

BoardMatters Quarterly

Insights for boards and
audit committees



In this issue

This edition of the BoardMatters Quarterly is focussed on data privacy and how companies are managing the General Data Protection Regulation (GDPR) compliances. GDPR introduces more stringent data protection requirements making it essential for boards to understand GDPR compliance in order to address impending data protection issues. The Uday Kotak Committee Report proposes policy and regulatory changes required to be carried out in order to enhance the efficiency of corporate governance norms for Indian listed entities. This issue also highlights some of the key changes in corporate governance norms suggested by the Uday Kotak Committee on Corporate Governance and accepted by the Securities and Exchange Board of India (SEBI).



General Data Protection Regulation (GDPR): A board director's perspective

In light of increasing privacy incidents, stringent data privacy and security regulations are evolving at local, national and global levels of Government. The article includes a list of questions that boards should ask to ensure GDPR preparedness and compliance.

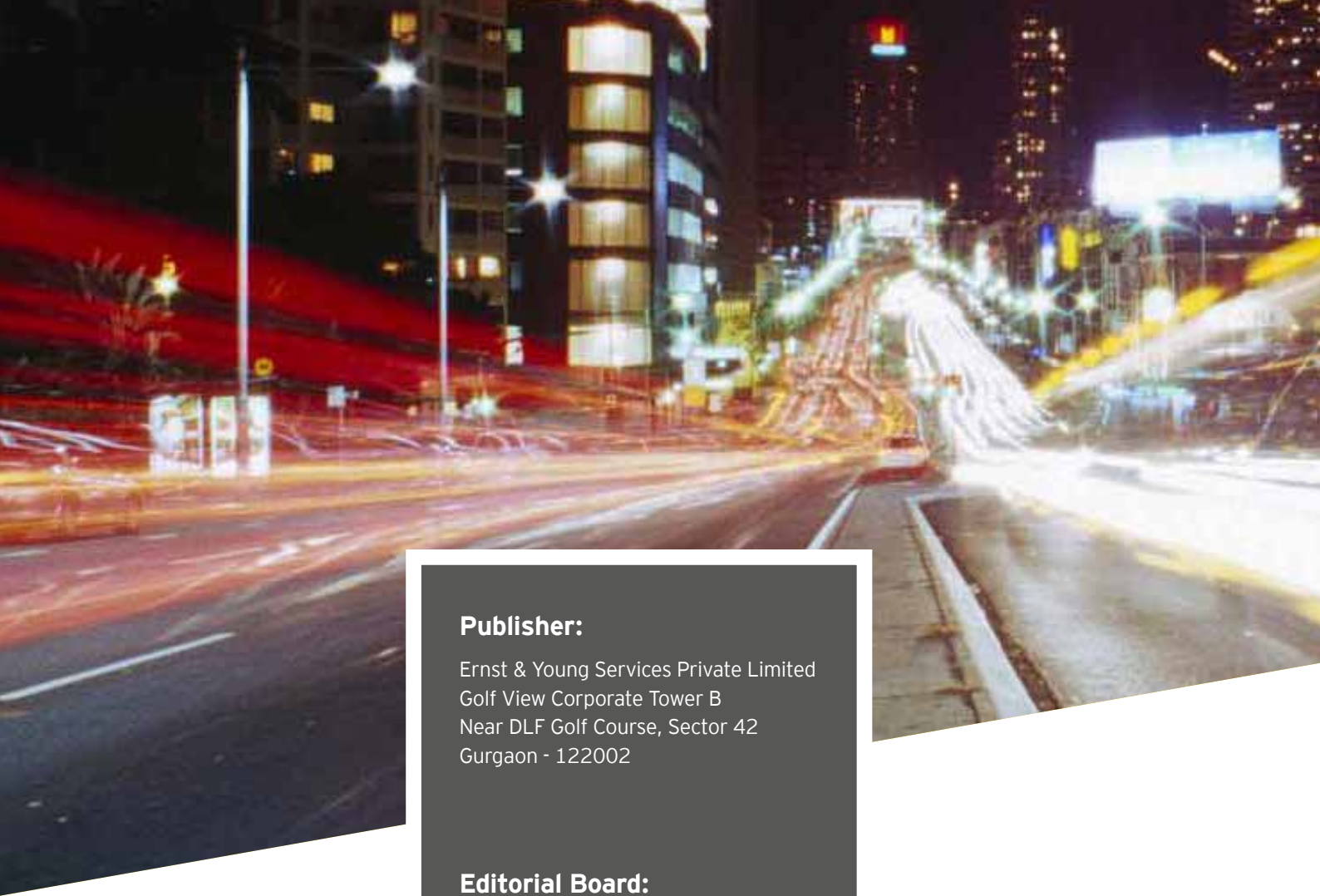


Compliance: Exposure or opportunity?

