



**THE INSTITUTE OF
Company Secretaries of India**
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Statutory body under an Act of Parliament

e-CS Nitor

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Corporate Secretaries International Association (CSIA) Council Meeting at Sao Paulo, Brazil on October 10-11, 2014



*ICSI delegation meeting with Ms. Abhilasha Joshi, Consul General, Consulate General of India, Sao Paulo (Brazil) on 14th October 2014
Standing from L to R : CS Anil Murarka, Past President, Council Member, ICSI and CS R Sridharan, President, ICSI*

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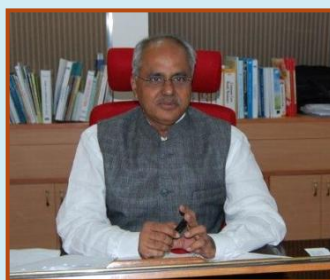


Seen in the picture : CS Sutanu Sinha, Chief Executive & Officiating Secretary, ICSI and other Officials of ICSI taking the Swachhata Shapath at Institute's Headquarters at New Delhi.



Seen in the picture : CS Sutanu Sinha, Chief Executive & Officiating Secretary, ICSI and other Officials of ICSI taking the Rashtriya Ekta Diwas Shapath at Institute's Headquarters at New Delhi.

Message from President



Dear Member,

You would have enjoyed the festive days, which I hope would have rejuvenated your mind. In India culture and festivities are intertwined. In our culture, carrying out one's duty has been considered as one of the highest virtues. Ours is a duty based society. Our thoughts and actions are interwoven with the call of duty. Ours is the land of duty, which is again distinct. Our scriptures time and again emphasized that duty is neither based on any reciprocal arrangements nor based on expectations, but though Srimad Bhagvad Gita, talks about various virtues of life, more emphasize has been given to discharge of one's duty without any fear or favour. The duty based philosophy has been reiterated in Vishnupurana thus: "*Among several countries Bharat is great for, this is land of duty whereas others are land of enjoyment*". Our is a *Karmabhumi* [land of duty] and not *Bhogabhumi* [land of enjoyment]. Against this backdrop, let us ponder over little, about professional duty or accountability.

In to-day's corporate world, accountability as a concept remains central to understand justice, honesty and responsibility. It is therefore, not surprising that the spate of corporate scandals that occurred over the last decade brought the importance of accountability into sharp relief. When things go disarray in the business world, society wants justice. Stakeholders, who suffer the consequences of business misconduct, demand the truth about exactly what happened, how it happened, why it happened and above all who are responsible for this misdeed either directly or indirectly. Stakeholders want those involved or responsible to take responsibility for their actions. Principles such as justice, honesty and responsibility require that individuals and corporations "give an account" of their decisions and actions. The implications seem simple and self-evident. On the other hand, if such actions or decisions have harmful consequences, blame or punishment can rightly be appropriated to the guilty parties. Understanding of accountability lies at the heart of most efforts to ensure ethical business conduct.

The regulatory and legal framework are created to ensure that the corporates do not cross over moral Rubicon. As compliance professionals, we have duty of care and responsibility and let's carry it with renewed zeal. I am sure that our members will not yield or buckled down pressures and pulls and carry out their duty and uphold cherished professional values by adhering to the prescribed standards and practices and exercising due care and diligence. Before concluding this column I would like to quote the profound observation made by Swami Vivekananda - "*Karma in its effect on character is the most tremendous power that a man has to deal with. Man is, as it were, a centre, and is attracting all the powers of universe towards himself and in this centre is fusing them all and again sending them off in a big current.*"

Let's commit ourselves in all full measure for total compliances and in the process, distinguish ourselves.

Regards,

CS R. Sridharan

President

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Nidhi Companies: Governance and Regulatory Aspects

Chitranjan Pal*

Assistant Education Officer, ICSI

Introduction

As per section 406 of the Companies Act, 2013, “Nidhi” means a company which has been incorporated as a *Nidhi* with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

The primary object of Nidhis is to carry on the business of accepting deposits and lending money to member-borrowers only against jewels, etc., and mortgage of property. For over a century, Nidhis with the objective of cultivating the habit of thrift, have been generally promoted by public spirited men drawn from affluent local persons, lawyers and professionals like auditors, educationists, etc., including retired persons. The area of operation has been local – within municipalities and panchayats. Some Nidhis on account of their financial and administrative strength have opened branches within the respective revenue district and even outside. The principle of mutual benefit has been to pool the savings from members and lend only to members and never have dealing with Non-members. Such Members are only individuals. Bodies Corporate or Trusts are never to be admitted as Members. Nidhis are not expected to engage themselves in the business of Chit Fund, hire purchase, insurance or in any other business including investments in shares or debentures.

Origin of the concept in India

The history of the Nidhis, their special features, manner of functioning, regulations, etc., have been described by the (i) Viswanatha Shastri Committee in 1965; (ii) Banking Commission in 1972; (iii) James Raj Committee in 1975; (iv) Chakravarthy Report in 1987 ; (v) Dr.A.C.Shah Committee in 1992.

Further the Central Government vide Notification No.5/7/2000-CL.V dated 23rd March 2000 constituted a Committee known as Sabanayagam Committee to examine the various aspects of the functioning of Nidhi Companies and suggested an appropriate policy framework for overall improvement of the Nidhi Companies and alternative mechanism to regulate and facilitate Nidhi Companies to play key role in mobilising and gainfully investing small savings and improving their viability resilience and performance.

* The views expressed are personal views of the author and do not necessarily reflect those of the Institute.



Prevailing Regulatory Aspects of Nidhi

In exercise of powers conferred under section 406 read with section 469 of the Companies Act, 2013, Central Government issued the Nidhi Rules, 2014 which came into force on the 1st day of April, 2014. Nidhi Rules, 2014 are applicable to:

- every company which had been declared as a *Nidhi* or Mutual Benefit Society under sub-section (1) of Section 620A of the Companies Act, 1956;
- every company functioning on the lines of a *Nidhi* company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a *Nidhi* or Mutual Benefit Society under sub- Section (1) of Section 620A of the Companies Act, 1956; and
- every company incorporated as a *Nidhi* pursuant to the provisions of Section 406 of the Act.

Incorporation of Nidhi

- (1) A *Nidhi* to be incorporated under the Companies Act, 2013 shall be a public company and shall have a minimum paid up equity share capital of five lakh rupees.
- (2) *Nidhi* shall not issue preference shares.
- (3) If preference shares had been issued by a *Nidhi* before the commencement of the Companies Act, 2013, such preference shares shall be redeemed in accordance with the terms of issue of such shares.
- (4) No *Nidhi* shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.
- (5) Every Company incorporated as a “*Nidhi*” shall have the last words ‘Nidhi Limited’ as part of its name.

Requirements for minimum number of members and net owned funds

Sub-Rule (1) of Rule 5 of the Nidhi Rules, 2014 deals with requirements for minimum number of members, net owned fund etc. It provides that:

- (1) Every *Nidhi* shall, within a period of one year from the commencement of these rules, ensure that it has—
 - (a) not less than two hundred members;
 - (b) Net Owned Funds of ten lakh rupees or more;
 - (c) unencumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14; and
 - (d) ratio of Net Owned Funds to deposits of not more than 1:20.



It may be noted that “Net Owned Funds” means the aggregate of paid up equity share capital and free reserves as reduced by accumulated losses and intangible assets appearing in the last audited balance sheet. Further, the amount representing the proceeds of issue of preference shares shall not be included for calculating Net Owned Funds.

Sub Rule (3) states that if a *Nidhi* is not complying with clauses (a) or (d) of sub-rule (1) above, it shall within thirty days from the close of the first financial year, apply to the Regional Director in Form NDH-2 along with fee specified in Companies (Registration Offices and Fees) Rules, 2014 for extension of time and the Regional Director may consider the application and pass orders within thirty days of receipt of the application. Sub-Rule (4) further states that if the failure to comply with sub-rule (1) of this rule extends beyond the second financial year, *Nidhi* shall not accept any further deposits from the commencement of the second financial year till it complies with the provisions contained in sub-rule (1), besides being liable for penal consequences as provided in the Act.

Membership of Nidhi

- (1) A *Nidhi* shall not admit a body corporate or trust as a member.
- (2) Every *Nidhi* shall ensure that its membership is not reduced to less than two hundred members at any time.
- (3) A minor shall not be admitted as a member of *Nidhi*. It may be noted that deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of *Nidhi*.

