

Position of “Company Secretaries” under Companies Bill, 2011

<http://www.caclubindia.com/forum/position-of-company-secretary-under-companies-bill-2011-181172.asp>

Dear All,

We are aware about the introduction of Companies Bill, 2011 in the Loksabha on 14th December, 2011. A simple effort has been made from my side to analyze the Companies Bill, 2011, keeping in view the career interests of Company Secretaries.

Before starting the same please have a look at the analysis of Companies Bill, 2011 shared day before yesterday in Caclubindia. This analysis is available at the link mentioned below:

Analysis of the Companies Bill, 2011

<http://www.caclubindia.com/forum/analysis-of-the-companies-bill-2011-a-must-read-180904.asp>

In Caclubindia I have also shared a post immediately after the introduction of Companies Bill, 2011 regarding the provision which makes the appointment of Company Secretary compulsory and put them in the bracket of Key managerial Personnel (KMP). This post is available at the link below:

Very Good News for Company Secretaries

http://www.caclubindia.com/bookmark/bookmark_visit.asp?bookmark_id=32628

Position of Company Secretaries under Companies Bill, 2011

Now let's discuss the position of Company Secretaries in the Companies Bill, 2011:

1. Company Secretaries as Key Managerial Personnel (KMP)

In clause 203 of the Companies Bill, 2011, the Company Secretaries are recognized as whole-time key managerial personnel along with Managing Director, Chief Executive Officer and managers. Also Companies Bill, 2011 has made the appointment of Company Secretary mandatory.

As per clause 203 of Companies Bill, 2011, every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—

- (i) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director; and
- (ii) **Company Secretary** [Company Secretary here means a Member of the Institute of Company Secretaries of India.]

1. Inclusion of Company Secretaries in the definition of Key Managerial Personnel

Companies Bill 2011, also provides the definition of Key Managerial Personnel under Clause 2(51) of the Bill, which is as follows:

“Key Managerial Personnel”, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) **the Company Secretary**;
- (iii) the Chief Financial Officer if the Board of Directors appoints him; and
- (iv) such other officer as may be prescribed;

The definition of “Expert” given in clause 2(38) also includes Company Secretaries.

2. Removal of defence regarding appointment of CS

Under section 383A of the Companies Act, 1956, a defence of “poor economic condition” was available regarding non-appointment of company Secretary. By Companies Bill, 2011, the same defence has been removed. Now a company falling in the criteria to appoint CS, cannot escape its liability to appoint a company Secretary just because poor economic condition.

3. Provision of penalty for non-appointment of CS

Earlier the penalty for non-appointment of company Secretary was Rs. 500 per day.

But considering the appointment of company Secretary important, Companies Bill, 2011 propose the penalty for non-appointment of CS as follows:

- a. On company – one lakh rupees which may extend to five lakh rupees.
- b. On every director and KMP who is in default – 50,000 rupees and 1,000 rupees per day if contravention continues.

4. Increased role in Annual Return of the company

A much detailed role has been proposed for company secretaries in employment and in practice as well through clause 92 of the Companies Bill, 2011.

As per clause 92 of the new Companies Bill, 2011, every company shall prepare its Annual return in the prescribed form containing the particulars as they stood on the close of the financial year regarding just like previous Section 159 of the Companies Act, 1956.

New Signing provisions at a glance:

Now Annual Return is required to be signed by:

(i) A director and the **Company Secretary**, or where there is no Company Secretary, by a **Company Secretary in whole-time practice**.

It means that now in respect of all the companies, whether private or public, listed or unlisted, if no Company Secretary is appointed by the company, the Annual Return is compulsorily required to be signed by the Company Secretary in practice.

(ii) In case of **listed companies and companies having such paid-up capital and turnover as may be prescribed**, the Annual Return is also to be signed by a Company Secretary in whole-time practice certifying that the annual return states the facts correctly and adequately and that the company has complied with all the provisions of the Act, in the prescribed form.

It means, in case of a listed company, even if the Annual Return is signed by the Company Secretary in employment of the Company, it is further **required to be signed by the Company Secretary in Whole time practice**.

Also, in case of a company having such paid up capital and turnover as may be prescribed and even if the company is not listed, the Annual Return is required to be signed by the Company Secretary in whole time practice in addition to the Company Secretary in employment.

(iii) In relation to a One Person Company and Small Company, the annual return is required to be signed by the **Company Secretary**, or where there is no Company Secretary, by one director of the company.

