

COMPANIES BILL 2009: GOVERNANCE, ACCOUNTABILITY & ROLE OF COMPANY SECRETARY

1. Key Managerial Personnel (Clause 178)

(a) Definition

- As per **clause 178**, every company belonging to such class or description of companies as may be prescribed shall have **Whole-Time Key Managerial Personnel (KMP)**.

A Company Secretary is a KMP, as defined in clause 2(zza):

- **Clause 2 (zza) -**

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

- (i) the Managing Director, the Chief Executive Officer or the Manager and where there is no Managing Director or Manager, a whole-time director or directors;
- (ii) the Company Secretary; and**
- (iii) the Chief Financial Officer;”

It is widely known fact that Smaller Companies are used to divert funds, manage data manipulation and inter party transactions. The Satyam Fiasco is a Clear cut example where money passes through smaller Companies resulted in a big bang. So Small Companies are in the need of more Corporate Governance and Stricter Compliances. And also it is highly felt that a Compliance Officer must be there to look the matter.

Even in the existing Act the Requirement of a Company Secretary is limited to only Big Companies having paid up Capital of Rs 5 Crore or More. The

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Requirement is generally guided by Rules and not by the Act. The New Provision provides more relaxation to Companies and Government for Granting Exemption from the Compulsory Appointment of CS. (Earlier it has only a single criteria paid up capital.) Might it be chances that more law evasion and dispute will arise after implementation of the said norms.

The New Provision has allowed more relaxation where the actual requirement is of more stringent norms and stricter Compliances. It would be better if Government comes with a provision that a Company having paid up Capital/Turnover of a prescribed amount must have to appointment a Company Secretary. And also this must be in the Laws and not be guided by any supportive Rules. It would send a Clear Cut message that Government and Statutory Body are very serious about such kind of frauds.

(b) Manner of Appointment

- Every Company Secretary being a Key Managerial Personnel is to be **appointed by a resolution of the Board** which shall contain the terms and conditions of appointment including the remuneration.

Next question is that why the responsibilities and role in the Company towards Corporate Compliance Management and Affairs have not been defined?

*Under the Existing Laws Section 5(d) widely known as the Section for **Officer in Default provides that** the Company Secretary along with Managing Director, Whole Time Director, Manager are one who has the prime responsibility towards effective Compliances of the Act and they are the prime one who are liable for any violation.*

In the proposed bill this provision has been abolished. Now who will be responsible for the effective compliance of the companies act is not clear. The actual requirement here is that for the default not only the director with company secretary but also promoters and directors with associated companies must take responsibility of the compliances of the laws.

There must be a provision that A Company Secretary appointed for the main Company are also responsible to look after all related party transactions and transactions occurs among associated Companies if associated Companies have no any Company Secretary.

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Also in the existing provisions the CS is standing with Directors and under proposed bill with key managerial persons (Just below the Level of Directors). Quite clear it is that those claiming CS has been promoted have to look into the matter again.

(c) Vacancy

If any **vacancy in the office of Key Managerial Personnel** is created, the same shall be filled up by the Board at a meeting of the Board **within a period of six months** from the date of such vacancy.

It is Wonderful that how they reach to the Conclusion that A Company Can Go without Managerial Person for a Period Of Six month? Why Such a Long Time? Take an Imaginary example

"If a Company Appoint a KMP for a Single day and KMP resigns for the next day whether it will be allowed to the Company to continue without the KMPs for further period of Six month?"

(e) Penalty

- If a company does not appoint a Company Secretary, **the penalty proposed is:**
On company - one lakh rupees
On every director and KMP who is in default - 25,000 rupees for each such default.

If the default is a Continuous one then even penalty is fixed for 25000 irrespective of Period .Why?

2. Annual Return (Clause 82)

- The scope of Annual Return has been widened. It now includes, besides the existing disclosures, the disclosures related to Corporate Governance practices in the company as well **as certification of compliances and disclosures.** Further the Annual Return of every company is now required to be **signed by a Director and a Company Secretary, or where there is no Company Secretary, by a Company Secretary in whole-time practice.**
- 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

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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.

