks that boards and independent directors should be cognizant of?

To my mind, it is the executive management's role to identify and manage risks. The boards are well engaged with regulatory risks. While many might not be as deeply engaged with sufficient understanding of strategic risks - an area around which the boards need to enhance their engagement - the diversity of the board members' experience adds significant value in developing a better understanding of strategic risks that the organization might be facing. I think sometimes the boards tend to engage in a discussion on operational risks, an aspect that I believe that they should keep away from.

If we were to talk about new risks, today, the boards and the executive management are alert to cyber security risks. As digitization is increasing, there is greater awareness around it and requisite measures to address potential risks are under sharper focus.

What role do you see boards' playing in crisis management, as instances of a serious magnitude can adversely affect an organization's reputation and relationship with its many stakeholders?

I firmly believe that the role of boards has to be mainly of oversight and of an advisory nature setting the direction for the executive to decide the action and remedial measures, even in a crisis. The board cannot take frontline positions, which if so, will make it an "interfering" one. It is the executive management that has the responsibility of running the business, managing the risks and any crisis that might occur in the course of doing so. However, if the board members can add value as a 'sounding board' and provide inputs that might be helpful in addressing a crisis, then probably yes, I see such interventions coming from an "engaged" board.

In my experience, the executive management does reach out to the board to seek advice and keep it fully abreast of the situation and how they see any crisis potentially evolving. In fact, our role would be to enable the management to avoid a crisis situation altogether.

How are boards' providing oversights on CSR? Is CSR a regulatory compliance or now being viewed as a key component of the business strategy?

I do not see how CSR can be strategically intertwined with business. The only strategic fit I can see is the adoption of CSR initiatives that would benefit the community at large, especially in the geographic proximity of an organization's operations, including the market place. CSR is about giving back to the society, rather than being considered part of the business strategy, as it then tends to become a commercial proposition.

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EYIN1604-033
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