

Whistle Blower Mechanism For Good Corporate Governance

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Abstract: *While change is the solitary invariable in this world, all the governed companies will have to accept the changes in and around them in a way that does not impair their vision when they serve the society at large. These changes have been brought about through an evolutionary process, most often referred to as 'globalization'. It also involves the corporate to ensure that environmental and societal requirements of the community in which it operates are adequately addressed. As such the need of the hour is a total shift towards 'shareholder approval and disclosure based regime' from the erstwhile 'government approval based regime' on the issue of company affairs.*

In the above context the author brings into light some of the provisions of SEBI Clause 49 of listing agreement which came into effect from 1st October 2014. The author elucidates why there was a need to amend the provisions of Clause 49 and discusses the big change with regard to compulsory Whistle Blower Mechanism, maximum number of directorships, term of independent directors, exclusion of nominee directors from the definition of independent director, separate meetings of independent directors, constitution of stakeholders relationship committee, enhanced disclosure of remuneration policies, other proposals vis-a-vis to Companies Act 2013, including at least one women director on the board and E-voting facility by top 500 companies.

Further the author expresses that the provisions of companies act applies to all the companies and the provisions of listing agreement is applicable to all the listed companies or on the companies seeking listing permission from stock exchange with mandating whistle Blower mechanism and carving out a certain more stringent provisions relating to independent directors, SEBI rings in tougher governance norms on listed companies as a condition of the listing agreement.

KeyWords: *Corporate Governance, directors, E- voting, stakeholders, SEBI Clause 49 listing agreement, Whistle Blower Mechanism.*

I. Introduction

In the present day ready for action borderless world environment, the rudiments have been appreciably transforming corporate governance and stakeholders in an integral relationship. While change is the solitary inflexible in this world, all the governed companies will have to accept the changes in and around them in a way that does not impair their vision when they serve the society at large. The changing business environment and activities have necessitated the need for reinstating the principles of corporate governance and professionalization of corporate management. Additionally, corporate scandals around the world have raised many apprehensions around the globe, namely, policy makers have been working to improve the governance standards, the companies themselves are also introducing their excellent governance traditions to earn good public image.

II. Literature Review

The literature has been reviewed from books and websites to understand the concept of whistle blowing for good corporate governance practices across the global economy.

1. The author is of the view that the targeted mission and vision of good governance depends on the directions and responsibilities of a strategic, consistent thinking aiming at achievement of the desired objectives and laying down a conspicuous role and responsibility for each of the contributors to the company, its board, auditors, shareholders and other stakeholders. Agarwal (2003).
2. Dr. Singh is of the view that the subject of corporate governance has occupied centre stage, particularly since the early 1990s in U.K., USA, rest of Europe, Canada, Japan, India and many other developing countries of the world. Dr S Singh (2005)
3. The writer aims to provide insights into the complexities of moral and ethical issues in business and society. He discusses them with respect of principles of ethics, role of ethics in business, and the necessity for ethical and effective corporate governance for sustainable growth and development of both economy and society. Madal (2010).

4. The author provides a detailed description of the current corporate governance principles, systems, standards and practices followed by the USA, the UK, Germany, Japan, France, Australia, New Zealand, Russia and India. Chandra (2012).

III. Market Supervisory Body SEBI

In the midst of a growing number of scams related to corrupt practices in corporate India, market watchdog SEBI has decided to make it mandatory for listed companies to have a whistle-blower mechanism for their employees and directors. The system would also need to have compulsory upholds to protect whistle-blowers from discrimination, while verifications would also be essential against any misuse of this resource aimed at cheering directors and employees to report authentic concerns and any misconducts at their company. Though the new Companies Act endows with certain classes of companies being vital to establish a alertness mechanism for their directors and employees, SEBI has now strong-willed to incorporate a stipulation in this regard in its new Corporate Governance Code for listed companies and made whistle-blower mechanism obligatory for listed companies. The whistle-blower arrangement, accepted in many developed nations, provides a chance for employees to testimony any misdoings within their firm. SEBI's Primary Markets Advisory Committee in fact recommended that the whistle blower instrument should be made accessible to all employees, as well as other stakeholders of the corporation. It also recommended that the whistle blower policy of the corporation must be extensively publicised to the target sections. SEBI, however, concluded that the machinery would preferably be kept open only for internal stakeholders such as employees and directors. "Erstwhile outside stakeholders are not entirely within the powers of the corporation and have other boulevards for redressal of their concerns. Consequently, the proposal are allied with the Companies Act, 2013 and whistle blowing mechanism is constrained to directors and employees only," SEBI said.

