

Analysis of the Companies Bill, 2011_A must read

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Dear All,

A simple effort has been made to analyze the Companies Bill, 2011 along with brand new provisions as introduced in the Lok Sabha on 14th December, 2011 with the help of inputs provided by ICSI. Hope you all appreciate the efforts:

SCHEME OF NEW COMPANIES BILL, 2011

1. The Bill has 470 clauses and 7 schedules as against 658 Sections and 15 schedules in the existing Companies Act, 1956.
2. The entire bill has been divided into 29 chapters.

Following chapters have been introduced, viz.

- a. Registered Valuers (ch.17);
- b. Government companies (ch. 23);
- c. Companies to furnish information or statistics (ch. 25);
- d. Nidhis (ch. 26);
- e. National Company Law Tribunal & Appellate Tribunal (ch. 27);
- f. Special Courts (ch. 28)

Just like previous The Bill empowers Central Government to make rules, etc. through delegated legislation after having detailed consultative process (clause 470 and others).

The Bill provides for self-regulatory process and stringent compliance regime.

THE SALIENT FEATURES OF THE BILL:

1. Concept of One Person Company (OPC limited) introduced by Companies Bill, 2011 through Clause 2(62).
2. In Clause 2(85) of Companies Bill, 2011, Small companies have been defined by fixing maximum paid-up share capital not exceeding Rs. 50 Lakhs and such companies will be required to follow less stringent regulatory provisions.
3. In Clause 18 of Companies Bill, 2011, the proper provision for Conversion of Companies already registered has been introduced.
4. In Clause 7(1)(b) of Companies Bill, 2011, A provision has been made regarding declaration to the effect that all the requirements of the Act in respect of registration and matters precedent or incidental thereto have been complied with. Company Secretaries continue to be recognized for the purpose of giving this declaration.

INTRODUCTION OF E-GOVERNANCE

Another important feature added by Companies Bill, 2011 in corporate practice is formal introduction of much awaited concept of E-Governance.

E-Governance proposed for various company processes like maintenance and inspection of documents in electronic form, option of keeping of books of accounts in electronic form, financial statements to be placed on company's website, holding of board meetings through video conferencing/other electronic mode; voting through electronic means.

After the introduction of E-Governance companies can maintain its statutory registers in electronic mode and hold its board meetings through video conferencing.

BOARD AND GOVERNANCE

Appointment of Key Managerial Personnel [Clause 203(1)]

As per clause 203 of Companies Bill, 2011 the Company Secretaries are recognized as whole-time key managerial personnel. Also Companies Bill, 2011 has made the appointment of Company Secretary mandatory.

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

- (i) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director; and
- (ii) **Company Secretary.**

Unless the articles of a company provide otherwise, an individual shall not be the chairperson of the company as well as the managing director or Chief Executive Officer of the company at the same time [Proviso to Clause 203(1)].

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

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

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

Every Company Secretary being a KMP shall be appointed by a resolution of the Board which shall contain the terms and conditions of appointment including the remuneration. If any vacancy in the office of KMP 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 [Clause 203 (2) & (4)]

If a company **does not appoint a Company Secretary**, the penalty proposed is:

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

MINIMUM PERIOD PRESCRIBED FOR AT LEAST ONE DIRECTOR ON BOARD TO STAY IN INDIA

This kind of provision also prescribed for the very first time. Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in previous calendar year [Clause 149(2)].

CONCEPT OF INDEPENDENT DIRECTORS

The concept of **independent directors** has also been touched upon for the very first time under clause 149.

- A. All listed companies are required to appoint independent directors.
- B. Such other public companies as may be prescribed by the Central Government shall also be required to appoint independent directors.
- C. At least one-third of the Board of such companies should comprise independent directors.
- D. **Nominee director** appointed by any institution, or in pursuance of any agreement, or appointed by any Government to represent its shareholding **shall not be deemed to be an independent director.**
- E. As per first proviso to Clause 161(2) only an independent director can be appointed as alternate director to an independent director.
- F. The Independent directors shall abide by a code provided in Schedule IV to the Bill.
- G. Independent directors shall hold office up to two consecutive terms. One term is upto five consecutive years.
- H. Eligible for appointment in same company after cooling period of three years.

BOARD MEETINGS THROUGH VIDEO-CONFERENCING ALLOWED NOW

Another master change proposed in Companies Bill, 2011 under clause 173(2) is **participation of directors at Board Meetings has been permitted through video-conferencing or other audio visual means**, provided such participation is capable of recording and recognizing. Also, the recording and storing of the proceedings of such meetings should be carried out.

RESIGNATION OF DIRECTORS (CLAUSE 168)

For the very first time something has been proposed regarding resignation of directors through clause. Earlier there was no section regarding this.

A director may **resign from** his office by giving notice in writing. The Board shall, on receipt of such notice, intimate the Registrar and also place such resignation in the subsequent general meeting of the company [Clause 168(1)].

The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later [Clause 168(2)].

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 [Clause 168(3)].

SECRETARIAL STANDARDS INTRODUCED AND PROVIDED STATUTORY RECOGNITION

Another major proposal is for the first time, the Secretarial Standards has been introduced and provided statutory recognition [refer Clause 118(10) & 205].

