Companies Bill 2008

KPMG IN INDIA

AUDIT ▪ TAX ▪ ADVISORY

The Companies Bill 2008 introduced in the Lok Sabha in October 2008 represents a thorough and comprehensive review of the present Companies Act. If and when enacted, it will have a far reaching impact. Many of the proposals of the Bill represent a major shift in basic postulates relating to corporate structure, philosophy and functioning. The Bill also reflects a conscious effort at simplification and at weaning out provisions that have remained on the statute book for a long time but have served only a very limited purpose – the result is a trimmer Bill that has 426 clauses against the 658 sections of the existing Act. Some of the significant features of the Bill are:

- More options and flexibility to entrepreneurs and professionals in determining the structure through which they operate e.g., one person company, small company, much larger partnerships (apart from limited liability partnerships which are sought to be introduced through a separate Bill). Compliance requirements for such entities would be simpler than those applicable to companies generally.
- Endeavour to restrict the principal Act to substantive matters, with procedural matters being left to be prescribed by the Central Government in the form of rules (there are more than 250 such clauses). However, since the dividing line between what is a substantive matter and what is a procedural matter is not always clear, there is bound to be some difference of opinion as to whether certain matters should have been dealt with in the Bill itself.
- Greater emphasis on self-regulation and minimisation of regulatory approvals to be sought by a company in managing its affairs. Most of the provisions of the present Act that require Central Government's approval, such as specified transactions with parties in which directors are interested, managerial remuneration in excess of prescribed limits, payment of profit- related commission to non whole time directors, auditor's appointment in certain cases, etc., have been amended so as to do away with the requirement of Central Government approval. However, counter-checks such as greater transparency and more powers to shareholders have been introduced.
- Vesting shareholders with greater powers. The Bill requires special resolution for a number of matters (many of which presently require only an ordinary resolution) e.g., appointing managing director, not re-appointing retiring auditor, removal of auditors, related party transactions, payment of dividend in certain cases, loan to managing/whole-time directors, etc.
- Greater disclosures e.g., a large number of further are matters required to be disclosed in annual return and in directors' report.

- Stricter measures for investor protection e.g., statutory recognition of Audit Committee, Remuneration Committee and Stakeholders' Committee, independent directors, ban on acceptance of deposits except in specified cases, protection of minority shareholders' interest in mergers/reconstruction etc., stricter checks on directors, provision for class action by aggrieved shareholders, abolition of voting shares with disproportionate rights, more credible valuations etc.
- Very stringent penalties on repeated or serious offences but lower penalties for mere technical or procedural non-compliances.
- Rationalisation of process of corporate mergers and acquisitions. In view of their increasing significance, the Bill seeks to rationalise the existing provisions to make the process of mergers and acquisitions simpler, faster and more cost-effective. Similarly, it seeks to facilitate cross-border mergers between Indian companies and foreign companies.
- Greater use of e-Governance systems. Specific provisions relating to maintenance of records electronically, holding of board meetings through video conferencing and voting through electronic means are some examples of how the Bill seeks to harness the advances in information and communication technology to make the corporate processes efficient and faster.
- A conscious effort at making the regulatory processes faster. In a number of provisions, specially where regulatory action or intervention is required (e.g., for winding up a company or for rehabilitation of sick companies), time limits have been laid down for completion of various actions by the authorities/other parties concerned.
- A more effective and comprehensive legal framework for rehabilitation of sick companies.
- A more efficient framework for liquidation and winding up of companies.

Given the complexities of the issues involved and the perceptions and interests of the various parties, it is not surprising that the initial response to the proposals of the Bill is a mixed one. However, one hopes that the debate on the proposals of the Bill at various levels would result in a final enactment that is forward-looking and satisfactorily addresses the shortcomings of the existing company legislation.

We look forward to receiving your feedback.

Russell Parera
Chief Executive Officer
KPMG in India

Table of Contents

1. Two new classes of companies and larger partnerships	01
2. Incorporation of companies made easier	02
3. Private subsidiaries of foreign bodies corporate	03
4. Capital	03
5. Key managerial personnel	05
6. Board of Directors – appointment, resignation, etc.	06
7. Functioning of Board of Directors	09
8. Related party transactions	12
9. Other restrictions on directors	14
10. Appointment and remuneration of managerial personnel/directors	15
11. Directors’ report	16
12. Meetings of members	17
13. e-Governance	18
14. Accounts and audit	19
15. Dividends	23
16. Investor protection	24
17. Reconstructions, mergers and acquisitions	26
18. Registered valuers	31
19. Framework for rehabilitation of companies	32
20. Framework for winding up of companies	34
21. Other significant proposals	37

Two new classes of companies and larger partnerships

Two new concepts viz. ‘one person company’ and ‘small company’ are proposed in an effort to provide simpler compliance regime for economically less significant companies. Along with the proposed option of limited liability partnerships (through a separate Bill), the attempt is to offer more choices and flexibility to entrepreneurs and professionals.

One person company

To encourage individuals with entrepreneurial capabilities to operate in corporate form, the Bill introduces the concept of ‘one person company’ (OPC) as a legal entity that would be separate and distinct from the promoter of the company.

- As the name itself suggests, OPC shall have only one member and can have a minimum of one director.
- An OPC need not hold an annual general meeting.
- A simpler compliance regime for one person companies is expected in respect of other matters too. To this end, the Central Government would be empowered to modify the provisions relating to prospectus and allotment of securities, share capital and debentures, management and administration, accounts and audit, and directors’ and managerial personnel’s appointment and remuneration in their application to one person companies.
- For transactions or contracts entered between an OPC and its sole member who is also a director, the company would be required to ensure that the terms of the contract or offer, if not in writing, are contained in a memorandum or are recorded in the minutes of the first Board meeting held after entering into the contract. The details of such contracts shall be submitted to the Registrar.

Small company

- A small company would be a private company whose paid-up share capital or turnover does not exceed such amount not exceeding INR 50 million as capital/INR 200 million as turnover, as may be prescribed.

- The following would, however, not qualify as small companies even if they meet the share capital/turnover criterion:

  > Holding or a subsidiary company
  > Company formed for charitable objects
  > Company or body corporate governed by any special Act

- A simplified and shorter scheme for merger of two or more small companies is proposed.

- As in respect of an OPC, the Central Government would be empowered to modify the provisions of the Act in relation to their application to small companies.

Larger partnership firms /associations of persons (AOPs)

- Limit on the number of members in a partnership firm or association of persons is proposed to be increased from the present 20 to such number, not exceeding 100, as may be prescribed. The limit would not apply to a Hindu Undivided Family carrying on any business and to associations/partnerships formed by professionals governed by special Acts, such as chartered accountants.

Incorporation of companies made easier

- Provisions relating to minimum paid-up capital of private and public companies are proposed to be omitted.
- Process of incorporation has been made faster and compatible with e-Governance. Detailed declarations and disclosures about the promoters, directors, etc. are required to be filed with the Registrar for incorporation.

- Stringent consequences would follow in case a company is incorporated by submitting false or incorrect information or by suppressing any material fact or information.
- The requirements relating to statutory meeting and statutory report have been dispensed with. Similarly, the certificate of commencement of business is no longer required. However, a declaration as to (i) payment for shares by subscribers to the memorandum and (ii) filing of prescribed return regarding verification of registered office is required in the case of public companies.

