

**SICK COMPANIES ,WINDING UP ,
REGISTERED VALUERS,
NCLT & NCLAT, MEASURES FOR CG,
CSR & OPPORTUNITIES FOR CHARTERED
ACCOUNTANTS**

By

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AGENDA

- **SICK COMPANIES ,WINDING UP ,**
- **REGISTERED VALUERS,NCLT & NCLAT,
MEASURES FOR CG, CSR &**
- **OPPORTUNITIES FOR CHARTERED
ACCOUNTANTS**
- How to master new provisions -conceptual clarity –bill,act ,rules
- Capacity building, Professional opportunities- both international and national
- How to develop practice in these areas



JESSICA COX

ATTITUDE

“He is able ,who
thinks he is
able.”-Gautam
Buddha

Overview of Companies Bill, 2012

- www.mca.gov.in
- E- Governance
- CSR
- OPC,dormant,small cos etc.
- Enhanced Accountability on part of Companies
- Additional Disclosure Norms
- Facilitating raising of Capital by Companies
- Audit Accountability
- NCLT & NCLAT
- Managerial Remuneration
- Facilitating Mergers & Acquisitions
- Protection for Minority Shareholders
- Investor protection
- Serious Fraud Investigation Office (SFIO)
- Woman Director
- Mediation and Conciliation Panel

History of law for Companies

- Companies Act, 1857, 1866, 1882, 1913, 1956
- Companies (amend) bill 1993, 1997
- Companies (amend) act, 2002 passed but implemented partially
- JJ Irani Committee (report on 31.5.2005)
- Companies Bill, 2008 (23.10.2008), 2009 (03.08.2009), 2011(14.12.2011)
- PSC report – 31.08.2010 & 26.06.2012
- Companies Bill, 2012 passed on 18/12/2012 by LS

Rules of interpretations

- General Clauses Act, 1897 , 30s, 11/03/1897
- Sec-8 construction of references to repeal enactments

Revival and Rehabilitation of sick companies

- Chapter XXIX - Companies Bill, 2012 - Cl 253 to 269
- The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) [w.e.f 12-01-1987]. 36 secs. www.bifr.nic.in
- Part VIA – Cos Act, 1956 – Secs.424A – 424L – yet to be notified.

Revival and Rehabilitation of sick companies – Cos Bill, 2012

- Chapter XIX – Cl.253 – 269
- 50% of secured creditors 30 days – cl.253
- NCLT determination – 60 days
- Revival & rehabilitation appln – 60 days
- Report of Interim administrator – within 60 days
- Appnt of Administrator – covers CAs & other professionals
- Scheme of revival & rehabilitation – Cl.261
- Sanction of scheme – 60 days – Cl.262
- Copy of scheme to ROC within 30 days

Revival and Rehabilitation of sick companies – Cos Bill, 2012

- Scheme binding on the employees, shareholders, creditors and guarantors of sick co.
- Failure to implement scheme – option to wind up
- Non-approval of scheme by creditors – order for winding up
- NCLT empowered to take action against delinquent directors
- Violation of Chapter XIX – imprisonment upto 7 years and fine upto Rs.10 lakhs – Cl.267
- Bar of other Courts – Cl.268
- Rehabilitation and Insolvency Fund c 269

Revival and Rehabilitation of sick companies - SICCA

- The Sick Industrial Companies (Special Provisions) Act, 1985 (w.e.f 12-01-1987), 36 secs
- Pertains to industries, 1st Schedule of IDRA Act, 1951
- Sick industrial co. - accumulated losses equal to or exceeding its entire net worth
- Constitution of BIFR & AAIFR
- Report sickness to BIFR - within 60 days of finalization of audited accounts
- Inquiry by BIFR
- Revival package
- Failure to revive – BIFR recommendation for winding up

