Corporate Governance in **India@2016**: Where Do We Stand?



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FICCI Centre for Corporate Governance

FOREWORD



We are pleased to present" Corporate Governance in India@2016: Where do we stand?", a survey-based report on the state of corporate governance in the country post introduction of Companies Act, 2013 and other Regulations applicable to listed companies.

The recent reform measures are aimed at creating a corporate regulatory environment that promotes business activity, market integrity and investor confidence. This publication represents a snapshot of contemporary views of industry on the collective impact of the reform process on doing business in the country.

The survey affirms that there have been significant improvement in the overall governance landscape post reforms. At the same time, it sheds light on the new regime's implementation challenges and increased compliance burden for companies, which, at times, outweighs the benefits.

I am happy to share that the Government has been very responsive towards enhancing the effectiveness of the regulatory environment. The Government's decision to move the second amendment to the Companies Act, 2013, within two years of its existence, testifies that the Government is committed to improve India's image as a competitive and secure market for domestic as well as international investors.

The purpose of this report is to highlight the course correction needed to ensure there is a balance between the need for higher reforms and the costs involved. We are hopeful that the recommendations in the report will find favour with the Government and other stakeholders.

We are thankful to Thought Arbitrage Research Institute (TARI) for their support and particularly to Mr Kaushik Dutta for sharing his expertise in the development of this publication.

A Didar Singh
Secretary General

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Executive Summary



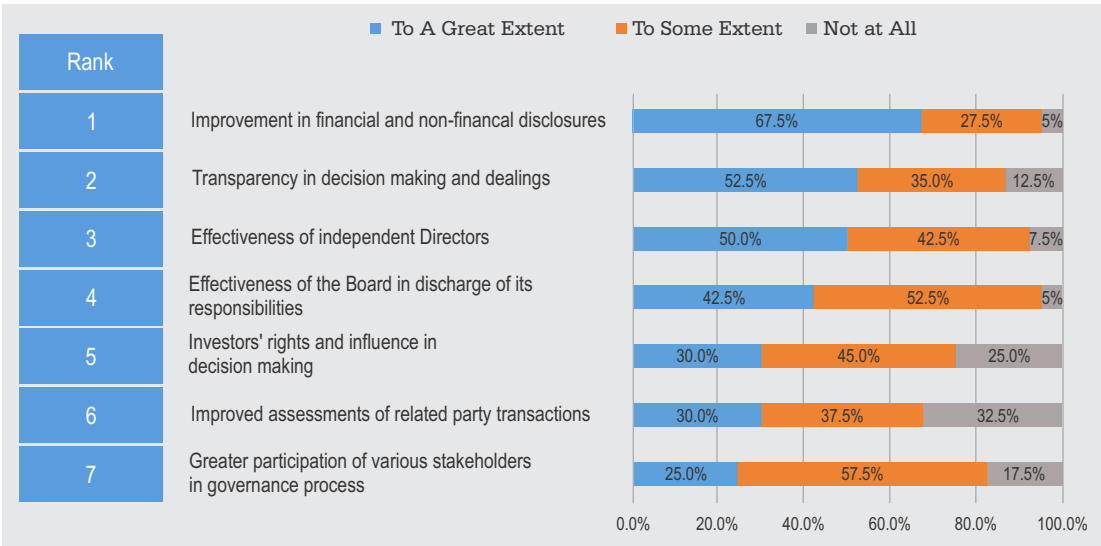
Life after reforms: Has corporate governance brought a paradigmatic shift to business in India?

The passage of the Companies Act of 2013 had generated tremendous hope in the country as industrialists as well as academics felt that it would provide an impetus to the country's growth momentum by bringing in global best practices in corporate governance.

More than two years down the line, it is time to pause and ask ourselves : How far have we actually travelled in our aspiration to develop an effective governance framework and have corporates internalised governance as part of their value proposition?

These two were the very objectives the Parliamentary Standing Committee had envisioned while framing the concept of the new law governing business. This survey tries to find the answers and tell us how close we have come to achieving those objectives.

Post-reforms, which are the areas of improvement in corporate governance?



The survey shows that post-reforms, the most pronounced improvement has been seen in the quality of financial and non-financial disclosures. 67.5% respondents said the change had been significant and visible. Other key areas which witnessed significant improvement are transparency in corporate decision making (52.5%) and effectiveness of independent directors (50%).

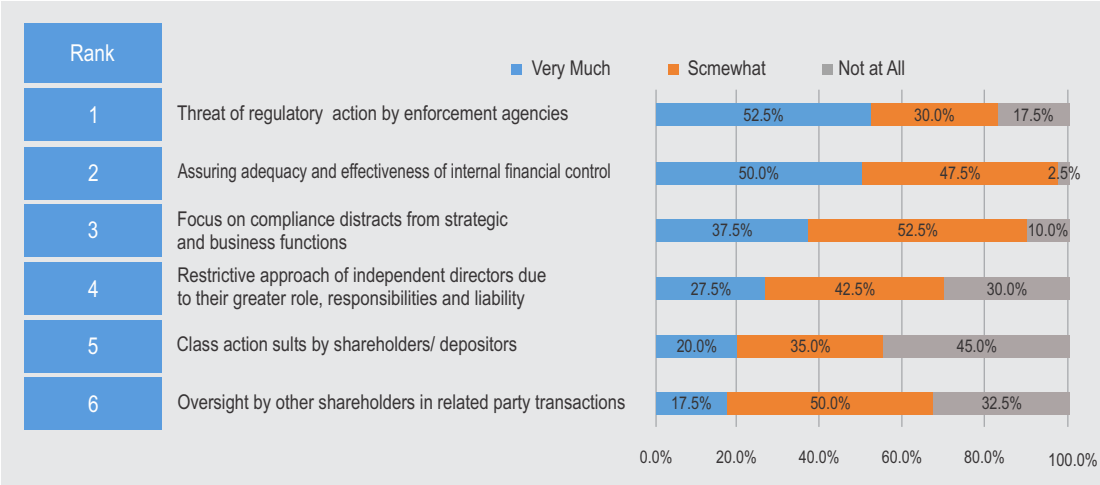
These changes, however, are not uniform across companies. To capture the extent of change in different companies, those surveyed were categorised into the following three groups:

- unlisted companies;
- small listed companies (with annual turnover up to Rs 500 crore) and
- large listed companies (with annual turnover above Rs 500 crore).

Based on these categories, some of the findings of the survey for this segment are:

- **Improvement in financial and non-financial disclosures:** 50% of the respondents among the small listed companies consider the improvement in disclosures to be significant as against more than 70% among the unlisted and large listed companies. Whilst disclosure and reporting requirements have been enhanced for all categories of companies, small listed companies do not perceive much benefit from this. For them, enhanced disclosure brings little tangible value addition to the readers of the financial information.
- **Effectiveness of independent director:** Unlisted companies have seen the maximum benefit of the expertise of independent directors (66.7%) due to their inclusion and participation in this change process. Small listed companies (25%), however, witness least improvement since they have been complying with previous SEBI regulations and these reforms have not made any tectonic shift in their governance mechanism. Larger listed companies have inducted newer directors, created better balance of skills, diversity and experience, which has resulted in better oversight and effectiveness of the institution.
- **Effectiveness of the board:** Only 25% of small listed companies feel their boards have become more effective with the reforms as against 50% of the unlisted and large listed companies. Greater compliance burden coupled with their inability to attract quality independent directors seem to be impacting the effectiveness of the boards of small listed companies.
- **Improved assessment of related party transactions (RPT):** Both small listed companies (40%) and large listed companies (50%) consider that there have been significant improvements in the assessment of RPTs. The enhanced scrutiny has created better systems and processes but, however, not led to significant benefits in form of better price discovery or enhanced investor confidence on the efficacy of such assessment.

What are the challenges companies face because of regulatory reforms?



The governance reforms pose several challenges to companies. *Foremost is the fear of regulatory action (52.5%), followed by assurance of effectiveness of internal financial controls (50%).* These challenges are not homogenous and vary for different categories of companies.

- **Threat of regulatory action**: The bigger the company, the higher the threat perception. The threat perception increases to 70% for large listed companies. Enhanced penalties and threats of prosecution have created an environment of uncertainty for directors. Large listed companies enshrine greater public interest and are therefore subject to more vigilance and actions by regulators. The challenge is further exacerbated by increased compliance requirements exposing companies and their directors to the risks of punitive actions.
- **Greater focus on compliance**: Enhanced focus on compliance is a challenge as it limits investment of time on strategic matters. More than 50% of the small listed companies feel this is significant and a distraction for their boards from strategic and business functions. Unlike large listed companies, smaller companies do not have established processes in place. Such companies believe that the compliance requirements have turned into a burden, rather than an opportunity for improvement and growth, which was the legislative intent.
- **Adequacy and effectiveness of internal financial control**: Small listed companies perceive this as a challenge. They lack resources to put an effective control system in place. The requirements of the Companies Act of 2013 are wider than those prescribed under the SEBI (Listing Obligations and

Disclosure Requirements) Regulations, 2015 [hereinafter called the Listing Regulations} and cover both financial and non-financial controls, which heighten the challenge for small listed companies in this aspect.

Corporate Governance Environment: Assessment of key themes

The survey analyses industry's response to question on four broad themes. Those surveyed comprised of C-level executives, independent directors, company secretaries and general counsels of companies. The respondents belonged to public listed companies (63.3%), private limited companies (18.3%) and public limited companies (18.3%).

Board and its Functions: Is the Indian Board Effective and Independent?

The role of directors has undergone a significant change in the new regulatory framework which codifies their duties, accountability and responsibilities. The survey reflects the following changes:

- Improvement in general board effectiveness (with some exceptions).
- Codified duties have made directors more compliance-driven.
- Boards have reviewed priorities post the reforms. They are more involved in the management of financial matters and are investing greater time and diligence.
- The strategy function of boards has been subsumed to some extent in the enhanced compliance functions which they have to discharge.
- Enhanced personal and professional liability, coupled with insufficient risk-reward matrix, has impacted availability of quality independent directors for smaller and emerging companies.
- Companies and their boards have benefited from diversity and complementary skills sets and experience of directors inducted post-reforms. Larger companies have brought in differentiated skills and have become more effective.
- Boards have moved towards formal evaluation of their directors, including that of boards. However, for most companies, including large listed ones, it is perfunctory.

Command and Control: How good are our processes, controls and risk management systems?

The Parliamentary Standing Committee underlined the need to promote self-regulation through internal mechanisms or procedures. It significantly enhanced board's reporting obligations to include aspects of internal financial controls, risk management and compliance. The respondents were asked to assess the effectiveness of changes brought by the new law. Their response is summed up as follows:

- Improvements are visible in internal controls across the companies. Large listed and unlisted companies have seen significant improvement in their financial reporting and related processes. Small listed companies have not seen optimal gains, as limited resources allowed only incremental steps to strengthen their processes.
- To provide assurance on adequacy and operational effectiveness of internal financial controls, boards seek greater assurance from statutory/ internal auditors, escalating time and costs. This focus on internal controls due to their enhanced liabilities has increased the cost of doing business, which, many argue, significantly outweighs its benefits.
- Enhanced regulations, accountability and onerous liabilities of boards on account of controls and processes have blurred distinctions between board and executive functions, resulting at times in micro management.
- Boards' focus on compliance has affected the time devoted to strategic planning, but it has improved the confidence of shareholders and investors in financial reporting.
- There is a discomfort among companies with respect to dealing with offences of fraud. Most respondents believe that effective fraud risk management and anti-bribery controls do not correspond with the realties in which companies operate and liabilities that a company and its management carry are onerous, if such controls were to be breached.