Private subsidiaries of foreign bodies corporate

- At present bodies corporate other than companies, including those incorporated outside India, are also deemed as companies for the limited purpose of determining the holding-subsidiary relationship. However, a similar provision has not been included in the proposed definition. One can argue that private companies that are subsidiaries of foreign companies in common parlance would not fall within the definition of a subsidiary as contained in the Bill and therefore they would not have to comply with the restrictive requirements applicable to private subsidiaries of a public company.

Capital

- The present requirements relating to minimum paid-up capital for private as well as public companies are proposed to be omitted.
- The limit of 20 years on the redemption period for preference shares as in the existing Act has been retained. However, for infrastructural projects (as may be prescribed), a longer redemption period is proposed to be allowed subject to the redemption of prescribed percentage of shares on an annual basis at the option of such preference shareholders.

- A new provision would enable a company which is not in a position to redeem preference shares or to pay dividend thereon to redeem the existing preference shares by issuing further redeemable preference shares subject to the consent of at least three-fourths of the holders in value and with the approval of the National Company Law Tribunal (which is proposed to be constituted). The approval of the Tribunal would contain orders that the shares held by those who did not consent should be redeemed forthwith.

- An issue of shares at a discount is proposed to be prohibited except in the case of sweat equity shares which may be issued at a discount subject to compliance with prescribed conditions (which would not involve regulatory approval).

- Shares with differential rights are proposed to be prohibited. The initial response to this proposal has been a mixed one. Many have expressed the view that the blanket prohibition is not desirable when the impact of present provisions permitting differential rights has not been adequately evaluated.

- Except in the case of a rights issue or issue to employees through employees' stock option or issue of shares by a public company upon exercise of conversion option attached to debentures/loans, any further issue of shares would have to be made at a price determined by a Registered Valuer subject to such conditions as may be prescribed.

- In an attempt to expedite the process of capital reduction, it is proposed that the Tribunal shall give notice of every application for capital reduction by a company to the Central Government, SEBI (in the case of listed companies) and the creditors of the company and shall take into consideration the representations received within a period of three months. If no representation is received within this period, it shall be presumed that there is no objection to the reduction. However, an additional safeguard has been proposed by stating that no such reduction can be made if the company is in arrears in the repayment of any deposits accepted by it or of the interest payable thereon.

- If a company, with intent to defraud, issues a duplicate certificate of shares, the company would be punishable with fine which would not be less than five times the face value of the shares involved in the issue of the duplicate certificate but which may extend to ten times the face value of such shares. Stringent penalties have also been proposed for defaulting officers of the company.

- The existing provision that empowers companies with long gestation periods to pay interest out of capital has been omitted.

Key managerial personnel

The Bill puts emphasis on the role and responsibilities of management of companies by proposing specific provisions on this aspect, distinct from those which deal with governance by the Board of Directors. The following broad concepts illustrate this attempt:

- The Bill introduces the concept of 'key managerial personnel' which has been defined to mean Managing Director (MD), Chief Executive Officer (CEO) or Manager (and whole-time director(s) if there is no MD or Manager), Company Secretary, and Chief Financial Officer (CFO).
- It will be mandatory for class or description of companies, as prescribed by the Central Government, to appoint whole-time key managerial personnel (KMP) by means of a Board resolution specifying the terms and conditions of the appointment including the remuneration. Any vacancy in the office of a KMP shall be filled by the Board within six months. As at present, a company shall not appoint a managing director and a manager at the same time.
- To be appointed as a KMP, a person should not suffer from any of the following disqualifications:
  - He should not be below 21 years of age
  - He should not have at any time suspended payment to his creditors or made a composition with them
  - He should not have at any time been adjudged insolvent
  - He should not at any time been convicted of an offence involving moral turpitude.

  There is no upper age limit for appointment of a person above 70 years of age as KMP but the same would require a special resolution of the members.
- No qualifications have been prescribed for managerial personnel except in the case of company secretary.
- A whole-time KMP shall not hold office in more than one company at the same time except that he may hold directorship of another company subject to the permission of the company.
- Details of appointment of KMP are required to be entered in a register and furnished in a return to be filed with Registrar.
- KMP are also included in the list of officers, all or any of whom may be officers in default.
- Key managerial personnel are included in 'related parties' of a company.

Board of Directors – appointment, resignation, etc.

Deemed director

The definition of a director has been extended to include a 'deemed director'. Deemed director means a person under whose advice, instructions or directions, the Board of Directors is accustomed to act, but does not include a person who has been engaged by the company to advise it in a professional capacity. Inclusion of 'deemed director' within the definition of director implies that provisions of the Act relating to directors' obligations and liabilities would apply equally to a deemed director. Thus, a deemed director will stand in the same position as a director in terms of his duties, obligations, etc.

Independent directors

- Every listed public company having paid-up share capital, as would be prescribed, should have at least one-third of the total number of directors as independent directors. For other public companies the Central Government may prescribe this number. In this context, the Bill specifies key attributes for determining 'independence' of a director. These include –
  - > Being a non-executive director
  - > Not holding any senior management position or position of KMP or an employment with the company during the preceding three financial years
  - > Neither he (nor any of his relatives) has or had any pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or its promoters or directors, of specified amount during the two preceding financial years
  - > Not holding, whether in own name or together with relatives, 2 percent or more of the total voting power of the company
  - > Not holding certain positions during a specified period e.g., partner or employee of the company's auditors/ company secretaries/ legal or consulting firm
  - > Having such qualifications as may be prescribed by the Central Government

- A director nominated by any institution, or appointed by any Government to represent its shareholding, shall not be deemed to be an independent director.

- An independent director shall not be entitled to any remuneration, other than sitting fee and reimbursement of expenses. However, an independent director can be entitled to profit-related commission and stock options as approved by members.

Vacation, resignation and disqualification of directors

- It is proposed that the office of a director would become vacant if he remains absent for all meetings of the Board for a period of 12 months, even where the leave of absence has been obtained. At present, vacation occurs upon absence, without leave of absence, from three consecutive meetings or from all meetings for a continuous period of three months, whichever is longer.

- The Bill introduces a new clause to specifically deal with resignation by a director and proposes as below:

  > A director may resign his office by giving a notice in writing. The company has no discretion in accepting resignation of a director

  > The Board shall intimate the Registrar about such resignation and place it in the subsequent general meeting of the company. The director can himself also file the details of his resignation with the Registrar

  > The resignation becomes effective when it is received or on the date specified in the resignation letter, whichever is later

  > Where by virtue of such resignation, the number of directors is reduced below the quorum fixed for Board meetings, the continuing director or director(s) shall be deemed to constitute the quorum

  > If all the directors of a company resign from their office or vacate their office, the promoter or in his absence, the Central Government, shall appoint the required number of directors to hold office till the directors are appointed by the company in general meeting.

- In addition to the existing provisions with respect to disqualification, a director shall not be eligible for appointment as a director if he has been convicted of an offence relating to related party transactions at any time during the last preceding five years.

- The present section 274(1)(g) contains provisions relating to disqualification of directors of a public company for appointment as directors of a public company in case the company commits a specified default, e.g., if it fails to file both annual accounts and annual return for three consecutive years. The Bill proposes to make failure to file either annual accounts or annual return for three consecutive years as an event of default. It is also proposed to extend the scope of the section to directors of companies other than public companies also if these companies commit a specified default. The consequence of default would be the disqualification of directors for re-appointment as directors of the defaulting company and appointment as directors of public companies for the specified period (which remains unchanged at five years).

