

Workshop on Powers, Duties & Restrictions of the Board



BOMBAY CHAMBER OF COMMERCE AND INDUSTRY
CORPORATE AS A CITIZEN

Team Legasis
May 25, 2018



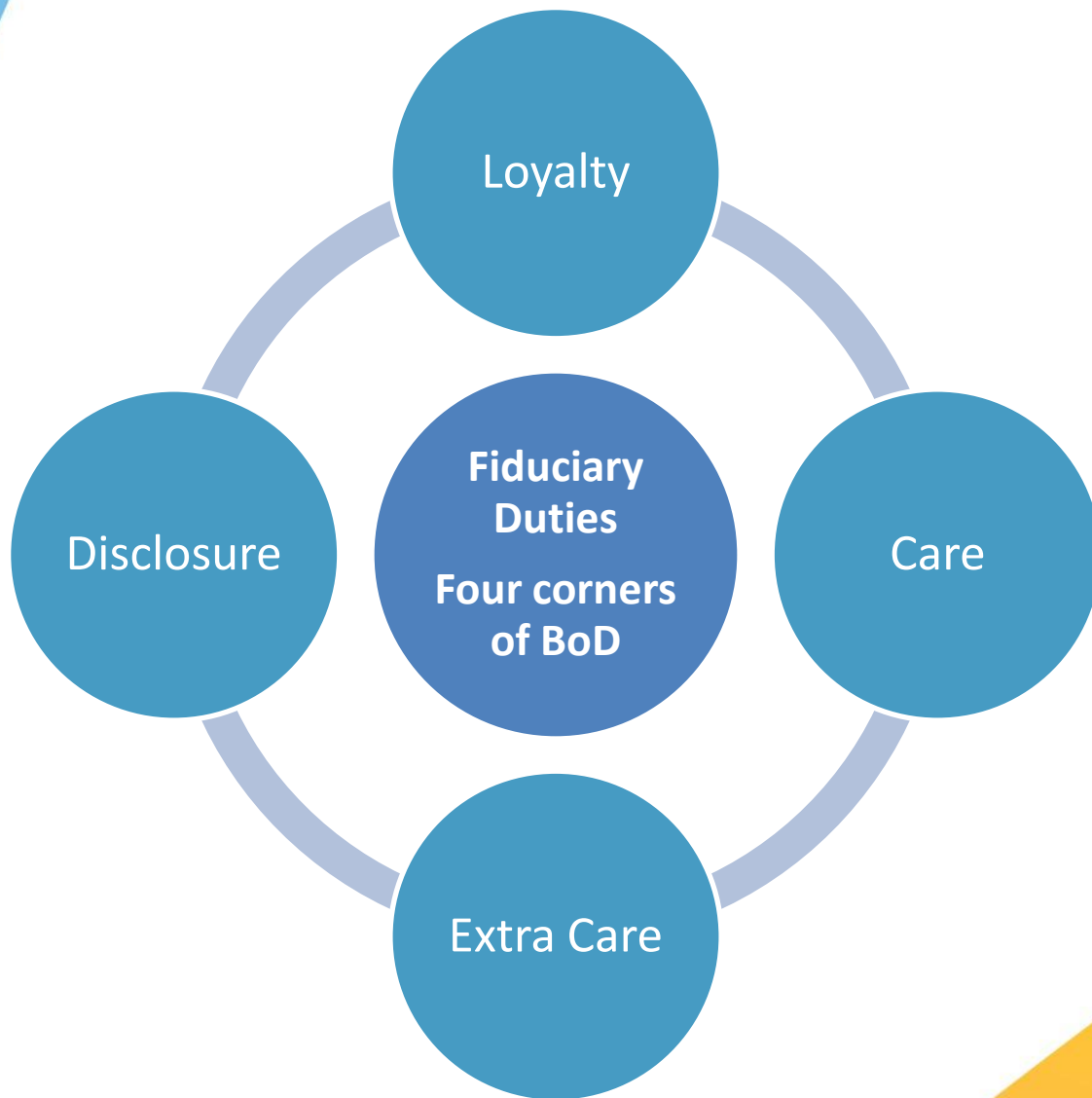
Powers, Duties & Restrictions of the Board: Agenda



- ❑ 10.00 AM to 10.15 AM: Introductions
- ❑ 10.15 AM to 11.00 AM: Fiduciary Duties- Four corners of BoD
- ❑ 11.00 AM to 11.30 AM: Statutory and Regulatory Landscape
- ❑ 11.40 AM to 12.15 PM: Delegation- what can't be delegated?
- ❑ 12.15 PM to 12.40 PM: Regulatory & Judicial Intervention
(focus on latest developments)
- ❑ 12.40 PM to 13.00 PM: Enhancing Board Effectiveness

