THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

CS R. Sridharan
PRESIDENT

MCA: 2014

April 2, 2014

Shri Naved Masood, IAS
Secretary to Government of India
Ministry of Corporate Affairs
Shastri Bhawan, New Delhi

Dear Sir,

Sub.: Rules under sections 203 (1) of the Companies Act, 2013

1. This is in continuation of the discussion we (myself, CS Sanjay Grover, Council Member, CS M. S. Sahoo, Secretary and CS Sutanu Sinha, Chief Executive) had with you on 31st March 2014 on the above subject. We (myself, CS Sanjay Grover, Council Member, CS Pavan Kumar Vijay, Past President CS M. S. Sahoo, Secretary, CS Sutanu Sinha, Chief Executive and Ms. Alka kapoor, Director) had also discussed the matter separately with Mr. M. J. Joseph, Additional Secretary and Ms. Renuka Kumar, Joint Secretary on the same day.

2. Rule 8 of **the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014** reads as under:

   "8. **Appointment of Key Managerial Personnel.-**

   Every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have whole-time key managerial personnel."

3. The legal provisions having bearing on this **Section 203** are as under:

   (i) **Section 2(24):** "company secretary" or "secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act;

Headquarters ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
tel 011 - 4534 1005, 4534 1001 **fax** +91 - 11 - 2462 6727 **email** president@icsi.edu **website** www.icsi.edu

(ii) **Section 2 (51):** "key managerial personnel", in relation to a company, means—

- The Chief Executive Officer or the managing director or the manager;
- The company secretary;
- The whole-time director;
- The Chief Financial Officer; and
- Such other officer as may be prescribed;

(iii) **Section 203**: Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel -

- Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
- Company secretary; and
- Chief Financial Officer.

(iv) **Section 205(1):** The functions of the company secretary shall include,—

- To report to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
- To ensure that the company complies with the applicable secretarial standards;
- To discharge such other duties as may be prescribed.

(v) **Rule 10:** Duties of Company Secretary.-

The duties of Company Secretary shall also discharge, the following duties, namely:-

- To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;
- To facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;
- To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;
- To represent before various regulators and other authorities under the Act in connection with discharge of various duties under the Act;
- To assist the Board in the conduct of the affairs of the company;
- To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
- To discharge such other duties as have been specified under the Act or rules; and
- Such other duties as may be assigned by the Board from time to time.

4. The import of the above provisions is as under:

   (i) **Section 203** requires specified companies to have (a) only three kinds of KMPs, not all kinds of KMPs as defined in Section 2(51), and (b) these have to be on full time basis which is not a requirement of KMP in Section 2(51). Further, for some kinds of KMPs, the law prescribes eligibility requirements while it does not do so for others. This means that the law treats different kinds of KMPs differently and a company need not have all kinds of KMPs. **As such there has to be different thresholds for companies to have different kinds of KMPs based on rationale for the same.**

   (ii) The law requires specific duties to be performed by a company secretary. For example, he is to report to board about compliance with all applicable laws, ensure compliance with secretarial standards and assist the board in ensuring governance. Every company needs to comply with the law, every company needs to comply with the secretarial standards and every board needs assistance to ensure governance. **Hence every company, whether private or public, is required to have a company secretary.**

5. The following are also relevant in this regard:

   (i) The draft Rules had provided that every listed company and every other company having a paid up share capital of Rs.5 crore or more shall have whole-time key managerial personnel. This meant a company with significant presence would have a company secretary. However, the Rules now notified have exempted public companies with a paid up capital up to Rs.10 crore and all private companies from having a company secretary. As a consequence, about 7000 companies would be required to have company secretaries. **This gives a message that compliance with law, secretarial standards, and governance norms, etc., which are responsibilities of a company secretary under the Companies Act, 2013, are not important for all, but 7000 companies.**

   (ii) The need for a company to have company secretary can be linked to scale of operations or presence which can be determined in terms of paid up capital, turnover, number of employees, number of shareholders, outstanding borrowings, etc. and has no link whether a company is public or private. In fact, we have moved to a regime where the law endeavours to provides level playing field to all kinds of market participants. The Companies Act, 2013 has withdrawn most of the exemptions / relaxations available to private companies under the earlier law. This is based on the profound realization that serious misdemeanor have been noticed in many private companies. **The laws of the land need to be complied with, secretarial standards need to be adhered to, and**

(iii) **governance norms have to be followed by every company, whether private or public.**

(iv) Section 383A of Companies Act, 1956 provided that every company having a paid up share capital of Rs.5 crore needed to appoint a whole time company secretary. The companies with less than Rs.5 crore of share capital needed to have persons with certain qualifications as company secretaries and or to use the services of a practising company secretary. This ensured that the services of company secretaries were available to every company, public or private. **Neither the Companies Act 1956 nor the draft Rules made any distinction between private companies and public companies.**

(v) Company secretaries are regulated professionals and they render services critical for companies. **A company needs a company secretary as much as it needs an auditor and every company is obliged to have an auditor.**

(vi) It is matter of record that companies which have engaged company secretaries have shown a marked improvement in compliance and governance.

(vii) The distribution of companies as per paid up capital as on 30th September, 2013 is as under:

Companies between paid capital (in Rs.)	Number of Private companies	Number of Public companies	Total Number of Companies
0-10 lakh	6,37,485	23,406	6,60,891
10 -50 lakh	1,13,745	9,999	1,23,744
50 lakh – 2 crore	62,746	10,275	73,021
2 – 5 crore	18,755	7,020	25,775
5 – 10 crore	5,938	4,331	10,269
10 – 25 crore	3,927	3,878	7,805
25 – 50 crore	1,405	1,563	2,968
50 – 100 crore	798	902	1,700
100 crore and above	820	1,244	2,064
Grand Total	**8,45,619**	**62,618**	**9,08,237**

6. It is observed from the above that private companies constitute about 93% of total companies in India. This number will increase further as the definition of private company has been modified to include companies having upto 200 shareholders subject to certain other requirements. Further the liberal dispensation would encourage conversion of public companies into private companies and most of the new companies would be private companies. As a consequence, only a few public companies will be under obligation to comply the substantive provision of the new law.

7. In view of the above, I request you to kindly modify the rules immediately **to require appointment of company secretary by every company as contemplated under the Act** and thereby strengthen governance and compliance in every company in public interest.

Yours sincerely,

(CS R. Sridharan)

CC: a. Mr. M. J. Joseph, Additional Secretary, Ministry of Corporate Affairs

b. Ms. Renuka Kumar, Joint Secretary, Ministry of Corporate Affairs.