LEXOLOGY
Getting The Deal Through

CORPORATE GOVERNANCE 2023

Contributing editors
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SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The corporate governance regime in India gains its powers from the Companies Act, 2013 (the Companies Act) along with the rules and regulations, notifications, circulars, orders and forms issued by the Ministry of Corporate Affairs (MCA), secretarial standards issued by the Institute of Company Secretaries of India, and the Securities and Exchange Board of India Act, 1992 (the SEBI Act) read with the rules and regulations, circulars and notifications issued by the Securities and Exchange Board of India (SEBI).

Unlisted Indian companies are subject to the corporate governance norms contained in the Companies Act. Listed companies are also required to comply with applicable corporate governance principles in the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2020 (LODR Regulations). Additionally, reports of the board of directors must include a section confirming compliance with the corporate governance provisions.

In case of non-compliance, the company and its management may be subject to penalties in the form of monetary fines, imprisonment or both. In the case of non-compliant listed entities, companies may face the imposition of fines, suspension of trading, freezing of promoter or promoter group holding of equity shares, and other actions by the market regulator SEBI.

The laws and regulations pertaining to corporate governance in India are still primarily based on the 'mandatory' approach, rather than the 'comply or explain' approach.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

The primary government agencies for implementation of corporate governance for all types of companies are:

- the Ministry of Corporate Affairs;
- the National Company Law Tribunal;
- the National Company Law Appellate Tribunal;
- the Regional Director; and
- the Registrar of Companies.

In addition, for listed companies, corporate governance is also implemented by SEBI.

There are also sector-specific regulators, such as:

- the Insurance Regulatory and Development Authority of India (insurance sector);
- the Telecom Regulatory Authority of India (telecom sector);
- the Reserve Bank of India (banking and non-banking finance sector); and
- the Department of Pharmaceuticals (pharmaceuticals sector).

The National Foundation for Corporate Governance was set up in 2003 by the MCA in partnership with the Confederation of Indian Industry, the Institute of Company Secretaries of India and the Institute of Chartered Accountants of India to promote good corporate governance practices at the level of both individual corporates and industry as a whole. Their views are sought for various policy-level decisions. Generally, the government of India sets up committees of eminent people from various industries to deliberate and make recommendations on various issues, including existing laws and proposed laws; however, their recommendations are not binding.

InGovern is India's first independent proxy adviser firm in the field of independent corporate governance research. SES Governance and Institutional Investor Advisory Services India Limited are other proxy adviser firms in India providing assistance to investors and shareholders in making informed decisions. Proxy adviser firms are subject to registration with SEBI.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The shareholders of a company have the power to appoint and remove directors, subject to compliance with the provisions of the Companies Act, 2013 (the Companies Act). If the articles of association of a company provide for the same, the board can also appoint any person as an additional director, alternate director or nominee director. An additional director holds office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier, and their reappointment is considered by the shareholders in the general meeting.

The shareholders have the power to remove a director by a simple majority vote, after giving the director concerned an opportunity of being heard. However, shareholders cannot remove a director appointed by the National Company Law Tribunal or the directors appointed by the minority shareholders under the proportional representation mechanism as per the provisions of the Companies Act.

Typically, shareholders do not interfere in the decision making of the board. However, under the Companies Act, the board is required to refer certain important matters to the shareholders for their approval. If the directors' acts were done in bad faith, or their actions are not in the interest of the company, the shareholders have the power to remove them by following the procedure prescribed under the Companies Act.

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

The Companies Act provides that certain important decisions must be approved by the shareholders of the company. Some of the decisions that are required to be approved by the shareholders include:

- the appointment and removal of directors and auditors;
- mergers and amalgamations;
- sales of undertakings;
- variations of shareholder rights;
- alterations in memoranda of association or articles of association;
- approval of audited financials and boards reports;
- declarations of dividends;
- reduction in capital; and
- liquidation of the company.

There are no provisions under the Companies Act for non-binding shareholder votes.

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Disproportionate voting rights

5 To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

The provisions of the Companies Act and regulations of the Securities and Exchange Board of India (SEBI) permit the issuance of equity shares with disproportionate rights as to voting, dividends etc, subject to an enabling provision for the same in the articles of association.

Private limited and unlisted public companies are permitted to issue equity shares with disproportionate rights as to voting, dividends or otherwise, subject to certain specified conditions, including the following:

- the voting power in respect of shares with differential rights cannot exceed 74 per cent of total voting power, including voting power in respect of equity shares with differential rights issued at any point in time;
- the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;
- the company has no subsisting default in the payment of a declared dividend to its shareholders; and
- the issue of shares is authorised by an ordinary resolution passed at a general meeting of the shareholders of the company.