Transparency and Disclosures: How meaningful is our corporate information?

The Parliamentary Standing Committee had stressed on the need for 'sturdy reforms, enhanced transparency and comprehensive disclosure based regime'. The elaborate disclosures proposed were not intended to increase the burden. The survey tried to assess the improvements these changes have brought. These are as follows:

- Transparency and disclosures have brought in significant improvements for large companies. However, in the case of small listed companies, the regulations have not led to significant improvements in financial and non-financial disclosures.
- There have been general improvements in the quality of disclosures but a vast majority of the requirements do not have adequate benefits and are mere "form over content," adding to compliance burden.
- Companies, particularly small listed ones, are finding it difficult to meet the challenges of continuous disclosure obligations. Assessing the materiality of information and managing the immediacy of disclosures are significant risks that such companies need to manage.

- Overall, companies find it difficult to comply with insider trading regulations, largely due to lack of awareness among all sections of the company. While the regulations add to transparency and reduce self-dealing, the costs involved are high.

Impact of Reforms: Has our compliance become onerous?

The measure of effectiveness of reforms lies in the benefits they generate and the ease with which they can be complied with. The survey sought to understand whether the difficulty of implementing the regulations is commensurate with the benefits gained. The survey found that:

- Compliance costs have increased. While large corporates have established compliance systems and resources to manage the extra burden, small listed companies find it difficult to mobilise resources and hence find it burdensome.
- Staff-related costs and capital costs towards structural improvements in systems and processes, including IT frameworks, have increased. Opportunity costs have also increased as more time is devoted to compliance, by management and boards, often at the expense of other business related activities.
- Threats of regulatory action and ambiguity in law have led the boards to seek additional assurances, further raising costs. A similar trend appears in the case of legal and consulting services with respect to enhanced fraud risk.
- Survey findings highlight that there is a greater propensity among small listed companies to exit public markets due to significant regulatory burden. The negative sentiment, however, could subside over time.

Recommendations

Listed below are the key recommendations based on the insights gained from the survey:

Effective functioning of the board:

The following steps are considered necessary to ensure that boards function more effectively and without the "stress" of compliance:

- ✓ Deleting section 134(5)(f) of the Companies Act of 2013 ("the Act"), which requires the board to state that they have devised proper systems to ensure compliance with provisions of all applicable laws and that such systems are adequate and operating effectively.
- ✓ The board's assurance function with respect to adequacy and operating effectiveness of internal financial controls for listed companies [section 134(5)(e) of the Act] should ideally be removed. If not, appropriate thresholds should be incorporated to exempt small listed companies from its purview.

- ✓ The requirement for creation of board committees, viz. Audit Committee, etc. (under section 178 of the Act) in closely held companies should be dispensed with or the existing limits such as paid up share capital of Rs 10 crore or more, should be suitably enhanced.
- ✓ Wholly-owned subsidiaries of companies which have no external funding (in the form of equity or debt) should not be subjected to the requirements of appointing independent directors or constituting a Nomination and Remuneration Committee.

Strengthening the office of independent directors:

The following steps are felt necessary to ensure that the office of independent directors remains significant and productive:

- ✓ Independent directors must be provided greater assurance with respect to actions taken in good faith, and greater clarity on what constitutes due process, in conformity with business judgement rule.
- ✓ The requirement of appointing independent directors in closely held companies should be removed or threshold limits suitably enhanced.

Processes, controls and risk management:

- **Exemptions to smaller listed companies:** Certain classes of listed companies can be exempted under section 462 of the Act, from the applicability of section 134(5)(e) of the Act which currently requires them to comply with the provision at par with large listed companies.
- **Internal financial controls**
  - ✓ An amendment is required in section 134(5)(e) to delete reference to the words 'internal financial controls' and replace it with 'internal controls over financial reporting' in line with rule 8(5)(viii) of the Companies (Accounts) Rules, 2014 and the "Listing Regulations"]. This is necessary to improve effectiveness of internal controls, processes and risk management:
  - ✓ The certification requirements should be limited to listed entities only.

Making disclosures effective and meaningful:

The following steps are felt necessary to ensure that disclosures are effective and meaningful, and not burdensome:

- ✓ The disclosures requirements under the Act should be aligned with that of the Listing Regulations and should be made more rational, by removing redundant disclosures that do not add value.
- ✓ The definition of the term 'connected persons' under the SEBI (Prohibition of Insider Trading) Regulations, 2015, may be revisited as its scope is very

wide and makes it very difficult for companies to monitor insider trading in this context.

- ✓ Mere errors of non-disclosure or late disclosure of information which are not significant in nature should not be made punishable with either substantial monetary penalties or imprisonment. Accordingly, it is necessary to substantially bring down the quantum of penalties for such errors.
- ✓ Limiting the scope of continued disclosure obligations. Materiality criteria may be defined by prescribing quantitative parameters for boards to consider while assessing materiality of an event/information, thus limiting subjectivity.

As we try to recalibrate the corporate governance reforms, it is necessary that we put the focus back on better implementation as a driver of effective regulation. As the survey suggests, many of the legal provisions are good in form but difficult to enforce and practice. Corporate law must be pragmatic and reasonable rather than punitive, and thus, counter-productive. The current corporate governance regime is also subject to too many gatekeepers. We must focus on the quality of compliance rather than number of compliances. The focus should be on enforcement of existing regulations, rather than multiplying the compliance burden for companies.

Further, while many of the regulations are well-intentioned, in the near short term to medium term they require significant investments, apart from the opportunity costs. The need is to draw a balance between the need for higher reforms with the costs involved.

It must also be realised that no reform is an end in itself; it is always a work-in-progress. Corporate Governance reforms in India, like any other reform, would need improvements and course corrections through a participative process and engagement. It is quite heartening that industry's initial recommendations on the Companies Act, 2013 and Companies Rules, 2014 were favourably considered by the Government and the Act and Rules amended accordingly. The second amendment of the Act is currently awaiting Parliamentary passage and is aimed to further facilitate the implementation of the law and help realise the effectiveness of the governance framework.

Corporate Governance in India@2016: Where do we stand?

The passage of the Companies Act of 2013 ("the Act") is regarded as a 'historic feat' intended to provide an impetus to the country's growth momentum by ushering in a regime of 'less regulations and more compliance.' The focus was to enhance transparency through fewer regulations, self-reporting and disclosure, to outline the positivity in the Indian economy.[1]

The underlying objective was to pave way for a futuristic looking India where we have good corporate governance, CSR, investment, job creativity, growth and also have compliances. The Companies Act, which was followed by changes to the securities listing regulations, pursued the goal of adopting best global practices and to make the corporate governance framework in India more effective.

How far have we come in that direction, more than two years since the reforms?

The Parliamentary Standing Committee as part of its review of the Companies Bill, laid down the following guiding principles on which the 2013 Act is based:[2]

- Sturdy systems, enhanced transparency and comprehensive disclosures-based regime;
- Self-regulation through internal mechanism/procedures;
- Severe and decisive action against fraudulent conduct, while protecting bona fide managerial conduct;
- Greater responsibility and accountability of independent directors and audit committee.

The environment in which the Standing Committee met was one of concern and caution in the backdrop of the global financial crisis and domestic corporate governance failure. The changes it recommended therefore had traces of regulatory scepticism.

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[1] Parliament passes Companies Bill; The Economic Times, August 8, 2013

[2] Standing Committee on Finance (2009-2010) Twenty-First Report on the Companies Bill, 2009. Available at http://www.icsi.edu/webmodules/linksofweeks/21_Report_Companies_Bill.pdf

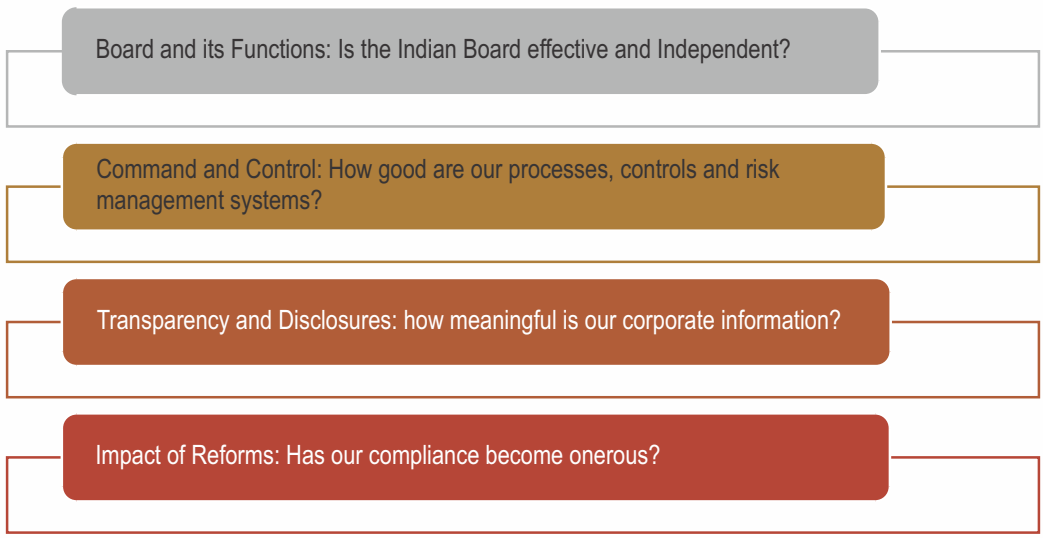
Many would argue that significant recommendations of the Committee were somewhat reactionary in the backdrop of regulatory activism. But regulatory theorists have put out an alternative view that corporate laws need modernisation which is suited to a global operating environment.

The resultant Act, particularly with respect to provisions on directors' accountability and liability including that of independent directors, audit oversight, provisions in relation to internal financial controls and fraud deterrence, is quite rigorous. In its current form, the Companies Act has over sixty provisions, which are punitive and carry criminal liabilities for the person found guilty.

Do the reforms bring a positive change in the regulatory climate? Or are they onerous and do their benefits outweigh the costs and efforts?

The Companies Act of 2013 was followed by revisions in Clause 49 of the Listing Agreement. The new framework has significantly changed the way companies are governed. These changes affected governance structures, operating models and approaches to risks for companies.

To assess the impact of these reforms on companies, on their governance structure, processes, operating environments, costs and the overall governance environment of the country; FICCI conducted a survey on the following parameters:



The survey and interviews, conducted during September 2015 to January 2016, collected 150 responses from Directors, CEOs, CFOs, legal counsels and others, supplemented by in-depth interviews, the details of which are given in the methodology section.