Clause 118(10) reads as;

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

Clause 205 casts duty on the Company Secretary to ensure that the company complies with the applicable Secretarial Standards.

It is the beginning of a new era where non financial standards have been given importance and statutory recognition besides Financial Standards.

SECRETARIAL AUDIT (CLAUSE 204)

In December 2009, the Ministry of Corporate Affairs introduced Voluntary Guidelines on Corporate Governance which inter-alia prescribed Secretarial Audit.

The Parliamentary Standing Committee in its report recommended to introduced Secretarial Audit.

Now, for the first time Secretarial Audit as been included in the Bill. The provisions of the clause relating to Secretarial Audit are as follows:

- a. Every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board's report a **Secretarial Audit Report**, given by a **Company Secretary in Practice**, in such form as may be prescribed.
- b. It shall be the duty of the company to give all assistance and facilities to the **Company Secretary in Practice**, for auditing the secretarial and related records of the company.
- c. The Board of Directors, in their report shall explain in full any qualification or observation or other remarks made by the **Company Secretary in Practice** in his report.
- d. If a company or any officer of the company or the **Company Secretary in Practice**, contravenes the provisions of this section, the company, every officer of the company or the **Company Secretary in Practice**, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

DUTIES OF DIRECTORS [CLAUSE 166]

For the first time duties of directors have been defined in the Bill. A director of a company shall:

- a. act in accordance with the articles of the company.
- b. act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- c. exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- d. not involve 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.
- e. not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain under sub-section (7), he shall be liable to pay an amount equal to that gain to the company.
- f. not assign his office and any assignment so made shall be void.

Penalty: If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

MANAGERIAL REMUNERATION (CLAUSE 197)

Provisions relating to limits on remuneration provided in the existing Act being included in the Bill. Maximum limit of 11% (of net profits) being retained.

For companies with no profits or inadequate profits remuneration shall be payable in accordance with new Schedule of Remuneration and in case a company is not able to comply with such Schedule, approval of Central Govt would be necessary.

BOARD MEETINGS (CLAUSE 173)

First time length of Notice of board meeting along with shorter notice provisions has been proposed via clause 173 (3).

At least seven days' notice is required to be given for a Board meeting. The notice may be sent by electronic means to every director at his address registered with the company [Clause 173(3)].

A Board Meeting may be called at **shorter notice** subject to the condition that **at least one independent director**, if any, shall be present at the meeting.

However, in the absence of any independent director from such a meeting, the decisions taken at such meeting shall be final only on ratification thereof by at least one independent director [1st & 2nd Proviso to clause 173].

ONE PERSON COMPANIES (OPC) - OPTION TO HOLD AGM [CLAUSE 122]:

One person companies have been given the option to dispense with the requirement of holding an AGM.

STATUTORY AUDITORS (CLAUSE 139)

The provisions of Rotation of auditors and audit firms are as follows:

No listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint—

- (a) an individual as auditor for more than one term of five consecutive years; and
- (b) an audit firm as auditor for more than two terms of five consecutive years:

Provided that—

(i) an individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(ii) an audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term:

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years:

BOARD'S REPORT (CLAUSE 134)

Board's Report has been made more informative and includes extensive disclosures like –

- (i) extract of annual return
- (ii) number of meetings of Board
- (iii) report of the committee on directors' remuneration
- (iv) a declaration by independent directors wherever they are appointed
- (v) particulars of loans, guarantees, or investments made
- (vi) particulars of contracts or arrangements entered into Explanation or comments on every qualification, reservation made –
 - a) by auditor in his report
 - b) by the Company Secretary in his Secretarial Audit Report

The Boards' Report is to be signed by the Chairman if he is authorized by the Board and where he is not so authorized, it shall be signed by at least two directors, one of whom shall be a managing director, or where there is only one director, by such director (Clause 134).

WOMAN DIRECTOR (CLAUSE 149)

At least one woman director being made mandatory in the prescribed class or classes of companies.

CORPORATE SOCIAL RESPONSIBILITY (CLAUSE 135)

Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

The Corporate Social Responsibility Committee shall formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and The Board of every company referred to in sub-section (1), shall make every endeavor to ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

If the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

SHARE CAPITAL AND DEBENTURES

Equity share capital has now been defined as:

1. Equity share capital, with reference to any company limited by shares, means all share capital which is not preference share capital and
2. Preference share capital with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—
 - a. payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and
 - b. repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company [clause 43].

If a company with intent to defraud, issues a duplicate certificate of shares, the company shall be punishable with fine which shall 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 or Rs.10 crore whichever is higher. Stringent penalties have also been imposed for defaulting officers of the company [Clause 46(5)]

PROHIBITION ON ISSUE OF SHARE ON DISCOUNT

A company cannot issue share at a discount. Any share issued by a company at a discounted price shall be void [Clause (53)]

MISCELLANEOUS

Concept of '**dormant companies**' are being introduced. This would allow a company to remain on the Register of Companies with minimal compliance requirements even without carrying on any operations.

Hope the above info helps you to understand Companies Bill, 2011 in a better way.

Thanks
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