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 prohibit a listed company from issuance of shares which may confer on any person superior rights as to voting or dividend vis-à-vis the rights of equity shares that are already listed. However, a listed entity with equity shares having superior voting rights issued to its promoters or founders is permitted to issue such further equity shares to its shareholders through a bonus, split or rights issue in accordance with the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018 and the Companies Act.

Shareholders' meetings and voting

6 Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

No meeting of shareholders can be validly held unless the minimum quorum prescribed under the Companies Act, or any higher number prescribed under the articles of association of the company, is present. The minimum quorum requirement for private companies is for two members to be present, irrespective of the number of members in the company.

For public companies, the minimum quorum requirements are:

- five members present, if the number of members in the company is up to 1,000;
- 15 members present, if the number of members in the company is more than 1,000 but up to 5,000; and
- 30 members present, if the number of members in the company exceeds 5,000.

Individual shareholders can attend the general meetings themselves or through a proxy appointed by them (who should be a natural person) to attend and vote at the general meetings. The proxy is not allowed to speak at any such meetings and only has the right to vote by poll. Unless the articles of association of the company permit, a proxy does not have the right to vote if voting is done by a show of hands.

If the shareholder is a body corporate, it can appoint any natural person as its authorised representative to attend and vote at a meeting of the shareholders. Such an authorised representative shall have all the rights of the shareholder, including speaking at the meeting and casting his or her vote on all matters, irrespective of the manner of voting.

For listed companies and companies with more than 200 shareholders, approval of shareholders on certain matters requires the adoption of a postal ballot mechanism or voting through e-voting.

It is mandatory for a listed company or other companies with more than 1,000 shareholders to provide an electronic voting facility to their members for general meetings. A virtual meeting of the shareholders is not permitted under the Companies Act.

Shareholders and the board

7 Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Shareholders' meetings are typically convened by the board. However, shareholders holding 10 per cent or more of the shares can make a requisition to the board to convene an extraordinary general meeting (EGM) and provide the details of the resolutions that they intend to move at such meeting. If, within 21 days of the receipt of such requisition, the board fails to proceed to call an EGM to be held within 45 days from the date of the requisition received from the shareholders, the shareholders may proceed themselves to convene the EGM within a period of three months from the date of the requisition by following the prescribed procedure.

There is no specific provision in the Companies Act that mandates a board to circulate the statements of dissident shareholders to all the shareholders. However, the statements of the dissident shareholders made during the meeting may be recorded in the minutes of that meeting, subject to the consent of the chairperson of that meeting.

Controlling shareholders' duties

8 Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

Decisions that require approval of the shareholders are taken with the consent of the majority shareholders. It is expected that all decisions must be taken in the interest of the company and its stakeholders, and not to benefit only a section of the shareholders at the expense of

other shareholders. If the majority shareholders benefit themselves at the expense of the minority shareholders or take such actions that are oppressive to them, the minority shareholders have the right to act against the majority shareholders to protect their interest.

As per the Companies Act, action for oppression and mismanagement can be initiated against the controlling majority by at least 100 shareholders or one-tenth of the total number of shareholders of a company, whichever is less, or shareholders holding at least 10 per cent of the issued share capital of a company.

The Companies Act provides for class actions by the minority shareholders for seeking restraining orders against the company, its directors, auditors or any expert, adviser or consultant for any action taken by them that is ultra vires to the memorandum or articles of the company, or other actions that are prejudicial to the interest of the company and its stakeholders and claim damages or compensation from them.

Shareholder responsibility

9 | Can shareholders ever be held responsible for the acts or omissions of the company?

The liability of the shareholders is limited to the extent of their shareholding in the company. Such shareholders will not be held responsible beyond the amount, if any, unpaid on the shares held by them. The shareholders cannot be held personally liable for the acts or omissions of the company. In the case of a company with unlimited liability, the shareholders can be made responsible to the extent of the amount agreed that they would contribute to the assets of the company in the event of its winding up.

However, if the shareholders have given any personal guarantees for a loan or any other obligations of the company, they can be held personally liable. Further, in cases where the corporate veil is lifted and the shareholders are found guilty, they can be held personally liable.

Employees

10 | What role do employees have in corporate governance?

Typically, the responsibility to implement and enforce proper corporate governance in a company is placed upon the company's board and senior management. The role of the employees is limited to specific duties assigned to them with respect to undertaking certain actions and reporting to the management.