Cos Bill, 2012 & SICA

Companies Bill, 2012	SICA
Applies to all companies	Applies only to industrial companies
No specific definition of sick company	Defined in Sec.3(1)(o)
National Company Law Tribunal - regulatory authority	BIFR (Board for Industrial and Financial Reconstruction)
Declared sick -fails to pay 50% or more of outstanding debt -30 days of notice & secured creditor moves NCLT	Declared sick if its net worth is completely eroded
17 clauses	36 sections
NCLT empowered to initiate winding up proceedings	BIFR can only forward its opinion to the concerned High Court to initiate winding up proceedings
Time limits prescribed are lesser than that prescribed under SICA	
Covers both secured and unsecured creditors	

Winding Up

- LLP (winding up & dissolution) rules 2011 w.e.f 30.3.2010 – 301rules – 90 forms
- The companies (Court) rules 1959 w.e.f 17.8.1959 361rules -160 forms
- Companies Act, 1956 - Part-VII, S.425 to 560
- Companies Bill, 2012 – Chapter XX – Cl.270 to 365

Winding Up – Cos Bill 2012

- Cl.270 - modes of winding up
- Part-I -winding up by the tribunal (Cl.271 to 303)
- Part-II - voluntary winding up (Cl.304 to 323)
- Part-III -Provisions applicable to every mode of winding up (Cl.324 to 358)
- Part-IV - Official Liquidators (Cl.359 to 365)

Winding Up – Cos Bill

Two modes of winding up -

- 1) By the Tribunal
- 2) Voluntary

PART–I, Winding up by the Tribunal

- Petition - Cl.272
- Circumstances:
 - a) unable to pay its debts
 - 1) Fails to pay creditor within 21 days >Rs 1L
 - 2) decree or order of any court or returned unsatisfied
 - 3) proved to the satisfaction of the Tribunal
 - b) by special resolution
 - c) against the interests of the sovereignty and integrity
 - d) ordered by the tribunal under Chapter XIX
 - e) Appln by the Registrar or any authorized person
 - f) default in filing FS or AR in preceding 5 consecutive FY
 - g) just and equitable opinion of tribunal

Procedure- Winding up by the Tribunal

Petition to the Tribunal

- a) the company
- b) any creditor/s
- c) any contributory/ies
- d) the Registrar
- e) any person authorised by CG
- f) CG or SG

Actions by Tribunal (within 90d from the date of presentation)

- (a) dismiss it, with or without costs
- (b) make any interim order
- (c) appoint a provisional liquidator
- (d) order for winding up with or without costs or
- (e) any other order as it thinks fit.

Appointment of CL and members' liability

- from the panel maintained by CG.
- Intimation to liquidator & ROC.
- Filing of declaration within 7D by liquidator.
- no suit or other legal proceeding to be commenced (except any proceeding pending in appeal before SC or HC).
- property and effects of the company deemed to be in the custody of the Tribunal from the date of order.
- promoters, directors, officers and employees, who are or have been in employment of the co. or associated with the co. to extend full cooperation to the CL (imprisonment 6m or/& fine 50K).
- Member not liable to contribute if he has ceased to be a member for the preceding 1Y or more before the commencement of the winding up.
- In ltd co. any person who is or has been a director or manager, whose liability is unlimited under the provisions of this Act, in addition to his liability to contribute as an ordinary member, liable to make a further contribution as if he were at the commencement of winding up, a member of an unlimited company

Other Provisions

Audit of CL's accounts – Cl.294

- CL to maintain proper and regular books of account
- Present to NCLT a/cs of receipts and payments at-least twice in each year of his tenure
- Printed copy of the a/cs or summary thereof by post to every creditor and every contributory by CL.
- Order by tribunal : Arrest of person trying to leave India or abscond - Cl.301
- Dissolution of company by Tribunal – Cl.302

