



**SEBI (LODR) (AMENDMENT)
REGULATIONS, 2018: A ROUTE TO
ACHIEVING A GLOBAL LEVEL
CORPORATE GOVERNANCE
STRUCTURE IN INDIA**

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Indian companies, throughout the previous centuries, have been a family run business following a practice of effective 'management' rather than effective 'governance'. As companies in India and abroad have grown leaps and bounds, the topic of corporate governance has been predominantly pressing the need to shift from the 'raja' model of governance to the 'custodian' model of governance where the stakeholder's interests are held to be supreme. Various such needs were met in the amended Companies Act, 2013, but want for a more operative regulation were felt. As a result, the Uday Kotak Committee was set up by SEBI which aimed at improving the governing standards for listed companies in the country. A spectrum of changes was recommended in the report to SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, some of which were recently accepted by SEBI vide notification dated May 9, 2018. The aim of this paper is to discuss whether these changes pave a better route towards a more operative corporate governance regime for listed companies in India and yield more power to the stakeholders while eliminating the so-called prevailing 'promoter's rule'.

Keywords: Corporate governance, stakeholders, SEBI, Uday Kotak Committee

Introduction

India recently climbed up the ladder in the World Bank ranking for 'ease of doing business'. It jumped up 30 places from 130 to 100 and credit can be given to various economic changes introduced in the country in the past couple of years like demonetization, introduction of GST and amendment of the FDI Policy. In an attempt to climb up the ladder further and attract foreign investments, substantial changes in the corporate governance and company compliance structures are underway. The CH Committee on Desirable Corporate Governance in India, 1998 defines corporate governance as:

'Corporate governance deals with laws, procedures, practices and implicit rules that determine a company's ability to take managerial decisions vis-à-vis its claimants- in particular its shareholders, creditors, customers, the State and the employees'¹

Accordingly, corporate governance is that arena of management of a company that deals with regulation of management, management's discipline, shareholder's rights and investors protection, business ethics, related party transactions, corporate social responsibility and stakeholder participation in decision making. A competent corporate governance structure facilitates sustainable economic growth, boosts the investor's confidence, develops

¹Confederation of Indian Industry, Desirable Corporate Governance: A Code 1 (1998), http://www.ecgi.org/codes/documents/desirable_corporate_governance240902.pdf (last visited Aug 7, 2018).



the financial markets and sets corporate democracy in pace. This makes corporate governance not a pure legal concept, but an amalgamation of law, economics, politics, finance, ethics and other fields of management.

SEBI (LODR) Regulations, 2015, the legislation that gravely impacts the listed companies in India, was majorly discussed in the high-powered committee set up by SEBI under the Chairmanship of Mr. Uday Kotak. The aim of the Uday Kotak Committee was to improve the governance standards in the listed companies in India so as to match the international standards. Various recommendations were given by the Committee out of which 40 were accepted without modifications, 15 were accepted with modifications and 18 were rejected completely. All these changes are to be put into effect from April 1, 2019.² Some of these recommendations relate to improving the role and composition of its committees and boards, ensuring the independence of independent directors, ensuring transparency and monitoring, safeguards from related party transactions etc.

The current corporate governance structure in India, which is extensively promoter-led, is on the verge of an evolution with these amendments in the SEBI LODR Regulations. The amendments bring in better structures, more rigorous checks and

balances and greater independence to key personnel including the Board and auditors, in order to match the globally followed trends. It is providing a mechanism to the listed companies to create a long-term value and protect the shareholder's interest while consistently applying proper skill and care. The amendment provides for a phased timeline from October 1, 2018, to April 1, 2020, for most of the amendments so that the listed companies can adapt to the changes and overcome any challenges faced during implementation. Also, various such amendments are to be adhered to by the top listed companies which are decided on the basis of their market capitalisation. Therefore, it is necessary to look into the amendments and see what effects it can have on paving a better path for corporate governance in India, diverting it from benefiting the promoters to benefiting the shareholders.

Institutionalizing True Democracy in Listed Companies

Reshaping the Board of Directors: Roles and Composition

The SEBI (LODR)(Amendment) Regulations, 2018 has introduced certain new changes that are to be made in the Board of the listed Companies. The minimum number of directors on the Board has been increased from 3 to 6.³ Emphasis was again given on the appointment of a women director on the Board who can either be an independent or a non-independent director.⁴ In order to ensure that the directors of a company are skilled and have

²Rishab Shroff & Tanmay Patnaik, India's Tough New Corporate Governance Regime – Impact on Promoters | Private Client [cyrilamarchandblogs.com](https://privateclient.cyrilamarchandblogs.com) (2018), <https://privateclient.cyrilamarchandblogs.com/2018/04/indias-tough-new-corporate-governance-regime-impact-promoters/> (last visited Jul 13, 2018).

³ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(i)(2).

⁴ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(i)(1).



knowledge in their field, the amendment now requires the directors to disclose their skills in a list of core skills/expertise/competencies identified by the Board as required in their business and sector without disclosing their names. This ensures that the appointment of the directors is actually based on their dexterity rather than a bias based on who they are. Further, the members already on the board of directors are also required to provide a list of their proficiencies.⁵ The Companies Act, 2013 allows a director to be appointed as a managing director, whole-time director or managers beyond the age of 70 years if shareholder's approval is taken. A similar recommendation has been incorporated in the 2018 amendment which allows the appointment of a non-executive director on attaining the age of 75 if a shareholder's approval under special resolution is achieved with proper justification in the explanatory notes annexed with it.⁶ This is an indication of the fact that age is no determinant for determining the abilities and capabilities of a person, nor is it a criterion for disqualification. If the shareholder's endorsement is given, it is evidence enough that the person is capable and should continue with their contributions to the company, thus giving an important power to the shareholders.

The quorum for Board meetings has been increased to 1/3 of its total strength or 3 directors, whichever is higher, including one

independent director,⁷ as opposed to the requirement in the Companies Act of 1/3 of the total strength or 2 directors, whichever is higher. In order to introduce a more balanced corporate governance structure, the amendment introduced a requirement for the chairperson of the board to be a nonexecutive director who shall not be related to the managing director or CEO of the Company.⁸ This change was made to avoid concentration of power in the hands of one individual and dividing it responsibly between the CEO/MD and the Chairperson in respect to the day to day operations and long-term actions. The Amendment also restricted the maximum number of directorship to 7 directorships from 1 April 2020. As for independent directors, the number is restricted to seven entities, but where such a person is a whole-time director/managing director in a listed company, the number of independent directorships shall not be more than 3 in listed entities.⁹ Lastly, to make effective board evaluations, the amendment required disclosures of the performance of the board, individual directors and the committees. SEBI's circular also specifies that every listed entity may consider observations of the Board for the year, previous years observations and proposed actions based on current year observations as a part of its disclosures on Board evaluation.¹⁰

⁵ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(x)(c)(i) (2).

⁶ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(ii).

⁷ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(iv).

⁸ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(iii) and Para 3(u)(c).

⁹ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(e).

¹⁰ SEBI Circular: SEBI/HO/CFD/CMD/CIR/P/2018/79, dated May 10, 2018.



The Board of Directors is responsible and answerable to the stakeholders of the company for meeting the corporate governance standards. They are also in charge of overseeing the management and governance of the company while taking important business decisions. Thus, the amendments ensure that there is gender diversity on the Board which brings in a new perspective for decision making. The increase in the quorum of the Board with the requirement of at least one independent director will result in better corporate governance and balance of powers as their independent directors would be responsible for voicing the opinions of the non-promoter group issues and point out red flags in the actions of the board. The reduction in the number of directorships can help the directors in giving sufficient time to all the companies and not hinder their role in playing an effective part. Lastly, all the disclosures and listing of skills would make sure that there is an appointment of directors who can actually add value to the governance process of the Company.

The role of independent directors

The SEBI 2018 Amendment seeks to exclude the possibilities of “board interlocks” that arise due to common non-independent directors on the boards of listed entities. The definition was amended and would now exclude persons who are non-independent directors of another company on the board of which any non-independent director of the listed entity is an independent director.¹¹ The criteria for evaluation of

Independent Directors have also been modified requiring an evaluation of their performance and fulfillment of a criteria of independence. The Independent directors are needed to file a declaration stating that they fulfill the independence criteria and have no knowledge of any impairment to the same. Such a declaration would need to be filed in the first board meeting that they participate in. They should also inform the board in case there is a change in circumstances changing their independence status. Also, there is a prohibition on the appointment of an alternate director for an independent director.¹²

Independent directors act as an impartial guide for the companies and bring with them expertise which might be lacking in the Board. They keep the activities and decisions of the Board in check while pointing out mismanagement, inefficient use of resources and unaccountability of decisions. They act as a harbinger of peace between the board and the non-promoter groups striking the right balance between individual, corporation and social interests. Thus, the amendments have turned independent directors into a cornerstone of the global corporate governance movement and eased the burden of ensuring independence in the Company and its decisions.