Introductions





The Fiduciary Duty - Loyalty

❑ Loyalty: To act in the Interest of the Company

- Consequential aspect: “Conflict of Interest” (Sec 188(1)(b), Sec 166 (4), Chp II Reg 4 of SEBI LODR, Reg 26)
- Consequential aspect: “Composition of the Board- Appointment of Independent Directors, Woman Director” (Sec 149(1), (4) to 149(13), Sec 150(2) to 150(4), Schedule IV, Reg 17(6)(d) of SEBI LODR, Reg 25)
- Consequential aspect: “Related Party Transactions” (Sec 188, Reg 23)
- Consequential aspects: “Business Responsibility and Corporate Governance Report” (Reg 34(f), Reg 72)

The Delhi High Court in its interim order (Rajeev Saumitra vs. Neetu Singh & Ors) held that a director is liable to pay to the company any undue gains realized from breach of duties prescribed by Section 166 of the Act.

The Fiduciary Duty - Care

❑ Care: Duty to pay attention and take due care

- Consequential aspect: Oversight Duty (Sec 166, Reg 4(2)(f))
- Consequential aspect: Committees (Sec 177, Sec 178, Sec 135, Reg 18 and Part C and D of Schedule II, Reg 21)
- Consequential aspect: Financial Controls (Sec 177, Sec 134, Rule 10A of Companies (Audit and Auditors) Rules, 2014)
- Consequential aspect: Compliance (Sec 134(5)(f))
- Consequential aspect: Best Judgement Rule- Business decision taken in good faith and in the best interests of the company.

The Fiduciary Duty - Disclosure

❑ Disclosure: Disclose all material information

- Consequential aspect: Mandated Disclosures v Material – Filings to be done with the ROC and Stock Exchange Filings: Suzlon Energy Limited: A total fine of Rs 1.1 Crore, including Rs 5 Lakh on the Company Secretary and Compliance Officer has been imposed as the Company failed to disclose price sensitive information as required under the listing regulations on more than one occasion (failure to make certain corporate announcements to Stock Exchanges about orders received by the Company).
- Consequential aspect: Information Asymmetry – Reg 4(2)(b) & (c)
- Consequential aspect: Policy and then delegate – (Sec 135(3)A, Reg 21, Reg 23, Reg 4(d)(iv), Clause (p) of sub-section (3) of Section 134, Reg 16(1) C, Sec 178, Reg 9, Reg 30(4)(ii), Reg 9, Reg 43A, Sch II Part D(A), Reg 17(5)A)

The Fiduciary Duty – Extra Care

- ❑ Extra Care: Careful Scrutiny of decisions: Event Based.

Consequential aspect:

Test for whether duty is met: no clear test; careful scrutiny of decision process.

Eg: Restructuring, Acquisition, Amalgamation, Preferential Payments, Fraudulent Preference etc. (Sec 327, 328)

The Governance Duty

Ensuring that organizational activities are aligned in a way that supports the organization's business goals.

- Board's Responsibility to set up
- Commonsense Approach & Principles



Tim Armour
CAPITAL GROUP



Mary Barra
GENERAL MOTORS
COMPANY



Warren Buffett
BERKSHIRE
HATHAWAY INC.



Jamie Dimon
JPMORGAN CHASE



Mary Erdoes
J.P. MORGAN ASSET
MANAGEMENT



Larry Fink
BLACKROCK



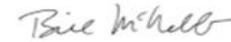
Jeff Immelt
GE



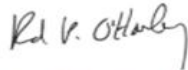
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Lowell McAdam
VERIZON



Bill McNabb
VANGUARD



Ronald O'Hanley
STATE STREET
GLOBAL ADVISORS



Brian Rogers
T. ROWE PRICE



Jeff Ubben
VALUEACT CAPITAL

The Risk Duty

Board's Oversight : Management's Risk Appetite



Risk Fitness Quiz: How Do You Score?

Risk Assessment

1. How well do we identify, measure and document the threats/risks that could impact on the achievement of our business objectives?