PART –II, Voluntary winding up

- By resolution in GM
- By special resolution
- Declaration of solvency by majority of BOD- within 5W immediately preceding the date of the passing of the resolution
- Filling of copy of resolution to the Registrar
- copy of the report of the auditors , valuation report
- Meeting of creditors (2/3 in value should be agreed)
- Publication of resolution within 14D of passing
- Appointment of CL in GM and approved by the majority of creditors
- Removal of CL by $\frac{3}{4}$ members or creditors
- Notice to the Registrar of the appointment
- On appointment of a CL all powers of BOD and MD / WTD/ manager to cease
- CL is punishable in case of failure with 10L rupees

Insolvency laws

- Presidency Towns Insolvency Act, 1909 – 127 secs & 2sch
- Provincial Insolvency Act, 1920 – 83 secs & 2sch
- Apl only to individuals, sole proprietorships & partnership firms
- S.107 of PTI Act, 1909 & S.8 of PI Act, 1920 - prohibits any insolvency petition against any corporation/association/company registered under any enactment
- Insolvency rules appl with respect to the estates of insolvent persons – in winding up of Insolvent Co. – Cl.325 of Cos Bill

Registered Valuers - Ch-XVII – Cl. 247, Cos Bill

- Property, tax, Shares, debentures, securities and goodwill such experience and qualifications
- Impartial, true & fair valuation
- Due diligence
- Accordance with rules
- Avoid interest valuation
- Punishment – fine 25k to 100k
- On conviction refund remuneration + pay damages for loss.
- CB – certificate course of ICAI www.icai.org
www.institutionofvaluers.net www.ivsc.org
- PO - Advice, valuation, representing bearer of loss, representing RV.

NCLT & NCLAT

- Chpt-XXVII, C -407 to 434
- By CG [Chair person+ (JM &TM-11max) for 5YRS another 5 YRS] in consultation with the Chief Justice of India
- President -a Judge of a High Court for 5YRS
- Judicial Member- judge of HC or DC (5YRS) or advocate (10YRS)
- Technical Member- member of the Indian Corporate Law Service or Indian Legal Service, CA , CS, CA in practice (15YRS), presiding officer of a Labour Court, Tribunal or National Tribunal (5YRS)
- Rectification of order within 2YRS
- Appeal to AT within 45D
- Appeal against order of the Appellate Tribunal to SC -60D additional 60D

PO in NCLT/NCLAT/other Tribunals under corporate laws

- Advisory
- Drafting of petition
- Representation
- National green tribunal www.greentribunal.in
- DRT www.bankdrt.net
- Competition Appellate Tribunal www.compat.nic.in
- SAT www.sat.gov.in
- CLB www.clb.nic.in , www.mumbaiclb.com
- FEMA Tribunal /PMLA tribunal
- CB visit to tribunals ,reading orders, discussion with experts

Framework of Governance

1. Supervisory Board/Committee/board charter
2. Audit Committee/audit committee charter
3. Internal Audit-standards
4. Statutory Audit- standards
5. Disclosure of information- bdr
6. Risk Management framework
7. Internal Control Framework
8. Whistle Blower Policy

Measures for CG

- Int Reports cadbury 1992,king 1994.greenbury 1995,blue ribbon 1998,turnbull 1999,higgs 2002,smith 2003 CII 1998 ,kumarmangalam 1999 narayanmurthy 2003
- Corporate governance voluntary guidelines 2009
- 4.1.2013 consultative paper of sebi on CG
- Board meeting (Cl 118(10)) SS-1
- General meeting (Cl 118(10)) SS-2
- Punishment for fraudulently inducing persons to invest money (Cl 36(c))