The Companies Act and SEBI regulations, as applicable, require all listed companies, companies that accept deposits from the public and companies with borrowings of more than 500 million rupees from banks or public financial institutions to establish a whistle-blowing mechanism that provides adequate safeguards against the victimisation of employees and directors who report issues pertaining to the governance of the company, unethical behaviour, actual or suspected fraud or violation of the company's code of conduct, etc to the management of the company. In addition, corporate governance practice must include

provisions for reports of any escalation of existing victimisation to be directly supplied to the company's management.

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

There are no specific statutory barriers to prevent takeovers in India. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code) mandates acquirers to make certain specific disclosures when a certain threshold of shares is acquired by them. Such disclosures alert the management and promoters of the target company, who may take necessary steps to either prevent such takeovers or to make the transaction more beneficial for the target company and its shareholders. Any acquirer, together with the persons acting in concert with them, is required to make certain disclosures related to their shareholding in the target company beyond the certain specified thresholds.

Companies use various anti-takeover devices to prevent and protect themselves from any unwarranted or hostile takeover bids or to make an unwanted takeover bid more difficult or expensive for the acquirer. These measures include greenmailing (ie, the target purchases its own shares back at a premium), acquisition by a 'white knight' (ie, permitting a takeover by a friendly company), 'poison pill' policies (ie, allowing existing shareholders to purchase additional shares at a discount, diluting the share pool), and the high-risk 'Pac-Man' defence, in which the target attempts to take over the acquirer.

Further, in India, takeovers meeting certain thresholds are under the surveillance of the Competition Commission of India (CCI) and can be stopped where, in CCI's view, such a takeover can have an appreciable adverse effect on competition in the relevant market.

Issuance of new shares

12 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Shareholders' approval is required to be taken by a company in a general meeting for issuing new shares and securities convertible into shares, except when the shares are being offered through a rights issue. Under a rights issue, shareholders are offered further shares to subscribe in the same proportion to their shareholding in the company. The articles of association of a company generally provide for the pre-emptive rights of shareholders.

In a listed company whose shares are listed, or are intended to be listed, on any recognised stock exchange in India, any offer to the public must comply with the relevant Securities and Exchange Board of India (SEBI) regulations.

Restrictions on the transfer of fully paid shares

13 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

The transfer of shares (including fully paid-up shares) of private companies is restricted by having specific provisions in their articles of association. However, fully paid-up shares of public companies are freely transferable unless restricted in terms of any agreement. The restrictions typically include rights of first refusal, restrictions on transfer to a competitor, lock-in period, etc.

Compulsory repurchase rules

14 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

The Companies Act, 2013 (the Companies Act) does not provide for the compulsory repurchasing of a company's shares by itself, except when a reduction of capital is approved by the National Company Law Tribunal, and once implemented, the same shall be binding on all shareholders. Further, in cases where the company has issued redeemable preference shares, it is under an obligation to redeem the same in terms of their issuance. Such redemptions of preference shares are not considered to be a reduction in share capital.

The Companies Act enables the buy-back of equity shares by a company, but the company cannot force any shareholder to tender their shares under a buy-back scheme – this is down to the shareholders' discretion.

Dissenters' rights

15 | Do shareholders have appraisal rights?

The Companies Act provides that in the event of an acquirer, or a person acting in concert with such acquirer, becoming the registered holder of 90 per cent or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming a 90 per cent majority or holding 90 per cent of the issued equity share capital of a company by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, is required to notify the company of their intention to buy the remaining equity shares and is required to make an offer to minority shareholders to purchase their shares at a price determined on the basis of valuation by a registered valuer in accordance with the prescribed rules to provide minority shareholders with an exit.

Further, in the case of a scheme or contract involving the transfer of shares approved by shareholders holding at least 90 per cent of the value of the transferable shares, the acquirer has the right to purchase the shares of minority shareholders and dissenting shareholders on the same terms as agreed with the approving shareholders. However, if dissenting shareholders make an application to the National Company Law Tribunal against such an acquisition and the Tribunal does not pass an order in their favour, the acquirer can purchase the dissenting shareholders' shares as per the prescribed procedure.

SEBI regulations also provide certain exit routes to the dissenting shareholders, including the process of valuation of their shares.

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

16 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominant board structure of listed companies is one-tier. A company's board is responsible for its entire operations and management, subject to certain conditions that require the approval of the shareholders.

Indian companies do not have supervisory boards.

A company's board is obligated to establish certain mandatory committees to look after specific functions in the company, such as an audit committee, a nomination and remuneration committee, a corporate social responsibility committee and a stakeholders' relationship committee.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

A company's board is responsible for managing the operations and management of the company in a legally compliant manner to achieve the company's objectives and to enhance and protect the interests of its shareholders, employees and all stakeholders. In case of non-compliance, a director can be held personally liable as being the 'officer-in-default'.