Directors

- (1) The Director shall be a member of *Nidhi*.
- (2) The Director of a *Nidhi* shall hold office for a term up to ten consecutive years on the Board of *Nidhi*.
- (3) The Director shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director.
- (4) Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure.
- (5) The person to be appointed as a Director shall comply with the requirements Director Identification Number.
- (6) A person shall not be eligible for appointment as a director of a *Nidhi*, if —
 - (a) he is of unsound mind and stands so declared by a competent court;
 - (b) he is an undischarged insolvent;
 - (c) he has applied to be adjudicated as an insolvent and his application is pending;



- (d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;
 - (e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
 - (f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
 - (g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
- (7) No person who is or has been a director of a Nidhi which
- (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
 - (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Share capital and allotment

- (1) Every *Nidhi* shall issue equity shares of the nominal value of not less than ten rupees each.
- (2) No service charge shall be levied for issue of shares.
- (3) Every *Nidhi* shall allot to each deposit holder at least a minimum of ten equity shares or shares equivalent to one hundred rupees:

It may be noted that a savings account holder and a recurring deposit account holder shall hold at least one equity share of rupees ten.

Branches of Nidhi

- (1) A *Nidhi* may open branches, only if it has earned net profits after tax continuously during the preceding three financial years. A *Nidhi* may open up to three branches within the district.
- (2) If a *Nidhi* proposes to open more than three branches within the district or any branch outside the district, it shall obtain the prior permission of the Regional Director and an



intimation is to be given to the Registrar about opening of every branch within thirty days of such opening.

- (3) *Nidhi* shall not open branches or collection centres or offices or deposit centres, or by whatever name called outside the State where its registered office is situated.
- (4) *Nidhi* shall not open branches or collection centres or offices or deposit centres, or by whatever name called unless financial statement and annual return (up to date) are filed with the Registrar.
- (5) A *Nidhi* shall not close any branch unless it—
 - (a) publishes an advertisement in a newspaper in vernacular language in the place where it carries on business at least thirty days prior to such closure, informing the public about such closure;
 - (b) fixes a copy of such advertisement or a notice informing such closure of the branch on the notice board of *Nidhi* for a period of at least thirty days from the date on which advertisement was published under clause (a) ; and
 - (c) gives an intimation to the Registrar within thirty days of such closure.

Acceptance of deposits by *Nidhis*

A *Nidhi* shall not accept deposits exceeding twenty times of its Net Owned Funds (NOF) as per its last audited financial statements.

In the case of companies every company which had been declared as a *Nidhi* or Mutual Benefit Society under sub-section (1) of Section 620A of the Companies Act, 1956; and every company functioning on the lines of a *Nidhi* company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a *Nidhi* or Mutual Benefit Society under sub- Section (1) of Section 620A of the Companies Act, 1956; and existing on or before 26th July, 2001 and which have accepted deposits in excess of the aforesaid limits, the same shall be restored to the prescribed limit by increasing the Net Owned Funds position or alternatively by reducing the deposit according to the table given below:

TABLE

Ratio of Net Owned Funds to Deposits (as on 31.3. 2013)	Date by which the company has to achieve prescribed ceiling of 1:20
a) More than 1:20 but up to 1:35	By 31.3. 2015
b) More than 1:35 but up to 1:45	By 31.3. 2016
c) More than 1:45	By 31.3. 2017



The companies which are covered above shall not accept fresh deposits or renew existing deposits if such acceptance or renewal leads to violation of the prescribed ratio. The ratio above shall also apply to incremental deposits.

Further, as per Rule 13 of the Nidhi Rules, 2014,

- (1) The fixed deposits shall be accepted for a minimum period of six months and a maximum period of sixty months.
- (2) Recurring deposits shall be accepted for a minimum period of twelve months and a maximum period of sixty months.
- (3) In case of recurring deposits relating to mortgage loans, the maximum period of recurring deposits shall correspond to the repayment period of such loans granted by *Nidhi*.
- (4) The maximum balance in a savings deposit account at any given time qualifying for interest shall not exceed one lakh rupees at any point of time and the rate of interest shall not exceed two per cent above the rate of interest payable on savings bank account by nationalised banks.
- (5) A *Nidhi* may offer interest on fixed and recurring deposits at a rate not exceeding the maximum rate of interest prescribed by the Reserve Bank of India which the Non-Banking Financial Companies can pay on their public deposits.
- (6) A fixed deposit account or a recurring deposit account shall be foreclosed by the depositor subject to the following conditions, namely:—
 - (a) a *Nidhi* shall not repay any deposit within a period of three months from the date of its acceptance;
 - (b) where at the request of the depositor, a *Nidhi* repays any deposit after a period of three months, the depositor shall not be entitled to any interest up to six months from the date of deposit;
 - (c) where at the request of the depositor, a *Nidhi* makes repayment of a deposit before the expiry of the period for which such deposit was accepted by *Nidhi*, the rate of interest payable by *Nidhi* on such deposit shall be reduced by two per cent from the rate which *Nidhi* would have ordinarily paid, had the deposit been accepted for the period for which such deposit had run. It may be noted that in the event of death of a depositor, the deposit may be repaid prematurely to the surviving depositor or depositors in the case of joint holding with survivor clause, or to the nominee or to legal heir with interest up to the date of repayment at the rate which the company would have ordinarily paid, had such deposit been accepted for the period for which such deposit had run.



Un-encumbered term deposits by Nidhi

Under Rule 14 of the Nidhi Rules, 2014, every *Nidhi* shall invest and continue to keep invested, in unencumbered term deposits with a Scheduled commercial bank (other than a co-operative bank or a regional rural bank), or post office deposits in its own name an amount which shall not be less than ten per cent of the deposits outstanding at the close of business on the last working day of the second preceding month. In cases of unforeseen commitments, temporary withdrawal may be permitted with the prior approval of the Regional Director for the purpose of repayment to depositors, subject to such conditions and time limit which may be specified by the Regional Director to ensure restoration of the prescribed limit of ten per cent.

Loans by Nidhi

- (1) A *Nidhi* shall provide loans only to its members.
- (2) The loans given by a *Nidhi* to a member shall be subject to the following limits, namely:—
 - (a) two lakh rupees, where the total amount of deposits of such *Nidhi* from its members is less than two crore rupees;
 - (b) seven lakh fifty thousand rupees, where the total amount of deposits of such *Nidhi* from its members is more than two crore rupees but less than twenty crore rupees;
 - (c) twelve lakh rupees, where the total amount of deposits of such *Nidhi* from its members is more than twenty crore rupees but less than fifty crore rupees; and
 - (d) fifteen lakh rupees, where the total amount of deposits of such *Nidhi* from its members is more than fifty crore rupees:

Where a *Nidhi* has not made profits continuously in the three preceding financial years, it shall not make any fresh loans exceeding fifty per cent of the maximum amounts of loans specified in clauses (a), (b), (c) or (d). A member shall not be eligible for any further loan if he has borrowed any earlier loan from the *Nidhi* and has defaulted in repayment of such loan.

- (3) The amount of deposits shall be calculated on the basis of the last audited annual financial statements.
- (4) A *Nidhi* shall give loans to its members only against the following securities, namely:—
 - (a) gold, silver and jewellery, and the re-payment period of such loan shall not exceed one year.
 - (b) immovable property and, the total loans against immovable property [excluding mortgage loans granted on the security of property by registered mortgage, being a registered mortgage under section 69 of the Transfer of Property Act, 1882 (IV of 1882)] shall not exceed fifty per cent of the overall loan outstanding on the date of



approval by the board, the individual loan shall not exceed fifty per cent of the value of property offered as security and the period of repayment of such loan shall not exceed seven years.

- (c) fixed deposit receipts, National Savings Certificates, other Government Securities and insurance policies. It may be noted that such securities duly discharged shall be pledged with *Nidhi* and the maturity date of such securities shall not fall beyond the loan period or one year whichever is earlier and in the case of loan against fixed deposits, the period of loan shall not exceed the unexpired period of the fixed deposits.

Dividend

Under Rule 18 of Nidhi Rules, a *Nidhi* shall not declare dividend exceeding twenty five per cent or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:—

- (a) an equal amount is transferred to General Reserve;
- (b) there has been no default in repayment of matured deposits and interest; and
- (c) it has complied with all the rules as applicable to *Nidhis*.

Appointment of Auditor

Nidhi shall not appoint or re-appoint an individual as auditor for more than one term of five consecutive years and Nidhi shall not appoint or re-appoint an audit firm as auditor for more than two terms of five consecutive years.

It may be noted that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of two years from the completion of his or its term. Further, in case of an auditor (whether an individual or audit firm), the period for which he or it has been holding office as auditor prior to the commencement of these rules shall be taken into account in calculating the period of five consecutive years or ten consecutive years, as the case may be.

Power of Registrar to enforce compliance

As per Rule 23 of the Nidhi Rules, 2014, the Registrar of companies may call for such information or returns from *Nidhi* as he deems necessary and may engage the services of chartered accountants, ***company secretaries in practice***, cost accountants, or any firm thereof from time to time for assisting him in the discharge of his duties.