SCORE /10

Risk Treatment

2. How well and how often do we reevaluate the effectiveness of our risk treatment strategies?

SCORE /10

Risk Treatment Optimization

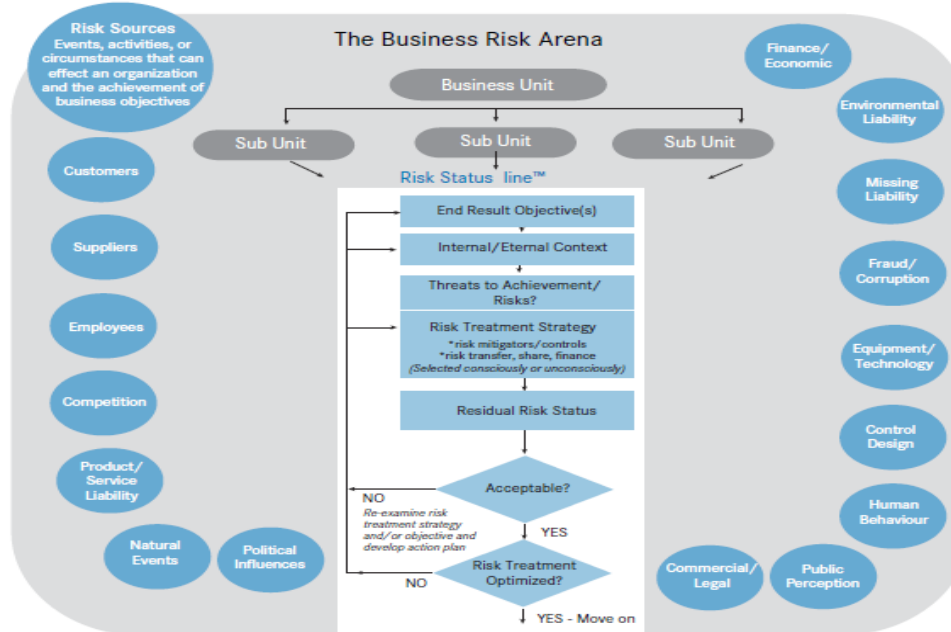
3. How good are we at identifying opportunities to eliminate expensive risk treatments while still maintaining an acceptable residual risk level at a lower overall cost?

SCORE /10

Risk Testing the Future

4. How good are we at documenting and evaluating risks when making important business decisions, launching new products/services, and preparing strategic business plans?

SCORE /10



Planning for Serious Risk Situations

5. Do we have contingency plans in place to deal with potentially high risk but low probability situations that could cripple business units or the organization? Do we periodically revisit these plans to reassess their adequacy?

SCORE /10

Worst Case Scenarios

6. How good are we at considering the possibility of high risk situations, which, if they occurred together, could have a devastating impact on the organization?

SCORE /10

Risk Oversight Process

10. How well briefed is the Board of Directors and Senior Management on the company's significant residual risks? Have they taken steps to ensure work units are identifying, measuring, treating and monitoring significant risks?

SCORE /10

Regular Risk Re-evaluation

9. How effective is our corporate process to reassess the effectiveness of our risk management processes and periodically reassess the acceptability of risk acceptance decisions?

SCORE /10

Risk Transfer/Financing Options

8. How effective are we at identifying risk sharing and insurance options to avoid or reduce the consequences of specific threats/risks to business objectives?

SCORE /10

Early Warning Systems

7. How good are we at regularly monitoring our risk status using early warning signs that indicate changes might be needed to risk treatments and/or objectives?

SCORE /10

TOTAL RISK FITNESS SCORE /100



The Compliance Duty



- Compliance with ALL laws
- Proper System: Adequate & Operating Effectively
- Non Prosecution
- Deferred Prosecution
- Risk Based Approach
 - Business Continuity vs Prosecution
- Standards of Systems
 - ISO 19600
 - ISO 37001

Statutory and Regulatory Landscape

Powers, Duties & Responsibilities



Statutory and Regulatory Landscape

Companies Act, 2013

- Section 166: Duties of Directors
- Schedule IV: Code of conduct of Independent Directors

SEBI (Listing Obligations and Disclosure Requirements) Reg, 2015

- Reg 4(2)(f): Responsibilities of the Board of Directors

Secretarial Standards

- Prescribe the procedural aspects of the duties of Directors



Delegation of Powers

What can't be delegated?



Statutory and Regulatory Provisions-delegation under CA



The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the MD, the Manager or any other principal officer of the Company the following powers on such conditions as it may specify:

- a) to borrow monies;
- b) to invest the funds of the company;
- c) to grant loans or give guarantee or provide security in respect of loans
- d) Vide circular 19/2014 dated 12 June, 2014, MCA has clarified that the powers of the Board under Rule 6(2)(a) of Companies (Share Capital and Debentures) Rules, 2014, with regard to issuance of duplicate shares can be exercised by a committee of Directors.

The committee of directors may exercise such powers subject to any regulations imposed by the Board in this regard.

Powers & Duties – What can't be delegated?

The Directors' Responsibility Statement

- a) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

Section 143(3)(e)- Duty of the Auditor to include in the Auditor's Report as to whether, in his opinion, the financial statements comply with the accounting standards.