- In relation to a One Person Company and Small Company, the annual return is to be signed by the Company Secretary, or where there is no Company Secretary, by one director of the company.
- Clause 82(2) provides that an extract of the Annual Return shall form part of Board's Report.

***First** Thing is that Why this provision is only for Listed Companies (Despite the fact that the listing agreement and other SEBI Regulation already contained the detailed provisions related to disclosure of Shareholding Pattern, Audit of RTA and Secretarial Audit related to Physical and Demate Mode). Why not for unlisted Companies have no such kind of disclosure?*

***Second** thing is that words mentioned in Clause 82 (1) (i) "matters related to certification of compliances, disclosures" is no where clearly defined in the Act. This will allow every one to take there own meaning as per his convenience. It would be better if the Law makers come with a clear cut format in any specific schedule or suggested list of Items to express the meaning of these words.(like in Clause 49 of the Listing Agreement).*

***Third** how a CS or a Firm of CS will be selected to execute this work is not cleared? Whether Board or Members have right to select/appoint is not been defined?*

In a closely held Company Where Share holding Pattern, Details of Directors, Creditors, Assets are recorded in registers which are required under Existing Companies Act (Bill also provides for the same) In practice theses registers are maintained manually and most of the time not in proper manner. So it would be much better if this certification would for those Companies have no Compliance Manager that they could get this certificate to authenticate their return in a better ways.

3. Recognition to Secretarial Standards (Clause 107)

Clause 107 of the Companies Bill makes it mandatory for every company to observe such Secretarial Standards as may be prescribed with respect to General and Board Meetings.

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Why only 2 type of Standards only when already 8 SS has been issued?

Annual general meeting (Clause 85)

The Proposed Bill same as in Existing Clause Provides that Annual General Meeting should be in a Business Hour and at a registered office is situated.

For effective participation in Meeting it should be allowed to hold even on a Sunday which is not a religious festival day.

Also in an area where maximum no of Shareholder resides should be allowed as an eligible place to conduct AGM if rests of members are agreeing.

Notice of Annual General Meeting (Clause 90)

A general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed:

It is a welcome steps for recognition of Electronic Mode for sending of Notice. But a big part of India is not using this service and still relying on traditional mode. It would be better that publication in a news paper for the meeting should be compulsory for the General Meeting.

The Deficiency is still continued in Existing as well as in New Bill regarding optional provision for publication.

In Clause 90(3) notice will be given to Members, Directors and auditors.

Why Key Managerial Personals (CEO have responsibility to manage affairs, CFO have the biggest, Contribution for the Preparation of Accounts and CS responsible for Investors and shareholders relation cannot get notice for Meeting.) are invited to participate in the meeting?

The New Bill provides Certification of Annual Return but has not allowed serving the notice to CS why?

(Whether the authentication of details regarding Directors, Members, KMPs, matters related to the statutory Compliances and affairs are not as important as the Financial Statements of The Companies?)

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Again in the Clause 90(4) the Wordings are as

“Any accidental omission to give notice to, or **the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.”**

By inserting such kind of Provision what message Policy makers want to give is a matter of debate. This is a special kind of Provision have the capacity to damage whole purpose of the new bill. Just think

“If a large number of Shareholders are those who have not received the notice and a meeting occurs then how the purpose of meeting will be fulfilled?”

AUDIT AND AUDITORS (Chapter X)

It was expected that after the Satyam Scandal Government will come with a new and strict regulation for the Auditing Firms. At least we could expect some different sets of provision regarding Audit. But unfortunately are same where earlier we are.

Auditor not to render certain services. (Clause 127)

Clause Provides that these Services are not eligible to render following services to the Companies-

- (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) rendering of outsourced financial services; and
- (h) management services.

Prima Facie this Clause is looking to be inspired with SOX Act. But the same time it is silent on the Services rendered by auditors to associated Companies and the

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Companies owned by Promoters. Why not these companies are not included under prohibition for rendering such kind of services same like in SOX ACT?