Corporate Governance Environment Assessment

Key Areas of Impact

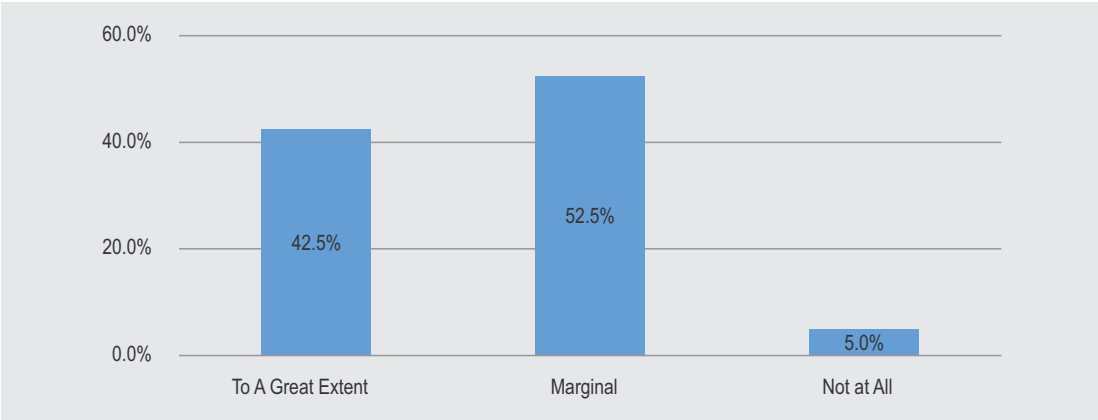


Board and its functions: Is the Indian board effective and independent?

Functioning of the Board

The role of the directors has undergone a catalytic change under the new regulatory framework set into motion by the Companies Act of 2013, and the Listing Regulations, which has codified the duties, accountability and responsibilities of directors.

Does the board discharge its responsibilties more effectively, post-the reforms?

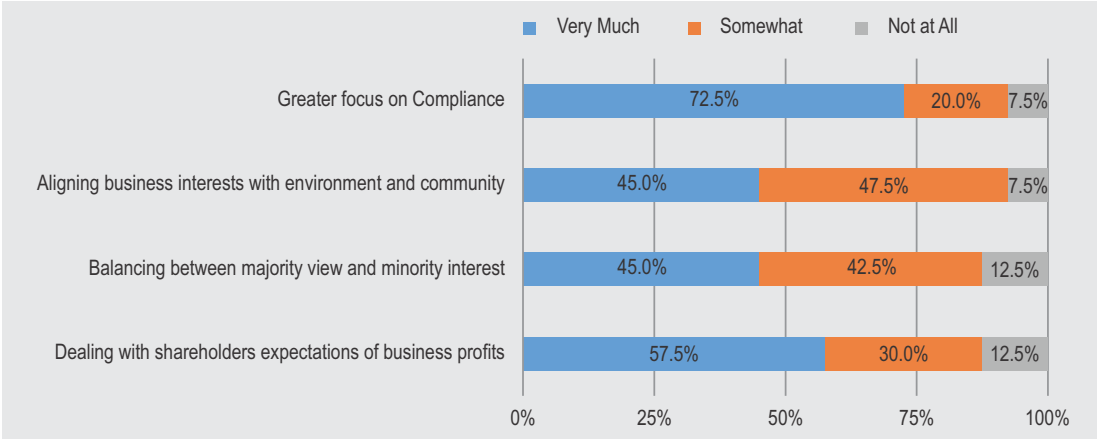


The survey highlights an improvement in general board effectiveness, with 42.5% of the respondents feeling positive about the change. However, segment analysis of the respondent companies shows that the improvement is not uniform. Only a meagre 25% of the responding small listed companies felt board effectiveness has improved "to a great extent".

What are the key factors which affect the functioning of the Board of Directors?

Statutory recognition of directors' duties requires the board to act more responsibly and carries with it the risk of greater scrutiny of their actions. The survey sought to assess the extent to which board's functioning has been impacted due to change in regulations

Key factors which affect the functioning of the Board



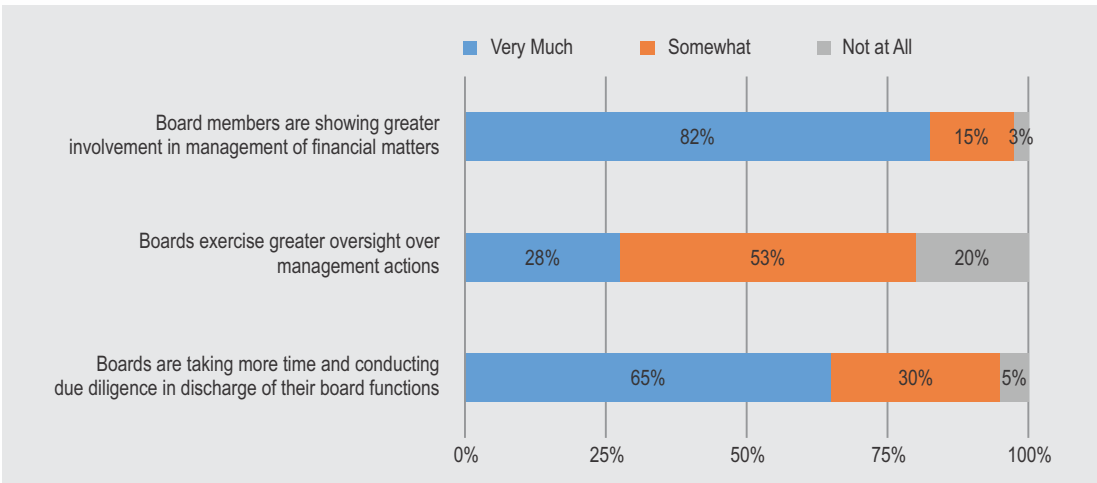
A bulk of the respondents agreed that the codified duties have made the board of directors more compliance-driven (72.5%).

It appears that this compliance-focus emanates from the need to mitigate the liability risks which the law puts, both on boards as well on its individual members. Excessive focus on regulatory compliance and managing risks can detract from the natural cause for which a business enterprise exists, which is to keep moving the wheels of economic progress by taking acceptable risks for disproportionate rewards.

> RESPONDENT
> *In some cases where the company is a private company without any public capital or interest, setting up governance and disclosure standards equivalent to a public company can become counterproductive and even against the principles of freedom for private enterprises.*

What then are the new priorities of the board in view of the new regulations?

Board priorities in dealing with enhanced regulations



Boards are showing greater involvement in the management of financial matters (82%). It is perceived that boards are more involved and watchful of their actions which may be due to the consequences and liabilities of not exercising due care.

Further, boards are investing greater time as they engage in more diligence measures, so as to be assured that they have discharged their responsibilities properly. This is reflected in the survey results, with 65% of the respondents feeling that they invest far greater time before arriving at a decision.

RESPONDENT

The board now spends a lot of time and effort in ensuring compliance with laws, since this is now a requirement calling for certification. Excessive focus on compliance now dilutes the time and effort on strategy and direction, which is a pity since board members have been appointed for their expertise and experience in their respective fields.

This, however, is potentially affecting the board's ability to provide strategic direction to the company. Sustainable performance of a company is contingent upon this function, which essentially drives its future direction and its long term objectives and goals. As the survey indicates, the strategy function of boards has been subsumed in the enhanced compliance functions which they have to discharge.

Will an over emphasis on compliance divert corporate attention at the top, away from its focus on business and the value it creates for the shareholders, government, employees etc.?

The survey results seem to support this conclusion. While greater thrust on compliance assurance by Boards has imbued greater oversight and control, it holds the risk or potential of diverting the attention of boards from their strategic functions. In the long run, this diversion may result in inversely affecting the competitive edge of Indian businesses.

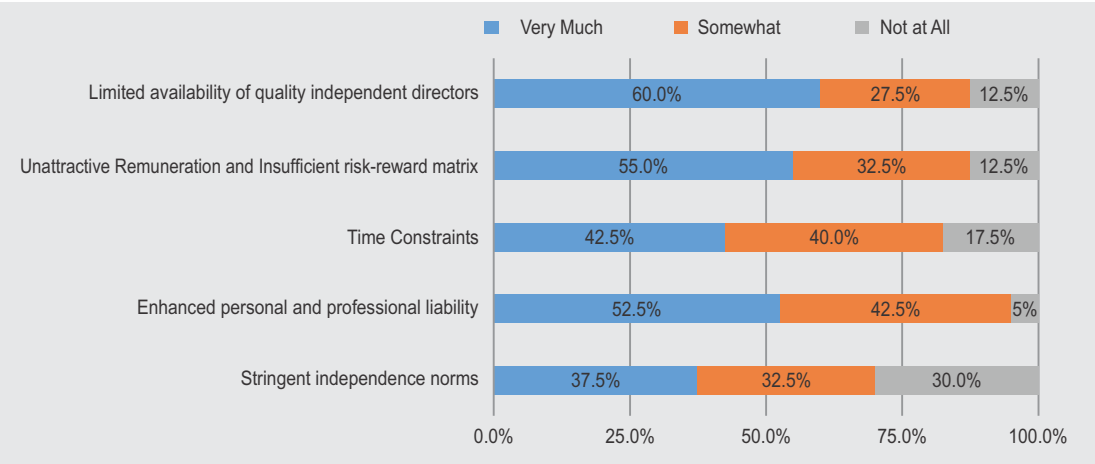
The board's function seems to be increasingly focused on meeting compliance formalities rather than developing standards which would generate value out of compliance. In the present context, compliance has become more of a 'tick-box' approach rather than holistic and need-based. Smaller-listed companies have not gained much improvement in terms of key governance areas, while adding to their compliance burden and cost.

Independent Directors: Are we expecting too much?

In the previous section, we have seen that independent directors have become restrictive in their role, a finding starker in the case of small listed companies. The survey shows that independent directors have become more compliance focused, which at times could come at the cost of sacrificing their strategic contributions to a company.

The roles and responsibilities of independent directors formed an essential part of the corporate governance reforms and gained significant statutory attention in the Companies Act, 2013. In the backdrop of such enhanced regulatory requirements, the survey sought to assess the factors which affect the decision making process of independent directors. The survey in particular sought to assess availability of quality directors, adherence to independence standards, enhanced liability, time commitment and motivational factors. To develop a perspective on the issue, interviews were conducted among serving independent directors.

Factors affecting the effectiveness of independent directors



The findings reflect the following:

- 60% of the respondents feel that there is a limited availability of quality independent directors. This comes in the way of a company's ability to choose an appropriate governance steward which in turn, may become a barrier to effective and robust decision making by the board, more so in the case of small listed companies.
- 55% of respondents feel that unattractive remuneration and an insufficient risk-reward matrix were factors which prevented independent directors from joining a board.
- Time constraints, in the wake of enhanced duties, form a key consideration for independent directors, as 42.5% of the respondents feel this to be an important factor. The number of meetings of the board and its sub-committees has increased in the past two years for most companies, requiring greater time commitments. As survey interviews show, independent directors prefer to join larger boards rather than smaller ones.
- 52.5% of respondents feel that enhanced personal and professional liability affect the functioning of such directors.

