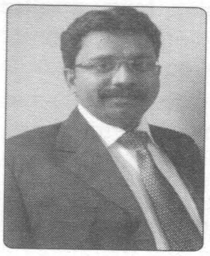
SECRETARIAL AUDIT UNDER THE COMPANIES ACT, 2013 *



Companies Act, 2013 (Act) is very loud and clear on its focus on a single element – Compliance! The whole Act seems to revolve around this lone concept of compliance and the means and ways to ensure its implementation. The enforcement mechanism is also well incorporated in the Act itself providing the requisite arms to strike home the point.

The corporate sector as well as the professional community is required to be extra vigilant in discharging their functions to ensure that they are compliant in their approach. Plethora of provisions spread over the Act and the Rules coupled with enhanced penal provisions, exorbitant additional filing fees and fraud related provisions makes the situation look more gloomy and frightening.

Audit is perhaps the only mechanism which provides some sort of comfort and assurance that controls and checks are in place. An audit helps to ensure that the company is following the right principles and procedures and also highlights areas which require attention to make timely corrections. Timely examination of procedures reduces risk as well as potential cost of non-compliance and also helps[s to build better corporate image. The benefits of audit far outweigh its cost.

In this article, we have made an attempt to highlight the need and importance of Secretarial Audit along with the provisions of Companies Act, 2013 relating to conduct of Secretarial Audit.

WHAT IS SECRETARIAL AUDIT?

Secretarial Audit, as the name suggests, is an examination of the various records, registers, documents, books and papers etc. of the company by an independent qualified person to check the compliance with the provisions of various Acts, Rules, Regulations, procedures and to highlight areas of non-compliance.

WHAT IS THE NEED FOR A SECRETARIAL AUDIT?

A secretarial audit aims at achieving a two-fold objective; on one hand it seeks to protect the interests of the customers, employees, revenue, environment and the directors and officers of the company, and on the other hand it helps to avoid any unwarranted legal actions by the law-enforcing agencies and other persons as well.

Secretarial Audit is not only essential for listed companies and big size public companies but it is vital for each and every company incorporated under the Companies Act. How financial audit has been mandated for each company irrespective of their capital, size or operations, same way a secretarial audit is also required for each entity in order to ensure that the company is compliant from all aspects, i.e. not only financial but all also legal and procedural. Financial audit has a defined scope and it covers only certain aspect of the functioning of a company. Similarly, cost audit also focuses on a specific aspect. A secretarial audit bridges the remaining gap and is essential to ensure that the company is functioning in line with the provisions of the various statutes applicable to it and also the following the various rules and regulations made thereunder.

The need for a secretarial audit has become even more profound in the current scenario due to the reason that the Companies Act has recently been changed and as with any other law it has given rise to lot of interpretation and understanding issues. The Act is in nascent stage and requires time to settle down. Till then a regular independent audit exercise is extremely essential to ensure the corporate as well the legislature that "all is well". Secretarial Audit will fill the vacuum which presently exists in the realm of legal compliance management.

WHAT ARE THE BENEFITS OF A SECRETARIAL AUDIT?

The corporate sector is governed by a complex web of laws, rules and regulations. However, enactment of laws is not enough and the desired results cannot be

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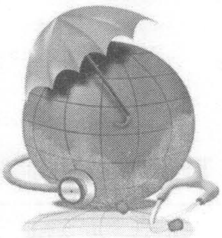
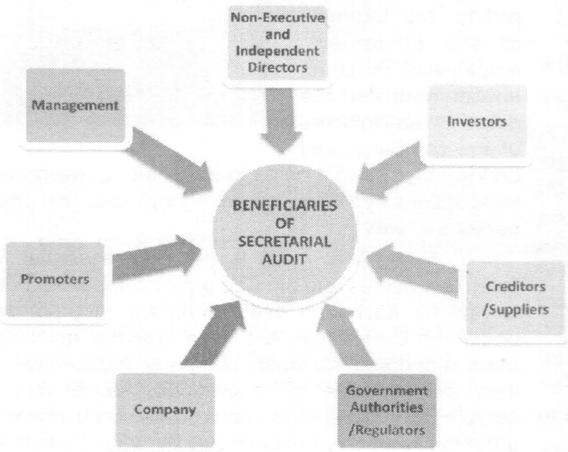


achieved unless their implementation is geared up. Lack of implementation of laws with no mechanism of audit to check their compliances has resulted in various scams. These setbacks not only impact the capital market but mar the economy has a whole and lowers the image of our country in the international market.



