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Corporate Governance in new Jacket by SEBI on Company Amendment Act, 2013

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Abstract
Corporate governance is restructuring process through operating, controlling, monitoring to achieve large goals for shareholder, employees, investor, customers, suppliers, companies, government and other related organization concerned legal regulations, values, statues, provision, parameters, ethics, morals, behaviour, management techniques, company act, principles, budget, financial policy, trade law, security portfolio, mutual fund, investment report, analysis credit, risk management, government policy and management in public, private sector. Base of corporate governance has company act, 1956 include Security Exchange Board of India, 1992 mainly related to the theme direct to clause 49 regarding directors power and authority, accountability. This research paper examines the Corporations group capital from a large investor base both in the domestic and in the international capital markets of faith in the aptitude of a corporation's management, invests money in a corporation, to act as trustees and ensure the safety of the capital and return. We also analyze the Corporate governance is the acceptance by management of the indisputable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders, commitment to values, ethical, business conduct and distinction between personal and corporate funds in the management of a company.

Keywords: *Corporate Governance, Company, Investor, Shareholders, SEBI, Report, Management, Security, Director, Company Act, 2013.*

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INTRODUCTION

"You are the creator of your own destiny"

—Swami Vivekananda

Corporate governance shapes the growth and the future of any capital market and economy attracting public attention in India to the halls of academia finding acceptance for its relevance and underlying importance in the industry and capital markets, Progressive firms in India. Corporate governance and related issues is an expected outcome of a process, firms shift to financial markets as the paramount source for capital recognizing that corporate governance is obligatory to market discipline capital flows a company that does not promote a culture of strong, misunderstanding, risks, a company's management, directors and its financial reporting system boards provide stewardship of companies, they play a significant role in their efficient functioning. India has shown that markets and investors well-managed companies, respond positively, reward, higher valuations allow adequate freedom to the boards and management to take decisions towards the progress of their companies and to innovate, a framework of effective accountability system of good corporate governance. Strong corporate governance is thus indispensable to elastic and exciting capital markets and is an important instrument of investor protection. It is the blood that fills the veins of transparent corporate disclosure and high-quality accounting practices moves a possible and available financial treatment.

The securities of their companies by the insiders, especially directors and other senior executives, such procedures, reporting requirements and rules corporate to other entities in the financial markets such as Stock Exchanges, Intermediaries, Financial institutions, Mutual Funds and concerned professionals have access to inside information dealt with in a comprehensive manner, by SEBI corporate governance involves besides shareholders, all other stakeholders in particular that of the shareholders and investors, because corporate governance prime constituency of SEBI control and reporting functions of boards, the roles of the various committees of the board, the role of management, special significance when viewed from this perspective. Corporate governance is from the contribution that good corporate governance makes to the efficiency of a business enterprise, to the creation of wealth and to the country's economy.

HISTORICAL BACKGROUND

The planning process started in India in 1951, formation of institutions and markets. Several systemic changes have taken place during the short history of modern capital markets. The setting up of the Securities and Exchange Board (SEBI) [1] in 1992 was a landmark development. It got its act together, obtained the requisite powers and became effective in early 2000. The setting up of the National Stock Exchange [2] in 1984, the introduction of online trading in 1995, the establishments of the depository in 1996, trade guarantee funds [3].

- The Securities Contract Regulation Act 1956 [4].
- Indian Contract Act 1872, a basic law to be followed by security markets in India [5]
- To regulate the issue of share prices, the Controller of Capital Issues Act (CCI) 1947 [6].
- The Fraudulent Trade Practices Act [7]
- Prevention of Insider Trading Act , 1995 [8]

Securities and Exchange Board of India (SEBI) appointed the Committee on Corporate Governance on May 7, 1999 under the Chairmanship of Shri Kumar Mangalam Birla, member SEBI Board, to promote and raise the standards of Corporate Governance [9].