In a world of fast changing regulations and severe penalties for non-compliance, it is critical for boards to demonstrate adherence to compliance management in order to gain competitive advantage. The article includes a sustainable compliance program framework as also key questions that boards and independent directors should consider while assessing a compliance program.

12 Highlights: Panel discussion on 'The Uday Kotak Committee recommendations and recent developments in corporate governance'

An engaging panel discussion on 'The Uday Kotak Committee recommendations and recent developments in Corporate Governance' was held at the EY BoardMatters Forum in Mumbai. The session focused on recommendations proposed by the Kotak committee towards improving corporate governance standards of listed firms in India. Turn to page 12 for a summary of this insightful and informative discussion.



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General Data Protection Regulation (GDPR): A board director's perspective

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With data becoming the lifeline of a global economy, consumer privacy is becoming an area of concern. The digital explosion and spread of connected technology has a potential impact on privacy making the protection of personal data a new priority. Over the last few years, an increasing number of personal data breaches have dominated the headlines, particularly concerning online and IT systems and services in various sectors such as government, telecom, media, manufacturing, education among others. Some of the reported breaches were high-profile and have had a serious impact, whereas there are instances where smaller breaches may go unreported. It is not unusual for the estimated exposure to be underestimated in the initial outcome, leading to serious repercussions in the future.

In the light of increasing privacy incidents, stringent data privacy and security regulations are evolving at local, national and global levels of Government. The Government of India is inching closer towards drafting a new data protection regulation, for which a Committee of Experts has been appointed to study various issues relating to data protection in India and making specific suggestions on underlying principles for a data protection bill and drafting such a bill.

While India is still in the process of passing such a regulation, there are global data protection regulations which have already considered privacy as a fundamental human right. One such regulation is the European Union's General Data Protection Regulation (GDPR), which is currently in the spotlight globally. The GDPR

introduces a rigorous and comprehensive privacy framework for businesses that operate, target customers or monitor individuals in the EU. Organizations now have to meet a host of new obligations imposed under the GDPR and implement compliance programs to protect data subjects and avoid hefty enforcement penalties. GDPR serves as a model for ensuring that the EU data subjects (citizens and residents) have autonomy in the digital economy and thus allows individuals to regain control of their personal and sensitive personal data.

Organizations need to understand and document what data is acquired, maintained and processed, and the legal basis for it. They have to provide clear and unambiguous information on how individual data is being processed and they have to obtain explicit consent from the data subjects to process it. GDPR underlines that cross-border transfers of data shall be allowed to countries that provide an adequate level of personal data protection. It mandates organizations to report a data breach within 72 hours of the incident. As GDPR empowers the data subject with privileges such as right to be forgotten, right to portability, right to object profiling, etc., organizations will have to ensure there are mechanisms in place to comply by these new requirements. It also emphasizes on the appointment of a data protection officer, who will be the single point of contact for the supervising authority and is required to advise upon, and maintain compliance with the GDPR. Privacy by design has become an enshrined requirement as it will force organizations to embed privacy protection into every aspect of their business rather than bolting it on as an afterthought.

GDPR compliance should be a top priority on board room agendas, with maximum fines of up to 4% of annual global turnover or 20 million Euros, whichever is

greater, increased breach notification requirements and additional administrative obligations applied from 25 May 2018.

Significant opportunities

GDPR compliance not only helps organizations in mitigating the extensive risks inherent in non-compliance fines and lost customer trust, but also reveals a critical by product opportunity when a strategic personal data protection program is enacted. Customers have more confidence and trust in companies that protect their personal data and will be more willing to share more of this data. This enables the enterprise to collect the data necessary to provide advanced services to its customers.

Increasing accountability of board members

It is imperative that the board understand the true essence of GDPR compliance in order to address impending issues and identify ways of growing business through enhanced data protection initiatives and information governance. Instead of taking a passive approach and relying on others to understand the underlying concerns, boards must direct their management to take proactive steps towards implementation. They should start questioning the organization's readiness towards GDPR by getting more involved in the compliance journey. Board members across all sectors will need to increase accountability around how data is processed, stored, used and deleted.

Top questions for board members: Is your organization ready for GDPR?

Independent directors and board members must take into consideration the below concern areas:

Has the organization identified the role of a data controller and data processor?

The data controller is in charge of deciding how data on the data subjects is processed and why. The data processor is an organization or individual that processes the actual personal data. Such appointments are critical to ensure protection of personal data.

Has the board ensured that third party risks are mitigated through adequate data protection clauses in vendor contracts?

To ensure compliance with GDPR, it is essential to update vendor contracts by including appropriate data protection clauses. This will help organizations to mitigate third party risks and protect their data.