Further, In respect of any *Nidhi* which has violated these rules or has failed to function in terms of the Memorandum and Articles of Association, the concerned Regional Director may appoint a Special Officer to take over the management of *Nidhi* and such Special Officer shall function as per the guidelines given by such Regional Director:



Role of Company Secretary

Company Secretaries create an enabling environment for Nidhis that stimulates their effectiveness, safeguards their autonomy and assist them in legitimately mobilizing necessary financial resources from their members. In addition, they also have a role to play in advising and guiding the Board on the regulatory requirements and compliances such as adherence to prudential norms, filing of necessary returns, Directors appointment, acceptance of deposits, share capital and allotment etc.

Nidhi Rules, 2014, too authorises Company Secretaries in Practice (in addition to other professionals) to certify half yearly return and return of statutory compliances. Also, the Registrar of companies may utilize services of Company Secretaries in Practice while discharging his functions under the Rule.

Company Secretaries thus, act as catalysts in growth and development of Nidhi. It could be noted that the profession of Company Secretaries has climbed the ladder of excellence and made its presence felt among the community of professionals. However, the changing paradigm requires the professionals to be adaptable, pragmatic, ethical and highly professional for maintaining competitive edge in a volatile environment. It is, therefore, vital for Company Secretaries to build upon broad range of areas by updating themselves in terms of changing regulatory ambience, understanding the contemporary developments and honing professional as well as technical skills.



Companies Act, 2013 – Challenges and Opportunities for Not for Profit Companies

CS Rachana Shanbhag*

Practicing Company Secretary

1st April 2014 may be considered to be a landmark in the history of modern corporate legislations. With the enforcement of majority of the provisions of Companies Act, 2013 (CA 13), the corporate scenario and the functioning of all enterprises registered under the Companies Act, 1956 and earlier Acts and all new companies changed, almost overnight.

All these entities, which were functioning as per a 58 years old Act that was workable at its best and outdated at its worse, were jolted out of their complacency and asked to relook their practices. Everything from raising of capital to appointment of directors, from conduct of shareholders meetings to the definition of a deposit had changed and the companies and the professionals are left to cope with the same.

Every change introduced comes with its own share of anxiety, fear and confusion. It is the law of nature, that every change is accompanied by a certain resistance. The manner of the implementation of the Act did not help much either. With the Rules and Notifications uploaded on the MCA just a week before the date of their coming into effect and most of these Rules differing significantly from the draft rules published earlier by the Ministry, led to confusion on the manner in which companies would proceed with the implementation. While the Ministry issued several Removal of Difficulties Order and clarifications and provided certain exemptions to different segments, there continues to be one form of company that has not yet received the MCA's attention - Companies formed for Charitable Objects or popularly known as Not for Profit Companies.

Companies Formed for Charitable Objects:

Any person or association of persons which has in its object promotion of commerce, arts, science, sports, education, research, social welfare, religion, charity, protection of environment, or any such other object and which intends to apply its profits if any, or other income for promotion for its objects and not for distribution amongst its members, may be issued a licence by the Central Government to be registered as a limited company without the words "private limited" or "limited" in its name (Section 8). As such, these companies are formed not for profit but for social and charitable causes and have to adhere to the terms and conditions prescribed in this regard. Section 25 of the Companies Act, 1956 and Section 26 of the Companies Act, 1913 correspond to section in the new Act.

* The views expressed are personal views of the author and do not necessarily reflect those of the Institute.



An essential feature of these companies is that on dissolution or on winding up of such company, the surplus or profits available after satisfaction of its debts and liabilities are not distributable among its members. Instead these companies are required to amalgamate or transfer their profits to other company registered under this section with similar objects. Hence, during the entire duration of the existence of such a company and even after its winding up, the members do not have any monetary or economic benefit in the same.

Considering the social objectives for which such companies have been formed, these companies are not operated in a strictly corporate manner but assume the form of Institutes, Trusts, Clubs, etc. Most of these companies are companies limited by guarantee than share capital and most of the Directors are appointed on an honorarium basis or do this work out of their social responsibility than for any profit or ulterior motives. Keeping this in mind, the MCA had, in the context of the earlier Act provided them with a slew of exemptions to ease their functioning and to prevent them unnecessary administrative and compliance costs.

Exemptions under Companies Act, 1956:

Some of the main exemptions available to Section 25 Companies under the previous Act, which are no longer in force includes:

Section (Companies Act, 1956)	Details of Exemption
166(2)	AGM of the Company to be held during business hours, not on a public holiday, in the city where the Registered office of the company is situated. This was exempted for Section 25 Companies
219	Annual Accounts could be sent to Members only 14 days prior to the date of the AGM
259	Approval of Central Government to increase the number of Directors above 12 was not required
285	Holding of one Board Meeting in every quarter - Section 25 Companies were required to hold only one board meeting in every six calendar months
Fees Structure	As per the Fees Table notified by MCA, in terms of the Old Act, Section 25 Companies were required to pay a fraction of the amount payable by other companies for filing of the forms with the MCA



Status of these Companies as per Companies Act, 2013:

As is visible above, due to the various exemptions available, these companies did not had a huge burden of compliance and administrative hassles. This helped the companies to minimise costs and operate in a manner that they deemed fit, within the ambits of law. These exemptions also helped such companies attract eminent professionals and people from all walks of life to contribute their services and memberships in such companies to attain such social objectives.

Although the intent of the new Act aiming parity and transparency for all companies is commendable yet, it has raised various challenges for such companies. Due to the lack of any exemptions stated in the Rules, all provisions of the Act, as applicable to other limited companies are now applicable to these companies as well. This has not only led to such companies, from being hesitant of the implementation of the new Act but has also made it difficult for them to explain to their stakeholders of these new requirements. For example, these companies, which were earlier only required to pay nominal amounts for their MCA filings are now required to pay, comparatively higher rates, thereby increasing their economic burden. Further, as most individuals associated with these companies work on a honorary basis or out of goodwill and support of the cause, requiring the proposing of candidature of such individuals as Directors (other than retiring directors) to be accompanied by a notice under section 160 of the new Act with a deposit of Rs. 1,00,000 or higher amount as may be prescribed, is a big obstacle on their willingness to be appointed. Requiring these companies, some of which are over a 100 years old, to disclose the names of all their members and the changes therein (which was exempt as per the Old Act), especially when the number of such members runs into tens of thousands, will be an exhaustive task for the management.

Corporate Social Responsibility (CSR) and Section 8 Companies:

As per Section 135 of the Act read with the Companies (Corporate Social Responsibility Policy) Rules, 2014, every Company fulfilling the conditions stated therein is required to provide 2% of its Net Profits for CSR activities as stated under the Act. This can be done by the companies, either by themselves (through a holding, subsidiary or associate company under section 8) or through registered Society, Trusts or other Section 8 Companies. If such an entity is not established by the company, it should have a track record of at least 3 years of similar activities in the sector in which the CSR activities are being carried out.

Accordingly, the introduction of CSR has opened up a huge avenue for Section 8 Companies to work with other companies to achieve their objectives. However, Section 8 companies will be required to ensure transparency, achieve the desired corporate governance and functioning standards of the companies and undertake due compliance of all the provisions of the Act. Further, as companies undertaking CSR are required to report their activities and implementation policies to their stakeholders and MCA, there will be an automatic supervision on the workings of the associated Section 8 company.



Adaptability to the changing times:

"Change is the law of life. And those who look only to the past or present are certain to miss the future."

- John F. Kennedy

There has been news of the MCA placing proposals for granting exemptions to Section 8 companies in the Parliament, in addition to exemptions available to private limited companies. Since the draft of the same is not yet made available, this can neither be confirmed, nor can the manner of exemptions being made be estimated. In such a case, however, there may be a ray of hope that there will be certain easing of norms for such companies in the future. However, considering the intent of the law and the changing scenario of the corporate sector in today's world, it is essential for Section 8 Companies to keep up with the changing times.

Further, if section 8 companies desire to collaborate with other companies for their CSR initiatives, they will be required to keep up with the increased disclosure and transparency standards that are prevalent in the industry today.

Hence, the Not for Profit Companies are required to change their attitude towards the increased compliance requirements and consider this as an opportunity to function at par with industry standards. Corporate Governance, a buzz word which has captured the imagination of the entire corporate sector at the moment needs to be looked by these companies as a necessity rather than a burden to keep their credibility intact in the eyes of the society and Government.



Governance Initiatives in Family Businesses

Dr. Hitesh Shukla*

Professor, Department of Business Management, Saurashtra University, Rajkot

'If you are in a family enterprise, you need to learn the basics of governance and apply the best practices that exist in family business governance' —John Davis

The phenomenon of the Family Business (FB) has received increasing attention of professionals and academicians in last few years. FB is recognized as the growth engine of the economy. In the aggregate, FB plays a significant role in providing highest employment and greater return on investment and considered as most sustainable business model throughout the globe. In broad-spectrum, the FB is dominated by SMEs and in particular by micro enterprises. While looking to India, FB is the lifeline of the economy though majority of Indian family firms are quite young in comparison to world history of family business. According to the CII's Family Business Network (India chapter), the gross output of these family-run businesses accounts for 90 percentage of India's industrial output, 79 percentage of organised private sector employment, and 27 percentage of overall employment, superseded only by the Government and Public Sector Undertakings. Although FB is vital to the Indian economy, little attention is paid to them.