The Companies Act provides for specific duties for directors, including the duty to act in good faith, to exercise due and reasonable care, skill and diligence, to avoid conflicts between the company's interests and their personal interests, and not to achieve any undue gain or benefit. Directors also have a fiduciary duty towards the company and are expected to act in the best interest of the company and its stakeholders. The Companies Act also prescribes a binding code with respect to professional conduct for independent directors.

In addition to holding meetings of the board, committees and shareholders, and to comply with all applicable laws, the board is also responsible for preparing books of accounts of the company, having the books audited and presenting the books of account before the shareholders in annual general meetings for their approval.

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

The company, being an artificial person, is represented by its board. The board is expected to manage the affairs of the company in a legally compliant manner and is required to act

within the authority entrusted to it. Any action taken by the board on behalf of the company within their powers will be binding on the company.

The directors act within the overall supervision of the board and are expected to act in good faith. They can be held liable for non-compliance by the company. They are not agents of the shareholders and cannot bind shareholders to follow certain actions.

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgment rule?

A director of a company can be held to be personally liable. Enforcement actions can be taken up against them by the company, its shareholders or third parties adversely affected in the event a director:

- defaults in his or her duties;
- is found guilty of fraud or misrepresentation;
- commits fraud, negligence, conspiracy, breach of trust and duties, false representation etc; or
- has personally assured, indemnified, or guaranteed the payment obligations of the company.

The business judgment rule is neither mentioned in the Companies Act nor is prevalent otherwise as a market practice. However, the Companies Act states that in any proceeding for negligence, default, breach of duty, misfeasance, or breach of trust, if the court is of the opinion that the director has done his or her duty honestly and in good faith and considering the circumstances of the matter ought to be excused, then the court may relieve them, either wholly or partly, from any such liability without taking any enforcement actions.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

The Companies Act specifically provides that the director of a company must exercise his or her duties with reasonable care, skill and diligence in decision making. Directors are required to act honestly and diligently while discharging their duties as a person of prudence of his or her ability and knowledge.

Board member duties

21 | To what extent do the duties of individual members of the board differ?

The duties of directors depend on their position in the company and the terms of their appointment. A director can be an executive director, non-executive director, managing director, independent director, etc. The basic duty of directors is to act in a good faith to promote and protect the interest of all its shareholders.

A managing director is typically entrusted with substantial powers of management to manage the affairs of the company. Executive directors are responsible for the overall management and day-to-day operations of the company and are generally appointed to manage specific business areas such as finance, operation, technical, human resources, etc, depending on their individual qualifications and skills. Independent and non-executive directors are part of the overall decision-making process of the board. Each director is responsible for the duties and functions assigned to them.

Delegation of board responsibilities

22 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

It is common practice for a board to delegate certain powers and functions either to a board committee or to individual persons to efficiently manage the affairs of the company. However, as per the provisions of the Companies Act, there are certain matters and powers that the board cannot delegate and must make decisions on (eg, issuance of securities, approving financial statements and the board's report, diversifications of the company's business, amalgamations, mergers, reconstruction, etc). In addition, a board cannot delegate powers if they are restricted from doing so by the company's articles of association or the shareholders' wishes.

Non-executive and independent directors

23 | Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

As per the provisions of the Companies Act, at least one-third of listed public companies' boards must be made of independent directors. Further, public companies that have paid-up share capital of 100 million rupees or more, a turnover of 1,000 million rupees or more, or aggregate outstanding loans, debentures and deposits exceeding 500 million rupees, are required to have at least two independent directors.

As per the Securities and Exchange Board of India (SEBI) regulations, if the chair of a listed company's board is a non-executive director, at least one-third of the total number of directors are required to be independent directors. However, if the listed company does not have a non-executive director as its chair, then at least half of its board must be made of independent directors. A chair held by a non-executive promoter or a person related to the promoters, or a person holding a managerial position at the board level or a level below that, will not be considered a non-executive chair.

'Promoter' refers to a person who has been named as such in a prospectus or is identified as such by the company in its annual return filed with the Registrar of Companies, or a person who has direct or indirect control over the affairs of the company, whether as a shareholder, a director or otherwise, whose advice, directions or instructions the board of directors is accustomed to act in accordance with; except for those who act merely in professional capacities.

A non-executive director can be anyone except for a whole-time director and is only appointed as a member of the board. Executive directors are whole-time directors. Independent directors are directors who are not the managing director, whole-time director or a non-executive director, who is not a promoter or related to any promoter of the company or its holding, subsidiary or associate company and fulfils the independence criteria as prescribed under the Companies Act.