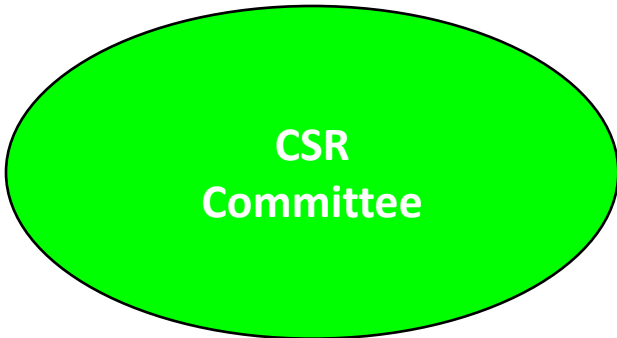
Measures for CG -Committees



Stakeholder
Relationship
Committee



Nomination &
Remuneration
Committee



CSR
Committee



Audit
Committee

Measures for CG -Defining Independent Director

- Director referred to in CI 149(5)
- A director other than MD or WTD or ND
- Integrity, Expertise & Experience
- Is Not or was not a Promotor
- Not related to Promotors
- No pecuniary relationship with company
- Nor any of ID's relatives have pecuniary interest
- One who possesses qualifications as prescribed
- Neither ID or his relatives have been
 - KMP or Employee of the company
 - Employee or Proprietor or Partner of
 - Firm of auditors or
 - Firm of company secretaries
 - Legal or Consulting Firm
 - Holds together with relatives 2% or more of total voting power
 - Is the Chief Executive or director of NGO that receives 25% or more receipts from the company

Measures for CG- Appointment of Key Managerial Personnel (KMP)

- Certain class of Company shall have WT KMP (CI 203(1))
- Definition of KMP – CI 2(51)
- CS appointed by Board Resolution (CI 203)
- No CS appointed penalty imposed on Company &KMP

CEO or MD or Manager

CS

CFO on Board Appmt

Measures for CG Duties of Directors – CI 166

- In accordance with the articles of the company
- Act in good faith
- due and reasonable care
- direct or indirect interest
- No undue gain or advantage
- Shall not assign office
- Contravention punishable with fine of Rs. 1lac to 5 lacs

Measures for CG

- Independent Directors (ID)
 - Their tenure & liability
 - Code for ID provided in Sch IV to the Bill
 - Databanks for IDs proposed
- CSRC of the Board proposed
 - This committee will have IDs to bring more independence
- “Promotor” definition includes his liability
- Provision in respect of Vigil Mechanism proposed
- CG empowered to restrict in respect of layers of subsidiaries for any class or classes of companies

Fraudulently Inducing persons to invest money – CI 36(c)

- Any person who
 - by wrong means
 - induces another person
 - to obtaining credit facilities
 - from any bank or financial institution.
- Punishment –
 - 10 years of imprisonment and fine max of 3 times the amt of the fraud.

PO in CG

1. Making CG framework
2. Code of conduct
3. ERM framework- 134(3)(n) BDR
4. Whistler blower policy
5. Audit Committee Charter
6. Internal control framework- 134(5)(e)
7. Training of BD, members
8. Evaluation of performance
9. Internal audit of CG compliance
10. Evaluation of effectiveness of ICF
11. Board charter
12. CG for CPSE 14.5.2010 www.dpe.nic.in
13. Corporate governance rating
14. CG in other sectors llp, firm, ct ap 12,300cr ,tirupati ,satya sai,sai baba

Few useful websites on CG

- www.nfcgindia.org
- www.agca-asia.org
- www.ecgi.org
- www.gcgf.orf ifc
- www.bis.org
- www.oecd.org

CSR Clause 135-sch VII

- Every company with
 - NW of 500 Crs or more or
 - TO of 1000 Crs or more or
 - NP of 5 Crs or moreDuring any financial year shall constitute CSR committee (CSRC) with at least one ID (Cl 135)
- Board's Report on CSR Initiatives (Cl 134)
- CSRC recommends CSR Policy
- Activities under Schedule VII
- BoD ensures company spends
 - 2% of Avg NP as computed in C 198 made in 3 immediately preceding FYs for CSR Policy
- Board explanation under Cl 134(3)(o) – where the expenditure is less
- PO-CSR policy, CSR Audit, CSR advice.