Functioning of Board of Directors

Duties of directors

The Bill seeks to lay down duties of a director as below:

- Act in accordance with the company's articles, in good faith in order to promote the objects of the company for the benefit of its members, and in the best interest of the company
- Exercise his duties with due and reasonable care, skill and diligence
- Not be involved in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company
- Not obtain any undue gain or advantage either to himself or to his relatives, partners, or associates
- Not assign his office

In case of contravention, the director is punishable with fine and where found guilty of making any undue gain either to himself or to his relatives, partners or associates, he shall also be liable to pay an amount, equal to that gain, to the company.

Powers of the Board

- The following would be added to the list of powers that can be exercised by the Board only at meetings (and not by passing resolutions through circulation):
    - > Issue securities (earlier this was limited to issue of debentures)
    - > Give guarantee or provide security in respect of loans (however, this power can be delegated as per the specified procedure)
    - > Approve financial statements and the directors' report
    - > Diversify the business of the company

> Approve amalgamation, merger or reconstruction

> Take over a company or acquire a controlling or substantial stake in another company.

- Investing otherwise than in trust securities the compensation received as a result of any merger or amalgamation is proposed to be added to the list of powers that the Board can exercise only with the consent of the shareholders through a special resolution.

- The Bill also defines the terms ‘undertaking’ and ‘substantially the whole of the undertaking’ in the context of provisions relating to limits on Board’s power to sell, lease or otherwise dispose of the whole or substantially the whole of any undertaking of the company. The insertion of these definitions is likely to reduce the interpretational differences. The proposed definitions define an ‘undertaking’ in terms of 20 percent of net worth or which generates 20 percent of total income during previous financial year. ‘Substantially the whole of the undertaking’ would mean 20 percent of the value of undertaking. It seems that in case of an undertaking below the prescribed minimum threshold, the shareholders’ consent would not be required.

Meetings of the Board

- Every company would hold the first meeting of the Board within 30 days of the date of its incorporation.
- The minimum number of meetings to be held during the year would remain unchanged at four but the maximum permissible interval between two meetings is proposed to be restricted to 120 days. The present provisions allow a company to hold a Board meeting at a larger time-gap e.g., one meeting may be held on say 1 January and the next on 30 June.
- Board meetings by video conferencing or such other electronic means as may be prescribed would be permitted (with Central Government having the power to specify matters which can not be dealt with in such meetings).
- A notice of not less than seven days would be required for a Board meeting except that meetings to transact urgent business can be called at shorter notice, provided at least one independent director is present or subsequently ratifies the meeting’s decisions. (the present Act is silent on the issue) Notice can be given in writing or by prescribed electronic means.
- Every company would have to observe such secretarial standards with respect to the meetings of the Board (and general meetings) as may be prescribed.

Committees of Board of Directors

Audit Committee

- The Board of Directors of listed companies and such other class of companies as may be prescribed would have to constitute an Audit Committee. Majority of the members of Audit Committee would be independent directors. The Chairman of the Audit Committee should also be an independent director. At least one member should have knowledge of financial management, audit or accounts.
- In addition to auditors, the key managerial personnel would also have the right to attend the meetings of the Committee when the audit report is considered (but, like auditors, they too would not have any right to vote).
- The mandatory terms of reference of the Committee are proposed to be extended to include recommendation for appointment of auditors, related party transactions, valuation of undertakings or assets of the company, wherever necessary, and evaluation of internal financial controls.
- A time period of one year shall be given to reconstitute the existing Audit Committees to conform to the revised requirements.

Remuneration Committee

- All listed companies and such other class of companies, as may be prescribed, would have to constitute a Remuneration Committee consisting of non-executive directors (including at least one independent director).
- The Committee should determine the remuneration policies relating to remuneration of directors, key managerial personnel and such other employees as may be decided by the Board.

Stakeholders Relationship Committee

- To ensure an effective investor-grievance redressal mechanism, a listed company whose total number of shareholders, debentureholders and other securityholders (all taken together) is 1000 or more at any time during the financial year would be required to establish a Stakeholders Relationship Committee to consider and resolve the grievances of stakeholders. The Chairman of the Committee would be a non-executive director and shall attend the annual general meeting (AGM).

Related party transactions

The Bill proposes major changes in provisions relating to transactions of a company with related parties. The most significant change is to substitute the existing government approval-based regime with the shareholder approval and disclosure-based regime.

- It would not be necessary to obtain the Central Government's approval in case of related party transactions as required at present. Thus, the time-consuming process required at present to be gone through for a large number of transactions is proposed to be done away with.
- The transactions of a public company with its related parties would require the consent of the Board of Directors of such company and be subject to compliance with such conditions as may be prescribed. However, transactions entered into by a public company in ordinary course of business would not attract these provisions (irrespective of the amount involved) except where such a transaction is not on an arm's length basis.
- Beyond a threshold limit relating to paid-up share capital or amount of transactions, as may be prescribed, the transactions of a public company with its related parties would require the prior approval of the company by a special resolution. For arm's length transactions entered into by the company in its ordinary course of business, no such approval is envisaged.
- The above proposals mark a significant departure from the existing provisions contained in section 297 of the Act which–
  - > Envisage Central Government's approval in the case of companies with paid-up capital of INR one crore or more
  - > Apply also to private companies
  - > Exempt transactions between two public companies
  - > Exempt all cash purchases and sales at prevailing market prices
  - > Cover almost all transactions of purchase/sale or supply of goods/materials/services which are not against cash
- The directors' report is required to include the details of related party transactions requiring consent of the Board/special resolution of members along with the justification for entering into them.

- The concept of ‘related party’, the transactions with which would be subject to the aforesaid requirements, is broader than the parties covered in existing section 297. The Bill defines ‘related party’ to mean–

  (i) A relative of a director or KMP

  (ii) A firm in which a director, manager or his relative is a partner

  (iii) A private company in which a director or manager is a member or director

  (iv) A public company in which a director or manager is a director or holds along with his relatives, more than 2 percent of its paid-up share capital

  (v) Any body corporate whose Board of Directors, managing director, or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager

  (vi) Any person under whose advice, directions or instructions a director or manager is accustomed to act

  (vii) Any company which is (a) a holding, subsidiary or an associate company of such company or (b) a subsidiary of a holding company of which it is also a subsidiary (i.e. fellow subsidiary).

  Advice, directions or instructions given in a professional capacity are excluded from (v) and (vi) above.

  An ‘associate company’ is one in which the other company has a significant influence, but which is not a subsidiary company of the company having such influence or of any other company. The term ‘significant influence’ means control of at least 26 percent of total voting power, or of business decisions under an agreement.

- Compared to section 297 of the existing Act, the scope of transactions subject to the provisions relating to related party transactions is proposed to be broadened to also include–

  > Aelling or otherwise disposing of, or buying, property of any kind

  > Leasing of property of any kind

  > Appointment of any agents for purchase or sale of goods, materials, services or property

  > Underwriting the subscription of derivatives of any securities of the company.

Other restrictions on directors

Prohibition on forward dealings and insider trading

- As part of its measures to curb insider trading, the Bill prohibits directors and key managerial personnel of a company from undertaking certain kinds of forward dealings in shares or debentures of the company, or of its holding or subsidiary companies. Further, they are not permitted to deal in securities of the company either on their own behalf or on behalf of any other person, or to counsel about, procure or communicate, directly or indirectly, any non-public price-sensitive information to any person. The wording of the clause seems to put a blanket restriction on dealings in securities of the company which perhaps is not the intention.