Unlike executive directors, non-executive directors and independent directors are not responsible for the day-to-day management of the company. Independent directors are responsible for improving the company's corporate credibility and governance standards, and play a vital role in risk management, including taking an active part in the various committees set up by the company to ensure good governance.

Board size and composition

24 How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

Board composition and disclosures

The size of the board is determined by the shareholders and mentioned in the company's articles of association.

As per the Companies Act, a private company must have at least two directors, whereas a public company must have at least three directors. A company may have a maximum of 15 directors unless a higher number is approved by the shareholders through a special resolution.

The right to appoint directors is held by the shareholders. However, if the articles of association of a company permit, the board can appoint additional directors, alternate directors and nominee directors. The board can fill any casual vacancy on the board that may arise if the office of a director is vacated before the expiry of his or her term, subject to the articles of association and subsequent approval by the shareholders in the next general meeting.

Every company must have a resident director (ie, a person who stays in India for a period of 182 days during the financial year).

SEBI regulations require that 50 per cent of the board of directors of all listed companies must comprise non-executive directors, and all listed and certain specified unlisted public companies are required to also have one female director. The board of the top 1,000 listed companies by market capitalisation in the previous financial year must have at least one female independent director.

The Companies Act makes it mandatory for all directors, during the first board meeting of each financial year, to disclose their interest in other entities (whether as shareholder, director, partner, proprietor, etc) and make a declaration that they are not disqualified to

be a director of the company, and submit the same to all companies in which they are a director. If there is any change in their interests, this must be disclosed in the first meeting of the board held after such a change.

Eligibility criterion

The Companies Act provides that only an individual can be a director. No person can be appointed as a director below the age of 18 years. A company cannot appoint a person as its managing director, manager or whole-time director who is below 21 years or above 70 years in age, except with the approval of the shareholders through a special resolution.

The Companies Act and SEBI regulations also provide for additional qualifications for independent directors, managing directors, whole-time directors, etc.

Further, among other things, the Companies Act provides that a person shall not be eligible for appointment as a director of a company if he or she:

- is declared not of sound mind by a competent court;
- is an undischarged insolvent;
- has been convicted by a court and sentenced to imprisonment for not less than six months; and
- has been convicted for dealing with related party transactions at any time during the preceding five years.

Board leadership

25 Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

The Companies Act provides that every listed company and every other public company having a paid-up share capital of 100 million rupees should not appoint the same individual as its board chair and managing director or chief executive at the same time, except where the company's articles of association provide otherwise or the company does not carry out multiple businesses.

However, the aforementioned restriction does not apply to large public companies with paid-up capital of 1 billion rupees or more and annual turnovers of 10 billion rupees or more, that are engaged in multiple businesses, and have appointed a CEO for each such business.

Currently, the chairs of many listed companies in India also act as the company's managing director and CEO. Previously, such companies were required to make the appropriate changes and comply with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 by 1 April 2022. Recently, considering the rather unsatisfactory level of compliance achieved so far, constraints arising from the covid-19 pandemic, and with a view to enabling companies to plan for a smoother transition, SEBI has made this provision applicable to listed entities on a voluntary basis and not as a mandatory condition.

Board committees

26 What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

The Companies Act and SEBI regulations require the mandatory constitution of the following board committees for better compliance and corporate governance purposes.

Audit committee and nomination and remuneration committee

The Companies Act provides that all listed public companies and public companies with paid-up share capital exceeding 100 million rupees, turnovers exceeding 1 billion rupees, or aggregate outstanding loans, borrowings, debentures or deposits exceeding 500 million rupees, must have an audit committee and a nomination and remuneration committee.

The audit committee should have a minimum of three directors, and a majority of them should be independent directors. In the case of listed companies, a minimum of two-thirds of the audit committee's members should be independent directors.

The members of the audit committee should have the ability to read and understand financial statements, and at least one member should have accounting or related financial management expertise.

The audit committee is required to review and provide suggestions to the board for financial reporting processes, internal financial control, audit processes, recommend the remuneration and appointment of auditors, approve related party transactions, supervise the vigil mechanism established by a company to address the genuine concerns of directors and employees, etc.

The nomination and remuneration committee should have at least three or more non-executive directors, of which not less than one-half should be independent directors.

Stakeholders' relationship committee

A company having more than 1,000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year is required to constitute a stakeholders' relationship committee, which shall consider and resolve the grievances of security holders of the company. It should consist of a chairperson who should be a non-executive director of the company, and any other members as decided by the board.