Opportunities For Chartered Accountants- Co Bill/corporate laws

1. Advice on compliance, interpretation
2. Formation- OPC, PVT, Public, Charitable(C-8),-FCRA www.fcraonline.nic.in
Dormant c 455, Govt. 2(45) C XXIII 394,395 , Foreign, Small, NBFC
www.rbi.org.in- 12.12.2012 new draft g , Nidhis (Ch-XXVI, S-406)
,unregistered cos, LLP , Chit funds (The Chit Funds Act, 1982)
3. Rehabilitation, Winding up
4. Registered valuers CH XXVII C 247
5. Class action, C 245
6. Co Liquidator 275(2)
7. NCLT & NCLAT-PMLA,CAT,FEMA,CLB,BIFR,AAIFR,SAT
8. Mediation & conciliation panel , C-442 S 89 (1-7-2002) of CPC 1908 every court ,trade body, SE , coop sector, every agreement
9. Arbitration and conciliation act 1996 –s 86 sch III no rules, Negotiation, mediation, conciliation, arbitration
10. Internal financial controls -134 (5)(e)

Opportunities For Chartered Accountants- Co Bill/corporate laws

11. Applicable laws compliance audit 134 (5) (f) business laws > 500

www.indiacode.nic.in

11. Internal audit for Secretarial audit matters

12. BD-Report 134(3) (a to q), 17

13. Independent directors bank, insurance, psu, pvt sector, se, other enterprises www.iodonline.com , www.dpe.nic.in

14. Advise to independent directors 149(7)

15. Listing requirements clause 49, PSE , insurance cos, banks etc

16. Representation before SFIO

17. Company Administrator

18. Statutory audit

19. Guiding auditors about compliance of C 143

20. Internal audit C 138 www.internalaudit.icai.org

21. Related party transactions

Opportunities For Chartered Accountants- Co Bill/corporate laws

- 23. Drafting & vetting of MOA, AOA, Shareholders agreements etc.
- 24. ROC filling, maintenance
- 25. Revival of companies Chpt-XVIII s-248 to 252
- 26. Technical Members of NCLT-practice 15yrs
- 27. Training corporate & others www.iica.in
- 28 SARFESI advice, The SARFAESI (Central Registry) Rules, 2011 www.cersai.org.in
- 29. *comprises, CH XV c 232 small co ,holding & subsidiary*
- 30. *Representation before SFIO c 211*
- CB www.corporatelawreporter.com, www.claonline.com, sebi & corporate laws of taxmann

International Scenario: Company Law

**UK Companies Act, 1948
is the great mother of
most corporate laws**

Singapore and Hong Kong: primarily based on UK laws; Hong Kong reviewed its law in 1999

Australia: based on UK law, but major changes in 1998

New Zealand: in 1990 started drifting towards US laws

Indian subcontinent
Inspired by UK law

South Africa: mixed influence of UK and Roman Dutch laws

United States: each state has its own law; Model Business Corporations Act 1984

Canada: more than 25 years ago, split its base from UK laws and is



United Kingdom

- Companies Act 2006 (CA 2006)
- CA 2006 - 1300 sections/ 47 parts/ 16 Schedules + over 70 statutory instruments
- Insolvency Act 1986
- The UK Corporate Governance Code
- Stewardship Code
- Guidance Notes - Financial Reporting Council
- European Union Directives
- Old Companies Act 1985
- Court cases

United Kingdom

- All limited companies in England, Wales, Northern Ireland and Scotland registered at Companies House
- Registration process simplified on 1.10.2009
- Companies House:
<http://www.companieshouse.gov.uk/>

United States

- Individual states incorporate most businesses
- Special types incorporated by the federal government
- Separate Entity Classification Rules For federal tax purposes - Internal Revenue Service
- S corporation
- C corporation
- Delaware corporation
- Nevada corporation

Australia

- The Corporations Act 2001
- Australian Securities and Investments Commission Act 2001
- The Australian Securities and Investments Commission - National regulatory authority
- Australian Securities Exchange (ASX) Corporate Governance Council
- CG Guidelines for Australian Listed Companies
- CG Principles and Recommendations – 1.1.2011