Prohibition on loans to directors

- It is proposed to prohibit giving loans to any director or giving guarantee/security for loans taken by any director or any other person in whom he is interested except in the following cases:
  - The loan is to a managing or whole-time director either as a part of the conditions of service extended by the company to all its employees, or pursuant to any scheme approved by the members by a special resolution
  - The lender is a company for which it is the ordinary course of business to make loans; however, the interest rate charged should not be lower than the RBI declared bank rate.

  This is unlike the present position whereby loans etc. to directors can be made with the approval of the Central Government. Similarly, unlike the present position, the above provisions are proposed to be applicable to private companies also.

Disclosure of interest

- Every director, including a deemed director, or key managerial personnel would have to disclose his interest in other associations within 30 days of appointment.

Appointment and remuneration of managerial personnel/directors

Consistent with its underlying philosophy of minimising the governmental intervention in the affairs of companies, the Bill proposes a number of changes in the provisions relating to appointment and remuneration of managerial personnel which include the following:

- Managing director, whole time director or manager can be appointed with the consent of all directors present in a meeting for which due notice has been given with prescribed details subject to the approval of members in the next general meeting by special resolution.
- The existing ceilings (in terms of percentage of net profits) on total managerial remuneration and remuneration of individual managerial personnel are proposed to be abolished.
- No Central Government approval would be required in respect of appointment and/or remuneration of managerial personnel. The authority to decide these matters would rest with the shareholders.
- No limit has been prescribed on payment of sitting fees to the directors. Accordingly, a director who is neither a whole-time director nor a managing director may be paid remuneration in the form of fee for attending meetings of the Board or Committees thereof in accordance with the Articles. Such a director may also be paid profit related-commission with the prior approval of members by special resolution.

Directors' report

- In the case of a listed company, Directors' Responsibility Statement to be included in the directors' report would be required to include an explicit assertion that the directors had laid down internal financial controls to be followed by the company and that such internal financial controls have been complied with.
- The directors' report is proposed to be made more informative by requiring additional disclosures like –

  (i) Extracts of annual return

  (ii) Report of the Remuneration Committee

  (iii) Declaration by independent directors wherever they are appointed

  (iv) Number of meetings of the Board

  (v) Particulars of loans, guarantees, or investments in excess of the specified limits that require prior approval of the shareholders

  (vi) Particulars of contracts or arrangements entered into with related parties that require consent of Board of directors of public company/prior approval of company by special resolution along with the justification for entering into such a contract or arrangement

  (vii) Composition of Audit Committee

  (viii) Matters on which the Board had not accepted any recommendation of the Audit Committee along with the reasons therefor.
- The requirement of giving particulars of employees receiving remuneration in excess of specified limits in the directors' report is omitted.

Meetings of members

- The first annual general meeting would need to be held within nine months from the end of the first financial year (the present time limit is 18 months from date of incorporation).
- Annual general meeting must be held at any time between 9 a.m. and 6 p.m.
- Notice for general meetings can be given in writing (as at present) or through prescribed electronic mode and has to be sent to every director also.
- The explanatory statement to be annexed to notice of a general meeting would need to state the nature of concern or interest of directors, manager or other key managerial personnel in an item of business relating to or affecting any other company if the extent of their shareholding is 2 percent or more of the paid-up capital of that company. The present cut-off percentage is 20.
- The provisions relating to passing of resolutions by postal ballot would be applicable to all companies, and not just listed companies as is the present position.
- For demanding a poll at a general meeting, a member must have either not less one-tenth of total voting power (as at present) or shares with aggregate paid-up amount of not less than INR 0.5 million (INR 50,000 at present).
- Every listed company would be required to file with the Registrar within 30 days of the annual general meeting (AGM) a report on the AGM containing such particulars as may be prescribed, including a confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and the rules made thereunder.
- An OPC would be exempted from holding an AGM.
- The time limit for filing of annual return would be 30 days (60 days at present) from the date of the annual general meeting.

e-Governance

In order to enable companies to meet the obligations cast upon them under the law in an effective manner, the Bill proposes a greater use of e-Governance systems. e-Governance will help in quicker registration, incorporation and filing process with the use of self-operating e-systems. It would also minimise physical interface and use of discretionary powers by authorities concerned.

- The Central Government may make rules requiring companies to file documents such as applications, balance sheet, prospectus, returns, declarations, memorandum and articles in an electronic form and providing for inspection of such documents, etc. through electronic form.
- Such documents shall be maintained by the Registrar in the electronic form and registered or authenticated in the prescribed manner.
- All provisions of the Information Technology Act, 2000 relating to electronic records shall apply in relation to the records filed electronically, unless inconsistent with the Act/Rules.

Accounts and audit

CFO and financial statements

- The concept of appointment of CFO has been recognised under the Bill. Being a key managerial personnel (KMP), the appointment of a whole-time CFO would be mandatory for such class or description of companies as prescribed by the Central Government. The CFO would have rights and duties of a KMP. In addition, he would be liable, besides other specified persons, for contravention of provisions relating to maintenance of books of account, financial statements, filing of financial statements with Registrar of Companies, etc. The CFO would also be a ‘related party’ of the company.
- The Bill proposes a uniform financial year i.e., period ending on 31 March, for all companies. However, the Tribunal would have the power to allow a company to adopt a different period as the financial year if the circumstances so warrant.
- Companies would be expressly permitted to keep books of account or other relevant papers in electronic mode in the prescribed manner.
- The Central Government would have the power to require a company to keep the books of account for a period longer than the prescribed period of 8 years in case an investigation has been ordered.
- Annual financial statements of every company would have to include a cash flow statement also.
- A holding company would present consolidated financial statements in addition to its standalone financial statements. Consequently, the extant provisions requiring a holding company to attach to its balance sheet a statement containing prescribed particulars relating to its subsidiaries and the accounts and reports of directors and auditors of subsidiaries would be omitted.
- While continuing to recognise accounting standards, the Bill also gives recognition to auditing standards. Unlike the present position according to which auditing standards are issued by the Institute of Chartered Accountants of India (ICAI), it is proposed that the Central Government would notify auditing standards also. Non-compliance with auditing standards would be a punishable offence under the Companies Act. As per the Bill, the rechristened National Advisory Committee on Accounting and Auditing Standards (NACAAS), in consultation with the ICAI, would make recommendations to the Central Government on matters relating to accounting and auditing standards.

- The power to prescribe the form of financial statements (i.e. the counterpart of Schedule VI of the existing Act) would be vested in the Central Government.
- It is specifically provided that in case the accounts are not adopted at annual general meeting, the unadopted accounts shall be filed with the Registrar and the Registrar shall take them on record as provisional till the final accounts are filed.