Despite their many competitive advantages like core values coupled with the mission, strong commitment, loyalty, speed, control, flexibility and better cost management, FBs have to undergo various time tests like generation disputes, sibling rivalries and succession vacuum. They are often accused of nepotism, infightings, mismanagement and lack of professionalism. There is a famous cliché, which seems to have been accepted as a universal truth; the first generation builds, the second generation consolidates, and the third generation destroys the family business. When accusing FB of such a short life span it is often conveniently forgotten that longevity is an objective difficult to achieve for any business.

The governance of a FB is more complicated than non-family owned companies because of the central role of the family that owns and typically leads the business. In most of the cases there is not much difference between the board room and the living room since the wife, brother, son and / or even father of the promoter is working as directors. This culture creates role conflict among various family members. If the employee doesn't perform well, s/he may be fired because s/he is hired but in the case of family business it can't happen as the person may be the owner's wife or father or brother or in-laws! The owner, being the head of the business, has to balance his / her emotion and expectation along with other members of the family. The biggest challenge for family business is to keep both, the family and business, separate yet coordinated.



Family management resembles socialist approach where everyone is considered equal in the family. Feelings, affection, aspirations, desires and wants of the family members become the basic criterion for decision making. Decisions are normally taken by heart. Such decisions may prove to be the best for having smooth and healthy relations in the family and to protect the family virtues but may prove to be disasters for the business. Now, if we consider business management, it resembles more to the capitalistic approach where there is complete freedom to the persons working in the business to manage his or her assigned task. They too will be efficient since they will take rational decisions to improve their economic well being. Decisions will be taken considering hierarchy, goals, performance and contribution made by every individual and they will be rewarded accordingly. Business decisions are taken with basic objective of wealth maximization and thus by mind. Thus, the head of a family business should balance his / her emotional quotient and intelligence quotient. S/he should not see as 'I' or 'We' but should see the bigger picture as 'Institution' and balance both family and business professionalism.

The biggest challenge of Indian family business is to keep everyone united in family, to maintain a sense of harmony. Integrity is maintained well during the first generation. With the passage of time, the family and the business grow and various branches of the family live in separate home and sometimes even in different cities. The next generations of such family need to understand and maintain the values, mission, culture and integrity. For that what needs is to establish a formal system of communication among the second / third generation to discuss the family and business matters. The other main challenge of family owned business includes succession planning, communication, retaining non-family talent working in the business, role of women in the business (they are playing vital role like women directors on the board) and family and employment of family members in the business. While peeping into all these problems, one thing comes out as a key to conquer this issue which is governance of FB.

Good governance is uppermost in everybody's mind today. But governance means different things in different family. Governance of family owned firm is always influenced by the family dynamics and emotions that may create hindrance in business decisions and power issues in family.

Establishing a family business governance plan that sets opportunities and responsibilities of every member working in the business can help and maintain the business, enable ongoing accomplishment and sustain the financial well-being of the family. A family governance plan is a framework that aligns the family interests with the business strategy. It balances the emotions of the family members and links it with their performance. Clearly documented procedures and non-binding, written operational agreements should be included in any governance plan, along with a detailed formal communication strategy that keeps the family well-versed about the business performance and firm about the expectations of family.

Conflict in the family or / and business is the result of disrupt progress and has negative effect on contributions to the business. The main cause for such conflict or split in the family / business is



neglecting small differences, rejection and ignorance. Ultimately, all such differences get accumulated and result into family split.

In cases like these, family governance system provides a clear approach for handling such emotional disagreements. All such problems are always the problems of communication and that can be resolved only through direct communication. We should respect, appreciate and acknowledge everyone in the family, understand their discomforts and find its best solution. Family governance system also provides detailed guidance for managing internal processes and contingency plans in case of any emergency or crisis.

To establish governance system in family owned business one should first make it clear that what is the vision and mission of the business? Mission is the statement that makes us clear about what a business does or stands for and it should be combined with family value. Where we are today and where we want to go tomorrow? (Goal settings both short and long term) What strategy should we follow to reach our goals? What business models and manpower do we need to succeed? How do we handle ownership and profit shares and legacy? Whom do we consider as our family members? (Do we consider married daughters and in-laws as family members?) How and up to what extent can they take part in the management? Do we involve our in-laws in the business? If yes, do we limit them only up to ownership and profit sharing or do we also allow them into management (decision making) of the business? Do we allow women family members in the business? If yes, up to what level? Are they considered only as employee or do we allow them as fulltime executive of the business? There should be a provision to link pay and performance of the family members and owners working in the business. One should make the ground clear before starting the game.

In India normally family business is 'Gifted' to the next generation. As a result majority of the FB can't survive beyond third generation. Instead the seniors should make them capable enough to 'Earn' the business. A significant concern for many family business owners is the succession planning i.e. handing over the business to their next generation. A governance plan gives details about succession process. There should be a clear direction for next generation for entering into the business. It should throw light on educational qualification, experience in the business and outside the FB and performance measurement system. Various other concerns need to be understood and clarified like - How can we transfer ownership to the next generation? How do we transfer leadership to the next generation? Do we allow married daughters into the business? If yes, do we allow her ownership right only or do we offer her leadership also? What about the next generation of married daughter? Do we allow her child to enter into business? If yes, upto what level of management? Can s/he be the chairman of the organization?

A plan can outline specific requirements and understanding of the business or a formal training for family members seeking to step into executive positions. It must be making clear that whom should the next generation report and who will help them to climb the ladder.



Some families require their members to work outside their business for gaining the insights of the industry before joining the family firm. The plan can also include restrictions on the way a family member can work in the business and set how his / her performance should be appraised. Family constitution must clearly define the participation of various members and should also reflect possible separation or prenuptial agreements.

The constitution should set guidelines for ownership and income distribution and clarify who gets what, when and how. In addition, it must establish the process of transferring the ownership (how shares can be sold, both internally and externally, outside the family). The formation of constitution will also make clear that whether the family involves in day to day business operation or will hire professionals. Many a times professional managers are helping hands for the growing next generation particularly when the next generation are not quite ready to take on senior management roles. Professional managers can also be a link between two generations of a family.

When the FB grows beyond a limit and the family leader finds that it is beyond his expertise to handle all aspects of the business, it is usually time to form a group of trusted peers into a Board of Advisors. Most of the established family firms follow this route for professional growth. These professional advisors are the experts of their fields and can bring new insights into the business. Independent and nominee directors on the board as prescribed under Companies Act and Clause 49 of Listing Agreement could be helpful in bringing independent opinion and professional expertise.

Formal council helps in scheduling family meetings and inform members about the financial status of the family and the business. Such family meetings provide opportunities for members to reconnect with one another, and family issues can be discussed constructively rather than being left to fester into larger issues. The ultimate objective of family council is to establish an association between family and business.

A good governance plan can foster a culture of mutual trust, provide guidance for healthier operation of the business and family separately and set the direction for managing financial assets to ensure future wealth.

In conclusion for better governance, we need separate council for family and business. Family council takes care of family and puts the family first while discussing any issue. It takes care of feelings, expectations and aspiration of the family members. Business council takes care of business interest always keeping business first. It takes care of professionalism and performance.

Thus, it can be concluded that good governance in family owned firm contributes three fundamental ingredients to function well - clarity on roles, rights and responsibilities for all members of the three circles of the family business i.e. family members, investors and managers (non-family employees).



Reference:

- Robert Kleiman and Eileen Peacock, Skip other details, Family Businesses as an Economic Phenomenon (including permanent urls, DOI, citation information), Volume 02, Issue 2, Winter 1996, pp. 93-101
- Ibrahim, A. B. & Ellis, W. H. (1994) Family business management: Concepts and practice. Dubuque, IA: Kendall/Hunt.

Board Evaluation – Challenges Ahead*

Globally, in most of the companies, Board evaluation is an annual exercise by choice or by regulatory prescription. The evaluation generally includes self evaluation, peer-evaluation and evaluation by an outside expert. However, the evaluation process varies from country to country or even from company to company for that matter, especially in those countries where there is no prescription on evaluation methodology. For example, in UK Corporate Governance code specifically prescribes that the evaluation of the board of FTSE 350 companies should be externally facilitated at least every three years and a statement should be made available of whether an external facilitator has any other connection with the company. However, in India the situation is different.

In India, the Companies Act, 2013 mandates performance evaluation of the Board, its Committees, Directors and the Chairperson, of all listed companies and such other companies prescribed by the Rules under the Companies Act 2013. Section 134 (3) (p) provides that every listed company and any other class of public companies as may be prescribed by the Rules, is required to make a statement in the Board's report indicating the manner in which formal evaluation has been made by the Board of its own performance and that of its committees and individual directors. Section 178 (2) describes the role of the Nominations and Remuneration Committee in performance evaluation of directors. It lays down that the Nomination and Remuneration Committee of every listed company and any other class of public companies as may be prescribed by the Rules, are required to carry out evaluation of every director's performance. Schedule IV of the Companies Act talks about the role of Independent Director in the performance evaluation of Boards, non-executive directors and chairperson.