- To suggest suitable amendments to the listing agreement executed by the stock exchanges with the companies and any other measures to improve the standards of corporate governance in the listed companies, in areas such as continuous disclosure of material information, both financial and non-financial, manner and frequency of such disclosures, responsibilities of independent and outside directors;
- To draft a code of corporate best practices; and
- To suggest safeguards to be instituted within the companies to deal with insider information and insider trading [10].

REPORTS AND COMMITTEES

- Report of the Cadbury Committee [10],
- Report of the Greenbury Committee [12]
- Combined Code of the London Stock Exchange [13],
- OECD Code on Corporate Governance [14] and
- The Blue-Ribbon Committee on Corporate Governance in the US [15].

Clause 45B of section 2 of the Companies Act, 1956 [16] defines the word "Securities and Exchange Board of India" mean the Securities and Exchange Board of India established under section 3 [17] of the Securities and Exchange Board of India Act, 1992. Since the definition in clause (45B) of the act is dependent on section 3 of the Securities and Exchange Board of India Act, 1992, the same is reproduced below:

1. With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purpose of this Act, a Board by the name of the Securities and Exchange Board of India.
2. The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common, seal, with power subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.
3. The head office of the Board of shall be at Bombay.
4. The Board may establish offices at other places in India."

Securities and Exchange Board of India Act, 1992 has been reproduced "An Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto".

The SEBI is managed by its members, which consists of following:

- The chairman who is nominated by Union Government of India.
- Two members, i.e. Officers from Union Finance Ministry.
- One member from The Reserve Bank of India.
- The remaining 5 members are nominated by Union Government of India; out of them at least 3 shall be whole-time members.

PURPOSE OF SEBI

SEBI was set up with the aim of checking on malpractices and protect the interest of investors. It was created to meet the needs of three groups. 1. Issuers: it provides a market place by increasing finance fairly and easily. 2. Investors: it provides protection and supply of accurate information. 3. Intermediaries: it provides a competitive professional market [18]

ROLE OF SEBI

SEBI aims to protect the interest of investors, promotes the development of stock exchange and regulates the activities of stock market. The objectives of SEBI are:

- To regulate the activities of stock exchange.
- To protect the rights of investors and ensures safety to their investment.
- To prevent criminal and improper balance between self-regulation of business and its required regulations.
- To regulate and develop a code of conduct for intermediaries such as brokers, underwriters, etc. [19]

FUNCTIONS OF SEBI

The SEBI performs functions to meet its three objectives. These are: (1) Protective functions, (2) Developmental functions, (3) Regulatory functions.

Protective Functions

SEBI functions to protect the interest of investor and also it provide safety of investment.

- Checks Price chains:
- Prohibits Insider trading:
- prohibits fraudulent and Unfair Trade Practices
- To educate investors
- promotes fair practices and code of conduct
- To protect the interest of debenture-holders
- to investigate cases of insider trading

Developmental Functions

SEBI promote and develop activities in stock exchange and increase the business in stock exchange. Under developmental categories following functions are performed by SEBI.

- Training of intermediaries of the securities market.
- Stock exchange by adopting flexible approach.
- Permitted internet trading through registered stock brokers.
- SEBI has made guaranteeing optional to reduce the cost of issue.
- Even initial public offer of primary market is permitted through stock exchange.

Regulatory Functions

SEBI functions to regulate the business in stock exchange by performing following function:

- To regulate the intermediaries such as merchant bankers, brokers, underwriters, etc.
- Regulates the working of stock brokers, sub-brokers, share transfer agents, trustees, merchant bankers and all those who are associated with stock exchange in any manner.
- Regulates the working of mutual funds etc.
- Regulates takeover of the companies [20].
- Audit of stock exchanges

ORGANIZATIONAL STRUCTURE OF SEBI

- SEBI works as a corporate sector.
- Its activities are divided into five departments. Each department is regulated by an executive director.
- The head office of SEBI is in Mumbai and it has branch office in Kolkata, Chennai

and Delhi.
- SEBI has formed two advisory committees to deal with primary and secondary markets.
- These committees consist of market players, investors associations and eminent persons [21].