The survey indicates that enhanced personal and professional liability for independent directors coupled with an insufficient risk-reward matrix acts negatively on effective performance of independent director, and also deters quality persons from taking up positions of independent directors. The intent of the Parliamentary Standing Committee in stressing the need to protect independent directors from criminal prosecution under various applicable laws, is relevant in this regard. As the Committee said, there is a need to circumscribe and limit the liabilities of independent directors, for them to act without fear.

RESPONDENT

Increased liabilities have necessitated that directors undertake considerable due diligence before accepting independent directorships in companies. It is also important to check the integrity of the promoters and financial position of the company. Due to the limit on the number of directorships as well as the enhanced liability on directors, mid-sized companies find it difficult to find independent directors who are willing to take on the role.

RESPONDENT

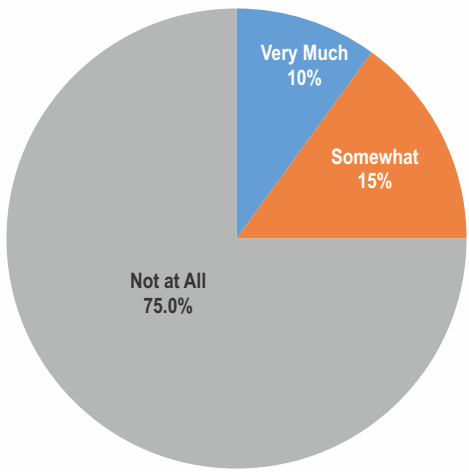
There seems virtually no incentive for an individual to join a board with all the onerous responsibilities and very little reward.

The survey finds that the functions of independent directors and the risks associated with it are not perceived to be commensurate with the rewards. This holds the risk of creating a gap in terms of fulfilling the expectations which the law has of independent directors and the potential rewards it offers to them. This is a challenge particularly for smaller companies, where the risk-reward gap is much higher than in larger companies, potentially making them unattractive for quality independent directors to join. One may need to put a renewed thought into how the role of the independent director could best be made effective for all companies.

Board Composition and Diversity

Board composition and its diversity in skills and background is essential to reduce "group think" and is crucial for unlocking fresh perspectives, innovation and organisational creativity. The regulatory framework, as enunciated in the Companies Act, 2013 and SEBI Regulations, highlights the need for diversity. SEBI Regulations state that it is the Board's function to ensure a transparent nomination process with diversity of thought, experience, knowledge, perspective and gender. Both provisions have called for gender diversity of boards, a requirement which is aimed at breaching the gender bias, improving corporate governance as well as championing women's rights.

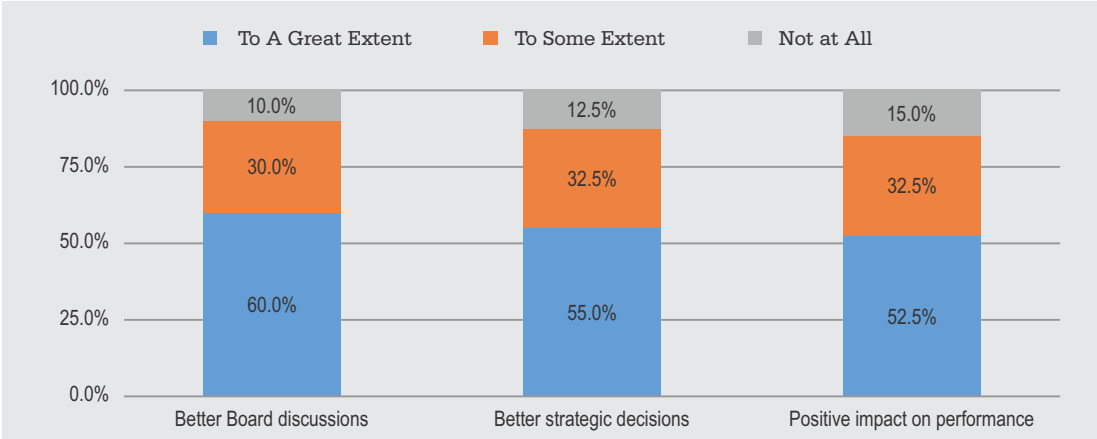
Does diversity of directors lead to a breakdown of board consensus?



Does diversity of directors lead to a breakdown of board consensus?

Every three out four respondents agreed that directors from different backgrounds make the board more diverse and decision making more robust and inclusive. Our survey shows that excessive board diversity does not negatively impact the ability to reach unanimity. Mature discussions need to be based on collegium and consensus and need not be unanimous, which was the trend of earlier corporate decisions. In due course, Indian boards will need to deal with dissent and significantly diverse and alternative positions taken by directors. This will "need getting used to" by the majority owners in many traditional industries.

Impact of board diversity on the company's functioning



More than 85% of respondents said that board diversity has from "some extent" to "a great extent" resulted in better board discussions and strategic decisions. Also, more than 50% of the respondents agreed that it had very much improved the performance of their organisations.

With respect to gender diversity, the survey respondents whom we interviewed, highlighted the positive impact of inclusion of women directors. A majority of the companies surveyed were content with the performance of women directors, whom they considered seasoned professionals first and foremost.

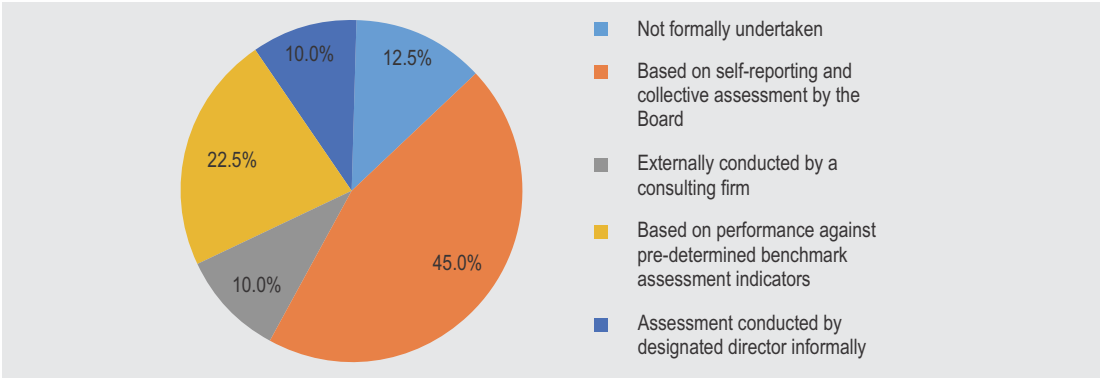
The survey results point that companies and their boards have benefited from the regulations to make boards more diverse and inclusive. Further analysis shows that larger companies have brought in a differentiated skill and experience mix with lesser degree of entrenchment and higher independence, leading to better board debates and discussions - resulting in more effectiveness.

Board Evaluation - Does it really matter?

Board evaluation ensures that board members understand their individual roles as well as their collective responsibilities. Under the Companies Act of 2013 and the

SEBI Listing Regulations, board evaluation is a formal requirement. The new company law now mandates formal annual evaluation of the board, its committees and individual directors. In this regard, the survey sought to understand how board evaluation is undertaken and the challenges faced in the process.

How does the board undertake its own evaluation?



The survey results show that three out of four agree that boards have moved towards a formal evaluation of their directors, including that of boards. However, the findings also suggest that companies do not have much clarity on the process of board evaluation. Being a new concept, it needs clarity in approach.

Board evaluation is in a nascent stage and will develop into a robust process as various constituents examine and develop protocols, frameworks and reference points for such evaluation. Till this process of evaluation becomes more inclusive, acceptable and robust, such evaluation of directors should be made in a collective manner which is more acceptable and builds trust among the board members.

> RESPONDENT
> *The prescriptive nature of the evaluation process is not practical in a promoter-led set up. A greater flexibility in the wording of the law would make the provision practical to implement. It should be left optional*

Whilst the objective of board evaluation is well-intentioned, there are challenges which come in the way, notably, concentrated ownership structures, absence of experience among board members, unrealistic expectations from certain classes of directors like independent directors, and a cultural bias against honest appraisal. In light of these challenges, the prescriptive nature of the evaluation process as prescribed under the Companies Act, for instance, performance review of the board, the chairman and non-independent directors, in an executive session attended exclusively by independent directors, does not appear practical.

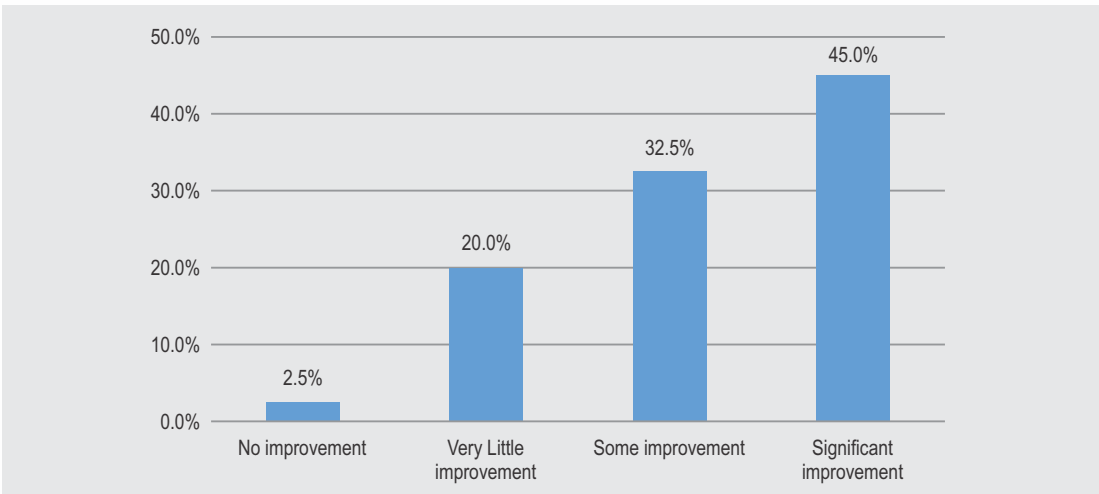
Command and Control: How good are our processes, controls and risk management systems?

The Parliamentary Standing Committee, as part of its review of the Companies Bill, 2009, underlined the need to promote self-regulation through internal mechanisms or procedures. Towards this objective, it significantly enhanced the board's reporting obligations to include aspects of internal financial controls, risk management and compliance.

Based on the Standing Committee's recommendation, an expansive meaning of 'internal financial controls' (IFC) was also adopted, to include, 'policies and procedures towards ensuring the orderly and efficient conduct of business, including adherence to company's policies, safeguarding of assets, prevention and detection of frauds and errors, accuracy and completeness of accounting records and timely preparation of reliable financial information.' Directors were required to affirm that such controls are adequate and operating effectively.

The survey sought to assess the effectiveness of the changes in terms of the benefits gained and challenges with respect to providing the required assurance.

Have internal controls and the risk management environment improved in the past 24 months?