Apart from the provisions envisaged in the Companies Act, 2013, Clause 49 of the listing agreement mandates performance evaluation of Board of Directors of all listed companies. However, both Companies Act, 2013 and clause 49 are silent about the criteria or parameters, based on which the performance of the Board of Directors, Independent directors and Chairperson be evaluated.

Internationally, the performance evaluations are either conducted in house by the Chairperson, or the Governance and Nomination Committee or by an external independent expert. In India, the intent of the Companies Act as well as of the amendments to Clause 49 is that, evaluations should be conducted by the Nomination and Remuneration Committee. There appears to be no bar for the Board and the Nomination and Remuneration Committee to formulate criteria internally or seek the assistance and guidance of external independent experts.

Again, developing evaluation parameters and the process to achieve this objective is complex. Boards need to invest considerable time and effort to make these exercises fruitful for the organisations. In most private sector companies, independent directors are appointed with the approval of the CEO and the promoter. Therefore, some criteria or parameters should be prescribed so that the scope of subjectivity in the evaluation process could be minimised.

* Contributed by Khusbu Mohanty, Assistant Education Officer, Dte. of Academics, ICSI. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.



**Circulars, Notifications, Orders, Amendment, Rules
under Companies Act, 2013**
(since last issue of e-CS Nitor)



General Circular No. 39/2014

**No. 4/2/2014-CL-I
Government of India
Ministry of Corporate Affairs**

5th Floor, "A" Wing, Shastri Bhavan,
Dr R.P. Road, New Delhi.

Dated : 14th October, 2014

To

All Regional Directors,
All Registrars of Companies,
All Stakeholders.

Subject : Clarification on matters relating to Consolidated Financial Statement.

Sir,

Government has received representations from stakeholders seeking clarifications on the manner of presentation of notes in Consolidated Financial Statement (CFS) to be prepared under Schedule III to the Companies Act, 2013(Act). These representations have been examined in consultation with the Institute of Chartered Accountants of India (ICAI) and it is clarified that Schedule III to the Act read with the applicable Accounting Standards does not envisage that a company while preparing its CFS merely repeats the disclosures made by it under stand-alone accounts being consolidated. In the CFS, the company would need to give all disclosures relevant for CFS only.

2. This issues with the approval of the competent authority.

Yours faithfully,

Sd/-

(KMS Narayanan)
Assistant Director (Policy)

Copy to:-

1. E-Governance Section and web contents Officer to place this circular on the Ministry website
2. Guard File



General Circular No. 40/2014

**F.No. 02/13/2014 CL-V
Government of India
Ministry of Corporate Affairs**

'A' Wing, 5th Floor, Shastri Bhawan,
Dr. Rajendra Prasad Road, New Delhi-110001

Dated: 15.10.2014

To

All Regional Directors,
All Registrar of Companies,
All Stakeholders.

Subject : COMPANY LAW SETTLEMENT SCHEME, 2014 (CLSS-2014)

Sir,

In continuation to the Ministry's General Circular No. 34/2014 dated 12.08.2014 on the subject cited above, this ministry has, on consideration of requests received from various stakeholders, has decided to extend the Company Law Settlement Scheme (CLSS 2014) upto 15th November, 2014

Yours faithfully,

Sd/-

(KMS Narayanan)
Assistant Director
23387263

Copy to:-

1. E-Governance Section and Web Contents Officer to place this circular on the Ministry's website.
2. Guard File.



General Circular No. 41/2014

**No. 2/13/2014-CL-V
Government of India
Ministry of Corporate Affairs**

5th Floor, 'A' Wing, Shastri Bhawan,
Dr. R.P. Road, New Delhi.

Dated: 15.10.2014

To

All Regional Directors,
All Registrars of Companies,
All Stakeholders.

Subject: COMPANY LAW SETTLEMENT SCHEME, 2014 (CLSS-2014)- Clarification u/s 164(2) of the Companies Act, 2013.

Sir,

Representations have been received from stakeholders seeking clarification as to whether immunity from disqualification of directors pursuant to clause (a) of sub-section (2) of section 164 of the Companies Act, 2013 will be applicable with respect to companies who have filed Balance Sheets and Annual Returns on or after 01/04/2014, but before coming into force of CLSS-2014 with effect from 15.08.2014 as contained in General Circular No. 34/2014 dated 12/08/2014.

2. The Matter has been examined and it is hereby clarified that in case of companies, who have filed their balance sheets and annual returns on or after 01/04/2014 but prior to launch of CLSS-2014, disqualification under clause (a) of sub-section (2) of section 164 of the Companies Act, 2013 shall apply only for prospective defaults, if any, by such companies.

3. This issues with the approval of the competent authority.

Yours faithfully,

Sd/-

(KMS Narayanan)
Assistant Director (Policy)
23387263

Copy to: -

1. E-Governance Section and Web Contents Officer to place this circular on the Ministry's website.
2. Guard File



[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II,
SECTION 3, SUB-SECTION (i)]

Government of India
MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION

New Delhi, the 24th October, 2014

G.S.R_ (E) In exercise of the powers conferred by sub-section (1) of section 467 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following further amendments to Schedule VII of the said Act, namely:-

- (i) In item (i), after the words "and sanitation", the words "including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation" shall be inserted;
- (ii) In item (iv), after the words "and water", the words "including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga;" shall be inserted.

2. This notification shall come into force on the date of its publication in the official Gazette.

[F. No. 1/18/2013-CL-V]

Sd/-

(Amardeep Singh Bhatia)
Joint Secretary to the Government of India

Note - The Schedule VII was brought into force with effect from 1st April, 2014 and was amended (effective from 1st April, 2014) vide notification number GSR 130(E) dated 27th February, 2014 and Corrigenda number GSR 261(E) dated 31st March, 2014 and also vide amendment notification number GSR 568(E) dated 6th August, 2014.

**GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS**

Draft Order of Amalgamation
Of
National Spot Exchange Limited (Dissolved Company)
With
Financial Technologies India Limited (Transferee Company)
Under Section 396 of the Companies Act, 1956

The Central Government proposes to issue the following Order (presently in the Draft form) causing Amalgamation of National Spot Exchange Limited with its Holding Company Financial Technologies (India) Limited, the reasons for passing the proposed Order are set out in detail in the Annexure annexed with the draft Order.

Whereas the Central Government is satisfied that to leverage combined assets, capital and reserves, achieve economy of scale, efficient administration, gainful settlement of rights and liabilities of stakeholders and creditors and to consolidate businesses, ensure co-ordination in policy, it is essential, in the public interest, that Financial Technologies (India) Limited, a company incorporated under the Companies Act, 1956 (1 of 1956) having its Registered Office at Shakti Tower-1, 7th Floor, Premises E, 766, Anna Salai, Thousand Lights, Chennai - Tamilnadu-600002 and the National Spot Exchange Limited incorporated under the Companies Act, 1956 (1 of 1956) having its Registered Office at FT Tower, CTS No. 256 and 257, 4th Floor, Suren Road, Chakla, Andheri (East), Mumbai, Maharashtra - 400093, should be amalgamated into a single company.

Now, therefore, in exercise of the powers conferred by sub-sections (1) and (2) of section 396 of the Companies Act, 1956 (1 of 1956) the Central Government makes the following order to provide for the amalgamation of the said two companies into a single company namely:

1. *Short title.*—This order may be called the *National Spot Exchange Limited and Financial Technologies (India) Limited (Amalgamation in Public Interest) Order, 2014.*

2. *Definitions.*—In this Order, unless the context otherwise requires—

(a) "Act" means The Companies Act, 1956 (1 of 1956)

(b) "appointed day" means the date on which this order is notified in the Official Gazette;

(c) "dissolved company" means the National Spot Exchange Limited ; and

(d) "transferee company" means the Financial Technologies (India) Limited

3. (a) The shareholding pattern of the two companies are as under:-

(i) Financial Technologies (India) Limited (Holding Company) is having paid up share capital of Rs. 92,104,112 consisting of 46052056 equity shares of Rs.2/- each as on 31.03.2014 (as per the information filed with National Stock Exchange Limited) the details of each category of shareholders are as under:

Category of Shareholders	Number of shares held	Amount
Promoter and Promoter Group: Indian Individuals/Hindu undivided family	8695910	17391820
Promoter and Promoter Group: Indian bodies corporate	12329968	24659936
Sub-Total (A)	21025878	42051756
Public Shareholding : Institutions		
Mutual funds	1254	2508
Financial Institutions /Banks	119773	239546
Foreign Institutional Investors	10337750	20675500
Sub-Total :	10458777	20917554
Public share Holding : Non - Institutional Bodies Corporate	2542195	5084390
Individuals	12025206	24050412