OBJECTIVES OF THE COMMITTEES

- To regulate intermediaries.
- To advise issue of securities in primary market.
- To advise on disclosure requirements of companies.
- To advise for changes in legal framework and to make stock exchange more transparent.
- To advise on matters related to regulation and development of secondary stock exchange.
- These committees can only advise SEBI but they cannot force SEBI to take action on their advice.

DEPARTMENTS IN SEBI

- Market Intermediaries Regulation and Supervision Department
- Market Regulation Department
- Derivatives and New Products Departments
- Corporation Finance Department
- Investment Management Department
- Integrated Surveillance Department
- Investigations Department
- Enforcement Department:
- Legal Affairs Department:
- Enquiries and Adjudication Department:
- Office Of Investor Assistance and Education:
- General Services Department
- Treasury and Accounts Division
- Facilities Management Division
- Department of Economic and Policy Analysis
- Office of the Chairman
- Information Technology Department [22]

Private Equity Agreements Regulatory Institutions and Investor Forums

- Option contracts have been an integral part of the private equity transactions in India.
- Option contracts are used to structure their deals, raise finances from the foreign lenders agreements.
- Foreign investor is the 'return' which the investing firm.
- In case of unlisted companies, it has been generally seen that PE secures its exit through initial public offering (IPO) or buy-back of shares or purchase of the equity investment of the foreign investor by the promoters. The agreements are so designed that such agreements provide a PUT option to the foreign investor in order to secure the return on its investment.
- Promoters also have a CALL/PUT option under which, promoters can buy out the shares of the foreign investor at their option. However, the legality of the options in the PE agreements has been subject to an ongoing debate at the hands of various regulatory institutions and investor forums. This article consolidates the regulatory developments on option contracts [23].

SECURITIES CONTRACT REGULATION ACT, 1956

Cairn-Vedanta transaction SEBI was of the view that put option and call option arrangements and the Right of First Refusal do not conform to the requirements of a spot delivery contract nor with that of a contract of Derivatives as provided under section 18A of the Securities Contracts (Regulation) Act, 1956 (SCRA). Also, put option and call option arrangement along with the right of first refusal are in violation of Notification No. SO 184(E) dated March 1, 2000 issued by SEBI [24].

Bombay High Court in the case of Niskalp Investments & Trading vs Hinduja TMT Ltd (2008) 143 Comp Case 2004 (BOM), held that: "an agreement for buying back the shares of a company in the event of certain defaults was hit by the definition of spot-delivery contract under the SCRA and hence, unenforceable [25]."

Bombay High Court in the case of MCX Stock Exchange Ltd vs Securities & Exchange Board of India &Ors 2012 (114) Bom LR 1002 held as "In the case of an option, a concluded contract for purchase or repurchase arises only upon the exercise of the option. Under the notification that has been issued under the SCRA, a contract for the sale or purchase of securities has to be a spot delivery contract or a contract for cash or hand delivery or special delivery. In the present case, the contract for sale or purchase of the securities would fructify only upon the exercise of the option in future. If the option were not to be exercised by them, no contract for sale or purchase of securities would come into existence. Moreover, if the option were to be exercised, there is nothing to indicate that the performance of the contract would be by anything other than by a spot delivery, cash or special delivery."

Thus, according to the Bombay High Court, once a contract is arrived at upon the option being exercised, the contract would be fulfilled by spot delivery and would, therefore, not be unlawful. However, the Supreme Court held on SEBI's appeal that it is needless to say, in making amendments in the Regulation, SEBI shall not be bound by any observations or comments made by the High Court in the impugned judgment [26].