A segment-wise analysis of the above results and respondent interviews highlighted the following:

- 22.5% of all respondents felt there was no improvement or very little improvement in the controls and risk management environment;
- Of the small listed companies who responded, 12.5% felt there was no improvement, while another 12.5% felt the improvement was very little.
- Small listed companies have not witnessed a significant improvement while having to bear the increased burden.
- Large listed companies have seen significant improvement in their financial reporting and related processes, as 55% of the respondents agreed.

A majority of the respondents who were interviewed stated that improvements relate to financial performance and related disclosures. *It therefore appears that even for large listed companies, the gains with respect to internal financial controls is not spread over the entire scope of IFC, as defined under the Companies Act of 2013.*

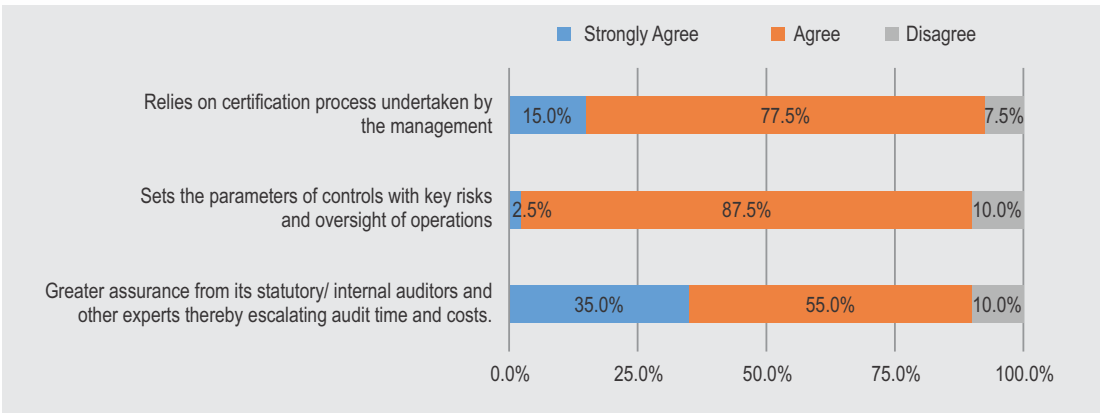
RESPONDENT

There is a greater recognition of the onerous nature of liability that the board faces in view of the changes in reporting requirements, said a respondent director, even as he agreed that the scope of 'internal financial control' is merely a tick-box assurance and does not generate value

Establishing the 'Adequacy and Operating Effectiveness' of Internal Financial Controls

The law requires boards of listed companies to state that the internal financial controls so established in their company are adequate and are operating effectively. The requirement under the Companies Act of 2013 is wider than under the SEBI Listing Regulations, which requires the board to provide this assurance only with respect to internal controls over financial reporting.

How does the Board provide assurance over adequacy and effectiveness of IFC?



The results highlight the following:

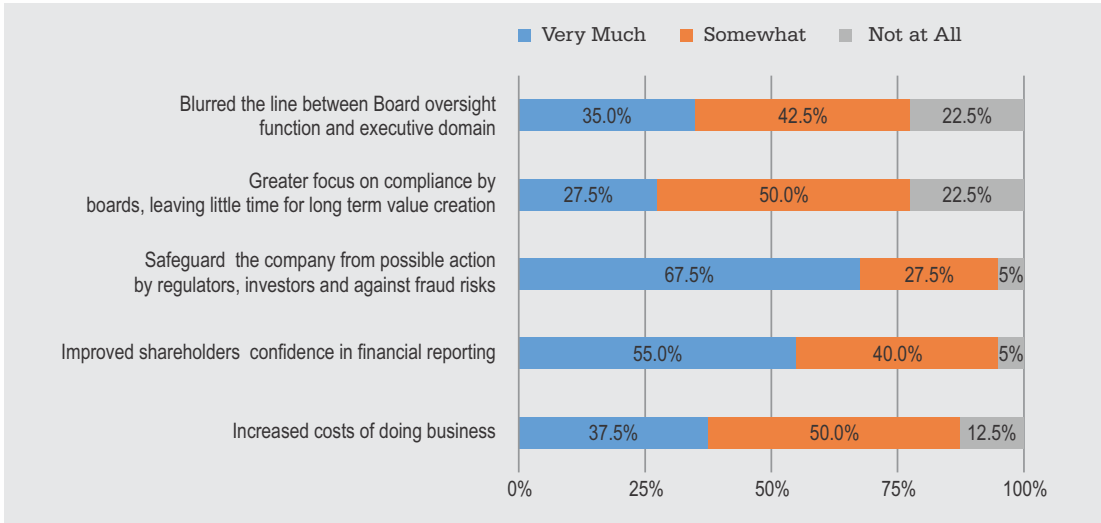
- Most respondents believed that Indian boards set the tone for an appropriate framework for internal controls and carryout oversight of its operational effectiveness.
- At times boards rely on the certificates of management and external experts on such matters.
- Boards seek greater assurance from statutory/ internal auditors, thereby escalating audit time and costs

It appears however, that small-listed companies are unfairly placed with respect to compliance with this requirement, which necessitates a review of its applicability on them. Also, for large listed companies, the improvement is limited to areas of financial reporting-a requirement which is adequately covered under SEBI regulations.

RESPONDENT

Too much reliance on management certification processes may not create a robust control environment and can be self-defeating. This may not create the best defence for directors in the event of compromise of such controls.

How has the board's focus on internal controls over financial reporting and beyond impacted the company's operating environment?



A strongly emerging theme is that enhanced regulations, accountability and onerous liabilities of boards has blurred the distinction between the board and the executive function. Boards' focus on compliance has cut down time for strategic planning and managing the future.

However, a strong compliance focus has improved the confidence of shareholders and investors in financial reporting and provides a safeguard against risks of various kinds. This was mirrored in a 2009 survey of 2,907 firms conducted by SEC (SEC 2009). 27% of the respondents agreed that the Sarbanes-Oxley Act (SOX) had enhanced investor confidence.[3]

However, boards' greater focus on internal controls has increased the cost of doing business which, many companies argue, is significantly outweighed by its benefits. This is particularly the case in relation to internal financial controls, as defined in its expansive manner under the Companies Act of 2013 and not limited to controls in relation to financial reporting.

> RESPONDENT
>
> *For directors to attest the adequacy and operating effectiveness of internal controls beyond financial reporting, without even a proper guidance and framework which one has to adopt, creates an environment of self-doubt. More so, in a situation where there is a fear of being held liable for potential breach which could not be identified as part of the board's subjective assessment.*

Based on these findings, the following aspects may require change/ clarification:

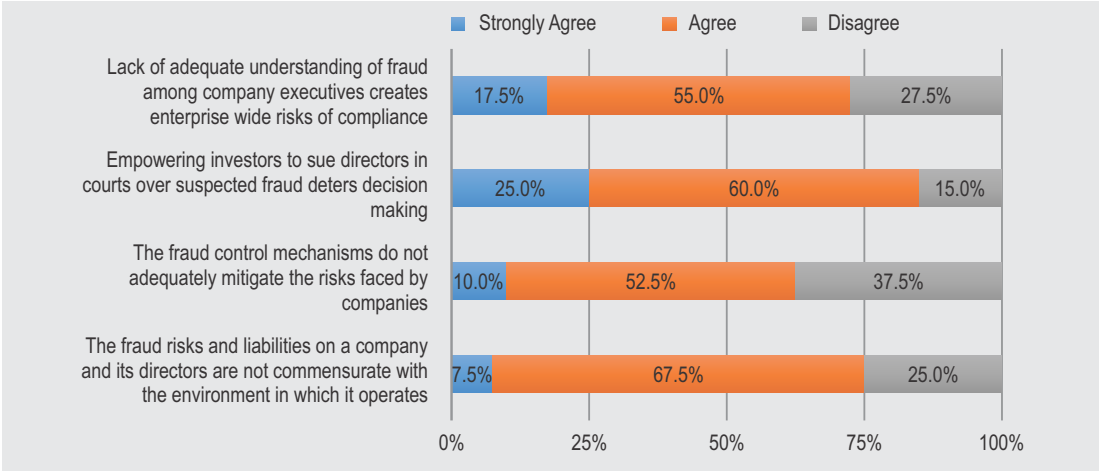
- The board's assurance on internal financial controls be limited to financial statements, thereby aligning with the requirements of the Listing Regulations.
- Provisions for criminal sanctions of directors in case of breach over 'adequacy and operating effectiveness' of internal financial controls be removed, as there is a great degree of subjectivity and discretion involved.

Dealing with Fraud Risks

The Companies Act, 2013 provides a very wide definition of fraud, creating onerous responsibilities on the company, the management and the board of directors, for actions/ inactions, even in cases where there is no wrongful gain or loss. In view of this enlarged definition, the survey asked the respondents how they were impacted by this change.

[3] SOX after Ten Years: A Multidisciplinary Review by Coates and Srinivasan- Harvard Business School January 2014

How does fraud risk affect the company, the board and the managment?



The following have evolved as the major fears:

- Lack of adequate understanding of fraud among company executives, thereby creating enterprise wide risks of compliance (72.5% of the respondents strongly agree/ agree).
- Existing fraud control mechanisms do not adequately mitigate the risks (62.5% of the respondents strongly agree/ agree).
- Fraud risks and liabilities on companies and directors are not commensurate with the operating environment (75% of the respondents strongly agree/ agree).

Based on these findings, the following aspects may require change/ clarification:

There are emerging signs of discomfort among companies with respect to dealing with offences of fraud. Many also feel that the provision of class action suits deters expedient decision making by directors due to fears that shareholder may challenge board decisions.

Companies operate within the realm of the operating environment that exists in a country. Most respondents believe that effective fraud risk management and anti-bribery controls independent of that milieu is unrealistic. The liabilities that a company and its management carry if such controls were to be breached are onerous. The Companies Amendment Bill of 2016, which brings in materiality thresholds to the definition of fraud, has provided some respite. Challenges with respect to effective handling of fraud risks however remains, making compliance difficult.

There is a growing concern among boards that their actions are not sufficient with respect to internal financial controls and fraud risks. Lack of clarity over implementation of related provisions has led to inconsistency in approach, particularly in relation to internal financial controls, and may need greater clarity.

Transparency and Disclosures: How meaningful is our corporate information?

Transparency in functioning of corporates formed a significant part of the Parliamentary Standing Committee deliberations on the Companies Bill of 2009, which stressed the need for 'sturdy reforms, enhanced transparency and comprehensive disclosure based regime.' While elaborate disclosures have been proposed, the regulatory intent was to ensure that the disclosure requirements do not create an unnecessary burden.

Financial and Non-Financial Disclosures

The Companies Act, 2013, has significantly enhanced the disclosure requirements and assertions in the Directors' Report – risk management, internal control for financial reporting, legal compliance, related party transactions, CSR among others.