At hand, a listed corporation possibly will set up machinery for employees to tale to the management, their apprehensions about unscrupulous behaviour, genuine or alleged fraud or infringement of the company's code of conduct or moral principles. Nevertheless, it is at present not compulsory for companies to include a whistle blower mechanism. SEBI whispered the steering philosophy of corporate governance enrolled by Ministry of Corporate Affairs insist the need to include well laid out Whistle-Blower Policy machinery.

IV. Necessity For An Effective Legislation

Increasing awareness of the problems faced by whistleblowers in terms of loss of jobs, victimization and other types of retaliation and their role, particularly in detecting and preventing fraud, has led to the development of whistleblower protection legislation. The need for an effective legislation is essential in India with the growing number of scams related to corrupt practices in corporate India. There are global legislations in place, which protect whistle blowers such as The Public Interest Disclosure Act, 1998, in the UK (which protects whistle blowers from victimisation and dismissal) and the Sarbanes Oxley Act, 2002 (which provides for the protection of whistle blowers and is applicable even to employees in public listed companies), it added. Under the new proposals, listed companies need to have a panel to look into the alerts raised by whistle blowers and the policy in this regard should be under the audit committee.

In conformity to the market watchdog, a non-executive director could act as an ombudsman and take charge of such an enquiry connected to matters raised by a whistle blower. If the disclosures are found to be true, SEBI has suggested that adequate action should be initiated which has to be a deterrent against such offences in the future. "The policy should be such that it encourages such disclosures to be made but makes sure that perky accusations do not be converted into a means to pester senior management,"

This section will contemplate on legal protection for whistleblowers in the US, UK and Germany.

V. US regulation on whistle blowing

5.1 Sarbanes Oxley Act of 2002

The SOX endows with a civil action to guard employees of publicly traded corporations who blow the whistle or equally lend a hand in a federal fraud investigation. The stipulation prohibits any officer, employee, contractor, or agent of a openly traded corporation from intriguing certain disciplinary actions. These manners include discharging, demoting, suspending, threatening, harassing, or discriminating against an employee who supports in an investigation or lawfully makes available information to a federal regulatory or law enforcement organization, a member or committee of Congress, or a person with managerial authority over the employee who has the authority to scrutinize or end the misconduct.

State laws, False Claims Act and Corporate Sentencing Guidelines (CSG)

The primary focus of most statutes is to prohibit retaliation and provide remedies to those that suffer it. The laws vary on other issues, such as who the observer should notify, whether motive should be considered, what

standard of wrongdoing should be required and what remedy should be provided to whistle blowers suffering from retaliation.

5.2 United Kingdom regulation on whistle blowing

5.3 The British Public Interest Disclosure Act of 1998 (PIDA)

Like most of the US approaches, the British Public Interest Disclosure Act of 1998 (PIDA) aims at avoiding organizational wrongdoing in general. Additionally, the PIDA evidently focuses on the prevention of retaliations and does not support whistle blowers through direct monetary rewards and protects individuals who make definite disclosures in good confidence and in the public interest and allows these individuals to bring action in respect of unfair treatment.

5.4 Germany regulation on whistle blowing

Germany legislation provides only a few explicit statutory rules to protect employees who notify very specific malpractice outside their company, e.g. in environmental law or labour law and in two federal state data protection laws.