Auditors

- All appointments of auditors, including the filling of a casual vacancy, would have to be made after taking into account the recommendations of Audit Committee constituted by a company as per the requirements of the Act.
- If no auditor is appointed or re-appointed at the annual general meeting, the existing auditor will continue. This is a significant departure from the existing position whereby the Central Government has the power to make the appointment in such a situation.
- While the requirement to obtain previous approval of the Central Government to remove an auditor (other than the first auditor) before the expiry of his term is done away with, such removal would require a special resolution of members as against an ordinary resolution as at present.
- A special resolution would be required (as against the present requirement of an ordinary resolution) for not re-appointing the retiring auditor or for appointing someone else in his place at the annual general meeting.
- The Bill proposes to dispense with the special provisions relating to reappointment of auditors of a company in which 25 percent or more of the subscribed capital is held by Central/State Government or specified entities such as public financial institutions, government companies, nationalised banks. Thus, an ordinary resolution would be adequate to re-appoint auditors of such companies.
- Time limit for appointment of auditors of government companies by Comptroller and Auditor-General of India (C&AG) has been fixed at 180 days from the commencement of the financial year. The auditor will hold office till the adoption of accounts of the financial year.
- Unless exempted by the company from doing so, an auditor would be required (and not just have the right) to attend the general meetings (by himself or through qualified authorised representative) and would have the right to be heard on matters of his concern.

- The auditor of a holding company will also have a right of access to the records of its subsidiaries insofar as it is required for audit of consolidated financial statements.
- The provisions for ensuring independence of auditors have been strengthened in a number of ways:
  > A person or a firm who has ‘business relationship’ of such nature as may be prescribed, with the company or its subsidiary, fellow subsidiary, holding company or associate company shall not be eligible for appointment as auditor

  > A person would not be eligible for appointment as auditor if his relative is in the employment of the company as a director or key managerial personnel

  > A person would be disqualified for appointment as its auditor if his relative or partner is indebted to the company for any amount

  > Some relaxation from present provision relating to disqualification on account of holding of securities is proposed by providing that only the holding of securities of value in terms of such percentage as may be prescribed would result in disqualification (presently, holding of voting security of any value results in disqualification). However, the Bill extends the scope of disqualification to holding of any security (of prescribed value). Besides, holding of security of prescribed value of an associate company would also result in disqualification, as would the holding by relative(s) or partners(s) of the auditor
- It is proposed that the auditor can not render the following services to the company:

  (a) Accounting and book keeping services

  (b) Internal audit

  (c) Design and implementation of any financial information system

  (d) Actuarial services

  (e) Investment advisory services

  (f) Investment banking services;

  (g Outsourced financial services and

  (h) Management services.

  Even the permitted services can be rendered only with the pre-approval of the Board or Audit Committee. Some believe that the scope of the term ‘management services’ must be clarified, else there would be confusion and consequent litigation on whether or not a service is permitted to be rendered by an auditor.

Auditors' report

- The scope of the auditors' report would be expanded to include:
  - > Compliance with auditing standards
  - > In the case of listed companies, compliance with the internal financial controls and directions issued by the Board of Directors.
  - > Any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith
- In the case of Government companies, the audit report would be required to also include the directions issued by the C&AG in respect of accounting standards, variance from the notified accounting standards, the action taken on such directions and the impact thereof on the company's accounts.
- C& AG has been given a time limit of 60 days to comment on or supplement the statutory auditor's report and to conduct any supplementary audit.

Cost auditor

The appointment of cost auditor, where required, would be made by Board of Directors but remuneration would be fixed by members. Approval of Central Government for appointment of a person as cost auditor would not be required.

Dividends

- The existing regulatory regime governing transfer of a specified percentage of profits to reserves before declaring dividends and utilisation of reserves for declaring dividends in the event of absence or inadequacy of profits is proposed to be dispensed with. The power to determine the amount to be transferred to reserves before declaring dividends is proposed to be vested in the company. Likewise, it is proposed that in case of absence or inadequacy of profits in any financial year, dividend can be declared and paid out of accumulated profits transferred to reserves with the unanimous consent of the Board of Directors, special resolution of shareholders in annual general meeting and approval from the financial institutions with outstanding term loans.
- The existing requirement of setting off the lower of the loss or unabsorbed depreciation of earlier years before declaration of dividend has been omitted. This would seem to allow companies to declare dividends out of their current profits even when they have substantial accumulated losses of earlier years. Doubts have been expressed in some quarters as to whether this would be financially prudent and in the interest of stakeholders other than shareholders.
- It is proposed to provide that the Board of Directors of a company may declare interim dividend during any financial year “out of the profits of the company for part of the year.” The intention seems to be to set at rest the controversy whether interim dividends can be paid out of past years’ profits.
- A company which fails to comply with the provisions relating to repayment of deposits, etc. accepted before the commencement of the Act (contained in clause 67 of the Bill) is proposed to be debarred from declaring any dividend on its equity shares so long as such failure continues.

Investor protection

The Bill contains a number of proposals to safeguard the interests of the investors by making the corporate systems and processes more credible and transparent, proposing new mechanisms and prescribing stringent penalties for defaults.

- Acceptance of deposits from public would be prohibited except in the case of banking and non-banking financial companies or such other company(ies) as may be specified by the Central Government. However, companies would be allowed to accept deposits from members subject to fulfillment of certain conditions which include, inter alia, taking deposit insurance in the manner and to the extent prescribed.
- All existing deposits and any interest thereon would be required to be repaid within one year from due date or one year from the date of the commencement of the Act, whichever is earlier. The Tribunal can, however, extend this period on a consideration of the financial condition of the company and other relevant factors. Default in making payment within the stipulated period (or extended period allowed by the Tribunal) is punishable with fine ranging from INR 10 million to 100 million. Further, every officer in default shall be punishable with imprisonment up to seven years or with fine of INR 2.5 million to 20 million, or with both. Another consequence of the default would be that if deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, there would be no limitation on the personal liability of responsible officers for losses or damages that may have been incurred by the depositors.
- Unlike as at present, claim of an investor over an unclaimed dividend or other amount transferred to Investor Education and Protection Fund shall not be extinguished.
- To combat the growing menace of acquiring shares in multiple or fictitious names, the Bill proposes punishment of upto three years and fine ranging between INR 50,000 and INR 500,000 for a person applying in fictitious name or making multiple applications or otherwise inducing companies to allot shares in fictitious name. The Court may also order disgorgement of any gains made by, and seizure and disposal of such securities still in possession of a person convicted of the aforesaid offence.
- Stringent punishment (imprisonment upto two years and fine) is proposed for failure to distribute dividend within 30 days of its declaration except in specified situations, e.g., where non-payment is due to operation of any law.

- Any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the Prospectus or who has invested money by fraudulent inducement can file a suit.
- On an application by any member/creditor or class of members/creditors (termed as ‘class action’), the Tribunal may issue orders restraining the company from committing certain specified acts, e.g., an act that is ultra vires the articles or memorandum or is contrary to any law.
- Annual return of a listed company and of a company having prescribed paid-up capital and turnover would have to include a certificate by a company secretary in whole-time practice on correctness and adequacy of facts stated in the annual return and on compliance with all the provisions of the Act.
- Many other measures to enhance investor protection e.g., prohibition on insider trading or forward dealing by directors/key managerial personnel, prohibition on issue of equity shares with disproportionate voting rights, valuations by registered valuers, restrictions on and disclosure of related party transactions, constitution of Stakeholders Relationship Committee etc. have been dealt with in other sections of this publication.

Reconstructions, mergers and acquisitions

In the last one decade or so, mergers and acquisitions have assumed a tremendous significance as part of growth and diversification strategies of corporate entities. In this context, the existing provisions relating to compromises, arrangements and reconstructions, as contained in sections 390-396A of the existing Act have been considered by many to be time-consuming and costly. The Bill makes a serious effort to address the perceived shortcomings of the existing provisions and to provide for a simpler and faster process of mergers and acquisitions. An even simpler process is envisaged for merger between two small companies or between a holding company and its wholly-owned subsidiary. The Bill also seeks to facilitate cross-border mergers, i.e. mergers of Indian companies into foreign companies, and vice versa. Further, the Bill seeks to rationalise the provisions relating to compromises or arrangements not involving mergers or acquisitions.