AMENDMENTS BY SEBI

By way of the notification, SEBI has enhanced the scope of contracts that are valid under the SCRA. The following have now been included within the scope of permissible contracts under SCRA:

- Contracts for pre-emption including right of first refusal, or tag-along or drag along rights contained in shareholders agreements or articles of association of companies or other body corporate;
- Contracts in shareholders agreements or articles of association of companies or other body corporate, for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities [27].

The contract for the purchase or sale of securities pursuant to the exercise of an option under clause (d) is subject to certain conditions:

- The title and ownership of the underlying securities is held continuously by the selling party to such contract for a minimum period of one year from the date of entering into the contract;
- The price or consideration payable for the sale or purchase of the underlying securities pursuant to exercise of any option contained therein, is in compliance with all the laws for the time being in force as applicable;
- The contract is settled by way of actual delivery of the underlying securities.
- The contracts now included within the scope of the SCRA shall be in accordance with the extant exchange control laws of India;
- The changes shall not affect or validate any contract which was entered into prior to the date of the Notification [28].

RBI'S REGULATION AND AMENDMENTS

Though SEBI has allowed options in shareholders' agreements, options contracts have been subjected to the existing exchange control regulations. Reserve Bank of India (RBI) has held that these contracts offer a guaranteed or secure return to the investor are more in the nature of debt as opposed to equity, and hence the same should be covered under European Central Bank (ECB) norms. Assured returns would allow a private equity investor to floor a minimum return from his investment and remove his risk of business exposure to which other equity investors are exposed. This makes option contracts appear like debt. In the past, the RBI has even issued various show cause notices for removal of such provisions.

However, the position of the RBI has changed as the central bank prescribed a new pricing command applicable to foreign investor exits using call & put options. The RBI has made it clear that all existing foreign investment contracts that promised exit options with assured returns to foreign investors need to be revised to qualify as foreign direct investment (FDI) compliant. The RBI has specifically rejected assured returns [29]. There are two separate regimes:

- One for agreements with optional clauses and one without optional clauses.
- A non-resident dealing with listed equity

shall buy at not less than preferential allotment price and sell at not more than preferential allotment price. In case of selling with the use of option, the non-resident shall sell at market price.

- A non-resident dealing with unlisted equity shall buy at not less than discounted cash flow based price and sell at not more than DCF-based price. In case of selling with the use of option, the non-resident should sell at not more than return on equity based price.
- In case of equity shares of unlisted company, the exit price for a foreign investor exiting via option shall not exceed that arrived on the basis of return of equity as per latest audited balance sheet.
- The other reason is probably the fact that if the RBI is to view optional clauses as equity investments and not debt investments, then private equity investors, like other equity investors, should be exposed to the downside risks of the business, which is adequately captured in the return of equity.
- The RBI regulation says any price that is arrived on the basis of the return of equity is valid. A higher price than that arrived on the basis of return of equity is not valid, but a lower price is valid.
- The return of equity some years down the line is not known to the investor in advance, so it is not an assured return. It is the variable in the equation for calculating return on his investment.
- Private equity investor investing for a long term will have higher returns than an investor investing for short term, depending on the improvements in the performance of the company which is reflected in its return of equity [30].

COMPANIES ACT, 2013

Companies Act, 2013 amendment of The Companies Act, 1956 did not have any section on Call/Put Options or Forward and Future contracts. This used to be regulated by SCRA. Section 58(2) of Companies Act, 2013 says: The securities or other interest of any member in a public company shall be freely transferable, provided that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract. This validates and enforces contracts entered into between promoters and private equity investors [31]. The Act also does not put any restrictions on the price of such contracts.

Section 194 of Companies Act 2013 is a new development aimed to assist institutional investors like private equity firms to exit from the company. The Section says: No director of a company or any of its key managerial personnel shall buy in the company, or in its holding, subsidiary or associate company: (a) a right to call for delivery or a right to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or (b) a right, as he may elect, to call for delivery or to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures [32].