Financial Statement, Board's report, etc.

120. (1) The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board **at least by the Chairman where he is authorized by the Board or by two directors out of which one shall be Managing Director or Chief Executive Officer, or, in the case of a One Person Company, only by one director**, for submission to the auditor for his report thereon:

Under the existing provision CS has to sign the Financial Statement is with the Director of the Company. Now the Signature of CS has been dispensed with. What reason may be behind this "removal of the signature of CS". So many Items in the accounts are of such nature having primarily linked with Company Secretary like remuneration of Directors, Related Party Transaction (transaction related to Directors and Promoters).

Again CFO is also not required to sign the same who is primarily responsible for the authentication of Balance sheet. It is not understandable because CFO and CS are one have the prime responsibility are not liable for the authentication of the financial statements is a big loopholes.

4. Report on General Meetings (Clause 109)

Every listed public company shall prepare in the prescribed manner a report on each Annual General Meeting which shall be filed with the Registrar within 30 days of the conclusion of the AGM.

As per the Listing Agreement a listed Company has to give proper disclosures about Pre and Post AGM affairs. But Most of the closely held Companies are in the practice who Conduct the Meeting only on Paper and no actual meeting held. It would be better if

- the date Venue and Time with the Name & Contact No. of Compliance Officer/Director/Chairman should be published in the news paper.*
- after The AGM not only the Report to be filed but also should be published in a manner that those members who could not participate will easily get information about the Proceedings of the Meeting.*

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If such kind of Disclosure will come then non receipt of notice to members and Conducting the General Meeting on Paper will be difficult for a Company.

All Companies having members and directors same and are of a tiny nature should be exempted from the Provision of AGM/EGM. There is nothing meaningful if person are same in Board Meeting and again in General Meeting also.

Requirement for the Independent Directors- (CLAUSE 132)

(3) Every listed public company having such amount of paid-up share capital as may be prescribed shall have at the least one-third of the total number of directors as independent directors. The Central Government may prescribe the minimum number of independent directors in case of other public companies and subsidiaries of any public company.

It might be a welcome steps if the requirement applied to those unlisted company having widely held shareholding pattern. But they limited their scope by limiting it for the listed company. For a Listed Company SEBI has already made more strict norms even then again in Companies Bill what was the need when it is going to change nothing?

AUDIT COMMITTEE (CLAUSE 158)

(1) The Board of Directors of every listed company and such other class or description of companies, as may be prescribed, shall constitute an Audit Committee and a Remuneration Committee of the Board.

Under the Existing law every Company having a paid up capital of Rs 5 Crore or more have to form an Audit Committee. Now only listed Company and other notified by the Government are required. By limiting the scope of the provision what message government wants to give?

Again for the listed Companies listing agreement has clear cut provision for the audit committee. Then again what was the need to make a new provision in the same matter.

Also it may be a matter for the discussion that what change actually happen in corporate environment which pushes the government to remove the audit committee requirement.

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INSIDE TRADING-

- Clause 172 - Right of directors and KMPs to buy
 - Call option
 - Put option
- Clause 173 - restriction on dealing in securities, counselling about securities or procuring or communicating any price sensitive information
 - Sweeping restriction on “dealing” in securities
 - Restriction applicable to directors also
 - Obviously, this is unintended

They Comes up with a bundle of strict norms but what is the purpose behind it when already SEBI has issued a separate regulation on the same matter is difficult to understand.

Merger or Amalgamation of certain companies. (Clause 204)

(10) The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fee due on revised capital:

Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be **set off against the fees payable by the transferee company on its authorised capital** enhanced by the merger or amalgamation.

Provision included with respect to set-off of fees payable on authorized capital is a confusing one. In respect of a merger transferee company is one which have to increase its capital and not the transferor company. Now the question is why such kind of set off. And also how the fee payable can be setoff and how older one can be set off is unanswered. Whether all increase in authorise capital since inception of Transferee Company will be allowed?

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