Sub-Total	14567401	29134802
Total Public Shareholding (B)	25026178	50052356
Total shareholding : (A) +(B)	46052056	92104112

- (ii) As on 31.3.2014 the National Spot Exchange Limited (a subsidiary company of the FTIL) is having paid-up share capital of Rs. 450000000 consisting of 450000000 Equity Shares of Rs.10/- each .The details shareholding is as under:

Name of Shareholder	Number of shares held	Amount
Financial Technologies (India) Limited	44999895	449998950
National Agricultural Cooperative Marketing Federation of India Limited (NAFED)	100	1000
Jignesh Prakash Shah	1	10
Arshad Modh Khan	1	10
Manjay Prakash Shah	1	10
V. Hariharan	1	10
Joseph Daniel Massey	1	10
Total	45000000	450000000

- (b) All the 44999895 Equity Shares of Rs.10/- each fully paid up in National Spot Exchange Limited , which are now held in the name of Financial Technologies (India) Limited including their nominees, shall be cancelled.
- (c) Since the entire share capital of the National Spot Exchange is not held in the name of Financial Technologies (India) Limited including their nominees, the transferee company shall be required to send further notice to the persons, whose names appear immediately before the appointed day, in the Register of Members of the "dissolved company" for the shares which shall be allotted to them in the transferee company in exchange for the shares held by them in the dissolved company as per the provisions of sub-section (3) of section 396 of the Act .

4. *Amalgamation of the Companies-*

- (1) On and from the appointed day, the entire business and undertaking of National Spot Exchange Limited and Financial Technologies (India) Limited on 'as is whereis' basis including all the properties, movable or immovable and other assets of whatsoever nature e.g. machinery and all fixed assets, leases, tenancy rights, advances of monies of all kinds, book debts, outstanding monies, recoverable claims, agreements, industrial and other licences and permits, imports and other licences, letters of intent and all rights and powers of every description, shall without further act or deed be transferred to and vest in or deemed to be transferred to and vest in the transferee company in accordance with law in force. Such transfer and vesting shall subject to all mortgages and charges and hypothecation, guarantees and all rights whatsoever affecting the said properties of National Spot Exchange Limited.
- (2) For accounting purposes, amalgamation shall be effected with reference to the audited accounts and Balance-Sheets as on 31st March, 2014 of the dissolved company, and, the transactions thereafter shall be pooled into a common account. The dissolved company shall not be required to prepare its final accounts as on any later date and the resulting company shall take over all assets and liabilities according to the Balance-Sheet of the dissolved company as on 31st March, 2014 and accept full responsibility for all transactions thereafter.

Explanation.—The undertaking of the dissolved company shall include (a) all rights, powers, authorities and privileges, (b) all property, movable or immovable including, cash balances, reserves, revenue balances, investments and all other interests and rights in or arising out of such property as may belong to or, be in the possession of the dissolved company immediately before the appointed day, and (c) all books, accounts and documents relating thereto and also all debts, liabilities, duties and obligation of whatever kind then existing of the dissolved company.

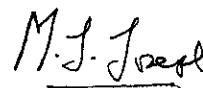
5. ***Transfer of certain items of property-*** For the purpose of this Order, all the profits or losses or both, if any, of the dissolved company as on the appointed day, and the revenue reserves or deficits or both, if any, of the dissolved company when transferred to the transferee company shall respectively form part of the profits or losses and the revenue reserves or deficit, as the case may be, of the transferee company as if such profits or losses have accrued or incurred by the transferee company.
6. ***Saving of Contracts, etc.*** -Subject to other provisions contained in this order, all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the dissolved company is a party, subsisting or having effect immediately before the appointed day, shall have full force and effect against or in favour of the resulting company and may be enforced as fully and effectually as if, instead, of the dissolved company, the transferee company had been a party thereto.
7. ***Saving of legal proceedings-***
- (1) All suits, prosecutions, appeals and other legal proceeding(s) instituted by or against the dissolved company pending on the appointed day shall not abate or be discontinued, or be in any way prejudicially affected by reason of the transfer to the transferee company of the undertaking of the dissolved company or of anything contained in this Order.
- (2) Subject to provisions of law relating to limitation, any suit, prosecution, appeal or other legal proceedings which may be required to be filed against the dissolved company will be filed against the transferee company.
8. ***Provisions relating to Taxation-*** All taxes in respect of profits and gains (including accumulated losses and unabsorbed depreciation, statutory allowance, investment allowance or other such allowances, if any) and any other type of taxation which is the subject of the business carried on by the dissolved company before the appointed day shall be payable by the transferee company subject to such concession and reliefs as may be allowed under the Income-tax Act, 1961 (43 of 1961) and other tax laws as a result of this amalgamation.

9. ***Provisions relating to Existing Officers and other Employees of the Dissolved Company***-Every whole-time officer (including whole-time Directors and the whole-time Company Secretary) or other employee, not being Directors who are not whole-time Directors of the dissolved company, employed immediately before the appointed day in the dissolved company, shall, as from the appointed day, become an Officer or other employee, as the case may be, of the transferee company. Such officer or other employee shall hold office or service therein and upon the same terms and conditions and with the same rights and privileges as he would have held under the dissolved company and shall continue to hold such positions until his employment in the transferee company is duly terminated by mutual consent or operation of law or on orders of the competent authority.
10. ***Position of Directors***- Every Director of the dissolved company holding office as such immediately before the appointed day shall cease to be a Director of the dissolved company on the appointed day.
11. ***Membership of Provident Fund and other employee benefit schemes***- All officers and employees of the dissolved company shall continue to be the members of such schemes relating to Provident Fund and other benefits for employees, if any, as they were in the dissolved company and the transferee company shall continue to make employers contributions in the same manner as were being made by the dissolved company.
12. ***Dissolution of National Spot Exchange Limited***- Subject to the other provisions of this Order, and clause (aa) of sub section (4) of section 396 of the Act, on the appointed day, National Spot Exchange Limited shall stand dissolved and after such dissolution no person shall make, or pursue any claims, demands or proceedings against the dissolved company or against a Director or an officer thereof in his capacity as such Director or Officer, except insofar as may be necessary for enforcing the provisions of this Order.
13. ***Registration of the Order by the Registrar of Companies***- The Central Government shall, as soon as may be, after a final Order is notified in the Official Gazette, send a copy of this order to the Registrar of Companies, Tamil Nadu and

the Registrar of Companies, Maharashtra. On receipt of such order both the Registrars of Companies shall register the Order under their hand forthwith. Thereafter, the Registrar of Companies, Tamil Nadu shall forthwith include all documents registered, recorded or filed with him relating to the dissolved company on the file, in electronic records or otherwise, of Financial Technologies (India) Limited with whom the dissolved Company stands amalgamated and consolidate these and shall keep all such consolidated documents in the electronic or physical records as the case may be.

14. ***Memorandum and Articles of Association of the Transferee Company-*** The Memorandum and Articles of Association of the Financial Technologies (India) Limited as they stood immediately before the appointed day shall, as from the appointed day be the Memorandum and Articles of Association of the transferee company with such modifications as may be necessary to incorporate and give effect to the objects of the dissolved company through the transferee company.

The addressees are hereby called upon to send their suggestions and objections, if any, within two months from the date of receipt of this order in the electronic form to the undersigned.



(M.J. Joseph)

Additional Secretary to Government of India
on behalf of the Central Government

Place: New Delhi

Date: 21.10.2014

Addressed to:

1. Financial Technologies (India) Limited
2. National Spot Exchange Limited
3. Publication on portal of the Ministry www.mca.gov.in for inviting suggestions and objections, if any, from shareholders and creditors of both the companies .

**GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS**

Annexure

Background and Reasons Necessitating Issue of Orders (presently in draft form) under Section 396 of Companies Act, 1956 for merger of National Spot Exchange Limited with Financial Technologies (India) Limited in essential public interest

1. Introduction

1.1 National Spot Exchange Limited (hereinafter NSEL)

1.1.1 NSEL was incorporated as a public limited company on 18.05.2005 under the Companies Act, 1956. The Authorised Share Capital of the Company as per the last available Balance Sheet as on 31-03-2013 is Rs 50 crore, divided into 5,00,00,000 equity shares of Rs 10 each. The issued, subscribed and paid-up capital is Rs 45 crore, divided into 4,50,00,000 equity shares of Rs 10 each. Of these, 4,49,99,900 equity shares are held by Financial Technologies (India) Limited (hereinafter FTIL), along with its nominees, constituting 99.9998% of the paid-up capital of NSEL. Thus, NSEL is a subsidiary of FTIL.

1.1.2 The main objects of NSEL as per its Memorandum of Association, inter alia, include; to establish, operate, regulate, maintain and manage facilities enabling the Members of the Exchange, their authorized agents and constituents and other participants to transact, clear and settle trades done on the Exchange in different types of contracts in agriculture produce & various commodities, securities and other instruments in ready markets and to provide accessibility to the markets to various members of the Exchange and their agents.