General provisions relating to compromises, arrangements and mergers / amalgamations

- National Company Law Tribunal ('the Tribunal') shall be the sole authority to sanction the schemes of compromises, arrangements and amalgamations. Presently, this authority rests with courts having jurisdiction over the area in which the registered offices of companies that are parties to such a scheme are situated.

- The notice to members and/or creditors for meeting of members/creditors in connection with a scheme of compromise or arrangement shall state that the recipient should, within one month from the date of receipt of such notice, intimate in writing his consent to the adoption of the compromise/arrangement.

- Only shareholders and creditors having a significant stake viz. 10 percent of the shareholding or not less than 5 percent of the outstanding debt respectively will have the right to object to any scheme. The change intends to streamline the procedure for articulation of the minority's interest while restricting the obstructionist attitude on the part of a section of minority.

- The notice of the meeting of members/creditors shall be sent not only to the Registrar and the Official Liquidator but also to other regulators i.e. the Central Government, the Reserve Bank of India, the Securities and Exchange Board of

India, the respective stock exchanges, the Competition Commission of India (only where necessary) and such other authorities which are likely to be affected by the compromise or arrangement. These authorities may file their objections, if any, within one month; otherwise it shall be presumed that they have no objection ('deemed approval').

- The scheme is binding if a majority representing three-fourths in value of the creditors or members, present and voting in person or by proxy or by postal ballot give their consent.

- The Bill retains the provision for offer of purchase of the stake of minority shareholders by a person holding 90 percent or more of the equity shares of a company by virtue of an amalgamation, conversion of securities, etc. However, to protect the interest of minority shareholders, it requires that such purchase should be at a price determined on the basis of a valuation by a registered valuer as per prescribed rules.

- To protect the interest of the members/others affected by a scheme of compromise or arrangement, including a merger/amalgamation/division, the Bill requires that any valuation for this purpose has to be carried out by a 'registered valuer'.

Specific provisions applicable to arrangements other than mergers/amalgamations

- A compromise or arrangement can include a takeover offer made in the prescribed manner. Listed companies will have to ensure that the relevant SEBI guidelines are complied with.

- To obviate the need for obtaining approvals from a multiplicity of authorities on matters consequential to a compromise or arrangement, the Bill provides that the Tribunal's order approving the scheme/arrangement may also provide for the following:

  - Where preference shares are to be converted into equity shares, an option to preference shareholders to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable
  - Protection of any class of creditors
  - Variation of the shareholders' rights in accordance with the relevant provisions
  - Abatement of proceedings pending before the Board for Industrial and Financial Reconstruction

- The Tribunal shall have the power to supervise the implementation of the scheme and give directions/make modifications as considered necessary for its proper implementation.

Specific provisions applicable to schemes of merger/amalgamation/demerger

Apart from the general provisions summarised earlier, the following specific provisions are proposed.

- With a view to bringing about greater transparency in schemes involving mergers/amalgamations, the Bill requires that if pursuant to a scheme of merger/amalgamation, the Tribunal orders a meeting of members or creditors, the notice of the meeting should be accompanied by
  - Draft scheme
  - Confirmation of its filing with the Registrar
  - A report of directors of the merging companies explaining the effect of merger/amalgamation on each class of shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties
  - Valuation report by the expert
  - A supplementary accounting statement if the last annual accounts of any of the merging companies relate to a financial year ending more than six months before the date of the first meeting of the company summoned for the purposes of approving the scheme

- With a view to obviating the need to obtain the requisite approvals from different authorities with regard to matters consequential to a merger/amalgamation, the Tribunal would be empowered to also provide for the following additional matters in its order:
  - Where there is an allotment of any foreign direct investment, allotment of specified percentage to the transferor and transferee companies
  - Transfer of employees of the transferor company to the transferee company
  - As per the existing law, delisting is possible only upon compliance with delisting requirements of SEBI. If the listed transferor company is not dissolved, it shall become an unlisted company, subject to safeguards for payments to those who decide to opt out.

- Any legal proceedings pending by or against any transferor company on the date of transfer shall be continued by or against the transferee company.

- Provision shall be made for any persons who dissent from the scheme within such time and in such manner as the Tribunal directs.
- The Bill proposes that the fees paid by the transferor company on its authorised capital should be available as a set off against the fees payable by the transferee company on its enhanced authorised capital resulting from merger/amalgamation.
- The above provisions would apply to demergers also.

Merger between two small companies or between a holding company and its wholly-owned subsidiary company

The Bill provides for an even simpler and faster process for merger or amalgamation between two small companies or between a holding company and its wholly-owned subsidiary company. There is no requirement of approval by Tribunal (except upon objection of Registrar to the scheme). The following process is envisaged:

- Notice of the proposed scheme to be given by both, the transferor and the transferee company, to persons affected by the scheme, inviting comments or objections within 30 days.
- Scheme to be approved by a special resolution of the shareholders in a general meeting after considering the objections received and by three-fourths in value of the creditors of respective companies.
- Transferee company to file a copy of the approved scheme with the Registrar and the Official Liquidator.
- Official liquidator to submit comments/objections to Registrar within 30 days.
- Registrar to review the scheme for public interest and interest of the creditors and consider comments/objections, if any, of the Official Liquidator.
- Registrar to register the scheme and issue a confirmation to the companies if he has no comments/objection, else objections to the submitted to Tribunal within 90 days of receipt of scheme.

- In the absence of any application to the Tribunal as above, scheme to be deemed as approved by the Official Liquidator and Registrar.
- Tribunal can order the scheme to be processed as per the normal procedure applicable to mergers/amalgamations (and not the simplified procedure discussed above), or confirm the scheme to be then registered by the Registrar.
- Transferor company to stand dissolved on registration of the scheme.

Merger or amalgamation with a company incorporated outside India/foreign company

The Bill facilitates the merger or amalgamation between an Indian company and a company incorporated in notified countries by providing that the provisions as discussed above shall apply to such mergers also. The Bill also provides that a foreign company may merge or amalgamate into an Indian company or vice versa. A 'foreign company' has been defined as a company or body corporate incorporated outside India which has a place of business in India whether established before or after the commencement of the Act. The terms and conditions of the scheme may provide for the payment of consideration to the shareholders of the merging company in cash or in Indian Depository Receipts (IDR) or partly in cash and partly in IDR.

Registered valuers

The following are some salient proposals relating to registered valuers.

- Valuation in respect of any property, stocks, shares, debentures, securities, goodwill or net worth of a company or its assets required under any provision can be carried out by only a registered valuer. Valuers can be appointed by the Audit Committee or in its absence by the Board of Directors

- The Bill requires valuers to be registered with the Central Government. A person cannot practise, describe or project himself as a registered valuer unless he is so registered.

  > A Chartered Accountant, Cost and Works Accountant, Company Secretary or any other person possessing prescribed qualifications can apply to the Central Government to be registered as a valuer

  > No company or body corporate would be eligible to be a registered valuer

- A valuer applying for registration would have to submit a declaration stating that he would –

  > Make an impartial and true valuation of assets

  > Make the valuation in accordance with prescribed rules and

  > Not undertake valuation of any assets in which he has a direct or indirect interest at any time during the process of valuation

- In case a registered valuer is sentenced to imprisonment for any offence or, being a member of any association or institute of professionals, is found guilty of misconduct in his professional capacity by such association or institute, he would be required to intimate the Central Government which may remove his name after giving him a reasonable opportunity of being heard.