Is the data privacy policy and privacy statement updated in line with GDPR requirements?

The privacy policy provides a guidance for implementing effective measures to protect data and respect the rights of data subjects. This should be in line with GDPR.

Are all customers informed and is the data being processed after seeking their consent?

Organizations must take explicit and affirmative consent from the data subjects before processing their personal data. Also, consent must be freely given and explicit, indicating the individual's specific agreement to the processing of personal data.

Will the organization need to invest in new technology to be GDPR compliant?

The board must be up-to-date about the various strategic investments made in the technology domain for becoming compliant to GDPR, such as encryption tools, rights management tools, data leakage prevention tools, incident management tools, etc.

There's still time to act

As the number and breadth of massive data breaches has increased, customers now demand new statutes and regulations with a focus on making corporate management and boards responsible parties for protecting their personal information. The EU security requirements are complex and demand constant surveillance. It is in this context that board directors need to realize that data security is not just an IT problem or a compliance issue, but a significant concern for the entire organization.

Directors must ask the right questions, become the sponsor of a GDPR readiness program and talk to the organization's legal counsel and Chief Information Security Officer.

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Compliance: Exposure or opportunity?

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Businesses today operate in a fast changing environment where we are witnessing geo-political shifts, emerging technologies, ever increasing focus on agility and simplification. At the same time, the focus on governance and risks is increasing. Organizations today need to deal with managing the expectations of stakeholders by providing optimal returns and also investing in making themselves sustainable in the long term.

One of the most important factors that needs to be managed and leveraged throughout this journey is the

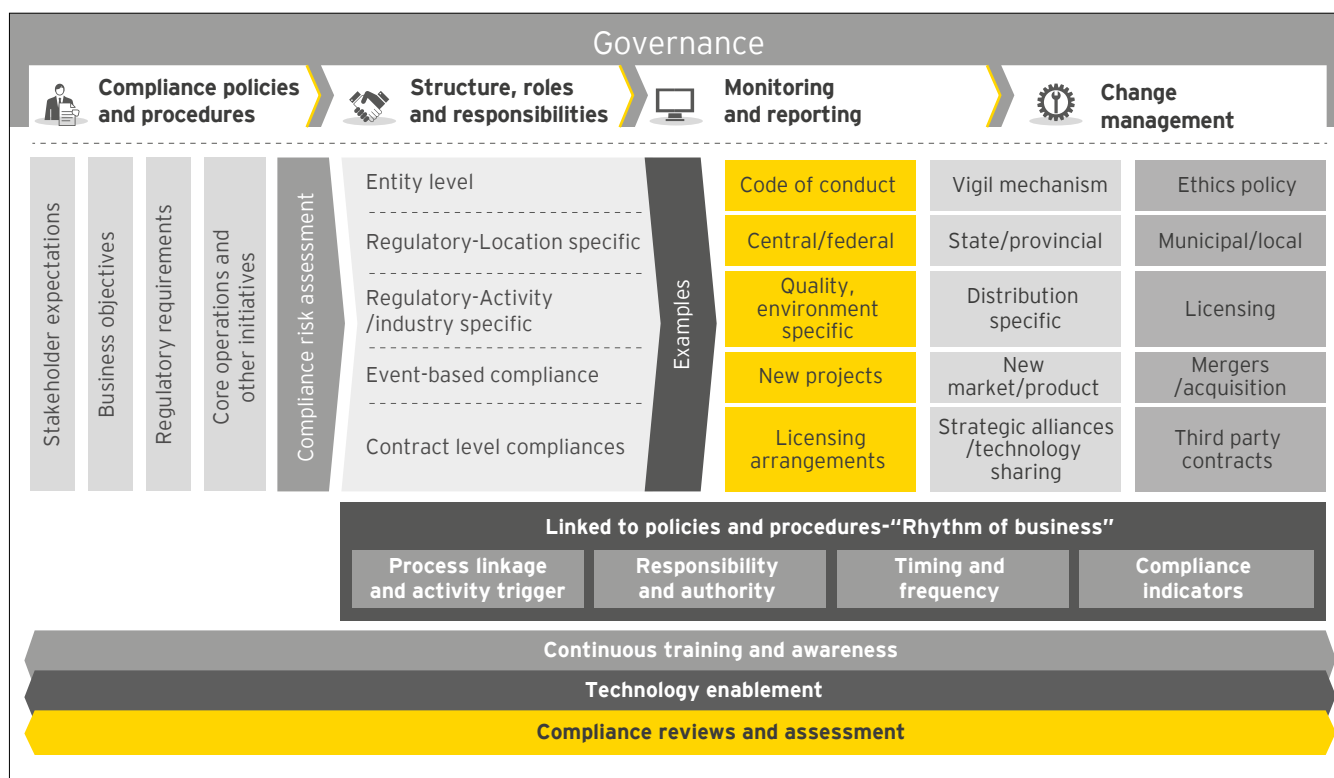
aspect of compliance. It's easy to notice that organizations focusing on and ensuring compliance are more successful and stable as compared to others who don't. Having said that, the understanding and coverage of compliance varies from one company to another.