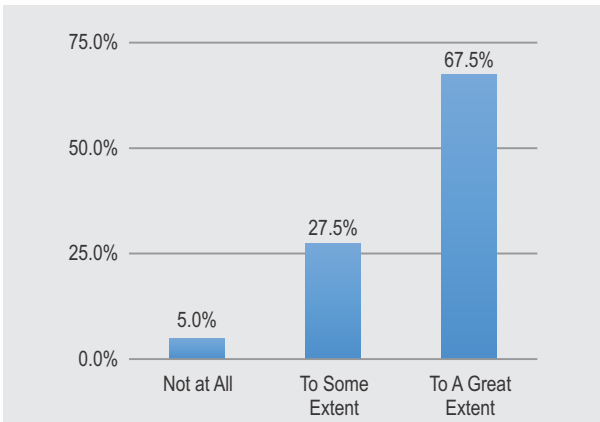
The survey aimed at assessing the improvements witnessed pursuant to these changes.

Has there been any improvement in financial and non-financial disclosures under the new regulatory framework?

The survey results highlight that transparency and disclosure have witnessed significant improvement. More than two–thirds of the respondents agreed that financial and non-financial disclosures improved to 'a great extent'.

The key areas of non-financial disclosures are embedded in the Directors' Report, reports of various board committees, disclosures to

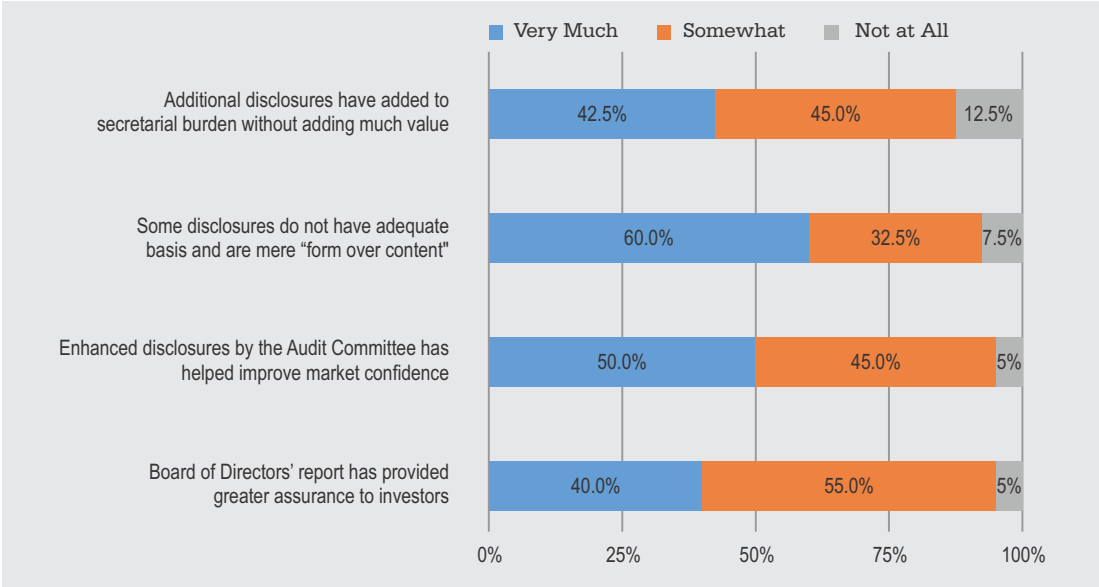
Improvement in financial and non-financial disclosures



the stock exchanges, transcripts of investor calls etc. Many felt that non-financial disclosures added new dimensions to financial information putting corporate results in a better perspective.

One of the essential requirements of any disclosure regulation is the benefit it provides to its intended user. The survey shows that while there is a feeling that there have been improvements in the quality of disclosures, there is a belief that some of the disclosure requirements are not beneficial and merely add to a company's compliance burden.

Have additional disclosures helped companies?



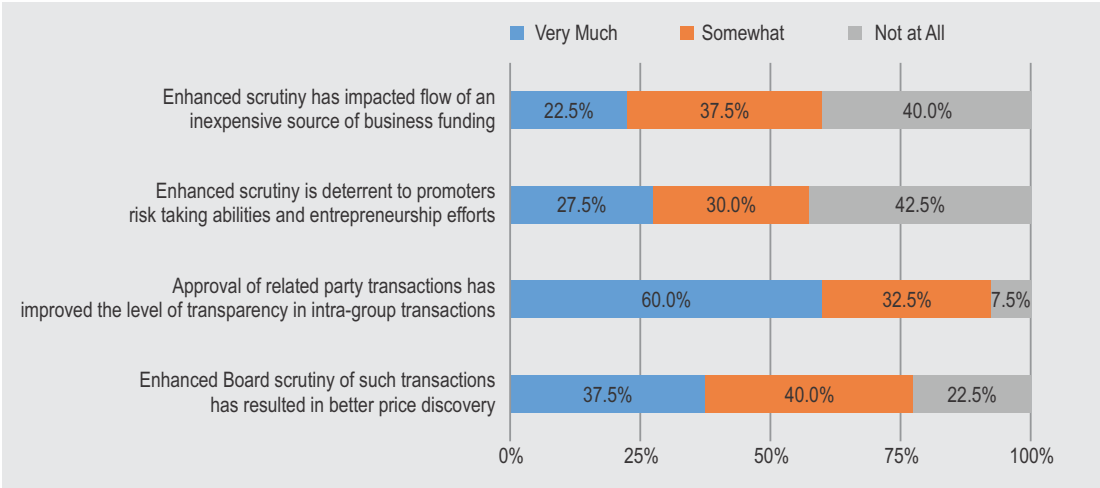
Reforming Related Party Transaction (RPT) – Issues & Challenges

RPTs are widespread and are part of every business group activity and have come under close scrutiny in recent years because of their potential abuse by companies. A study by IIM Bangalore[4] which analysed company dealings between 2009 and 2011 found that RPTs were widespread and present in almost all Indian companies.

Reforms over RPTs were aimed at bringing transparency to company's dealings. The survey therefore tested the effectiveness of the regulations with respect to the transparency they brought in a company's affairs.

[4] An Analysis of Related-Party Transactions in India by P Srinivasan, IIM B. January 2013

How does the Board look upon Related Party Transactions, in an environment of enhanced regulatory scrutiny?



The focus on related party transactions and its approval process through the audit committee, board and the shareholders has brought significant oversight and demonstrative processes for fair price discovery. RPT's in India are not only unavoidable given the diverse interests of most Indian promoters but also creates a defined and dependent supply chain.

The reforms have brought about significant transparency, scrutiny and oversight of such transactions, which are presumed not to be on arm's length unless otherwise proven. Though some respondents feel such scrutiny is a deterrent to expedient business decision making, but a fair price discovery process and its independent monitoring creates greater shareholder value.

Have restrictions on Inter-Corporate Loans/ Investments impacted financing capabilities of companies?

Many respondents felt that due to such restrictions family companies may be losing out to an easy way of financing which could result in faster corporate growth. Restricting holding companies from providing loans/ guarantees/ security to its subsidiaries has impacted some company's financing abilities, though exemptions for wholly owned companies have provided some relief.

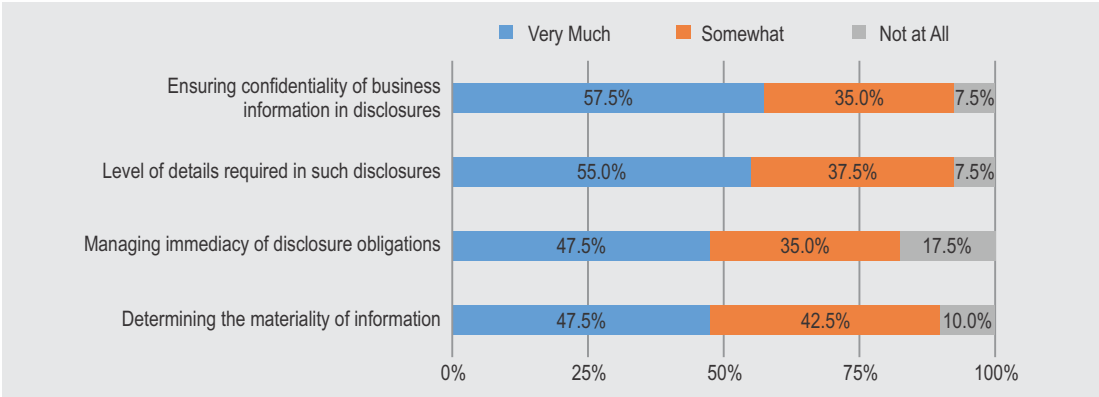
The survey respondents highlighted the concern among private entities over challenges in raising capital pointing to a need to re-calibrate the regulatory tightening of norms.

Continuous Disclosure Obligations – A Compliance Poser

The disclosure obligations of listed companies were enhanced with SEBI putting into force the continuous disclosure requirements in September 2015. The objective of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 is to enable investors to make well informed investment decisions by timely, adequate and accurate disclosure of information on an ongoing basis.

The survey asked respondents whether the challenges with respect to continuous disclosure are easy to comply with.

How difficult is compliance with continuous disclosure obligations?



47.5% of the respondents strongly agree that assessing the materiality of information posed a key challenge for boards since opinions of individuals differ and consume significant amount of time of board and management.

Also, 47.5% of the respondents' felt that manging the immediacy of disclosure, which according to the Regulations must be within a span of 24 hours of an information/event happening, is challenging. Another area of concern is to ensure confidentiality of business information and maintain competitive advantage in the regime of enhanced disclosures.

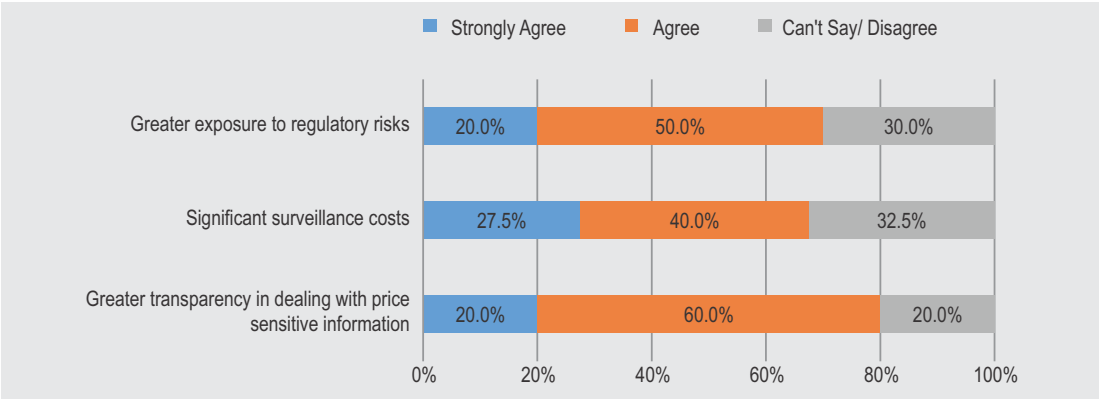
Overall, it is felt that companies, particularly small listed companies, are finding it difficult to meet the challenges of continuous disclosure obligations. It appears that companies are carrying out a delicate balancing act of making immediate disclosures without giving out speculative information that may trigger movements in capital markets. However, there are significant risks with respect to failing the regulatory expectations in relation to ongoing transactions and over fears of losing confidential information to business competitors.

