Dissecting the New Law

With Great Power, comes Great Responsibilities

Enhanced Responsibilities & Compliances by the Board of Directors and the Company Secretary

Under The Companies Act, 2013

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Enhanced Responsibilities and Compliances by the Board of Directors and the Company Secretary

Executive Summary:

The Companies Bill 2013, has been given the assent by the Hon'ble President of India, Shri Pranab Mukherjee on 30th August, 2013 and therefore, will now be known as **The Companies Act, 2013** (Act No.18 of 2013)

The Companies Act, 2013 ("the Act") has given a wide scope to the Company Secretaries, it has also brought along additional responsibilities.

The Companies Act, 2013 lays substantial emphasis on Compliance of Statutory Laws and Rules made there under. The Company Secretary will have to ensure that all applicable laws have been complied which will have to be stated by the Board of Directors in the "Directors' Responsibility Statement" under the Director's Report. Non Compliance attracts stiff penalties.

Trivia

Section 383A of the erstwhile Companies Act, 1956 stated that "Every company having paid-up share capital of Rs. 5 Crore and above shall have a whole time secretary"

Such a provision has been omitted from the new Companies Act, 2013.

1. Section 205 of the Companies Act, 2013 lays down the Functions of a Company Secretary:

    a. **to report to the Board about compliance with the provisions of this Act**, the rules made thereunder and other laws applicable to the company;
    b. to ensure that the company complies with the applicable **secretarial standards;**
    c. to discharge such other duties as may be prescribed

    Therefore the Company secretary shall be responsible for all compliances under the Companies Act and all other applicable laws. Therefore all statutory Compliances will have to be adhered to with strict monitoring.

The Company Secretary will also have to ensure compliance of **Secretarial Standards** with respect to Board Meetings & General Meetings which prescribe a set of principles for:

a. Convening and conduct of Meetings of the Board of Directors and matters related thereto, mode of conducting, procedure and action plan in Board Meetings including Committees. The same also prescribe the voting, quorum, frequency, agendas, minutes etc. in relation to calling and holding of meetings in line with the Act and other recommendations

b. Conducting general meetings not only of all members but also class of members, creditors, debt holders etc, the major issues requiring General Meeting consent, notice content and procedure of sending the same, manner of putting a resolution to vote, casting poll, appointing proxies, the votes casted, type of resolutions, frequency, quorum etc.

Section 118 (10 & 11) of the Companies Act, 2013 states that :

Every company shall observe secretarial standards with respect to 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 as such by the Central Government

If any default is made in complying with the provisions of this section in respect of any meeting,

a. the company shall be liable to a penalty of twenty-five thousand rupees and

b. every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

2. Currently the system of review of Statutory Compliances was only mandated by Clause 49 of the Listing Agreement **which was only applicable to Listed Companies** stating that:

"The Board shall periodically review compliance reports of all laws applicable to the company, prepared by the company as well as steps taken by the company to rectify instances of non-compliances."

Section, 134(5) of The Companies Act, 2013 states that :

The Directors' Responsibility Statement referred to in clause (c) of sub-section (3) shall state that:

e. the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

f. the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

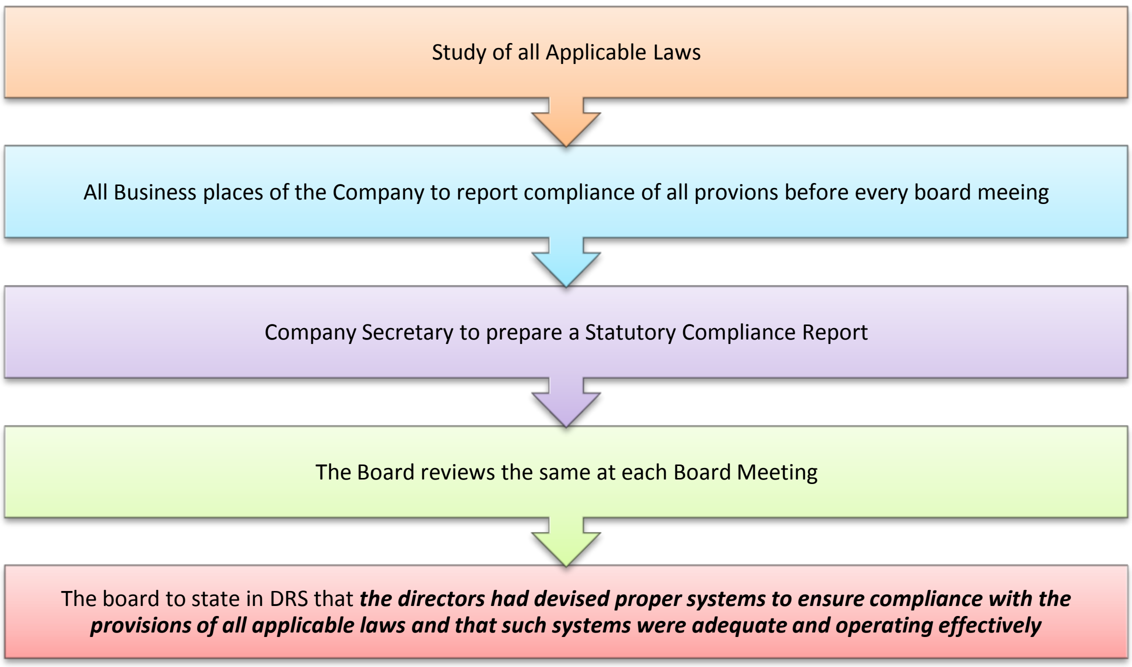
This means that even directors of unlisted companies will have to review the statutory compliances and will have to devise a mechanism to ensure that all statutory laws have been complied with.

Penal Provisions for Non compliance under this Section:

a. Minimum fine of Rs. 50,000 extending upto Rs. 25 Lac on the Company

b. All officers in Default punishable with imprisonment for a maximum term of years or with a minimum fine of Rs. 50,000 extending upto Rs. 5 Lac or both

System to be adopted to ensure the compliances



3. Section 166 of the Companies Act, 2013 lays down the **duties of Directors** as under:

    - ✓ To act in accordance with the articles of the company
    - ✓ To act with due and reasonable care, skill and diligence and to exercise independent judgment
    - ✓ To 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 stakeholders (company, employees, shareholders, etc.)
    - ✓ To avoid conflict of interest (with that of the Co.)
    - ✓ Not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates
    - ✓ Not assign his office and any assignment so made shall be void

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

4. Section 447 of the Companies Act, 2013 defines **fraud** as:

    a. *Any act, omission*
    b. *Concealment of any fact*
    c. *abuse of position committed by any person or any other person with the connivance in any manner, with intent to*
        i. *deceive,*
        ii. *to gain undue advantage from, or*
        iii. *to injure the interests of, the company or its shareholders or its creditors or*
        iv. *any other person,*

    whether or not there is any wrongful gain or wrongful loss

Any person who is found to be guilty of fraud, shall be punishable with:

a. imprisonment for a term which shall not be less than six months but which may extend to ten years and

b. **shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in fraud.**
c. **where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.**

Conclusion

1. The Company Secretaries of ALL COMPANIES, (whether LISTED OR UNLISTED) will have to ensure that all laws have been complied and shall have to periodically report to the Board with their Compliance Reports. The CS will have to record the Director's review of such compliances in the Minutes Book and will have to ensure that Secretarial Standards are followed.

2. Great care will have to be taken to ensure that no facts are concealed otherwise it will amount to fraud.

3. Directors will have to comply with all their duties and will have to report it correctly in the DRS.

4. Although Secretarial Audit is mandatory for Listed Company, if any Practicing CS conducts audit in a manner which is harmful for the stakeholders, the PCS will attract the ire of NFRA.

Disclaimer : This note is based on the research and contains the views of the author on the above subject. The note is intended to initiate sharing of knowledge on Companies Bill, 2013 and cannot be construed to be any professional or legal advice.

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