1.1.3 NSEL is managed by its Board of Directors and presently, it consists of one Managing Director and eight Directors.

- 1.1.4 As per the last available Balance Sheet as on 31.03.13, the net worth of the company is as under:

(Fig. in Rs in crore)

Particulars	2011-12	2012-13
Share Capital (X)	45.00	45.00
Free Reserves:		
General Reserve	--	--
Securities Premium	--	--
Surplus in P&L	16.05	140.00
Total Free Reserves (Y)	16.05	140.00
Total (X)+(Y)=(A)	61.05	185.00
Less: Intangible Assets (B)	14.12	9.24
Net worth (A) - (B)	46.93	175.76

1.2 Financial Technologies (India) Limited (FTIL)

- 1.2.1 FTIL was incorporated on 24.01.1995 and was later amalgamated with "E.xchange On The Net Limited" pursuant to a scheme of amalgamation approved by the Bombay High Court vide order dated 29.11.2000 and by Madras High Court vide Order dated 13.03.2001. After amalgamation, the resultant company changed its name to "Financial Technologies (India) Limited" with effect from 10.4.2001. Presently, the company's shares are listed in the National Stock Exchange of India Limited (NSE), BSE Limited (BSE), Madras Stock Exchange Limited (MSE) and Ahmedabad Stock Exchange Limited (ASE).

- 1.2.2 The main objects of the company, inter alia, include acting as service or facility builder, owner, transferor and provider, facility for present and future automated electronic markets in the areas of finance and technology, etc. Presently, it is said to be carrying on the business of provider of end-to-end straight through processing (STP) technology solutions for financial service

industry as well as of software solutions for brokers and other market intermediaries for use in their front offices, middle offices and back offices for the purpose of dealing in Securities/commodities/currencies through exchanges. The company is also said to be providing start-ups to various exchanges like Multi Commodity Exchange of India Limited (MCX), Indian Energy Exchange Limited (IEX), National Spot Exchange Limited (NSEL), Dubai Gold and commodity exchange (DGCX), etc. The products developed by the company are sold and applied directly to the core technologies underlying the establishment of the exchanges.

1.2.3 The company is managed by its Board of Directors and it presently, consists of one Managing Director and seven Directors.

1.2.4 As per the last available Balance Sheet as on 31.03.13, the net worth of the company is as under:

(Fig. in Rs in crore)

Particulars	2011-12	2012-13
Share Capital (X)	9.21	9.21
Free Reserves:		
General Reserve	231.60	264.13
Securities Premium	417.47	417.47
Surplus in P&L	1795.13	2042.57
Total Free Reserves (Y)	2444.20	2724.17
Total (X)+(Y)=(A)	2453.41	2733.38
Less: Intangible Assets (B)	26.70	20.93
Net worth (A) - (B)	2426.71	2712.45

2. Background to proposal for scheme of merger

2.1 NSEL started functioning ostensibly as a 'Spot Exchange' in or about 2008. This became possible by virtue of notification No. S.O. 906(E) dated 5th June, 2007 issued by the Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs (DCA) in exercise of powers conferred on it under section 27 of the Forward Contracts (Regulation) Act, 1952 (FCA). The said Notification had exempted all forward contracts of one-day duration for the sale and purchase of commodities traded on the NSEL, from operation of the provisions of the FCA subject to the following conditions, namely:

- (i) No short sale by members of the Exchange shall be allowed;
- (ii) All outstanding positions of the trade at the end of the day shall result in delivery;
- (iii) The National Spot Exchange Ltd shall organize spot trading subject to regulation by the authorities regulating spot trade in the areas where such trading takes place;
- (iv) All information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency;
- (v) The Central Government reserves the right to impose additional conditions from time to time as it may deem necessary and
- (vi) In case of exigencies, the exemption will be withdrawn without assigning any reason in public interest.

2.2 NSEL was neither recognized nor registered under the provisions of the FCA and since it was granted exemption under Section 27 thereof by the DCA, it was never under the regulatory purview of FMC. Subsequently, a supervisory role was given to FMC in respect of settlement of outstanding one-day forward

contracts at NSEL subsequent to the suspension of trading by NSEL on 31-07-2013 by the Government vide notification dated 06-08-2013.

2.3 DCA had earlier issued a notification dated 6th February 2012 substituting the words 'its designated agency' in condition (iv) in the Notification of 05-06-2007, by the words 'Forward Markets Commission, Mumbai'. This enabled FMC only to call for information from NSEL as and when considered necessary.

2.4 After analyzing the trade data received from NSEL, in terms of Notification of 06-02-2012, FMC identified certain issues relating to contracts traded on NSEL and sought clarifications from the company in February, 2012. On receiving and consideration of the clarification submitted by NSEL, FMC reported to DCA on 10-04-2012 that NSEL was violating conditions of exemption granted to them. DCA issued a Show Cause Notice to NSEL on 27th April 2012. NSEL submitted its reply to DCA in May, 2012.

2.5 DCA vide its letter dated 12th July, 2013 directed NSEL to submit an undertaking that:-

- a) No further/fresh contracts shall be launched by NSEL until further instructions from concerned authority; and
- b) All the existing contracts will be settled on the due dates.

2.6 In response to the above letter, the NSEL filed its reply vide its letter dated 22nd July, 2013. This response was referred to the FMC for its comments; FMC reported to the DCA that the undertaking was not in conformity with the directives of the Government.

- 2.7 NSEL vide its circulars dated 16th July 2013 and 22nd July, 2013: announced the suspension of launching of any new commodity, product or new centre and reduced the settlement and delivery period of existing contracts to T+10 days ('T' means the 'Transaction Date') and made them 'trade to trade' (i.e. no netting is permitted).
- 2.8 On 31st July, 2013, NSEL announced that trading in all contracts (except e-series contracts) was suspended and that it had been decided to merge the delivery and settlement of all pending contracts and defer the same for a period of fifteen days. As a result of this action by NSEL, a payment crisis of approximately Rs 5600 crore arose in NSEL involving about 13,000 investors. Such dues include dues to Public Sector companies, like, Projects and Equipment Construction Limited (PEC) and Minerals and Metals Trading Corporation (MMTC).
- 2.9 Subsequently, DCA vide Gazette Notification dated 06-08-2013 (in partial modification of the Gazette Notification dated 05-06-2007) imposed additional conditions on NSEL which, inter alia, provided that the settlement of all outstanding one-day forward contracts at NSEL shall be done under the supervision of the FMC. In view of this fresh supervisory role, FMC has taken various steps, including the following directions to NSEL:
- (i) To submit the details of the members who owed the money and the member to whom the money was owed.
 - (ii) To open an Escrow Account wherein all the pay-in received on or after 31-07-2013 from the members who owed money are being deposited and disbursement from this account to the members to whom money was owed is being done with the approval of FMC.

- (iii) To declare members who owed the money as 'defaulters' as per the rules & byelaws of the Exchange. Accordingly, NSEL vide its circulars dated 22-08-2013, 28-08-2013 and 22-10-2013 announced that 22 members who owed the money (out of 24 such members) are declared 'defaulters' as per the rules of the Exchange for not making any payment of their dues.
- (iv) To engage an independent agency to physically inspect the commodities in its warehouses. NSEL appointed SGS Limited for this purpose.
- (v) FMC has instructed NSEL to initiate recovery proceedings and take all other actions against the defaulting members as per their bye-laws.

2.10 In November 2013, FMC constituted a Monitoring cum Auction Committee (MAC) comprising of representatives of members and Investor bodies to assist and advice FMC in carrying out its supervisory work. The Committee was discontinued on 04-09-2014.