- The report of valuation would have to be in the prescribed form.

- The registered valuer shall not charge at a rate exceeding the rate prescribed.

- The Central Government shall review the performance of all registered valuers once in three years and may remove the name of any person after giving him an opportunity of being heard.

Framework for rehabilitation of companies

The proposals contained in the Bill seek to ensure that adequate opportunity is given for rehabilitation and revival of a sick company and if this is not possible, the company is wound up in a time-effective manner. The key highlights of the proposals of the Bill are as follows:

- Powers in respect of revival and rehabilitation of sick companies would be exercised by the Tribunal and not by Board for Industrial and Financial Reconstruction (BIFR).

- The criterion for determination of a sick company would be amended. Instead of the present provisions which determine sickness with reference to extent of erosion of net worth, the trigger under the Bill for such determination is the inability of a company to pay the debt of secured creditors representing fifty percent or more of its outstanding amount of debt within 30 days of demand or to secure/compound the same. Upon such occurrence, an application could be filed with the Tribunal by any of the secured creditors or the company for declaring the company to be a sick company. Thus the Bill recognises that it is the creditors whose interests are primarily threatened when a company becomes sick and therefore the focus is on providing protection to them.

- Unlike the present position whereby the provisions relating to sickness apply only to industrial companies, the corresponding provisions of the Bill apply to all companies.

- If a company is determined by the Tribunal to be sick, any secured creditor or the company would have the power to make an application to the Tribunal for determination of the measures for its revival.

- The Bill envisages a mechanism aimed at formulating a scheme for rehabilitation and revival of a company that has been determined by the Tribunal to be sick. However, any such scheme would require approval by the specified majority of creditors – 75 percent of secured creditors and 25 percent of unsecured creditors (both in terms of value). If the creditors do not approve the scheme, the company would be wound up.

- The entire rehabilitation/liquidation process has been sought to be made time-bound as would be evident from the following:

  > Tribunal would be required to pass an order within 60 days of receipt of the initial application for determination whether the company is a sick company

  > An application for revival and rehabilitation of a company determined by the Tribunal to be sick would have to be made within 60 days of such determination

  > Tribunal would be required to fix a date of hearing within 90 days and appoint an interim administrator to take over the management of the company and protect and preserve its assets

  > Interim administrator would have to submit his report to Tribunal within 60 days of his appointment by Tribunal

  > Tribunal shall then decide whether or not the company can be revived. If it is found that it can be revived, Tribunal shall appoint a company administrator (who can be the interim administrator himself) to manage and revive the company. Company administrator would be required to prepare the scheme of revival and get it approved by creditors within 60 days of appointment. The Tribunal shall be required to pass an order on the scheme of revival within the stipulated time period

  > Where at any stage, it is found that revival is not possible, Tribunal shall pass order for winding up or modification of scheme within the stipulated time period

Framework for winding up of companies

Winding up by the Tribunal

- The powers in relation to winding up of a company, presently with Courts, would vest with the Tribunal.

- In addition to the existing provisions, the Tribunal would have the power to wind up a company if, on an application made by specified person(s), it is of the view that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and it is proper that the company be wound up.

- Not commencing business within a year of incorporation or suspending business for a whole year or reduction of the number of members to below the minimum number would no longer constitute a trigger for winding up. (In this context, reference may also be made to the proposal for classification of companies not having any significant accounting transaction during a specified period as dormant companies.)

- To make the process time-bound, the Bill requires the Tribunal to pass an appropriate order or interim order within 90 days of the filing of a petition for winding up. The Tribunal has been given the power, inter alia, to appoint a provisional liquidator of the company till the order for winding up is passed.

- Failure to file the statement of affairs with the Tribunal when so ordered would render directors and officers of the company responsible for the non-compliance liable to imprisonment or fine or both.

- Specific provisions with respect to removal of a company liquidator by the Tribunal on specific grounds such as misconduct, fraud or misfeasance, professional incompetence, conflict of interest or lack of independence have been proposed.

- A time limit of 60 days has been proposed for filing of the report by the company liquidator.

- The Bill proposes to make it obligatory for the Tribunal to fix a time-limit within which the entire proceedings for winding up and dissolution of a company shall be completed. In appropriate cases, the Tribunal may revise such time-limit.

- In the case of a limited company, the Bill also seeks to make directors and managers, present or past, whose liability is unlimited under the Act liable to further contribute (in addition to liability to contribute as a member) as if they were at the commencement of winding up, members of an unlimited company. However, subject to the articles of the company, such contribution would be required to be made only if the Tribunal deems it necessary to require such contribution to satisfy the debts, liabilities and expenses. Besides, past directors and managers, who have ceased to hold office atleast one year before commencement of the winding up would not be liable to make further contribution, nor would any past director or manager be liable for any debt or liability of the company contracted after he ceased to hold office.

- The period for which the Tribunal can stay the proceedings of winding up is proposed to be capped at 180 days. Proceedings can be stayed only on an application along with a scheme for rehabilitation filed with the consent of 75 percent of the company's secured creditors and 25 percent of its unsecured creditors (both in value terms).

Voluntary winding up

- The declaration of solvency to be filed by the directors in connection with a voluntary winding up would be required to contain, inter alia, a specific assertion that the company is not being wound up to defraud any person. Penal provisions with respect to filing of a declaration of solvency without reasonable grounds are sought to be made more stringent.

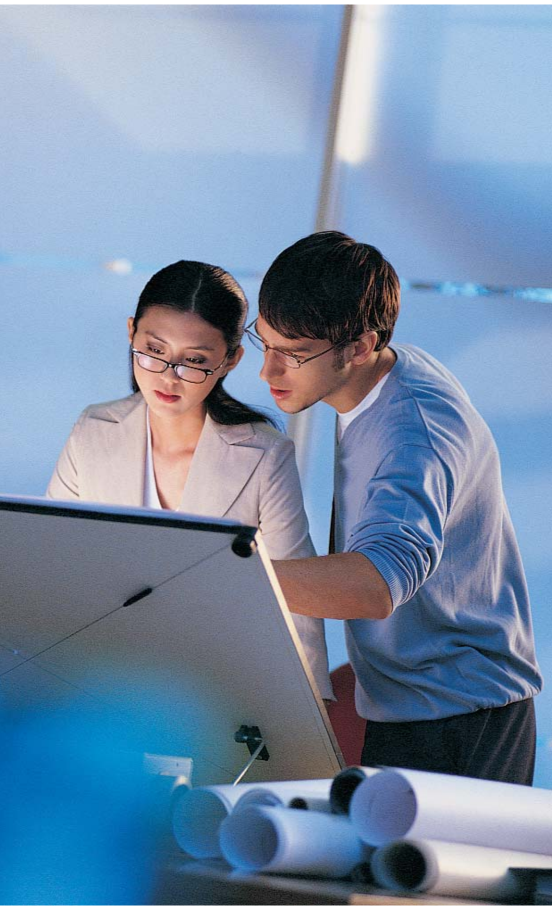
- For voluntary winding up, the Bill proposes to require the approval of creditors representing two-thirds in value of total creditors as against the present requirement of a simple majority.