5.5 Why the need to amend the provisions of SEBI Clause 49 of listing agreement

In the above context the author brings into light some of the provisions of SEBI Clause 49 of listing agreement which came into effect from 1st October 2014. The market regulator is of the opinion that the need to amend the provisions of Clause 49 of listing agreement is to provide additional requirements to strengthen the corporate governance framework for the listed companies in India.

With the compulsory whistle-blower mechanism any person within the organization can make public any misconduct, fraud, illegal activity, abuse or misappropriation. But the question is, will the stakeholder be ensured protection for his job and family after reporting the misconduct is a subject of debate.

Now with regard to the maximum number of directorships an individual can hold in a financial year as per Companies Act, 2013 is 20 and the maximum number of directorships in public company cannot exceed 10. On the other hand SEBI's recommendations are sterner, where the maximum number of boards an independent director can serve on listed companies be restricted to 7. The highest number of directorship serving as a whole time director is for a maximum of three.

5.6 Term of Independent Directors

As per Companies Act 2013, an independent director can hold up to two 5 year terms after which there needs to be a 3 year cooling off period. The change made in the Companies Act is prospectively (i.e., it doesn't count the time served already). However SEBI has imposed stringent provisions with regard to independent directors. The change proposed by SEBI takes into consideration the previous terms (if a person has served as independent director on aboard for 5 years or more, starting October 1st he shall be eligible to only one term of 5 years). Further clause 49 has excluded the nominee director from the list of independent director, the role of the audit committee has been expanded and the Board reviews its effectiveness. The regulator prohibits the stock options to independent directors, and spelled out separate meetings for independent directors only.

5.7 More provisions under clause 49

Prerequisite was also created for constitution of stakeholder's relationship committee, enhanced disclosure of remuneration policy by remuneration committee, performance evaluation of independent directors and board of directors, prior approval of audit committee for all related party transactions, and approval of all material related party transactions through special resolution with absenting related parties from voting. Previous suggestions vis-a-vis to Company's Act 2013, are compulsory constitution of nomination committee fixed on evaluating the board of directors of its respective firm and on investigating the skills and characteristics that are needed in board candidates. Chairman of the committee shall be independent and there is stipulation for compulsory constitution of remuneration committee where chairman of the committee shall be independent. There should be at list one women director in the board and E-voting facility to be provided to all top 500 companies.

So whistle blowing is generally viewed as a process rather than an event (Near and Miceli, 2002), where whistleblower give the information of fraud, or immoral act of the company to the owner or one-time parties, similar to the government. Whistle blowing can be internal or external to an organization.

5.8 Internal Whistle blowing

Internal whistle blowing is the situation where the agent might turn the irregular, immoral activities to the auditing or oversight department or straight to the board, or call as skipping hierarchies, where the information will reach to someone who is willing and able to process it responsibly.

However, the internal whistleblower is usually more aware of unethical acts but may be more afraid of consequences of blowing the whistle, such as loss of job or being ostracized within the organization..

5.9 External Whistle blowing

External Whistle blowing is duty to inform of internal irregularities that is beyond the confines of the organization. It means that the representative blows the whistle of lopsided and immoral practice to an external body, such as supervisory board, regulator, and ombudsman and so on.

Nonetheless, whistleblower external to the firm may have less to apprehension from the consequences of whistle blowing but may not have as much at stake about the nonappearance of unethical acts in a meticulous corporation, or may not be conscious of the extent of unscrupulous acts.

5.10 Importance of Whistle Blowing Rules and Regulations

Whistle blowing rules and regulations are playing an importance role to encourage potential whistleblowers to come forward with their suspicion by providing avenues for employees to raise concerns and define a way to handle unethical practices. Staff members are often the first to know of any unethical or downright illegal dealings that go on within a firm. However, they also tend to be the last to speak out, fearing the loss of their job, their friends or their future promotion. Therefore, by having whistle blowing rules and regulations, the whistleblowers can vote out any wrongdoing or misconduct by the employees without fear of losing their job, their friend or their future promotion under the protection of rules and regulations.