2.11 On December 17, 2013, FMC passed an Order declaring FTIL, Sh. Jignesh Shah, Sh. Joseph Massey and Sh. Shreekant Javalgekar as not 'fit and proper' to be shareholder/ Director in the management and the Board of any Exchange, recognized or registered by the Government of India/ FMC, under the Forward Contracts (Regulation) Act, 1952. The following points emerging from the Order of FMC, are worth mentioning:

- (i) The violation of conditions prescribed in the exemption notification; trading in paired contracts to generate assured financial returns under the garb of commodity trading; admission of members who were thinly capitalized having poor net worth and giving margin exemption to those who were repeatedly defaulting in settling their dues; poor warehousing

facilities with no or inadequate stocks; no risk management practices followed, non-provision of funds in Settlement Guarantee Fund (SGF); consciously appointing Shri Mukesh P. Shah as statutory auditors for the year 2012-13 despite the said person being a relative of Sh. Jignesh Shah; and the apparent complicity of NSEL with the defaulters in defrauding the investors, etc. FMC held that these factors lead to an inescapable conclusion that a huge fraud was perpetrated by the NSEL despite having the presence of two Board members of FTIL on the Board of NSEL, one of whom was the Vice-Chairman of NSEL;

- (ii) NSEL cannot be said to be independent from the control of the holding/parent company i.e. FTIL which holds 99.9998 % of its share capital.
- (iii) Since FTIL is effectively the only shareholder of NSEL, the constitution of the Board of Directors of NSEL is entirely under its control.
- (iv) FTIL through the Board of Directors of NSEL constituted by it possesses effective and absolute control over its subsidiary company i.e. NSEL. Such control is further amplified and accomplished by the fact that Shri Jignesh Shah, the promoter and Chairman-cum-Managing Director of FTIL, has been on the Board of NSEL and functioning as Vice-Chairman of the company since its inception. Shri Joseph Massey was also a common Director both on the Board of FTIL and NSEL, while Shri Shreekant Javalgekar continued to be a Director of NSEL till he resigned from the post in July 2013;
- (v) It is on record that all the minutes of Board meetings of NSEL were regularly tabled at the Board meetings of FTIL. Crucial and sensitive

matters like the observations of Internal Auditor on higher risk of credit default, insufficient stock of commodities at warehouses, mis-utilisation of margin money by NSEL, favour shown to defaulting members, etc. were all matters which were in the knowledge of the Board of Directors of NSEL, and through it in the knowledge of FTIL as well. Thus, FTIL kept itself apprised about the affairs of NSEL as it also approved/ ratified the actions of NSEL in its Board meetings on a regular basis. In other words, the Board of FTIL had full knowledge of the unsatisfactory affairs of its subsidiary and it was the duty of the Board to ensure that the corrective or penal action was initiated to set right such irregularities;

- (vi) It is undisputed that NSEL was an Exchange in which FTIL had ownership interest to the extent of 99.9998% leaving a negligible 0.0002% stake to NAFED. The Articles of Association of NSEL confers authority on its shareholders to appoint Directors. As the single largest shareholder, it is FTIL which has nominated all the directors on the NSEL board. As a wholly-owned subsidiary, NSEL is completely under the control of FTIL, including financial control over the affairs of NSEL. FTIL, which had the responsibility of managing the affairs of NSEL, cannot claim to be unaware of the wrong-doings and fraud committed by the management of NSEL;
- (vii) FTIL cannot shy away from its role and duty as a parent company to take reasonable care and exercise prudence in management and governance of the subsidiary company;
- (viii) FTIL has not furnished any explanation as to what steps have been taken by NSEL or by FTIL itself as a parent company to honour the

commitment of assuring safety and risk-free trading to the members and clients who have traded on their platform on the basis of an explicit assurance that the Exchange shall step into the shoes of counter parties should there be any default by any participant;

- (ix) FTIL has the principal business of development of software which has become the technology platform for almost the entire industry engaged in brokering in shares and securities, commodities, foreign exchange etc. Allowing trading in forward contracts on the NSEL platform in a circuitous manner which was neither recognized nor registered under FCA indicates mala fide intention on the part of the promoter of FTIL to use the trading platform of its subsidiary company for illicit gains away from the eyes of Regulator.
- (x) The facts of the case and the manner in which the business affairs of NSEL were conducted leaves no doubt that FTIL, notwithstanding its contention that it was ignorant of the affairs and conduct of NSEL, exerted a dominant influence on the management. It directed, controlled and supervised the governance of NSEL.
- (xi) In the face of a fraud of such a magnitude involving settlement crises of Rs 5600 crore owed to over 13,000 investors on the trading platforms of NSEL, FTIL, cannot seek to take refuge behind the corporate veil so as to unjustifiably isolate itself from the fraudulent actions that took place at NSEL resulting in such a huge payment crisis.

2.12 FMC, therefore, inter alia, ordered that in the public interest and in the interest of the Commodities Derivatives Market which is regulated under Forward Contracts Act, holding that FTIL is not a 'fit and proper person' to

continue to be a shareholder of 2% or more of the paid-up equity capital of Multi Commodity Exchange of India (MCX).

3. Proposal of Forward Markets Commission (FMC)

3.1 FMC has brought to the notice of the Government that:

- i) Even after one year's incessant efforts and in spite of FMC's active role in supervising the settlement of contracts, the settlement plan could not result in making any substantial payment to the investors as the process of recovery of dues by NSEL from the defaulting members is very slow.
- ii) It is the NSEL, which has the responsibility to take all possible coercive measures as per their rules/ bye-laws and other laws of the land to ensure that the outstanding dues of all investors are settled. However, as on date, NSEL has been able to make a payment of only Rs 362.43 crore to its members as against the payment dues of approximately Rs 5689.95 crore involving around 13,000 investors. Thus, the recovery constitutes only 6.7% of the total amount due indicating a very dismal progress of recovery of dues by NSEL.
- iii) The employee attrition in NSEL in the recent months, has been extremely high and it is learnt that the staff strength of NSEL has come down considerably, adversely affecting the recovery process. As per the information received from NSEL, the total employee count on NSEL rolls was 193 as on 31.07.2013 (when NSEL had suspended trading in one day forward contracts) which has come down to 33 on 31.7.2014. NSEL is also confronted with a number of cases against it, which are pending in the High Courts and the Special

Court under the Maharashtra Protection of Investors Deposits Act (MPID) relating to its failure to make payment to the investors. The company is hardly left with any financial resources to meet even legal expenses apart from defraying staff salaries and other expenses related to the recovery process.

- iv) FMC had received feedback from the representatives of investors/ member bodies on the erstwhile Monitoring & Auction Committee, constituted by it reporting that with the loss of credibility, weak Organizational structure, depletion of man-power strength and lack of financial resources, NSEL as an organization has become very weak. As NSEL is a wholly owned subsidiary of FTIL, it is the primary responsibility of the parent company, i.e. FTIL to own complete responsibility for the affairs of its subsidiary company.

3.2 Thus, it would be observed from above that NSEL is not having the resources, financial or human, or the organizational capability to successfully recover the dues to the investors pending for over a year. Further, NSEL is not left with any viable, sustainable business while FTIL has the necessary resources to facilitate speedy recovery of dues.

3.3 In the above background, a proposal has been received from FMC vide letter dated 18-08-2014, proposing the merger of NSEL with FTIL by the Central Government under the provisions of Section 396 of the Companies Act, 1956. The proposal has been supported by the Department of Economic Affairs (DEA), Ministry of Finance. FMC has proposed the merger/ amalgamation of NSEL with FTIL in essential public interest so that the human/ financial resources of FTIL are also directed towards facilitating speedy recovery of

dues from the defaulters at NSEL and the FTIL takes responsibility to resolve the payment crisis at NSEL at the earliest.

3.4 Further, FMC vide its letter dated 17-10-2014 has forwarded representations from various members/ investor bodies requesting for merger of NSEL with FTIL and has reiterated its recommendation submitted vide letter dated 18-08-2014. The said communication has provided additional grounds in support of the earlier recommendations, viz.:

- (i) The equity investment carries inherent investment risk. The shareholders of FTIL have enjoyed benefits like higher dividend, capital appreciation by way of rise in share prices of FTIL at the time of higher profits of the company which were derived from NSEL operations. Therefore, as shareholders, they are bound to be fully aware of the fact that if they are enjoying the benefits from the performance of the subsidiary company, i.e., NSEL, they may have to also bear the risk associated with the acts of omission and commission by the holding company.
- (ii) FTIL is conscious of its role as a parent company as by giving a loan of Rs 179.26 crore to NSEL which was distributed to the small investors of NSEL, has already owned up some responsibility for the NSEL payment crisis. However, the company cannot be allowed to confine its responsibility and concern only for the small investors alone, it has to shoulder full responsibility for the outstanding dues at NSEL;
- (iii) A charge sheet has been filed by the Economic Offence Wing, Mumbai Police in NSEL matter against Sh. Jignesh Shah, the founder and Managing Director of FTIL. This clearly shows that Mumbai Police has

already found prima facie evidence against Sh. Jignesh Shah regarding his culpability in the NSEL matter.

4. Consideration of the Proposal by the Central Government

- 4.1 While considering the above proposal, the Central Government has also taken into account the findings/ observations during the course of inspection under Section 209A of the Companies Act, 1956 of the Books of Account of NSEL and FTIL. The said inspections bring out non-compliances of the various provisions of the Companies Act, 1956. It is further observed that the management of the affairs of NSEL was being controlled and directed by FTIL and its key managerial persons (KMPs).
- 4.2 The Central Government has carefully considered the proposal received from FMC and DEA and is of the considered opinion that to leverage combined assets, capital and reserves for efficient administration and satisfactory settlement of rights and liabilities of stakeholders and creditors of NSEL, it will be in essential public interest to amalgamate NSEL with FTIL.
- 4.3 Accordingly, the Central Government has taken a view that there is a prima facie case for invoking Section 396 of the Companies Act, 1956 and to initiate this process by issuing the draft Order in terms of Section 396(4) of the Companies Act, 1956.



(M.J. Joseph)

Additional Secretary to Government of India
on behalf of the Central Government

Place: New Delhi

Date: 21.10.2014



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