Insider Trading Regulations – Meeting the Challenges

SEBI's Prohibition of Insider Trading Regulations of 2015 require companies to deal with the risk of insider trading with greater alacrity. The key changes introduced include expanded definition of an insider and manner of dealing with price sensitive information.

The survey aimed at assessing the impact as well as the challenges faced by companies in complying with this regulation.

How have the new insider trading regulations impacted you?



The survey indicates that companies are not confident of overall compliance with the insider trading regulations.

70% of the respondents agree that the Regulations have resulted in greater exposure to regulatory risks. They feel that it is hard to sensitise all concerned sections within a company to develop an awareness of their obligations under the Regulations.

RESPONDENT

Transparency in disclosure should be the driving force for the insider trading regulations.

While 80% of the respondents held the view that the Regulations have led to greater transparency in dealing with price sensitive information; 20% were not sure of its benefits or disagreed with this view. Compliance with the insider trading regulations has significantly raised the surveillance costs for companies, 67.5% of the respondents said.

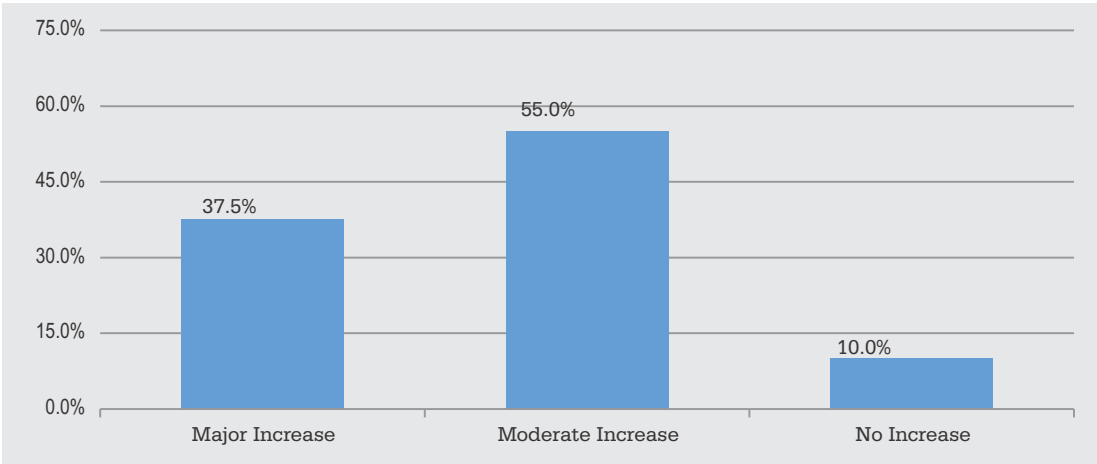
Overall, companies find it difficult to comply with the insider trading regulations, largely due to lack of awareness among all sections of the company. While the insider trading regulations are adding to transparency and reducing self-dealing, the costs involved are high. The survey finds that a significant part of the challenge is to build sensitivity and create awareness at all levels of the organisation. Unless that is reached, true compliance with the objectives of the Regulations may not be achieved.

Impact of Reforms: Has our compliance become onerous?

Regulatory reform comes with its own share of burdens. The measure of effectiveness of reforms lies in the benefits they generate and the ease with which they can be complied with.

The survey sought to understand if the difficulty of implementation of the Regulations is commensurate with the benefits gained. The findings of the previous sections highlight that compliance excesses have often diverted the board's attention from other functions like strategy building. Here, we consider the cost implications on companies.

What has been the overall impact of regulatory reforms on the total compliance cost?

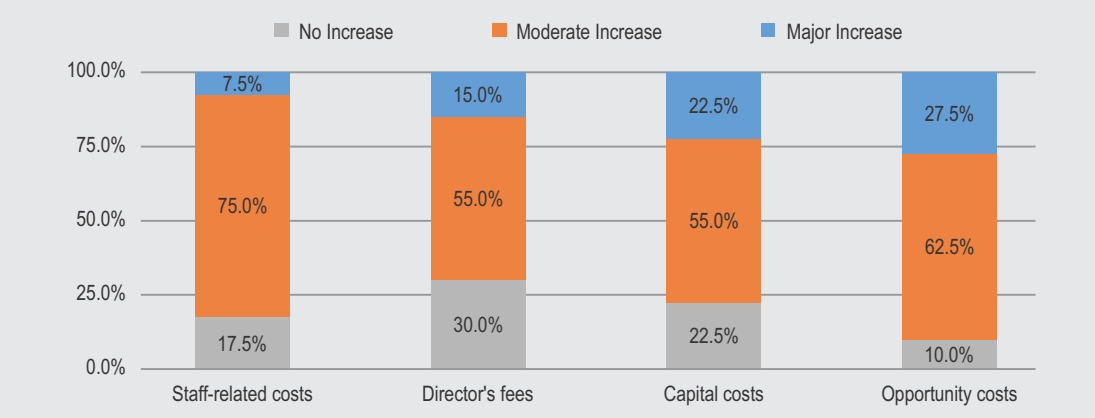


A significant number of the respondents (92.5%) felt that total compliance cost has increased, of which 37.5% felt that increase in such costs is significant. This corresponds with the findings in the US where implementation of the Sarbanes–Oxley Act (SOX) has been costly, with some estimating that it is 20 times higher than what the US Securities and Exchange Commission initially estimated.

Our survey indicates that there has not been a uniform increase in the compliance cost across all types of companies. While large corporates which have already established compliance systems and have resources that can manage the extra burden, the smaller listed companies find it difficult to mobilise resources.

The costs of compliance can be clubbed into various categories, given the multi-faceted nature of the reforms - capital costs includes costs towards building IT frameworks, internal processes, staff-related costs and costs incurred due to enhancement in fees of directors, who have significantly higher accountability under the new regulatory regime. Then there are opportunity costs, which essentially result from the need to divert expenditures to regulatory compliance and away from more productive uses.

On what counts have costs increased?



The key findings as follows:

- The survey shows 82.5% respondents said the staff-related costs have increased, highlighting that companies now require more headcount to fulfil their regulatory compliances.
- 77% of the respondents said capital costs have increased, for undertaking structural improvements in systems and processes including IT frameworks;
- A vast majority of the respondents feel that their opportunity costs have gone up. This is a result of time deployment on the part of management and the board on compliance, often at the expense of other productive activities.

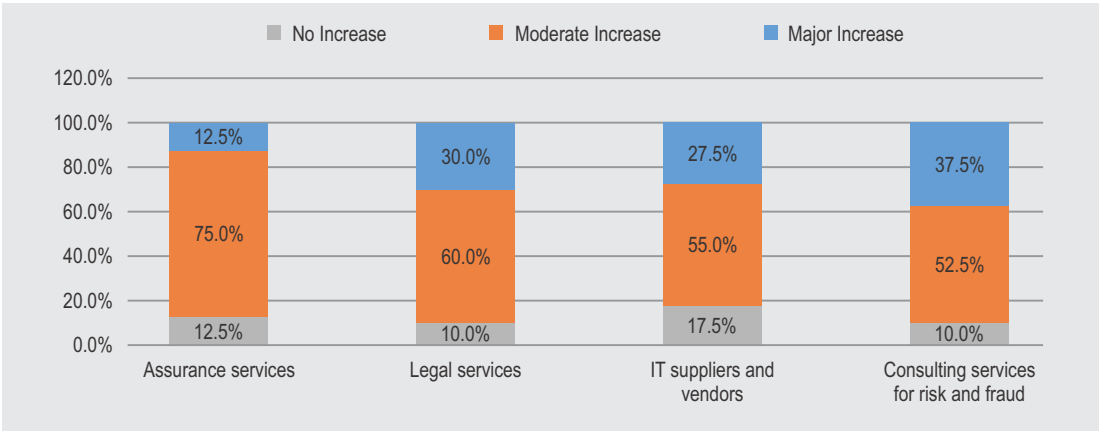
RESPONDENT

Compliance has become time consuming and costly. Areas include internal audit, risk management, compliance of laws, secretarial audit, cost audit and company secretarial work. Some of the areas like cost audit and filing multiple forms with different agencies by the company secretary has created more work and employment without adding commensurate significant value.

The threat of regulatory action and ambiguity in provisions of law have added to boards opting for additional assurances, which also has its impact on costs. The

survey considered the compliance-related out of pocket expenditures to assess the impact it has on companies.

Over the last financial year, what has been the increase in terms of compliance-related out of pocket expenditure?



The following findings have emerged:

- As many as 87.5% of the respondents agreed that assurance services have resulted in increase of out-of-pocket expenditure, from a moderate to major level.
- A similar trend appears in the case of legal services and consulting services with respect to enhanced fraud risk.

This increase is a result of the increased uncertainty among companies, particularly small listed companies, with respect to their response to fraud risk and necessary mitigation steps. As previously discussed, companies are not confident of their response to change in regulations with respect to insider trading, fraud risk management and internal financial control. Hence, they seek external assurances, which leads to cost escalation.

> RESPONDENT
> *Ease of doing business must take into account cost of doing business. While the government is taking steps to ease the doing of business, the costs are going up*

The foregoing analysis of costs suggest that meeting compliance goals entails incurring significant costs.

While many of the regulations are well-intentioned, in the near short term to medium term they require significant investments, apart from the opportunity costs. The need is to draw a balance between the need for higher reforms with the costs involved.

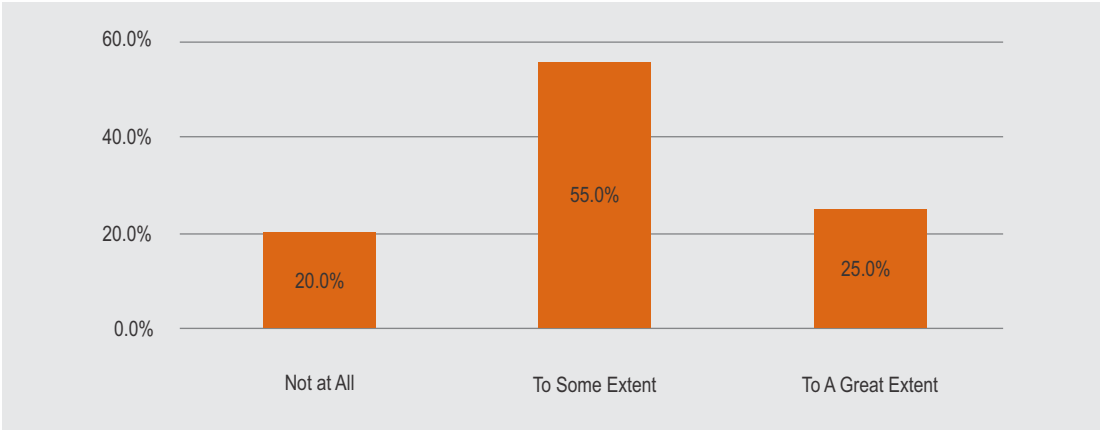
The current corporate governance regime is subject to too many gatekeepers. We

must focus on the quality of compliance rather than number of compliances. The focus should be on enforcement of existing regulations, rather than multiplying the compliance burden for companies.