It does not prohibit the director from becoming a writer of a call or a put option. Such director of key managerial personnel can take up an obligation to buy a specified number of shares at a later date. The party intending to sell the shares at the later date will be the private equity fund which may appoint a nominee director on the Board of the company. The nominee director does not buy the right in his own name but in the name of the fund, which is not prohibited. The nominee director is not paying the consideration for the contract, but the private equity firm which is paying consideration. This will avoid any remaining confusion and undue fears [33].

THE SECURITIES LAWS (AMENDMENT) ORDINANCE, 2013

1. Securities and Exchange Board of India, 1992 (“SEBI”) [34]
2. Securities Contracts (Regulation) Act, 1956 (“SCRA”) [35]
3. Depositories Act, 1996 [36]

The Ordinance, 2013 apart is that it has given SEBI a lot of powers when it comes to bringing to book violators. Further, by proposing to set up Special Courts, speedy trails of offences have also been attempted the major amendments to all the three acts [37].

- Scope of calling for information [38]
- Power to SEBI with retrospective effect
- Transfer to IEPF [39]
- Explanation inserted to provisions pertaining to SEBI's powers to issue directions
- Search and seizure powers to SEBI [40]
- Powers to make regulations
- Settlement of administrative and civil proceedings
- Omission of provisions relating to appeal of consent orders to Securities Appellate Tribunal
- Amendment to provisions pertaining to cognizance of offence by courts
- Establishment of Special Courts

SEBI, sweeping powers has given SEBI by allowing it to search and seize documents. Such powers were with limited number of authorities by giving reflective effect to ask for information on old cases from foreign regulators; SEBI has been given more teeth in relation to cases pending for more than 15 years. It remains to be seen as to how SEBI will utilize the additional rights conferred on it going forward [41]. Sahara vs. SEBI case, Vijay Mallya case, NDSL vs. SEBI case and many more cases related to same background.

WRAPPING UP AND SUGGESTIONS

- Establishing a better governance framework for corporate India.
- Clarity and transparency of financial statements
- Significant to investor confidence.
- corporate governance standards were being prescribed by multiple authorities,
- Party transaction
- Good governance
- New policy

REFERENCES

1. Security Exchange Board of India, 1992
2. National Stock Exchange in 1984
3. Depository act, 1996
4. The Securities Contract Regulation Act, 1956.
5. Indian contract act, 1872
6. CCI, 1947
7. Fraudulent Trade Practices Act
8. Prevention of Insider Trading Act, 1995
9. Kumar Mangalam Birla Committee. Appointed on May 7, 1999 by SEBI;
10. ibid
11. Report of the Cadbury Committee
12. Report of the Greenbury Committee
13. Combined Code of the London Stock Exchange
14. OECD Code on Corporate Governance
15. The Blue Ribbon Committee on Corporate Governance
16. Clause 45B of section 2 of the Companies Act , 1956
17. section 3 of the Securities and Exchange Board of India Act, 1992
18. SEBI Rules & Regulations
19. SEBI
20. SEBI
21. SEBI
22. SEBI Regulations & Amendments
23. Section 194 of Company Act, 2013
24. Cairn-Vedanta transaction march, 2000
25. Niskalp Investments & Trading vs Hinduja TMT Ltd (2008)
26. MCX Stock Exchange Ltd vs Securities & Exchange Board of India &Ors 2012 (114) Bom LR 1002
27. Securities Laws (Amendment) Ordinance, 2013
28. Clause (d)Securities Laws (Amendment) Ordinance, 2013
29. Reserve bank of India, Amendment 2013
30. Reserve bank of India, Amendment 2013
31. Section 58(2) of Companies Act, 2013
32. Section 194 of Companies Act 2013
33. Section 194 of Companies Act 2013
34. Securities and Exchange Board of India, 1992
35. Securities Contracts (Regulation) Act, 1956
36. Depositories Act, 1996
37. Securities Laws (Amendment) Ordinance, 2013
38. Section 11(2) (IA) of SEBI Act
39. section 11B and 12A
40. Chapter III of SEBI with section 13
41. Ibid

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