Corporate social responsibility committee

Every company having a net worth exceeding 5 billion rupees, turnover exceeding 10 billion rupees or net profit exceeding 50 million rupees during the immediately preceding financial year, and a corporate social responsibility obligation exceeding 5 million rupees, is mandatorily required to constitute a corporate social responsibility committee.

This committee should consist of at least three directors, of which at least one must be an independent director. A company that is not required to appoint an independent director

should have at least two directors in the corporate social responsibility committee. Additionally, a private company having two directors must constitute a corporate social responsibility committee with those directors. In the case of a foreign company, the corporate social responsibility committee should have at least two directors, one of which should be a resident of India and the other a person nominated by the foreign company.

The corporate social responsibility committee is required to formulate a corporate social responsibility policy, including the activities to be undertaken under the said policy, expenditure to be incurred on such identified activities, and to monitor the implementation of the same.

Other committees

In addition, the top 500 listed companies in India, and some other companies, are required to constitute risk management committees. The risk management committee formulates policies for the identification of risks primarily in finance, operations, cyber operations, governance and the mitigation of such risks.

The board may also constitute and discharge certain powers to other committees made of directors or experts from various fields as is deemed necessary to assist the board in discharging its functions.

Board meetings

27 Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Every company is required to hold its first board meeting within 30 days of its incorporation. Thereafter, every company, including listed companies, is required to conduct a minimum of four board meetings in each calendar year. The gap between two consecutive meetings should not be more than 120 days. In the case of a non-profit company incorporated under section 8 of the Companies Act, small companies, dormant companies and private companies registered as a start-up company, only two board meetings are required to be held, once in each half of the calendar year, and the gap between two meetings shall not be less than 90 days.

Board practices

28 Is disclosure of board practices required by law, regulation or listing requirement?

As per the Companies Act, the company must disclose committee structure, the number of meetings held, meetings attended by each director, directors' responsibility statements, etc in the board's report, which it must submit to shareholders in a general meeting and thereafter filed with the Registrar of Companies.

As per SEBI regulations, a listed company is required to submit quarterly, half-yearly and annual compliance reports to the stock exchange, containing such particulars as may be prescribed by SEBI from time to time.

Board and director evaluations

29 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

A listed company is required to undertake evaluations of its board and various committees. As per the Companies Act and SEBI regulations, a listed company is required to constitute a nomination and remuneration committee which will be responsible for formulating the criteria for evaluation of the board and independent directors.

Independent directors will be evaluated by the board, and independent directors are required to evaluate the company's non-independent directors. The boards of listed companies are required to provide a statement in the corporate governance section of the company's annual report, stating the way the formal annual evaluation of the board, committees and independent directors have been conducted.

REMUNERATION

Remuneration of directors

30 How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

As per the Companies Act, 2013 (the Companies Act), there are no provisions specifically dealing with the limit and restriction on remuneration to be paid to directors of a private limited company, and such a company is free to determine the remuneration at the time of their appointment as per the company's policies.

As per the Companies Act, a public company (whether listed or unlisted) cannot pay remuneration beyond 11 per cent of the net profit of the company to its directors, including whole-time directors and managing directors. If a public company only has one managing director or whole-time director or manager, the remuneration paid to that person must not exceed 5 per cent of the net profit of the company and the total remuneration paid to all such directors and managers should not exceed 10 per cent of the company's net profit.

Non-executive directors of a public company can receive remuneration which should not exceed 1 per cent of the net profit of the company if the company has only one managing director or whole-time director or manager, and 3 per cent of the net profit in all other cases.

Any fee paid to directors for attending board meetings is excluded when calculating their remuneration.

If a company has no or inadequate profits, the remuneration paid to directors can be based on the effective share capital of the company.

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As per the Securities and Exchange Board of India (SEBI) regulations, in the case of listed entities, in addition to the threshold limits prescribed under the Companies Act, they must adhere to the ceiling laid down under the applicable SEBI regulations. Unless otherwise approved by the shareholders by passing a special resolution, a company that only has one managing director or whole-time director or manager, remuneration should not exceed 50 million rupees (an absolute limit) or 2.5 per cent of the net profits of the company, whichever is higher; in case of more than one such director or manager, 5 per cent of the company's net profit.

Length of director's service contract or appointment

A managing director, whole-time director or manager can only be appointed for a maximum term of five years at a time. The reappointment can be considered not earlier than one year before the expiry of his or her term. This limit does not apply to private limited companies unless a company's articles of association provide otherwise.

For public companies, two-thirds of the total number of directors (except independent directors) must retire by rotation, unless the company's articles of association provide a higher number. Of those directors, at least one-third are required to retire at every AGM. Retiring directors, if eligible, can offer themselves for reappointment.