Germany

- German company law (Gesellschaftsrecht)
- Separate regulatory structure for public and private companies

Primary forms of Business:

- Public companies (Aktiengesellschaft),
- Cooperatives (eingetragene Genossenschaft)
- Private limited companies (Gesellschaft mit beschränkter Haftung)
- Partnerships (Kommanditgesellschaft auf Aktien)

Germany

- Mitbestimmungsgesetz (in English, Codetermination Act) of 1976
- Applies to all German capital companies having > 2000 employees,
- Co's of over 2000 employees to have 1/2 the supervisory BOD as representatives of workers.
- Supervisory board must have 12, 16 or 20 members depending on the company's size.
- Seats usually reserved for union representatives

Others

- FRANCE - Public companies Societe Anonyme (SA) and Private companies Societe a Responsabilite Limitee, (SARL) - separate law exists. Single member companies - EURL (Enterprise Unipersonnelle a Responsabilite Limite) also exist
- SOUTH AFRICA - Republic Of South Africa Companies Act, 1973
- PAKISTAN – Legal regime in Companies Ordinance, 1984. Administration of Cos - Securities and Exchange Commission of Pakistan and Registrar of Companies

List of Professional Opportunities

1. Accounting Services
2. Statutory Audit Services
3. Specialty Audit Services
4. Corporate Law Services
5. Management Accounting Services
6. Strategic Financial Management Services
7. Internal Audit and Internal Assurance Work Services
8. Financial Planning and Wealth Management Services

List of Professional Opportunities

- 9. Financial Market Services
- 10. Direct Tax Law Services
- 11. Indirect Tax Law Services
- 12. Rehabilitation, Insolvency, Liquidation Services
- 13. Corporate Governance
- 14. Valuation Services
- 15. Business / Commercial Laws Services

List of Professional Opportunities

- 16. Laws related to formation of various forms of business entity
- 17. Drafting of documents and conveyancing services
- 18. Laws related to financial institutions
- 19. Sector / industry specific laws
- 20. Laws relating to foreign exchange
- 21. Laws Relating to International Trade

List of Professional Opportunities

- 22. Social Security Laws and Employee Ownership
- 23. Takeover Laws
- 24. Opportunities with State Legislations and Regulations
- 25. Information Technology and Information System Audit
- 26. Arbitration
- 27. Climate change and Carbon Credit Mechanism
- 28. International Professional Opportunities
- 29. Education, Training and Publication
- 30. Export/Import Consultancy

List of Professional Opportunities

- 31. Business Process Outsourcing
- 32. NRI Service
- 33. STPI and SEZ
- 34. Business Startup Service
- 35. NGOs, Societies and Trusts
- 36. Consultancy to Government Projects
- 37. Pension Services
- 38. Performance Measurement

List of Professional Opportunities

39. Insurance

40. Local Bodies

41. Knowledge Management

Taking part in the activities of the ICAI

- www.icaai.org
- Time invested is experience ,money and opportunities gained
- Various committees
 - Ethical Standards Board
 - Committee for Financial Markets and Investor's Protection
 - Committee for Government Accounting
 - Auditing and Assurance Standards Board
 - Committee for Members in Industry
 - Corporate laws and Corporate Governance Committee
 - Professional Development Committee
 - Internal Audit Standards Board
 - Expert Advisory Board
 - CASLB
 - Research Committee
 - Perspective Planning Committee etc etc etc

How to develop practice in these areas

- Website
- Periodical newsletter
- Talk in chamber of commerce
- Article in business periodicals/business magazines, consultations, opinions
- Projecting as expert- self feeling
- Training, writing books in these areas
- International seminars
- Becoming part of govt committee, body

Questions

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Knowledge shared is
knowledge gained.

We invite joint venturers in capacity building

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