

# ICSI-EIRC NEWSLETTER



## THE INSTITUTE OF Company Secretaries of India

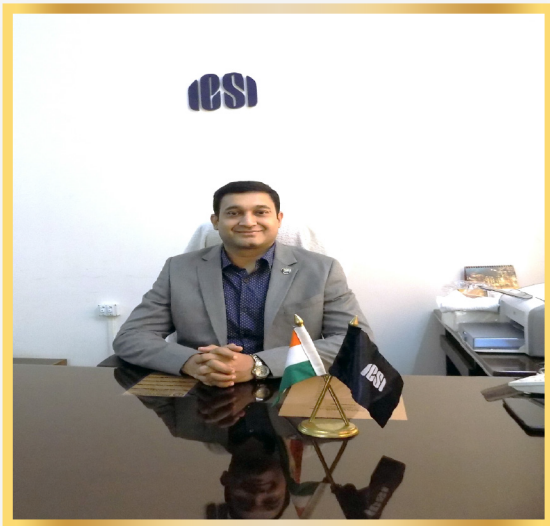
IN PURSUIT OF PROFESSIONAL EXCELLENCE

Statutory body under an Act of Parliament

APRIL 2017 ISSUE



# CHAIRMAN'S MESSAGE



My Dear Esteemed Colleagues,

At the outset, please accept warm greetings on behalf of the Eastern India Regional Council (EIRC) of ICSI! It gives me immense pleasure in sharing my thoughts with you for the fourth time through this Communique in the capacity of Chairman of EIRC-ICSI.

I am happy to share that in these four months, me and my team amongst other aspects has been able to revive the spirit and culture of Study Circles and Group Discussions. We held several small discussions and study circles which provided the platform to delegates to raise, discuss and deliberate on several issues.

I personally feel that these forums provide much greater leaning and sharing opportunity.

Needless to reiterate, that placement of members has been a priority for my council. We are not only in dialogue with several organizations for placement of our members but we have also conducted sessions to prepare and groom our young members for facing interviews. Under the guidance of Head Office, a Mega Campus Placement drive is scheduled on 26th and 27th of May 2017.

We are planning to hold Regional Students Conference on 30th July 2017. We are also planning to hold the 13th Regional Conference of Practicing Company Secretaries on 26-27 August 2017. I request all my esteemed members to kindly block their calendar for the upcoming Regional PCS Conference in the month of August.

During the month of April, we organized a half day workshop on a very relevant topic "Voluntary Liquidation". We also organized "Capacity Building Conclave" at Middleton Chambers in Kolkata. As the name suggests, the focus was on capacity building of our members in relevant fields such as NCLT, GST, Insolvency & Bankruptcy Code and Secretarial Audit.

My Regional Council Colleagues and our respected Central Council Members have been supporting and guiding me in all my initiatives. Needless to mention the untiring and dedicated efforts of my EIRO colleagues provides strength to the Regional Council.

I once again acknowledge the efforts put in by our Past Presidents, Past Chairmen and Council Colleagues in building this Institution of Excellence. We as a team will endeavor to take the legacy forward.

I request my fellow members and students to reach out to me with their thoughts at my coordinates provided below-

CS Siddhartha Murarka  
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With warm regards  
Your privileged colleague

Siddhartha Murarka  
Chairman - EIRC-ICSI

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ACTIVITY REPORT  
OF CHAPTERS

## List of Activities organised by EIRC from 1.4.2017 to 30.4.2017

| Date                                 | Programme / Activity  | Venue                       |
|--------------------------------------|---|-----------------------------|
| 1st April, 2017 to 20th April, 2017  | 120th MSOP (Management Skills Orientation Programme)        | ICSI-EIRC House             |
| 7th April, 2017                      | Briefing cum Grooming Session for preparation of Interviews | ICSI-EIRC House             |
| 7th April, 2017                      | Induction Programme for newly registered students           | ICSI-EIRC House             |
| 7th April, 2017 to 8th April, 2017   | 7th Batch of PIP (Professional Induction Programme)         | ICSI-EIRC House             |
| 10th April, 2017 to 11th April, 2017 | 5th Batch of PEGP (Professional E-Governance Programme)     | ICSI-EIRC House             |
| 13th April, 2017                     | HDW on Voluntary Liquidation                                | ICSI-EIRC House             |
| 22nd April, 2017                     | Capacity Building Conclave                                  | Middleton Chambers, Kolkata |