Although incidental to the business, compliance is a foundational pillar for ensuring sustainability and continuity of the organization.

So, let's answer the fundamental question first. What is compliance? Is it compliance with laws and regulations? Is it compliance with the internal policies and procedures? Is it handling of larger regulatory risks or is it a way of working? Compliance programs are defined basis their coverage and scope. The levels of maturity too differ across organizations.



Compliance management framework





Six pillars of a sustainable compliance program

1

Alignment with the business

The compliance management framework must be aligned with the business dynamics and positioned as a critical enabler to the business. A crucial step here would be to understand the key priorities, risks and strategic initiatives that a business is contemplating. This includes entering new geographies, launching a new product line, etc.

Once the key risks and initiatives are understood, the role of the compliance function is then to ensure that related compliances and regulatory touch points are identified and actioned.

For example, if a company is exploring entry into a new geography, the compliance function will partner with the business in the following areas:

- ▶ Conducting a compliance due diligence to assess the potential exposures on account of non-compliance with the laws and regulations
- ▶ Reviewing the contract to ensure that adequate safeguards on management of existing exposures are incorporated
- ▶ Conducting a pre-takeover assessment to agree and document the situations and conditions in which the assets, premises, etc. were accepted perhaps related to infrastructure facilities pertaining to handling of hazardous material, etc.

2

Holistic coverage

Historically, the focus of most compliance functions has primarily been on regulatory laws and regulations under various statutes. Seldom have compliance functions been able to elevate their stature in the organization to focus on more strategic and important matters. Mostly, things remain active only at a transactional compliance level. The key focus areas that should be included in the compliance program are as under:

- ▶ **Entity level compliance:** The focus here is to establish broad entity level policies on compliances which set the 'tone at the top' in the organization. Given that most aspects of compliance are behavioral, it is important that the cultural values are set right before focusing on the underlying tactical aspects. Entity level policies help position compliance in the organization, aid in inculcating ethical behavior, making roles and responsibilities clear and unambiguous and most importantly, putting the onus of compliance on the business itself. Indicative policies that should be defined include the code of conduct, code of ethics, compliance policy, vigil mechanism, anti-bribery and corruption, etc.

Imbibe a culture of compliance consciousness across the organization.

▶ **Event-based compliance:** It is important to engage the compliance function in all the key events planned and initiated in the organization. Once involved, the compliance function has to assess the key exposures and institute adequate mitigations therein. For example, if there is a licensing agreement being signed for distribution of products, the compliance team will assess the responsibility of adherence to the packaging norms, storage norms, handling of expired products, etc. ensuring that related legal requirements are embedded in the contract.

The challenge is to establish a sustainable process whereby involvement of compliance happens by design.

▶ **Contract compliance:** Although, this may not strictly qualify to be purely regulatory compliance, it should be included within the purview of the compliance function. For example, a pharma company may enter into an out-licensing agreement for distribution of its products with another company. In such a scenario, the contract becomes a critical document to determine the responsibilities of each of the parties on ensuring adherence to the laws and regulations.

Often it is found that there are huge exposures accepted in the contracts signed by the organization.

3 Linkage with policies and procedures

A standalone compliance function, which is not embedded with the ways of working in the organization is bound to fail and merely become a tick in the box exercise. Focus should be to list down all the critical compliance requirements and embed them as part of the existing operational and functional policies and procedures.

Failure of a compliance management program in any organization is because it operates in silos.

Instead of compliance being tracked on a standalone basis, it should be tracked as a part of the routine management reviews. For example, if there is a requirement to not engage any child labor, then a mere checklist would not be sufficient to ensure adherence. Rather, this requirement should be linked with the human resources process. Critical controls should be defined to check age proofs prior to allowing an individual (whether directly or through a contractor) to work for or on behalf of the company.

Key compliance requirements must be ingrained in the operating procedures of respective functions and departments, to ensure sustained and continuous adherence to these requirements.