Loans

A company registered under the Companies Act can provide a loan, guarantee or security in connection with any loan to any person or entity in whom any of the directors have an interest, only if such a transaction is approved by the company's shareholders by way of a special resolution.

There are certain conditions in which a loan can be given, namely:

- loans to a managing director or whole-time director may be given if it is a part of the company's policy approved by the shareholders by way of a special resolution; and
- the loans may be given by companies in the ordinary course of business if the rate of interest charged on such loans is no less than the prevailing yields of one, three, five or 10-year government securities closest to the tenor of the loan.

Remuneration of senior management

31 How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

There is no specific law that prescribes any limit on the remuneration that can be paid to the members of senior management, except directors, managing directors and managers. A company's nomination and remuneration committee is responsible for determining and recommending the remuneration that can be paid to directors, key managerial personnel (eg, managing directors, chief executives, chief financial officers, whole-time directors or

company secretaries) and other members of senior management. The remuneration is typically bifurcated into fixed and variable components including incentives and is paid based on the combined performance of the individual and the overall achievement of the company's financial and other goals. The agreed remuneration and other perquisites (including loans and advances), and the way such remuneration and perquisites shall be paid forms part of the terms of the employment contract.

Say-on-pay

32 Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

In the case of a private limited company, no approval from the shareholders is required for payment of remuneration to directors irrespective of the amount. However, in the case of a public company, the remuneration must be paid within the limits prescribed under the Companies Act and approved by the shareholders in a general meeting. The shareholders can approve the remuneration to be paid to directors, managing director or managers for a maximum period of three years at a time.

DIRECTOR PROTECTIONS

D&O liability insurance

33 Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance has been recognised by the Companies Act, 2013 (the Companies Act), and obtaining it is becoming an increasingly common and prudent business practice in India. Due to the changes in the legal and economic paradigms, including the substantial compliance burden on directors and officers, companies have started opting to take D&O liability insurance to safeguard their interests from any liability, such as any negligence, default, misfeasance, breach of duty or breach of trust, for which directors or officers of the company may be guilty in relation to the company.

As per the Companies Act, if the company buys and pays premiums for D&O liability insurance, the amount so paid shall not form part of the director or officers' remuneration. However, if the director or the officer is found guilty, then such premium paid by the company will form part of their remuneration.

Indemnification of directors and officers

34 Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

There is no specific restriction under the Companies Act with respect to indemnification of directors and officers by the company for the liabilities that they may incur for negligence, default, misfeasance, or breach of trust or duty. Further, it is also not mandatory

for a company to provide such indemnifications. However, due to the increasing obligations and risks associated with business, more and more companies are procuring D&O liability insurance for directors and officers to protect them from any such liability. In practice, even if no D&O policy is obtained or no specific policy is made for such indemnification, many companies indemnify their directors and officers against liabilities incurred by them while discharging their duties in good faith.

Companies can make specific provisions with respect to indemnification of their directors and officers in their articles of association and can make policies for the same accordingly.

Advancement of expenses to directors and officers

35 To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

The law does not impose any monetary limit on the expenses that a company may advance to its directors and officers to litigate any matter, and the same may be given as per the internal policies of the company.

Exculpation of directors and officers

36 To what extent may companies or shareholders preclude or limit the liability of directors and officers?

It is not possible for a company or its shareholders to preclude or limit the liability of the directors and officers under the Companies Act. However, when a director or officer is specifically made responsible for certain acts, then only such director or officer shall be responsible in case any offence is committed while performing their obligations, unless any other director or officer was in connivance with them, or any such offence was committed with their consent. Therefore, a company can make specific persons responsible for different roles and activities to minimise the risk for other directors and officers.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

37 Are the corporate charter and by-laws of companies publicly available? If so, where?

The charter documents (ie, memorandum of association and articles of association of a company) are available for public inspection and download on the online portal of the Ministry of Corporate Affairs. Charter documents may be inspected and downloaded by paying a nominal fee of 100 rupees. It is also possible to obtain certified true copies of the charter documents from the concerned Registrar of Companies by payment of a specified fee.

Company information

38 What information must companies publicly disclose? How often must disclosure be made?

As per the Companies Act, a company is required to disclose and submit certain documents and information in the prescribed electronic forms to the Registrar of Companies from time to time. Such filings include audited financials, annual reports, the appointment and resignation of auditors, changes in directors, issuance and allotment of shares, the creation or satisfaction of charges on the company's assets, declaration of deposits, etc.

Additionally, companies that get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed 45 days from the date of acceptance or the date of deemed acceptance of the goods or services are required to file a return with the Registrar of Companies every half year in the prescribed form.