**8** Career Awareness Programmes were organised during this period.

120th MSOP from 01.04.2017 to 20.04.2017



(L to R) Shri Alok Samantarai, RD ,MCA(Eastern Region), CS Siddhartha Murarka, Chairman ICSI-EIRC, Shri Ghanshyam Das Khandelia, Head of GBM service Centre and HSS Service Delivery HSBC Operations, Services and Technology, CS Ashok Purohit, Vice Chairman, ICSI-EIRC, Shri Tapas Roy, Assistant Director, ICSI-EIRO



(L to R) CS Sandip Kr. Kejriwal, Member, EIRC; Dr. G C Dutt, IPS, Inspector General of Police (Police Directorate), West Bengal; CS Siddhartha Murarka, Chairman, EIRC; Shri Vijai Pratap Singh, Hon'ble Member, NCLT; CS Ashok Purohit, Vice Chairman, EIRC and CS Gautam Dugar, Secretary, EIRC along with the best participants



Group photo of the participants of 120th batch of MSOP with dignitaries

Half Day Workshop on Voluntary Liquidation on 13.04.2017



(Extreme right) CS Siddhartha Murarka, Chairman, EIRC addressing the participants; other on dais (R to L) CS Ashok Purohit, Vice Chairman, EIRC; CS Mamta Binani, Immediate Past President, ICSI and CS Vinod Kothari, Past Chairman, EIRC



Cross section of the participants

## Capacity Building Conclave on 22.04.2017



CS Siddhartha Murarka, Chairman, EIRC addressing; others sitting on dais - CS Mamta Binani, Immediate Past President, ICSI and CS Ashok Purohit, Vice Chairman, EIRC

Dignitaries at the inaugural lamp lighting  
Next row has 3 photographs of speaker:



CS Vinod Kothari,  
Practising Company Secretary addressing



CS Sumit Binani,  
Practising Chartered Accountant addressing



CA Shivani Shah,  
Practising Chartered Accountant addressing

## Briefing cum Grooming Session for preparation of Interviews



## 2 Days Professional Induction Programme





**FCS Rajib Kumar Das**  
 Email : [rajibdas@live.com](mailto:rajibdas@live.com)

SEBI has introduced a Guidance note on "Board Evaluation" on 05th day of January, 2017. The new concept was introduced and highlighted in Companies Act, 2013 under provision of section 134 (3) , 178(2), Schedule-IV of Code of Independent Director and Rule 8(4) of Companies (Accounts) Rule, 2014 with SEBI (LODR) Regulation, 2015 under Chapter (II) and Chapter (IV).

The guidance note has covers the following areas of Board Evaluation :

- Subject of Evaluation i.e. who is to be evaluated
- Process of Evaluation including laying down of objectives and criteria to be adopted for valuation of different persons
- Feedback to the persons being evaluated
- Action Plan based on the results of the evaluation process
- Disclosure to stakeholders on various aspects
- Frequency of Board Evaluation
- Responsibility of Board Evaluation and
- Review of the entire evaluation process periodically