4 Clarity on responsibilities

More often than not, compliance is presumed to be the responsibility of the legal or compliance function in the organization. It is important to note that though the legal and compliance functions play a critical role in establishing and sustaining the compliance framework, it is important to identify appropriate skilled personnel

Final responsibility has to rest with the line management and business owners.

for management of compliance in each vertical of the organization. The legal and compliance team can take up the responsibility of coordination and maintenance of the function and act as a support to the line management in ensuring adherence. The final accountability rests with the business. Focus should also be to ensure adequate segregation of compliance responsibilities, so as to avoid burdening only a few individuals. Responsibility should be spread across the organization. It is equally important that stakeholders are made aware of the “zero tolerance” policy on non-compliance demonstrated through timely and appropriate consequence management in the event of a non-compliance.

5

Monitoring and reporting:

Establishing monitoring and reporting protocols is essential to ensure that potential issues are flagged in time and remediation of anticipated problems is planned in a proactive manner. This is one area which still needs to see progress. Monitoring dashboards which indicate the status of compliance do not provide much comfort to the stakeholders. What is needed instead is deployment of analytics and other new age tools, which provide predictive analysis of likely non-compliances. For example, analytics may be used to monitor the trend in the air emissions depending upon the volume and nature of production activities. It can send triggers and alerts if the trend highlights that the limits under the consent conditions are likely to be exceeded.

Monitoring activities need to have alerts built in which should be triggered when they sense a potential non-compliance and not after the event has manifested.

from their competition. Additionally, like any other activity, companies should invest in a technology enabler to send regular reminders and alerts to help in ensuring adherence with the applicable laws and regulations. Technology not only makes it easier for people to ensure compliance but also helps in maintaining adequate trail of activities over a period of time. This can later be harnessed for continual improvement.

Role of board and independent directors

We are living in a world governed by a labyrinth of regulations, which are at most times not only difficult to understand and keep track of, but also come with severe penalties for non-compliance. Most importantly, these regulations pose a significant challenge for corporates who want to be good citizens and can avoid an error because of the sheer quantum of compliance requirements. With the new corporate regulations and changes, compliance is a board level matter. The Board of Directors under section 134, have to state that "Directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively." Not only does the requirement make the board accountable towards establishing a system of compliance, but also towards sustained functioning and effectiveness of the system.

It is, therefore, extremely important for the boards to demonstrate "due care" with respect to compliance management and also try to guide the management to make sure that compliance can actually help gain a competitive edge. Demonstrating "due care" by the boards would mean that they play an active role in understanding the compliance program proposed by the organization and also share their insights and thoughts to enhance the effectiveness of the program.

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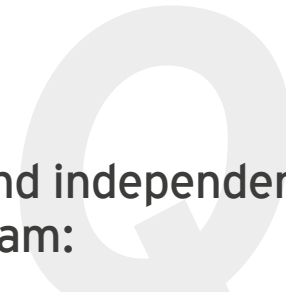
Focus on change management and technology enablement

Compliance programs impact every individual, function and location in the organization as they are pervasive. It is therefore suggested, to launch the program under sponsorship from the board and executive leadership. A change management program could be launched to reiterate the importance of compliance. What this also means is that the stakeholders should be adequately trained on the aspects of compliance so that they understand and appreciate the underlying impact on non-compliances and further explore how compliance can be used as a lever to enhance performance and differentiate themselves

It is important to manage the roll out of a change management program in a manner in which there is engagement with all stakeholders to communicate the importance of this initiative.

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Key questions to be considered by the Board and independent directors while assessing the compliance program:



Alignment with business	Well prepared	Requires consideration
Q. Is the compliance program addressing the key risks identified by the business?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Are compliance touchpoints considered for strategic initiatives and key business decisions?	<input type="checkbox"/>	<input type="checkbox"/>

Holistic coverage		
Q. Are adequate entity level policies defined on compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Does the compliance function have a seat at the table while taking critical business decisions?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Does the compliance program cover all geographies, locations, entities and businesses?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Are event-based compliance and contract compliance included within the purview of the compliance program?	<input type="checkbox"/>	<input type="checkbox"/>

Linkage with policies and procedures		
Q. Does the functional and operational policies or procedures address the relevant and applicable compliance requirements? How are these updated on a periodic basis?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Are there separate key responsibility areas for ensuring adherence to compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Are adequate controls defined (manual or automated) to ensure adherence with the applicable laws and regulations?	<input type="checkbox"/>	<input type="checkbox"/>

Responsibilities		
Q. Is responsibility of compliance clearly defined and communicated?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is there a governance structure for regular monitoring of compliance and escalation of issues?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is responsibility appropriately distributed across all relevant stakeholders?	<input type="checkbox"/>	<input type="checkbox"/>

Monitoring and reporting		
Q. Is the compliance agenda included in the regular business review meetings?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is there a program of ongoing compliance reviews? Is the Board getting independent assurance on compliance from the auditors?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is analytics being used to identify and act on potential non-compliances?	<input type="checkbox"/>	<input type="checkbox"/>