- b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;

Section 143(2) - Duty of the Auditor to include in the Auditor's Report, whether the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year

Powers & Duties – What can't be delegated?

- c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;

Section 128- Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year

Section 143(12) - If an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud involving such amount or amounts, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time.

- d) the directors had prepared the annual accounts on a going concern basis; and

Indian Accounting Standard (Ind AS) 1 - An entity shall prepare financial statements on a going concern basis unless management either intends to liquidate the entity or to cease trading, or has no realistic alternative but to do so.

Powers & Duties – What can't be delegated?

- e) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

Pursuant to Rule 10A of the Companies (Audit and Auditors) Rules, 2014, for the financial years commencing on or after 1st April, 2015, the report of the auditor shall state about existence of Internal Financial Controls with reference to financial statements and its operating effectiveness. – This enlarges the scope of the Auditor.

- f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

This cannot be delegated.

Regulatory & Judicial Intervention



SC Judgement - Independent Directors

SC- “Neither the independent directors nor the promoter directors shall alienate their personal properties or assets in any manner, and if they do so, they will not only be liable for criminal prosecution but contempt of the Court.”

While the SC on May 16 stayed the liquidation proceedings against Jaypee Infratech, it has asked the promoters to deposit Rs 1,000 crore by June 15 to refund homebuyers and the matter has been listed for hearing on July 4.



Are Board's Effective?



Section 403- Fees for Filing: Recent amendments

- ❑ Financial Statements & Annual Return can be filed with delayed filing fees of Rs. 100/- per day (after prescribed 30/60 days), different amount may be specified for different classes of companies.
- ❑ For other E- forms – additional fees will be prescribed; different amount may be specified for different classes of companies.
- ❑ In case of subsequent 2 or more defaults in submission of forms, higher fees may be prescribed.

The Companies (Registration Offices and Fees) Second Amendment Rules, 2018

- ❑ Notified on 7th May 2018.
- ❑ In case the due date of filings under Section 92 (Annual Return) or 137 (Annual Financial Statement) of the Companies Act, 2013 expires after 30/06/2018, the additional fee @Rs.100 per day shall become payable in respect of MGT-7, AoC-4, AoC-4 XBRL and AoC-4 CFS.
- ❑ In all other cases where the belated Annual Returns or Balance Sheet/Financial Statement which were due to be filed whether under the Companies Act, 1956 or the Companies Act, 2013, additional fee as per the applicable slab for the period of delay up to 30th June 2018 plus @Rs.100 per day w.e.f 1st July 2018 shall become payable.

Section 403- Fees for Filing: Recent Amendment

Case 1 – The Company has failed to file form AOC-4 for the Annual General Meeting held on September 30, 2018. In this case the fees will be calculated as below: (Prior: Prior to amendment; Post: Post amendment)

Nominal Share Capital of the Company	Fees Applicable	Late fees to be paid				
		Up to 30 days	More than 30 days and up to 60 days	More than 60 days and up to 90 days	More than 90 days and up to 180 days	More than 180 days
Less than 1,00,000	Rupees 200	Prior – 600 Post – 3,200	Prior – 1000 Post - 6200	Prior -1400 Post - 9200	Prior – 2200 Post - 18200	Prior – 2600 Post – 18200 (plus Rs 100 for every extra day)
1,00,000 to 4,99,999	Rupees 300	Prior- 900 Post- 3300	Prior – 1500 Post - 6300	Prior – 2100 Post - 9300	Prior – 3300 Post - 18300	Prior – 3900 Post – 18300 (plus Rs 100 for every extra day)
1,00,00,000 or more	Rupees 600	Prior – 1800 Post - 3600	Prior – 3000 Post - 6600	Prior – 4200 Post - 9600	Prior – 6600 Post - 18600	Prior – 7800 Post – 18600 (plus Rs 100 for every extra day)

For condonation of delay additional fees have to be paid for filing with ROC. (Fees for E- Cods is Rs. 30,000)

Section 403- Fees for Filing: Recent Amendment

Case 1 – The Company having Paid Up Share Capital of more than 1 crore has failed to file form MGT 7 for the Annual General Meeting held on September 30, 2017. The failure has continued till December 31, 2018. In this case the fees will be calculated as below: (Prior: Prior to amendment; Post: Post amendment)

Nominal Share Capital of the Company	Fees Applicable	Late fees to be paid
		More than 180 days
1,00,00,000 or more	Rupees 600	Prior – 7800 Post – 26,200 (plus Rs 100 for every extra day)
For condonation of delay additional fees have to be paid for filing with ROC. (Fees for E- Cods is Rs. 30,000)		

Q&A

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Thank You!