An Enhanced Character of Board Committees

Promoters | Private Client [cyrilamarchandblogs.com](https://privateclient.cyrilamarchandblogs.com/) (2018), <https://privateclient.cyrilamarchandblogs.com/2018/04/indias-tough-new-corporate-governance-regime-impact-promoters/> (last visited Jul 13, 2018).

¹² SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(i).

¹¹Rishab Shroff & Tanmay Patnaik, India’s Tough New Corporate Governance Regime – Impact on



The Board Committees help the Board, which is responsible for acting on behalf of the interest of the stakeholders, to effectively govern and take decisions. The 2018 amendment has enhanced the role that the Board Committees play, indicating an optimistic move towards an effective governance regime. As per the amendment, the *Audit Committee* is responsible for reviewing the utilization of loans and other advances given by the holding company to the subsidiary companies exceeding 100 crores or 10% of the asset size of the subsidiary, whichever is lower.¹³ The *Nomination and Remuneration Committee* shall now, along with their previous duties, have to identify and recommend to the board, the appointment, renewal and remuneration of persons for the positions/offices a level below the chief executive director/ managing director/ whole time director/ manager, specifically counting the position of the company secretary and the chief financial officer and such positions shall now be considered to be a part of the 'senior management'.¹⁴ The *Shareholders Relationship Committee* shall now compose of at least 3 directors with one independent director and shall have an enhanced role to play. Also, the function of the *Risk Management Committee* shall specifically include cyber security as well.¹⁵

The amendment ensures that the audit committee is justifying the risk to the Group by scrutinizing the purpose of lending funds,

¹³SEBI (LODR) (Amendment) Regulations, 2018, Para 3(u)(a).

¹⁴ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(c)(iii) and Para 3(u)(b)(i).

¹⁵ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(h)(a) and Para 3(h)(b).

performance analysis, a sufficiency of internal cash with the subsidiaries etc. Widening the roles and responsibilities of the SRC is a thrust towards providing the investors with prompt and high-quality services, especially to those who hold a non-controlling interest or are other security holders. The inclusion of an independent director as a part of this committee and presence of the Chairperson of the Committee would help in building an effective Corporate Governance practice. Lastly, with the increasing speed of technological advancement, the role and responsibility of the RMC is to oversee the integrity of the network, programs, data and software from unauthorized use and access. All in all, these changes would ensure that there is healthier surveillance and governance of the decisions taken by the Board.

Increased Disclosure Requirements: Enhanced Transparency

The underpin of a good corporate governance structure is transparency and disclosures. Timely and accurate disclosure of all the material matters of the Company ensures efficient functioning, management, performance and governance of a Company. The SEBI (LODR) Regulations have brought in newer and stringent requirement for disclosures like a set timeline for submission of reports to the stock exchange and publishing on the website, allowance to submit the report in an electronic mode, credit rating disclosure, a particular format for the disclosures, utilization of funds from qualified institutional placement (QIP) /preferential issues, disclosures for directors and disclosures in the view of the committee not accepted by the Board.



Thus, the submission of annual accounts in soft copy would contribute to the green initiatives of the Ministry of Corporate Affairs. Credit rating disclosure will help in evolving a credit risk market pricing system and develop credit spread across various bonds in the future, further enhancing transparency in credit risk across instruments and sectors. It will become easier for the investors to get information about the Company and its filings by submitting the disclosures in searchable formats which are easily available online. Disclosures by the directors in the name of the Company would enable the investors to make an informed decision as to whether the director is involved in any competing business or not. The disclosure related to the disqualification of the directors would further help in gaining the confidence of the investors who will be ensured that the directors will act in good faith and towards the achievement of the Company's objectives. Therefore, it would be safe to conclude that these amendments would not only push the listed entities towards a more transparent system of disclosures, it would be the harbinger of the best corporate governance practice in India.