Change management and technology enabler		
Q. Is there adequate communication and awareness on importance of compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Are new and likely changes being tracked and acted upon on a timely basis?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is technology being used to facilitate triggering, monitoring and tracking status of compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Q. Is compliance discussed at the Board meeting on a regular basis? Are adequate details documented in minutes to demonstrate "due care"?	<input type="checkbox"/>	<input type="checkbox"/>



Highlights: Panel discussion on 'The Uday Kotak Committee recommendations and recent developments in corporate governance'

EY hosted the tenth BoardMatters Forum in Mumbai on 8 May 2018. The Forum featured a panel discussion on *the Securities and Exchange Board of India (SEBI) accepted recommendations from the Uday Kotak Committee on Corporate Governance and recent developments in the corporate governance landscape in India*. Sudhir Soni, Chartered Accountant, moderated the discussion, with subject matter experts including Amit Tandon, Founder and Managing Director, Institutional Investor Advisory Services (IIAS) and member of the Uday Kotak Committee on Corporate Governance, Bharat Vasani, Partner, Cyril Amarchand Mangaldas and Milind Sarwate, Founder & CEO, Increate Value Advisors LLP and Independent Director.

The SEBI constituted in June 2017 a panel headed by banker Uday Kotak, Managing Director, Kotak Mahindra Bank. This 21-member committee on corporate governance submitted its report to the SEBI recommending a major overhaul of corporate governance norms for listed firms in India.

Opening with a brief overview, Sudhir Soni raised the point on how initially many felt that the Kotak Committee's recommendations may not be implemented. However, after the SEBI's meeting in March 2018, almost 70% of the recommendations

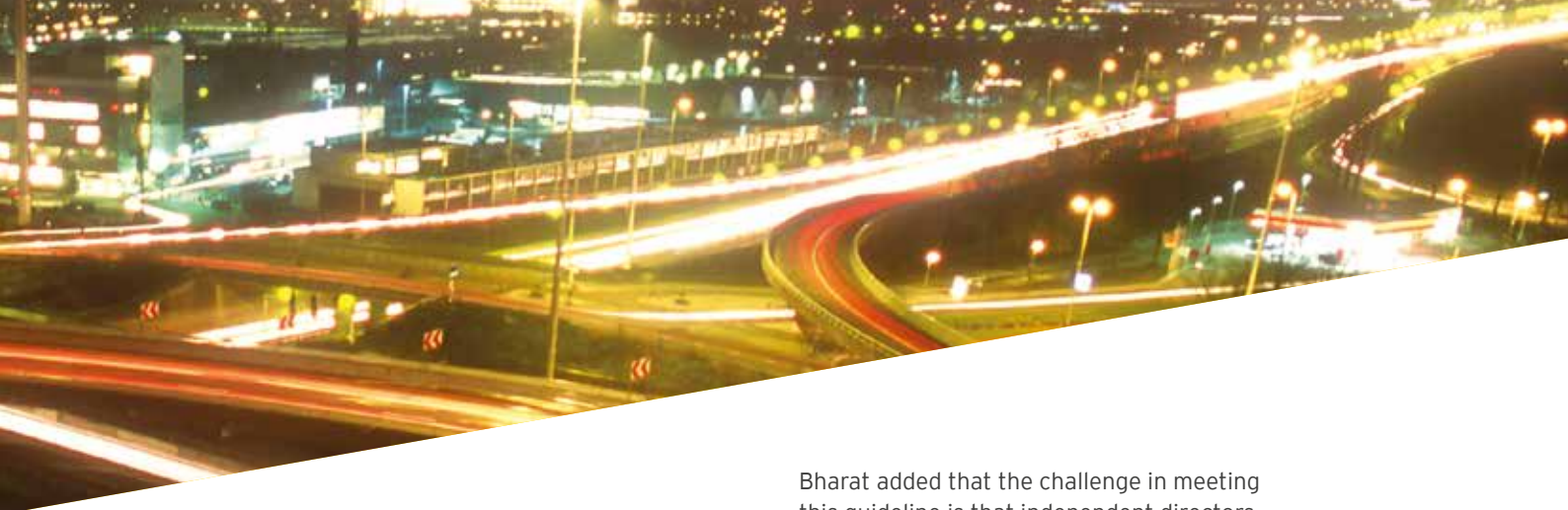
have been accepted in their current form or with minor modifications on applicability.

One of the criticisms of the Committee's report was that it overstepped the mandate by making recommendations that should have been addressed to either the Institute of Chartered Accountants, the Ministry of Finance or the Ministry of Corporate Affairs. The SEBI has directed such recommendations to the appropriate regulators. It has also rejected many of the recommendations that seemed like micromanagement.