In addition, whistle blowing rules and regulations can reassure employees will be protected from punishment or unfair treatment for disclosing concerns in good faith. It is for the reason that most of the corporations will penalize the whistleblowers by fired, suspended, or charged violating laws or employment agreements to them even they are act in good faith. Therefore, the whistle blowing rules and regulations are importance to protect employees who blow the whistle on those involved in fraudulent and illegal acts against retaliation by public companies. Fortification from revenges aims at motivating employees to propel the whistle through the control of his accepted "expenditure". Guarding from retaliation also possibly will be utilized by employees to fend off justifiabedisapproval or disciplinary measures because they are primarily able to assert the status of a whistleblower. Besides that, whistle blowing rules and regulations also enable management to be informed at an early stage about acts of misconduct. By having whistle blowing rules and regulations, it encourages employees to inform illegal, immoral, or irregular practice by employers to the top of management within organization. Consequently, compassionating the company the chance to correct a professed transgression and settle the unethical exercise internally earlier than it might harm the firm or recognized by public.

Moreover, whistle blowing rules and regulations also help to develop a culture of openness, accountability, and integrity. With the whistle blowing rule and regulation, the organization could have a good culture in organization due to all employees should need to follow the rules and regulations, subsequently reducing the corruption and dangerous situation which could cause an organization to file bankruptcy. The protection of the rules and regulations are also able to enforce ethical conduct within the organization by encouraging the employee to report an unethical behaviour to the suitable level of management, and therefore could significantly increase the efficiency of incomplete institutional arrangements and encourage culture of openness, accountability and integrity.

5.11 Optimistic and pessimistic repercussion of Whistle Blowing

Whistle blowing has two-edged sword effect as it brings positive and negative implications to organization and society. A whistleblower may consider as our hero as it brings positive implications to organization and society, it may also consider as a traitor as it brings negative implications to organization and society. The first positive implication is reduction of organizational waste and mismanagement. Whistle blowing can help the organization by informing the wrongdoing to the top management at early stage, so that management can take appropriate corrective action at once. By doing this can help to avoid the wrongdoing become more serious and uncontrollable in future that may affect the public interest which may incur lawsuit to organization. Therefore, whistle blowing can benefit the organization by lowering the cost of doing business through reducing unnecessary lawsuit that may face by organization because of wrongdoing or fraudulent.

In addition whistle blowing can also help to perk up employees' morale in a company. Flourishing whistle blowing demonstrates to employees that they have power to modify unprincipled behaviour in the company and get better their work lives. Whistle blowing will also create optimistic climate in functioning environment that is allied with improved employees' satisfaction.

Furthermore, whistle blowing can maintain goodwill of an organization and avoidance of damage claims. It is because, if the public learns of wrongdoing of an organization, they may boycott the organization's product or service to penalize the wrongful behaviour. As a result, whistle blowing can facilitate to avoid larger damage occurred such as instantaneous punishments by first caution the managers to give them chance to correct

the bad behaviour before outsiders learn about it, as the community may ultimately learn of the wrongdoing particularly in the case of precarious consumer product even without whistleblower.

On the other hands, whistle blowing may bring negative impact to organization as it is challenge to authority structure. Many managers believe that membership in a bureaucracy requires obedience and loyalty. Whistle blowing maybe considered threatening the authority structure and dwindling the chain of command. Since a few managers may vision whistleblowers as having 'gone after their backs' or 'in excess of their hands', which demoralizes rightful control in organization.