Trickling down of governance to the subsidiaries

Most of the businesses now operate through a web of subsidiaries in their country and abroad and now have a complex corporate structure. The legal, financial and structural complexities increase with the increase in sales, size and increasing global flow of capital. In order to ensure effective governance of the Group, it is important to take up good governance practices at the

holding level, which would trickle down to the subsidiary levels and to the entire structure. In this view, the obligations of listed companies in respect to their subsidiaries have been enhanced. One independent director from the board of directors of a listed entity should also be a director on the board of directors of its unlisted foreign material subsidiary. Additionally, the board of all listed entities will now have to be assessed of significant transactions involving all unlisted subsidiaries. Also, the definition of 'material subsidiary' has been amended to define subsidiary as a subsidiary whose income or net worth exceeds 10% of consolidated income or net worth of the listed entity and its subsidiaries in the immediately preceding year.¹⁶ Along with this, the subsidiaries and their listed companies are required to maintain secretarial audit with their annual reports.

This will ensure that the companies are placing monitoring mechanisms on its subsidiaries to get timely information about all its transactions. The company will also have to ensure that the corporate governance policy of the subsidiaries is at par with the parent listed company to get the same value of ethics, policies, processes and controls and appointing an independent director in the subsidiary is a step towards the same. Disclosure as to the accounts of the subsidiary will help to get an overview of the Group as a whole. With the increasing complexity of transactions, the responsibility of the directors have increased to get all significant transactions under their

¹⁶ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(c)(ii), Para 3(j)(a) and Para 3(j)(b).



purview to prevent financial and reputational damage, ensuring a strong group corporate governance framework. Thus, the corporate governance practice of the subsidiaries should be such that it recognizes the different kinds of risk i.e legal, tax, societal etc, be it in India or abroad.

Related Party Transaction and Controlling shareholder

One of the most crucial topics under corporate governance is the relationship between the listed entity and the promoters. Since, a majority of the listed companies in India is still promoter-driven, following the 'Raja' system of governance, it is important to create a system of checks and balances in order to shift it to the 'Praja' form of governance. The interest of the shareholders, being the Praja or the public on whose investments the companies run, should be given more importance than filling the pockets of the promoters and promoter groups.

The SEBI (LODR) (Amendment) 2018 has amended the definition of 'related party' to include any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more shareholding in the listed entity¹⁷. The amendment requires a consolidated statement of the related party transactions within 30 days from the date of publication of stand alone and consolidated financial results for the half year.¹⁸ Further, disclosures of transactions of the listed entity with any person or entity belonging to

the promoter or promoter group of the listed entity which holds 10% or more shareholding in the listed entity¹⁹, is to be made in the annual report. The Amendments in the clauses pertaining to the approval of related party transaction allows related parties to cast a negative vote, as such voting cannot be considered to be in conflict of interest.²⁰ Lastly, SEBI has now considered to include payments made to a related party with respect to brand usage or royalty as 'material related party transactions' if such transactions exceed 2% of the annual consolidated turnover of the listed entity as per the entity's last audited financial statements.²¹ This will make sure that the company does not make excessive payments to its controlling shareholder and do not bleed out payments before giving out dividends. The widening of the definition of related party and introducing such disclosures would make sure that the transactions with the promoter/promoter group is at arm's length. The negative voting on related party transactions by the related party allow them to give their dissenting opinion when they do not favour a transaction, thus providing more commercial substance to it. Therefore, these amendments are a meansto curb the challenge to corporate governance relating

¹⁷ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(a).

¹⁸ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(i)(e).

¹⁹SEBI (LODR) (Amendment) Regulations, 2018, Para 3(x)(a).

²⁰ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(i)(c) and Para 3(i)(d).

²¹Poonam Pal Sharma & Simone Reis, SEBI Corporate Governance Norms: Will Change Be The Promising Constant? - Corporate/Commercial Law - India Mondaq.com (2018), <http://www.mondaq.com/india/x/693580/Corporate+Governance/SEBI+corporate+governance+norms+will+change+be+the+promising+constant> (last visited Jul 16, 2018).



to the transactions between the firm and its promoters.

Accounting and Audit

A good quality financial statement is a document primarily used by most of the stakeholders to measure the role that the management has played in earning returns on the capital provided by the shareholders and employed by them. This statement gives an idea of the financial position of the company, its earnings prospects and earning generation for a particular period of time. It is therefore extremely necessary to meticulously structure the accounting statements and carry out audits. The SEBI LODR amendments seek to improve the disclosure quality and enhance the effectiveness of financial statements and audits.

In the SEBI (LODR) Regulations currently, if the management is not able to make an estimate as to any audit qualifications, it needs to provide reasons and these reasons shall then be reviewed by the auditor and reported accordingly. The amendment modifies this requirement and says that in cases where the audit qualifications are not quantifiable, the management has to mandatorily make an estimate which shall be reviewed and reported by the auditors. In case the management does not make an estimate in matters like sub-judice or going concern, the management has to provide the reasons and the auditor has to review the same.²²

²² SEBI (LODR) (Amendment) Regulations, 2018, Para 3(w).