- The Company Liquidator would be required to report on the progress of winding up of the company at meetings of the members and creditors held once in each quarter or more frequently as against reporting on an annual basis under the existing provisions.

- In order to ensure speedy dissolution of companies, the Bill proposes a time limit of 60 days from the date of receipt of the application for the Tribunal to make an order of dissolution.
- Where a company is wound up voluntarily and the whole or any part of its business or property is transferred or sold to another company, consent of the secured creditors would be required for receiving any part of the consideration in the form of shares or other like interest in the buyer company.
- Any arrangement between a company and its creditors in voluntary winding up shall require approval by a special resolution of the members and also by the creditors holding 75 percent in value of the total amount due to all creditors.

Summary procedure for liquidation

The Bill proposes to empower the Tribunal to order the winding up of a company by a new summary procedure where the book value of assets held by company does not exceed INR 10 million. Broadly, the summary procedure shall involve appointment of an official liquidator (by the Tribunal) who shall dispose of assets, recover amounts from debtors and settle claims of creditors within the specified period of time.



Other significant proposals

Dormant companies

- To reduce the cost of compliance by companies that are not carrying on any significant operations, the Bill introduces the concept of 'dormant' companies. An application to the Registrar for obtaining the status of a dormant company can be made by –

  a) A company formed for a future project or to hold an asset or intellectual property but which did not have any significant accounting transaction

  b) An inactive company, i.e. a company which has not been carrying on any business or operation or has not had any significant accounting transaction during the last two financial years or has not filed financial statements and annual return during the two financial years

  Where a company has not filed the financial statements or annual returns for two financial years consecutively, the Registrar is required to suo motu accord it the status of dormant company after issuing a notice to it.

- A dormant company would be required to have such minimum number of directors, file such documents, and pay such annual fee as may be prescribed. Failure to comply with the prescribed requirements would cause the Registrar to strike off the name of the company from the register of dormant companies to be maintained by the Registrar.

- A dormant company can become an active company on an application accompanied by such documents and fee as may be prescribed.

Associate companies

The Bill introduces the concept of 'associate company'. An 'associate company' has been defined as one in which the company has a significant influence (viz., control of at least 26 percent of total voting power, or of business decisions under an agreement), but which is not its subsidiary or subsidiary of any other company. The Bill places an associate company at par with a subsidiary for a number of provisions, e.g., for purposes of disqualification for appointment of auditor on account of indebtedness, for determining the independence of directors, and classification as a related party.

Application for registration of charge

- In the event of failure of a company to register a charge, the person in whose favour the charge is created may apply to the Registrar who would be authorised to register a charge in such a situation after giving due notice to the company. The fee paid to the Registrar in relation to this can be recovered from the company.

Annual return

- In order to enhance the information value of annual return (which is a public document), a number of additional disclosures therein are proposed. These include:

  > Principal business activities

  > Particulars of holding, subsidiary and associate companies

  > Promoters, directors, key managerial personnel along with changes therein since the last financial year (at present, particulars of only directors, managing directors and manager are required)

  > Meetings of members or a class thereof, and of Board and its various committees along with attendance details

  > Remuneration of directors and key managerial personnel

  > Penalties imposed on the company, its directors or officers and details of compounding of offences

  > Matters related to certification of compliances, disclosures; and

  > Such other matters as may be prescribed

- In the case of annual return of a listed company or of a company having paid-up capital and turnover as may be prescribed, a certificate, in the prescribed form, by a Company Secretary in whole-time practice would also be required, confirming compliance with all the provisions of the Act and also that the annual return states the facts correctly and adequately.

- An extract of the annual return in the form to be prescribed shall also form part of the Board's Report.

- The time limit for filing of annual return with the Registrar is proposed to be reduced from sixty days to thirty days from the date on which the annual general meeting is held or ought to have been held.

Establishment of Special Courts

- To ensure speedy trial of offences under the Act, the Central Government may establish Special Courts, each consisting of a single judge. Once constituted, all offences under the Bill would be dealt with only by the Special Courts which shall be deemed to be Courts of Session. High Courts would have the powers relating to appeal and revision. The Special Courts would have discretionary power to conduct summary trial for offences which are punishable with imprisonment for a term not exceeding three years. But in case of such a trial no sentence of imprisonment for a term exceeding one year shall be passed.

Inquiry and investigation

Significant changes have been made to the provisions relating to inquiry and investigation to make the investigations effective. Suitable provisions have been introduced to compel the company to facilitate proper investigation including production of relevant records.

- The period for which the Registrar can retain the seized documents is proposed to be increased from 30 days to 180 days.
- The Tribunal would have the power to order an investigation by the Central Government on an application by at least 100 members instead of 200 members under the existing law. Besides, as at present, the Tribunal can also order an investigation on application by members having 1/10th of total voting power or 1/5th of the members if there is no share capital.
- To assist in any inspection, inquiry or investigation under the Act or under the corresponding law in force in a foreign state, the Central Government may enter into reciprocal arrangements with foreign states.
- The Tribunal would have the power to pass an order for the freezing of funds, assets or properties of the company for a maximum period of three years where it is of the opinion that the transfer or disposal of funds, assets or properties would be prejudicial to the interest of company or its shareholders or creditors or public interest.
- No suit or other proceeding shall lie against any action initiated by the Central Government for making an investigation into the affairs of a company till the investigation report is submitted.
- The provisions of inspection or investigation would apply equally to foreign companies.

Removal of names of companies by the Registrar

- The Bill prescribes conditions under which an application to Registrar for removal of name of a company from the register of companies could be made.

- Where an application is made by a company to the Registrar for removal of its name with the intent of evading the liabilities or to deceive the creditors or to defraud any other persons, the persons in charge of the company's management shall be jointly and severally liable to pay damages to any person who has incurred a loss due to dissolution of the company. Further, the Registrar could also recommend prosecution against the persons responsible for filing the aforesaid application.

The information used in this report is sourced from:
The Companies Bill, 2008: http://www.mca.gov.in/MinistryWebsite/dca/actsbills/pdf/Companies_Bill_2008_27oct2008.pdf
The Companies Act, 1956: http://www.mca.gov.in/MinistryWebsite/dca/actsbills/pdf/Companies_Act_1956_Part_1.pdf
http://www.mca.gov.in/MinistryWebsite/dca/actsbills/pdf/Companies_Act_1956_Part_2.pdf

in.kpmg.com

KPMG in India

Mumbai
KPMG House, Kamala Mills Compound
448, Senapati Bapat Marg,
Lower Parel,
Mumbai 400 013
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Delhi
DLF Building No. 10,
8th Floor, Tower B,
DLF Cyber City, Phase 2,
Gurgaon -122002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Pune
703, Godrej Castlemaine
Bund Garden
Pune 411 001
Tel: +91 20 3058 5764/65
Fax: +91 20 3058 5775

Bangalore
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bangalore 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chennai
No.10 Mahatma Gandhi Road
Nungambakkam
Chennai 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Hyderabad
8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad - 500 034
Tel: +91 40 6630 5000
Fax: +91 40 6630 5299

Kolkata
Park Plaza, Block F, Floor 6
71 Park Street
Kolkata 700 016
Tel: +91 33 2217 2858
Fax: +91 33 2217 2868

Key Contacts

Pradip Kanakia
Executive Director
Head - Markets
e-Mail: pkanakia@kpmg.com
Tel: +91 80 3980 6100