I have highlighted in this Article only process of evaluation. The following questionnaires will help us to identify the areas which need to be evaluated

| S I. No.                          | Subject Matter                              | Query  | Reply/ Observation |
|-----------------------------------|---|--|--------------------|
| <b>A) BOARD AS A WHOLE</b>        |   |  |                    |
| <b>(a) Structure of the Board</b> |   |  |                    |
| 1.                                | Competency of Directors                     | Whether Board as a whole has directors with a proper mix of competencies to conduct its affairs effectively?   |                    |
| 2.                                | Experience of Directors                     | Whether Board as a whole has directors with enough experience to conduct its affairs effectively?  |                    |
| 3.                                | Mix of qualifications                       | Whether Board as a whole has directors with a proper mix of qualifications to conduct its affairs effectively?   |                    |
| 4.                                | Diversity in Board under various parameters | Gender/background/competence/experience, etc. – Whether there is sufficient diversity in the Board on the aforesaid parameters.  |                    |
| 5.                                | Appointment to the Board                    | Whether the process of appointment to the board of directors is clear and transparent and includes provisions to consider diversity of thought, experience, knowledge, perspective and gender in the board of directors  |                    |
| <b>(b) Meetings of the Board</b>  |   |  |                    |
| 1.                                | Regularity of Meetings                      | Whether meetings are being held on a regular basis?  |                    |
| 2.                                | Frequency                                   | Whether the Board meets frequently?<br>Whether the frequency of such meetings is enough for the Board to undertake its duties properly?  |                    |
| 3.                                | Logistics                                   | Whether the logistics for the meeting is being handled properly- venue, format, timing, etc.?  |                    |
| 4.                                | Agenda                                      | a. Whether the agenda is circulated well before the meeting?<br>b. Whether the agenda has all relevant information to take decision on the matter?<br>c. Whether the agenda is up to date, regularly reviewed and involves major substantial decisions?<br>d. Whether the quality of agenda and Board papers is up to the mark (explains issues properly, not overly lengthy, etc.)?<br>e. Whether outstanding items of previous meetings are followed-up and taken up in subsequent agendas?<br>f. Whether the time allotted for the every item (especially substantive items) in the agenda of the meeting is sufficient for adequate discussions on the subject?<br>g. Whether the Board is able to finish discussion and decision on all agenda items in the meetings?<br>h. Whether adequate and timely inputs are taken from the Board members prior to setting of the Agenda for the meeting?<br>i. Whether the agenda includes adequate information on Committee's activities? |                    |

| S I.<br>No.                | Subject Matter                         | Query  | Reply/<br>Observation |
|----------------------------|--|--|-----------------------|
| 5.                         | Discussions and dissent                | a. Whether the Board discusses every issue comprehensively and depending on the importance of the subject?<br>b. Whether the environment of the meeting induces free-flowing free flowing discussions, healthy debate and contribution by everyone without any fear or fervor?<br>c. Whether the discussions generally add value to the decision making?<br>d. Whether the Board tends towards groupthink and whether critical and dissenting suggestions are welcomed?<br>e. Whether all members actively participate in the discussions?<br>f. Whether overall, the Board functions constructively as a team?  |                       |
| 6.                         | Recording of Minutes                   | a. Whether the minutes are being recorded properly- clearly, completely, accurately and consistently?<br>b. Whether the minutes are approved properly in accordance with set procedures?<br>c. Whether the minutes are timely circulated to all the Board members?<br>d. Whether dissenting views are recorded in the minutes?   |                       |
| 7.                         | Dissemination of information           | a. Whether all the information pertaining to the meeting are disseminated to the members timely, frequently, accurately, regularly?<br>b. Whether Board is adequately informed of material matters in between meetings?  |                       |
| (c) Functions of the Board |  |  |                       |
| 1.                         | Role and responsibilities of the Board | Whether the same are clearly documented E.g. Difference in roles of Chairman and CEO, Matters reserved for the Board, etc.   |                       |
| 2.                         | Strategy and performance evaluation    | a. Whether significant time of the Board is being devoted to management of current and potential strategic issues?<br>b. Whether various scenario planning is used to evaluate strategic risks?<br>c. Whether the Board overall reviews and guides corporate strategy, major plans of action, risk policy, annual budgets and business plans, sets performance objectives, monitored implementation and corporate performance, and oversees major capital expenditures, acquisitions and divestments?  |                       |
| 3.                         | Governance and compliance              | a. Whether adequate time of the Board is being devoted to analyse and examine governance and compliance issues?<br>b. Whether the Board monitors the effectiveness of its governance practices and makes changes as needed?<br>c. Whether the Board ensures the integrity of the entity's accounting and financial reporting systems, including the independent audit and that appropriate?<br>d. Systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards?<br>e. Whether the Board oversees the process of disclosure and communications?<br>f. Whether the Board evaluates and analyses the compliance certificate from the auditors / practicing company secretaries regarding compliance of conditions of corporate governance?. |                       |
| 4.                         | Evaluation of Risks                    | a. Whether Board undertakes a review of the high risk issues impacting the organization regularly?<br>b. In assessment of risks, whether it is ensured that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant risks not being recognized or exposes the entity to excessive risk?  |                       |
| 5.                         | Grievance redressal for Investors      | Whether the Board regularly reviews the grievance redressal mechanism of investors, details of grievances received, disposed of and those remaining unresolved.?   |                       |
| 6.                         | Conflict of interest                   | a. Whether the Board monitors and manages potential conflicts of interest of management, members of the board of directors and shareholders, including misuse of corporate assets and abuse in related party transactions?<br>b. Whether a sufficient number of non-executive members of the board of directors capable of exercising independent judgement are assigned to tasks where there is a potential for conflict of interest?   |                       |