Will stringent regulations drive companies away from public markets?

Historical traces show that stringent regulations result in companies moving away from public markets. In 2007, 33 months after SOX was implemented it was empirically established that the propensity to go private peaked about three years after the law become applicable. This was concentrated with smaller and less liquid companies and over a period the enhanced regulations became a norm. Is there a similar emerging trend in India?

Will the regular burden drive companies away from public markets?



The Companies Act of 2013 has imposed strict scrutiny on the money raised from public issue and liability on promoters and directors for mismanagement of funds. Also, provision of imposing stringent penalties including punitive actions have put entrepreneurs and promoters in a spot of bother.

The survey shows the following:

- Every 4 out of 5 respondents felt that new regulations, to some extent, would keep companies away from the capital market.
- A segment-wise analysis show that 50% of respondent small listed companies feel a propensity to exit public markets, in the wake of the significant regulatory burden.

The negative sentiment could, however, subside. As observed in the case of US markets, the negative sentiment among listed companies came down over a period of time post-SOX and did not hold back companies from entering public

markets. A similar trend could follow in India. The regulatory provisions have a long lasting effect on broadening and growth of the capital markets with better disclosures, transparency oversight and robust business processes.

Indian companies, especially those which are in the initial stages of their growth need the support of compliances, which are less onerous and not costly to implement. This could give such companies requisite time to gain strength, following which they could be brought into the scope of greater regulatory oversight. In that respect, the law should follow a maturity model for various entities. While amendments to the Companies Act of 2013 have exempted a cross-section of companies including private ones from rigorous compliance of the law, it could be made more broad-based to help companies which are in their nascent stages of development.

Recommendations



Towards an effective governance framework

Several policy measures have been taken since the Companies Act was passed in 2013 ("the Act") to streamline compliance with the law and make it more effective. While the government has brought some essential amendments and has also exempted certain classes of companies from the rigorous provisions of the law, many challenges still exist, as the survey points out.

The survey highlights that boards are increasingly under stress to meet the enhanced compliance requirements. The threat of heavy penalties including criminal prosecution for breach of directorial duties has created an environment of skepticism and fear. As a result, there is delay in decision making, boards are turning risk-averse and are diverting focus from strategic planning. Listed below are the significant recommendations based on the insights gained from the survey:

Effective functioning of the board

The following steps are considered necessary to ensure that the boards function more effectively, without the "stress" of compliance:

- **Board's assurance over adequacy and effectiveness of compliance systems:**
  - ✓ Deletion of section 134(5)(f) of the Act, which requires the board of directors to state that they have devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems are adequate and operating effectively.
- **Board's assurance over adequacy and effectiveness of internal financial controls:**
  - ✓ The board's assurance function with respect to adequacy and operating effectiveness of internal financial controls for listed companies [section 134(5)(e) of the Act] should be ideally removed, and if not, appropriate thresholds be incorporated to exempt small listed companies from its purview.

- **Formation of various committees/ appointments**

  ✓ The requirement for creation of board committees, viz. Audit Committee, Nomination and Remuneration Committee of the board [under section 178 of the Act] in closely held companies, viz. with shareholders below 500, and pure investment companies, should be dispensed with or the existing limits such as paid up capital of Rs 10 crores or more, be suitably enhanced.

  ✓ Wholly-owned subsidiaries of companies which have no external funding (in the form of equity or debt) should not be subjected to requirements of appointing Independent Directors or constituting a Nomination and Remuneration Committee.

Strengthening the office of independent directors

As the survey points out, the role of independent directors has become compliance-focused, therefore distracting them from their other key role of strategic planning. The function of independent directors has been impacted by challenges such as an inequitable risk-reward profile, enhanced liability with a risk of reputational loss and criminal prosecution, forcing talented directors to stay away from taking up such positions particularly in smaller companies.

The following steps are felt necessary to ensure that the office of independent directors remains significant and productive:

- **Regulatory assurance over good faith actions:**

  ✓ Independent directors must be provided a greater assurance with respect to actions taken in good faith, similar to the business judgement rule. This could be issued in the form of an executive order taking into consideration the board process requirements.

- **Appointment of Independent Directors:**

  ✓ The requirement of appointing independent directors in closely held companies should be removed or limits suitably enhanced from the existing share capital limit of Rs 10 crores or more.

Processes, controls and risk management

The survey points out the challenges faced by companies in their effort to provide an assurance on internal controls, financial reporting and risk management. Difficulties faced by different classes of companies are different, as the survey highlights that smaller listed companies are faced with a significant burden to fulfil the requirements. Following is thus suggested:

- **Exemptions to smaller listed companies:** Certain classes of listed companies can be exempted under section 462 of the Act, from the applicability of section 134(5)(e) of the Act which currently requires them to comply with the provision at par with large listed companies.
- **Internal financial controls**
  - ✓ An amendment is required in section 134(5)(e) to delete reference to the words 'internal financial controls' and replace it with 'internal controls over financial reporting' in line with rule 8(5)(viii) of the Companies (Accounts) Rules, 2014 and the "Listing Regulations". This is necessary to improve effectiveness of internal controls, processes and risk management:
  - ✓ The certification requirements should be limited to listed entities only.

Making disclosures effective and meaningful

A heavy disclosure burden has been imposed on companies under various provisions of the new Act. Particularly onerous are the board's disclosure requirements as part of their report to the shareholders.

The following steps are felt necessary to ensure that disclosures are effective and meaningful, and not burdensome:

- **Disclosures in Director's Report [Section 134 of the Act]**
  - ✓ This should be in line with the approach adopted under the Listing Regulations. They should be made more rational, by removing redundant disclosures that do not add value.
- **Maintenance of statutory records**
  - ✓ Maintenance of statutory records should be applicable only w.e.f. 1st April, 2014 i.e. from the inception of the Companies Act, 2013 instead of from the date of incorporation.
- **Penalties and decriminalisation**
  - ✓ Mere errors of non-disclosure or late disclosure of information which are not significant in nature should not be made punishable with either substantial monetary penalties or imprisonment. Accordingly, it is necessary to substantially bring down the quantum of penalties for such errors.

- **SEBI (Prohibition of Insider Trading) Regulations, 2015**

  ✓ The definition of the term 'connected persons' may be revisited as its scope is very wide and it makes it very difficult for companies to monitor insider trading in this context.

- **Continuous disclosure obligations under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015**

  ✓ Limiting the scope of continued disclosure obligations. Materiality criteria may be defined by prescribing quantitative parameters for boards to consider while assessing materiality of an event/information, thus limiting subjectivity.

Corporate governance reforms have a multi-layered impact and hence must correspond to the realities of time. It must respond to the demands of the society in which businesses operate and hence, require a nuanced vision. It is necessary that the intent and efficacy of the law is measured in terms of the effectiveness which it serves. India fares poorly in terms of the rule of law index— a measure of enforcement of law. In terms of shareholder rights index, it fairs much higher, which along with the rule of law index is used by researchers to measure the effective protection of shareholder rights in countries.[5]

As we try to recalibrate these reforms, it is necessary that we put the focus back on better implementation as a driver of effective regulation. As the survey suggests, many of the provisions put in the law, as it currently exists, are good in form but are difficult to enforce and practice.

Corporate law must be pragmatic reasonable and based on mutual trust rather than being punitive on failures resulting from acts done in good faith and thus counter-productive.

[4] Chakrabarti, Rajesh, Corporate Governance in India - Evolution and Challenges (January 17, 2005)

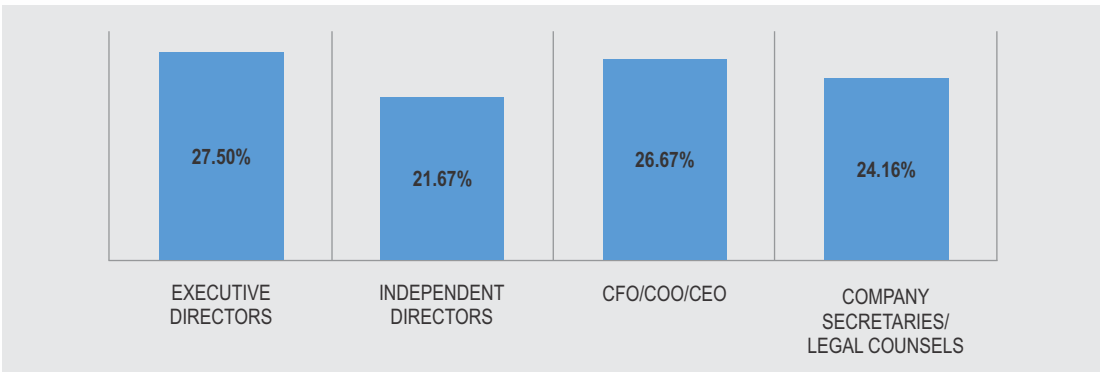
Methodology

The survey was conducted based on a questionnaire, which was intentionally kept short and objective, with a focus only on key areas, to garner sufficient number of responses.

The survey was administered through online tool "Survey Monkey." An email invitation with the survey link was sent to companies with a request for their response. It was in the field from September 2015 to February 2016.

The survey received 150 responses from among over 1,200 persons that were contacted. The profile of respondents who participated in the survey is shown below. Respondents were also requested for their subjective view on the questions of the survey to complement the findings of survey. In addition, some of the respondents were also interviewed to develop greater insights.

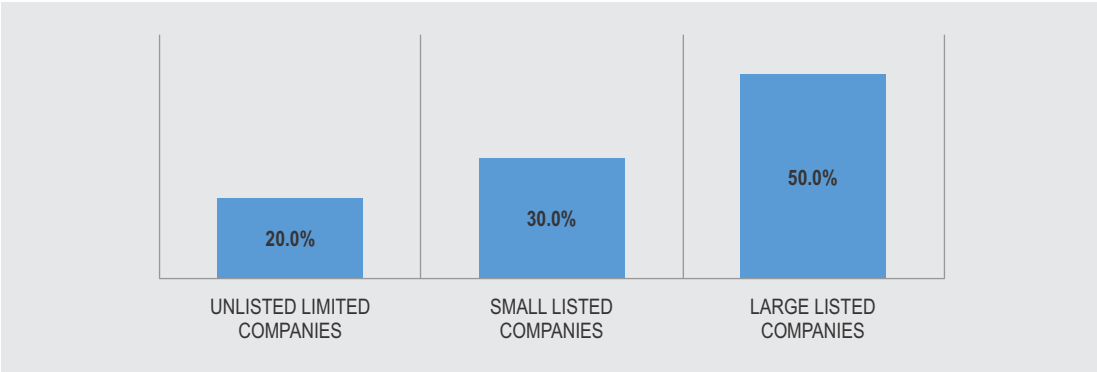
Profile of Respondents



The profile of companies who participated in the survey is also shown below. These companies were, categorised into three group for refined analysis:

- unlisted companies,
- small-listed companies (those having an annual turnover up to Rs 500 crores),
- large listed companies (those with annual turnover above Rs 500 crores).

Profile of Companies





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