The amendment has reviewed the financial disclosure requirements and has made significant changes in the same like making it mandatory to submit consolidated financial results on a quarterly / year-to-date basis, relaxing the requirement of getting the financial results of the last quarter audited, changes in the submission of cash flow statements and necessary requirement to take a limited review of the audit of all companies/ subsidiaries whose accounts are consolidated.²³ Thus, organizations and companies ought to begin their arrangement right on time for making a comparative financial statement. SEBI needs to define the scope of limited review of the subsidiaries and whether it shall apply to the foreign subsidiaries as well and issue direction for limited review of the audit of various other components. Therefore, the listed entity is required to disclose all the relevant information of its subsidiaries on time to the statutory auditor to perform the limited review.

Further, disclosure requirements for reasons for resignation of auditors²⁴, audit and non-audit services provided by the auditors²⁵ and credentials and audit fees²⁶ of the auditors has been amended and introduced. The auditors play an important role in laying out all the material information related to the Company, violations and compliances. In order to ensure transparency, it is important

²³SEBI (LODR) (Amendment) Regulations, 2018, Para 3(o).

²⁴SEBI (LODR) (Amendment) Regulations, 2018, Para 3(v).

²⁵ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(x)(c)(iii).

²⁶ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(r)(ii).



that the company gives disclosure of the reasons why the auditor resigned before the expiry of their term. The professional competency and experience of the auditors or the audit firm is a vital information allowing the shareholders to make informed decisions while employing auditors. Thus, these practices will help in enhancing transparency and achieving a superior corporate governance practice in the listed entities.

Shareholders participation

Shareholders are the most important stakeholder in the company and it is for their primary benefit that corporate governance requires effective communication between them and the Board. There will be an increase in shareholder participation and involvement with the new amendment. AGM is to be held within 5 months from the end of the financial year 2018-19²⁷ and there shall be mandatory web-cast²⁸ of the same. Also, an approval from the shareholders would be required for brand royalty payments.²⁹ Thus, aligning the timing of the AGM with the global trends will reduce the possibilities of a clash of AGM of different companies resulting in higher participation from the shareholders. The constraints of physical presence have been overcome by introducing web-cast of the meetings in the Company allowing remote participation

from shareholders who can't physically attend the meeting. The outcome shall be a skilful leadership for endorsement of audit accounts, the election of executives, the arrangement of auditors and different activities, consequently encouraging achievement of business objectives and key targets. To conclude, it can be said that shareholders participation and approvals are empirical to a useful governance mechanism to move away from promoter supremacy and towards shareholder sovereignty.

Conclusion

The recent changes in the industry and economy called for a need to redefine the corporate governance standards and the Uday Kotak Committee has responded to that need to improve the situation. The changes approved by SEBI aims to align the corporate governance standards to the best global practices. The firmly rooted business reality, where listed entities are promoter-led, increasing the risk of promoter-raj at the expense of minority shareholder, has been addressed to in the approved recommendations.

Prima facie, all these changes seem promising but the real test lies in the implementation of these changes. Some may argue that the precluding of the smaller listed entities from complying with the amended recommendations is contrary to the essence of the amendment. Some may also claim that the added compliance will have an effect of increasing the burden of the listed companies and increase their transactional costs. On the other hand, some analysts believe that the enhanced disclosures requirements will reduce the information asymmetry between the

²⁷ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(s)(ii).

²⁸ SEBI (LODR) (Amendment) Regulations, 2018, Para 3(s)(ii).

²⁹ Suhail Nathany & Tomu Francis, Sebi accepts Kotak Committee recommendations: Getting closer to global best practices Moneycontrol (2018), <https://www.moneycontrol.com/news/business/economy/sebi-accepts-kotak-committee-recommendations-getting-closer-to-global-best-practices-2542795.html> (last visited Jul 15, 2018).



company and the shareholders, benefiting even the smallest shareholders.

Needless to say, the approved recommendations incorporated by SEBI in the LODR regulations is a welcomed change and is expected to extol corporate India. It will bundle commendation on the structure of corporate governance and leadership positions. All in all, a rugged governance will augment the integrity of the public markets, attract foreign and domestic investors for the long term thus building a ladder for India to climb up the World Bank Ranking for 'ease of doing business' and becoming a hub of globally acclaimed corporate governance practices.

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