| Sl. No.                        | Subject Matter   | Query   | Reply/Observation |
|--------------------------------|--|---|-------------------|
| 7.                             | Stakeholder value and responsibility                                     | <p>a. Whether the decision making process of the Board is adequate to assess creation of stakeholder value?</p> <p>b. Whether the Board has mechanisms in place to communicate and engage with various stakeholders?</p> <p>c. Whether the Board acts on a fully informed basis, in good faith, with due diligence and care, with high ethical standards and in the best interest of the entity and the stakeholders?</p> <p>d. Whether the Board treats shareholders and stakeholders fairly where decisions of the board of directors may affect different shareholder/ stakeholder groups differently?</p> <p>e. Whether the Board regularly reviews the Business Responsibility Reporting / related corporate social responsibility initiatives of the entity and contribution to society, environment etc.?</p>  |                   |
| 8.                             | Corporate culture and values   | Whether the Board sets a corporate culture and the values by which executives throughout a group shall behave?  |                   |
| 9.                             | Review of Board evaluation   | Whether the Board monitors and reviews the Board evaluation framework?  |                   |
| 10.                            | Facilitation of independent directors                                    | Whether the Board facilitates the independent directors to perform their role effectively as a member of the board of directors and also a member of a committee of board of directors and any criticism by such directors is taken constructively.?  |                   |
| <b>(d) Board of Management</b> |  |   |                   |
| 1                              | Evaluation of performance of the management and feedback                 | <p>a. Whether the Board evaluates and monitors management, especially the CEO regularly and fairly and provides constructive feedback and strategic guidance?</p> <p>b. Whether the measures used are broad enough to monitor performance of the management?</p> <p>c. Whether the management's performance is benchmarked against industry peers?</p> <p>d. Whether remuneration of the management is in line with its performance and with industry peers?</p> <p>e. Whether remuneration of the Board and the management is aligned with the longer term interests of the entity and its shareholders.?</p> <p>f. Whether the Board selects, compensates, monitors and, when necessary, replaces key managerial personnel based on such evaluation. ?</p> <p>g. Whether the Board 'steps back' to assist executive management by challenging the assumptions underlying strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the entity's focus?.</p> |                   |
| 2                              | Independence of the management from the Board                            | Whether the level of independence of the management from the Board is adequate?   |                   |
| 3                              | Access of the Management to the Board and Board access to the management | Whether the Board and the management are able to actively access each other and exchange information ?  |                   |
| 4                              | Secretarial support  | Whether adequate secretarial and logistical support is available for conducting Board meetings ?  |                   |
| 5                              | Fund availability  | Whether sufficient funds are made available to the Board for conducting its meeting effectively, seeking expert advice E.g. Legal, accounting, etc.?  |                   |
| 6                              | Succession plan  | Whether an appropriate and adequate succession plan is in place and is being reviewed and overseen regularly by the Board ?   |                   |
|                                | <b>(e) Professional development</b>                                      | <p>a. Whether adequate induction and professional development programmes are made available to new and old directors?</p> <p>b. Whether continuing directors training is provided to ensure that the members of board of directors are kept up to date?</p>   |                   |