5. Functions of a Company Secretary

Through clause 205 **Functions of a Company Secretary has been proposed for the very first time, which** shall include,—

- (a) to report to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards issued by ICSI and approved by Central Government;
- (c) to discharge such other duties as may be prescribed.

This shows that the law makers are quite serious regarding the position of Company Secretaries in the corporate and this is the reason why major responsibilities are prescribed for Company Secretaries in new Companies Bill, 2011. For the Growth of profession it is really good and welcome approach from Government.

6. Introduction of Secretarial Audit

Secretarial Audit was very much there in Listed Companies. However in Companies Bill, 2011, the parliamentary Standing Committee also recommended Secretarial Audit for listed as well as company belonging to other class of companies as may be prescribed.

Clause 204 of the Companies Bill, 2011 explains the proposed provisions relating to Secretarial Audit which are as follows:

- a. Every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board's report a **Secretarial Audit Report**, given by a **Company Secretary in Practice**, in such form as may be prescribed.
- b. It shall be the duty of the company to give all assistance and facilities to the **Company Secretary in Practice**, for auditing the secretarial and related records of the company.
- c. The Board of Directors, in their report shall explain in full any qualification or observation or other remarks made by the **Company Secretary in Practice** in his report.

Penalty: If a company or any officer of the company or the **Company Secretary in Practice**, contravenes the provisions of this section, the company, every officer of the company or the **Company Secretary in Practice**, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Introduction of Secretarial Audit proves that Government is serious about good Corporate Governance. That is why Secretarial Audit is made mandatory by an independent professional i. e. **Company Secretary in Practice**...which is a very good move for good governance and for the profession of **Company Secretary**.

7. Compulsorily application of Secretarial Standards

For the first time, **the Secretarial Standards has been introduced and provided statutory recognition in the Act.**

As per clause 118(10) of the Companies Bill, 2011:

“Every company shall observe Secretarial Standards with respect General and Board Meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.”

As per clause 118(10) of the Companies Bill, 2011 it is duty of the Company Secretary to ensure that the company complies with the applicable Secretarial Standards.

As per my understanding it is completely a new beginning for Company Secretary Profession. In the Companies Bill, 2011, due recognition has been given to the Company Secretary professionals and the Institute of Company Secretaries of India. It is the beginning of a new era where non financial standards have been given importance and statutory recognition besides Financial Standards.

8. Some other provisions giving recognition to the profession of Company Secretaries

A. Professional assistance to Company Liquidator (Clause 291)

The Company Liquidator may, with the sanction of the Tribunal, appoint **one or more professionals including Company Secretaries** to assist him in the performance of his duties and functions under the Act.

- B.** As per Clause 140 of the Companies Bill, 2011, A Company Secretary in practice shall immediately report to the Central Government, if they have reason to believe in pursuance of their duties that an offence involving fraud is being committed against the company.
- C.** Clause 432 of the Companies Bill, 2011, corresponds to section 10GD of the Companies Act, 1956 and seeks to provide that a party to the proceeding may appear in person or authorise a Company Secretary or Legal Practitioner to present the case before the Tribunal or the Appellate Tribunal.
- D.** As per Clause 140 of the Companies Bill, 2011, in the form to be prescribed by Central Government, a Company Secretary engaged in the formation of a company, shall

declare that all requirements of the Act and rules in respect of registration and the matters precedent or incidental thereto have been complied with.

E. Big Amount of Penalties proposed

During my study of the Companies Bill, 2011, I have observed that most of the penalties has been enhanced with maximum and minimum quantum of penalty for each offence with deterrence for repeated defaults. This would result in better compliance of law by companies through more and more reliance on services of professionals like Company Secretaries.

FINAL VIEW

After going through the entire provisions of Companies Bill, 2011, we can conclude that lots of good provisions have been proposed like applicability of Secretarial Standards. Revised framework for regulation of mergers and amalgamations, insolvency, rehabilitation, liquidation and winding up of companies offers great scope for Companies Secretaries not only to act as liquidator/administrator but also to represent the various stakeholders before the Tribunal. It is quite visible that to promote good governance, detailed disclosures are contemplated under the proposed Bill for the compliance of which the companies would look forward to professionals including Company Secretaries.

I sincerely hope that the above article will help you to under the Importance and positions of Companies Secretaries in the New Companies Bill, 2011. If you like the above article, please share your views.

Regards
RG