Splitting of the role of the chairman and managing director

The rule now suggests a segregation in the chairman and the managing director's (MD) roles for the top 500 companies with effect from April 01 2020 and that these individuals should not be related. Organizations do not need to follow this rule in the absence of an identifiable promoter. Milind Sarwate opined that organizations transitioning to meet this norm are likely to face significant challenges as the issue of splitting of roles is deeply cultural in the Indian context where the chairman and MDs have run the organization for several years. Therefore, ceding both power and position may not come naturally to most. Division in roles of the non-executive chairman and MD too is a critical step.

Bharat Vasani added that this is a move that could not have been deferred any further in the interest of corporate governance standards. The quality of board level deliberations to a large degree depends on the independence of the Chairman of the Board. It limits the discussions if the MD or Chief Executive Officer (CEO) is to be evaluated where the same individual is



also the Chairman of the Board. In the past, several efforts were made to introduce this but it had always met with severe opposition from promoters.

Increased oversight from the holding company on subsidiaries

The Committee recommends that where a listed entity has a large number of subsidiaries, group governance committees may monitor governance of subsidiaries and set policies for the same. It also states that the boards of material foreign subsidiaries whether incorporated in India or not, must have at least one independent director from the board of directors of the listed parent company. There appears to be a general feeling among the regulators that subsidiary boards are not occupied by as powerful board-members as are in groups' boards. In the case of non-listed subsidiaries, there is a tendency in corporate India to appoint individuals reporting to the group CEO as members on the boards of subsidiaries. Therefore, the quality of supervision and oversight is weak.

Bharat added that the challenge in meeting this guideline is that independent directors from the parent company may be unwilling to act as board members of subsidiaries as these positions are counted in their total number of directorships permitted by the Companies Act and other regulations. It is however an important amendment, lending significant supervision responsibility over the subsidiary board, and to an extent compromising their autonomy. Historically, many cases of fraud in India have emanated from subsidiaries where the promoters have shied away from taking any responsibility. This change will enhance accountability of IDs of the parent company for the acts of subsidiary companies.

To mitigate liabilities on the independent directors, obtaining Directors and Officers (D&O) insurance for all IDs of top 500 listed companies by capitalization, calculated as on March 31 of the preceding financial year, is mandated by 1 October 2018. Amit Tandon noted that while D&O insurance is a positive step, the exceptions to such policies may not be sufficient to protect IDs from legal non-compliances. From a practical perspective, with the increased obligations and expected greater oversight recommended for independent directors and the lack of protection accorded to them, it may



Panellists at the BoardMatters Forum in Mumbai: Sudhir Soni, Chartered Accountant; Bharat Vasani, Partner, Cyril Amarchand Mangaldas; Milind Sarwate, Founder & CEO, Increate Value Advisors LLP and Independent Director and Amit Tandon, Founder & Managing Director, Institutional Investor Advisory Services (IIAS).

be difficult to find individuals with the right expertise willing to accept independent director appointments.

One independent director from the parent company also needs to be on the board of a material foreign subsidiary. There are both advantages and disadvantages to this, stated Bharat. The advantage being foreign boards are not counted in the maximum limit of eight directorships in listed entities for an individual. While there are no other practical challenges, independent directors on foreign boards must be conscious that they are imposed to the law of the country that the subsidiary operates in, with which they may not be familiar.

For enhanced oversight, the statutory auditors of listed entities must undertake a limited review of the audit of all the subsidiary entities whose accounts are to be consolidated with the listed entity.

Skills matrix and board evaluation

Boards now need to describe in a report the composition of the board for the company in consideration and the skills which are necessary to run it. They need to map the required skills with what is currently possessed within the board composition. Milind identified two apparent observed gaps in boards: (1) technology skills, and (2) mentoring and overall human resources management, largely because Indian boards rarely have specialist positions of Director-IT and Director-HR. Separately, it would also need some element of adjustment for an expert to be on the board in a non-executive independent role and yet be able to influence the executive management of the company. Independent directors must hone an important skill of knowing when to intervene and when to let go. Further, organizations must have a write-up or some policy identifying what each independent non-executive director will bring to the table.

In line with the suggestions of the Kotak Committee, the SEBI has recommended that the board evaluation process be disclosed including the previous year's and current year's observations arising from the evaluation and the actions undertaken by the company. Amit noted this as an important step requiring the Chairperson of the Board to be honest in identifying the gaps and listing how they will be addressed, this includes skills gaps. The best performance evaluations are done through a one-on-one conversation between the Chairperson of the

Board or between the Chairperson of the Nominations and Remunerations Committee (NRC) and the concerned director. The documented outcome of such discussions should be general enough to protect the directors' interests, but also specific to list the action areas.