Whistleblowers may also face impulsiveness action from organization. For instance, whistleblower may inform the wrongdoing to the top management, but organization maybe unresponsive. Conversely, the most awful situation is when whistleblower being taken to court, back by organization because of breach of privacy. A few whistleblowers even faced discriminations from organization such as being fired or blacklisted by the employer. The final unenthusiastic repercussion of whistle blowing to society is court logjams. The general public may experience costs of whistle blowing, for example, lawsuits involving less considerable charges can avert courts from dealing with more vital matters. Regulatory bodies also have to enforce more rules and regulations to look after the whistleblower, which possibly will incur high cost to society. Even though there are constructive and unconstructive implications that whistle blowing bring to companies and society, optimistic implications still prevail over pessimistic implications. Consequently, we can bring to a close that whistle blowing should be encouraged, because it brings more advantage than cost to company and society at large.

5.12 Pragmatic problems faced by a whistle blower

The major raison d'être that would manipulate a person in the company to take no action when they discovered any misconduct or deceptive act, is because they understood reporting would not lead to actions. Moreover, there is also anticipation gap concerning auditor's role. A few players in the organization take for granted that whistle blowing is the auditor's role, which in point of fact is not the accountability of an external auditor. An outside auditor only lend a hand in this case, as the role of an outside auditor is to give assertion that financial statement is in true and fair view and totally is not to deliberately investigate and report about fraud.

One more reason of not blowing the whistle is for the reason that the people are fearful of losing their job. Based on a statement given by audit commission in year 1994, they noted that the mainstream of six million frauds noticed by them over the past three year's period in point of fact might have been detected by employees and internal audit staff. Nevertheless, when these personnel and internal audit staff were interrogated, they said that they were terrified of losing their jobs if they reported maltreatments or denigration to their administrators.

Other than that, people who are more dependent on the business tend to think cautiously before they blow the whistle. This is unlike extremely accomplished people where they believe they are trustworthy, authoritative and willing to be connected with their statements. They are not frightened of losing their job because they are extremely skilled and they do not rely entirely on the firm to survive. Moreover that, once a member of staff has blown the whistle, growing pressure will be placed on them to desist from further revelation and withdraw their proclamations.

Additionally, if the company viewed the act of whistle blowing unconstructively, whistleblower will be facing disciplinary act such as their job duties are taken away, the administration may enquire their mental health, proficiency and integrity and the worse is the management might incessantly seeking ways to trap him or her by giving unworkable tasks which may compel them to leave their job.

A further reason of not blowing the whistle when the personnel in an organization discovered any fraudulent act is due to lack of reachable whistle blowing measures. Whenever a employees discovered any transgression or fraud happen, they do not know what is the appropriate channel to elevate up this issue. Consequently, owing to this limitation they would rather keep silence.

5.13 Conclusion and Recommendations

Subsequent to going through the practical problems that are faced by whistleblower, the author would like to give some recommendations on how to develop and support whistle blowing within an organization. First and foremost, the companies should establish a set of code of ethics, clearly defined and straight forward reporting procedure. This is imperative to improve inner communications and encourage internal revelation which will facilitate the administration to take instantaneous remedial actions before the trouble grow larger or multiply to the outside parties.

Another way to encourage whistle blowing is by protecting the whistleblower. Whistleblower need clear sign of support from the organization. As a result, organizations should give strong hold up to them by incessantly monitoring the whistleblower's wellbeing, give confidence the whistleblower to report any revenge against him or her as well as make sure their employment safety. By doing so, the whistleblower will feel they are being protected and supported.

Our subsequent suggestion is to encourage organizations cooperate with independent specialized association to handle the issues raised up by the whistleblower. Every time there is a report of deceitful act, these two committees will meet and handle this issue together. This is also one of the effective ways to make sure the problems raised up by the whistleblower will be taken sincerely and further investigated. This is also to avoid organization from covering up the issue and take unscrupulous actions against the whistleblower. In end, whistle blowing is about exposing or publicizing wrongdoing. There may be a risk of retribution, which could lead to loss of employment, affiliation and mental trauma, but the consequences of not reporting can be very serious. Hence, whistle blowing rules and regulations should be imposed in order to guard the welfare of whistleblower, as well as cheering whistle blowing culture in the place of work. This is to make sure that an organization is always free from any deceptive and illegal act that may harm the business and put in danger the society.

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