Listed companies, in addition to the filings that must be made to the Registrar of Companies, are also required to provide additional information to stock exchanges in a time-bound manner as per various Securities and Exchange Board of India regulations.

The timelines for each disclosure and filing differ.

HOT TOPICS

Shareholder-nominated directors

39 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

As per the Companies Act, 2013 (the Companies Act), shareholders have the right to propose the appointment of any person as a director of the company by serving a notice of at least 14 days before any general meeting.

In the case of a listed or public company, the proposal must be accompanied by a deposit of 100,000 rupees or such other amount as may be prescribed from time to time, as a nomination fee. After receiving such a proposal, the company is required to serve a notice to all members informing them of the candidate, and if the nominated person is appointed as a director, the nomination fee is refunded to the shareholder who proposed the nomination.

In the case of an appointment of an independent director, or a director recommended by the nomination and remuneration committee or the board, the deposit of a nomination fee is not required.

Shareholder engagement

40 | Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

A company engages with shareholders when it conducts an annual general meeting or an extraordinary general meeting of shareholders. To increase the participation of the shareholders in such meetings, in the case of listed companies and certain other companies, attendance of shareholders through video conferencing is permitted. In the case of a private limited company, shareholders must meet physically, unless exempted in some extraordinary situations, like the covid-19 pandemic.

An annual general meeting must be conducted once a year, within six months of the end of a financial year. It is mandatory for all directors to attend such a meeting. The chair of the meeting is required to notify the meeting of absences and provide reasons. The company's statutory auditor is also required to be present in the meeting.

Sustainability disclosure

41 | Are companies required to provide disclosure with respect to corporate social responsibility matters?

As per the Companies Act, every company on which provisions pertaining to corporate social responsibilities (CSR) are applicable is required to furnish certain details regarding these activities it undertakes in the directors' report. The details must include the amount required to be spent on them in the previous financial year, activities undertaken and the actual amount spent. The reasons for not spending the full amount must be furnished if any of the required amount was not spent.

Companies are also required to prepare and publish CSR policies on their website.

Further, all unspent amounts of the CSR budget must be deposited in a special account opened by the company in any scheduled bank or deposited in a fund specified by the Ministry of Corporate Affairs in the Schedule VII of the Companies Act, under the terms of the amendments brought under the Companies (Corporate Social Responsibility) Amendment Act, 2021.

CEO pay ratio disclosure

42 | Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

There is no mandatory requirement for a private or unlisted public company to disclose the 'pay ratio' between its CEO's annual total compensation and the annual total compensation of other workers.

However, a listed company is required to declare the ratio of the remuneration of each director to the other employees' remuneration in its board report, along with additional

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details prescribed under the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016.

Gender pay gap disclosure

43 Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

It is not mandatory for a company to disclose gender pay gap information. However, the Equal Remuneration Act, 1976 mandates that a company must pay the 'same pay for same work', irrespective of gender.

UPDATE AND TRENDS

Recent developments

44 Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

There have been few developments during the last year to enhance corporate governance.

With the amendment in the Companies (Corporate Social Responsibility (CSR) Policy) Rules, 2014 under the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022, now if a company has any unspent amount left from previous financial year, in its unspent corporate social responsibility bank account as per sub-section (6) of section 135, this company shall be required to constitute a CSR Committee and comply with the provisions contained in sub-sections (2) to (6) of section 135 of Companies Act, 2013. Having said that, as per the FAQs issued by the Ministry of Corporate Affairs dated 25 August 2021, any company is spending less than I5 million rupees on CSR activity, will not be mandatorily required to form a CSR committee but the functions of the CSR committee shall be discharged by the board of directors of the company.

Due to the covid-19 pandemic in India, the Ministry of Corporate Affairs (MCA) allowed companies to undertake their AGM and EGMs through video conferencing or other audio-visual means. The MCA, has recently (see its General Circular No. 10/2022 and 11/2022 for AGM and EGMs respectively, dated 28 December 2022) allowed the companies until 30 September 2023 to undertake their AGM through video conferencing or other audio-visual means.

Further, environmental and social govenance (ESG) compliances and disclosures by the companies are becoming a new norm. All companies are required to disclose certain information related to ESG in their annual report.

The Securities and Exchange Board of India (SEBI) has made it mandatory for the top 1000 listed companies by market capitalisation to submit their Business Responsibility and Sustainability Report (BRSR) as part of their annual report detailing their ESG initiatives.

Filing a BRSR is now mandatory (since 2022-23) and replaces the earlier report, namely, a business responsibility report.

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