Board composition, eligibility criteria for independent directors and board interlock

Individuals from the promoter group cannot be appointed as independent directors. Further, it addresses board interlocks arising due to common non-independent directors on boards of listed entities. The regulation now states that an independent director is one who is not an independent director of another company on the board of which any non-independent director of the listed entity is an independent director. This comes into force with effect from 1 October 2018.

The recommendations also state that there should be at least one woman independent director in the top 500 listed entities by market capitalization by 1 April 2019 and at least one woman director in the top 1,000 listed entities by 1 April 2020.

Special resolution for payments to executive and non-executive directors

The SEBI has put a check on the remuneration for both executive and non-executive directors. If the remuneration for executive directors, who are promoters or members of promoter group, is more than 2.5% of net profits of the listed entity or more than INR 5 crores, whichever is higher, they are subject to shareholder approvals by a special resolution in general meeting. In the case of non-executive directors, shareholders' approval by special resolution shall be obtained each year in which the annual remuneration payable to a single non-executive director exceeds 50% of the total annual remuneration payable to all non-executive directors.

Related party transactions

The current recommendations define that listed entities shall formulate a policy on materiality of related party transactions and on dealing with related party transactions, including clear threshold limits duly approved by the board of directors. Additionally,

the policy now must be reviewed by the board of directors at least once every three years and updated accordingly. The Committee recommended a 5% threshold of materiality for the payment of royalties or brand usage. The SEBI reduced the threshold where a payment to a related party over brand usage or royalty shall be considered material if the transaction individually or taken together with previous transactions during a financial year, exceed 2% of the annual consolidated turnover of the listed entity as per the last audited financial statements. Related parties are not allowed to vote on a related party transaction, a position also under the Companies Act. This has now been amended such that a related party can vote against the resolution.

Safeguards for prevention and detection of frauds

Milind is of the view that among independent directors the highest responsibility lays with the Audit Committee Chairperson and Audit Committee members since they oversee related party transactions. There are several residual mechanisms like whistle-blowing mechanisms, using forensics to identify procurement frauds, nominating an ombudsman, etc. However, these may or may not be effective in case of promoter frauds. In an ideal scenario, internal audit reviews must cover all risk areas, but promoter dealings are rarely viewed as a risk area. Independent directors must rely upon their instincts to look at transactions that have been classified as related party transactions and what are the red flags that arise. Many a times, there may be an organizational definition of conflict of interest that enables promoter transactions to not fall under any control category, yet, when one studies cases, one can make out if there is a conflict of interest or not. In case of doubts, Audit Committees have the authority to appoint external investigators to get into details.

Through the Finance Bill, 2018, the Prevention of Money Laundering Act (PMLA) was amended to include corporate frauds under the definition of scheduled offences. The PMLA is stringent and it is difficult to secure bail when charged under it. Bharat opined that this has serious consequences for board directors where a repercussion of the amendment could be the questioning of dealings with a company where fraud is discovered and potentially having assets seized or directors arrested. Directors must be extraordinarily alert on how the board agenda and minutes are recorded and have a keen eye on the risk

management policies of the company. They must be trained on how to take notes, identify and retaining the right data from board meetings and board papers, retaining important board related communication including emails even after the board term has ended, etc. These serve as crucial legal defenses in case of conflict situations.

Bharat explained the current legalities in India pertaining to frauds. In *Sunil Bharti Mittal v. CBI*, the Supreme Court held that an individual can be held liable for an offence by the company if (i) there is sufficient evidence of the individual's active role coupled with criminal intent; or (ii) where the statute itself stipulates the liability of directors and other officials, such as under the PMLA. Under the Companies Act, an exception has been specifically carved out for independent and non-executive directors, ensuring that they are liable only in cases where their knowledge and involvement can be established or where they, despite having knowledge, failed to act diligently. However, such exceptions are generally not prevalent in other statutes like the PMLA. Non-executive directors often find themselves explaining to the authorities that they were not involved or that they had acted diligently. Once a fraud is discovered, being a non-executive director does not shield the individual from liability or criminal prosecution. Directors today typically depend on the support of the company or board for legal guidance. Prior to taking up board positions, independent directors could ensure that there are specific agreements signed that the company will defend them in case of legal conflicts. Generally, there are provisions in the article of the company identifying an individual as a director and subsequently if in case the individual is prosecuted, the company will provide the necessary support. However, the reality is that it depends on the management. In case the management changes, the new management may or may not honor commitments to former directors. Protection under section 149 of the Companies Act, 2013 is only for offences under the Companies Act and not under any other laws.

Sudhir concluded the discussion by stating that this is a period of intense change in the regulatory framework impacting independent directors, corporate boards, other related players like auditors, corporate lawyers, etc. The coming year is expected to be defining in how the new and amended regulations play out and how newer practices evolve.

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