Some of the benefits of secretarial audit to various stakeholders are enumerated below:

- Secretarial Audit is compliance audit; it is a part of total compliance management in an organization. The Secretarial Audit is an effective **tool for corporate compliance management.** It helps ensure timely corrective measures when non-compliance is detected.
- One of the most arresting features of Companies Act, 2013 is its penal provisions. A Secretarial Audit helps to **reduce the risk of exposure to penal provisions** by providing timely check on the levels of compliances for both the company, its officers and also for the professionals.
- It helps to **foster the image of the company** in the minds of the regulators as well as stakeholders. A duly audited company is well perceived in the minds of the stakeholders and is looked upon favorably by the society.
- It **protects the interest of the management,** directors and key managerial personnel by reducing unwarranted exposure to legal actions and issues thereby reducing time and cost also.
- It helps to **reduce cost of additional filing fees** to be paid in case of delay in filing of reports and returns in time as required under the various provisions of law.
- It provides information to the management highlighting the level of compliances being followed in the company and the **areas which require correction.**
- It also provides an opportunity to the company to understand the **complex laws applicable to them** thereby enabling them and to carry out their activities in tune with the requirements of law.
- It also helps the shareholders, creditors and other stakeholders by providing them **a report regarding the level of compliance** being followed in the company.
- A company secretary conducting secretarial audit is duty bound to **report any instances of fraud** being committed in the company.

PROVISIONS OF COMPANIES ACT, 2013 RELATING TO SECRETARIAL AUDIT

❖ Introduction of Secretarial Audit in Companies Act, 2013

Secretarial Audit has been a matter of discussion for a long time. In the year 2009, MCA had released "CORPORATE GOVERNANCE VOLUNTARY GUIDELINES 2009". The Guidelines, amongst other things, recommended the introduction of Secretarial Audit. Pursuant to these guidelines, The Institute of Company Secretaries of India had issued a "Referencer on Secretarial Audit". This referencer not only provided the scope and usefulness of secretarial audit, but also provided a detailed format of the Secretarial Audit Report. However, these guidelines being voluntary in nature could not make their required mark. Companies Act, 2013, for the first time, makes secretarial audit mandatory.

❖ Scope of Secretarial Audit under Companies Act, 2013

Secretarial audit has a very vast scope. It extends not only to Companies Act but covers all the laws, rules and regulations applicable to the entity under audit. The scope of secretarial audit can be understood in the below manner:

COMPLIANCE OF APPLICABLE ACTS, RULES, REGULATIONS AND STANDARDS

- The Companies Act, 2013 (the Act) and the rules made thereunder;
- The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the rules made thereunder;
- The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;
- Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the

extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

- The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 ('SEBI Act'):-
  - The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
  - The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
  - The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
  - The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
  - The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
  - The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;
  - The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and
  - The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
- Other laws as may be applicable specifically to the company
- Secretarial Standards issued by The Institute of Company Secretaries of India.
- The Listing Agreements entered into by the Company with Stock Exchange(s)

SUGGESTIVE SECRETARIAL AREAS TO BE VERIFIED

- Constitution and composition of Board of Directors
- Meetings of the Board and Members – Frequency, Notice, Agenda, Minutes, voting, quorum etc.
- Maintenance of statutory registers and entries therein
- Share transfer/transmission process
- Availability of adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.
- Major events during the period under review like -
  - Public/Right/Preferential issue of shares / debentures/sweat equity, etc.
  - Redemption / buy-back of securities
  - Major decisions taken by the members in pursuance to section 180 of the Companies Act, 2013
  - Merger / amalgamation / reconstruction, etc.
  - Foreign technical collaborations

SUGGESTIVE LIST OF DOCUMENTS TO BE VERIFIED

- Notice and agenda of Board Meetings & General Meetings
- Minutes Books
- Statutory and other registers maintained by the company
- All related party contracts and agreements
- Notices of disclosure of interest given by the directors
- All forms and other returns filed with various authorities with their challan/acknowledgments
- Appointment letters of senior level executives and executive and independent directors
- Any show clause or other notices received by the company
- Contracts and agreements with related parties.
- All other commercial contracts and agreements
- Various policies set up by the companies like CSR policy, Whistle Blower Policy etc.
- Quarterly, semi-annual and annual reports and returns

Obligations of the company under audit

As per Section 204 of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 notified to come on force from 01.04.2014, Secretarial Audit is mandatory for following class of Companies:

- All listed Companies, and
- Every other public company having a paid-up share capital of fifty crore rupees or more, and
- Every other public company having a turnover of two hundred fifty crore rupees or more

The above class of companies is mandated to appoint a Practising Company Secretary as secretarial auditor, in a meeting of the Board, and annex the secretarial audit report received from the secretarial auditor to the Board's report.

The Board of Directors, in their report made in terms of sub-section (3) of section 134, shall explain in full any qualification or observation or other remarks extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

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