## B) COMMITTEES OF THE BOARD

| 1  | 2  | 3   | 4   | 5   |
|--|--|---|---|---|
| Mandate and composition  | Effectiveness of the Committee   | Structure of the Committee and meetings   | Independence of the Committee from the Board                              | Contribution to decisions of the Board  |
| Whether the mandate, composition and working procedures of committees of the board of directors is clearly defined and disclosed ? | Whether the Committee has fulfilled its functions as assigned by the Board and laws as may be applicable ? | a. Whether the Committees have been structure properly and regular meetings are being held<br>b. In terms of discussions, agenda, etc. of the meetings, similar criteria may be laid down as specified above for the entire Board | Whether adequate independence of the Committee is ensured from the Board? | Whether the Committee's recommendations contribute effectively to decisions of the Board? |





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### Explain the constitution of Board of Directors

As per section 149 (1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of individuals as directors-

*In case of Public Company- a minimum number of three directors  
In case of Private Company- a minimum number of two directors  
In case of OPC- a minimum number of one director*

The following class of companies shall appoint at least one woman director on its board as per the second proviso of section 149(1) read with rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014-

- i. every listed company;
- ii. every other public company having –
  - a) paid-up share capital of one hundred crore rupees or more;
  - or
  - b) turnover of three hundred crore rupees or more

**Explanation -** For the purposes of this rule, it is hereby clarified that the **paid up share capital or turnover**, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

As per section 149(3) **Every company** shall have **at least one director** who has **stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.**

As per section 149(4) **Every listed public company** shall have **at least one-third** of the total number of directors as independent directors.

The following class or classes of companies shall also have at least two directors as independent directors as per section 149(4) read with rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 -

- i.) the Public Companies having **paid up share capital of ten crore rupees or more**; or
- ii.) the Public Companies having **turnover of one hundred crore rupees or more**; or
- iii.) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, **exceeding fifty crore rupees.**

**Note:** A company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

#### **Explanation-**

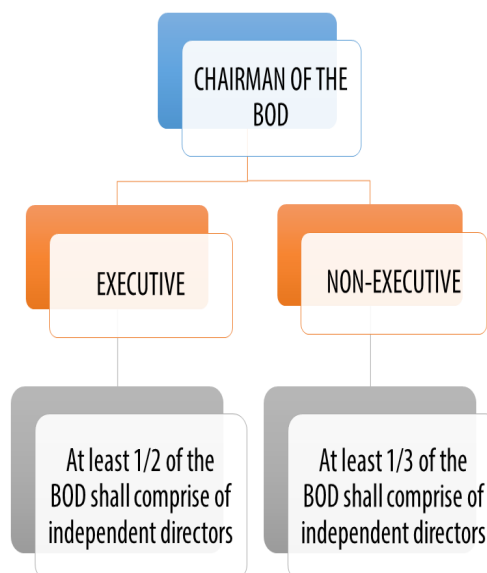
>> For the purpose of above section, any fraction contained in such one-third number shall be rounded off as one.

>> For the purposes of rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, it is hereby clarified that, the **paid up share capital or turnover or outstanding loans, debentures**

**and deposits**, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

**Pursuant to Regulation 17** of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, the composition of board of directors of the listed entity shall be as follows-

>> Board of directors shall have an **optimum combination of executive and non-executive directors** with at least one woman director **and not less than fifty per cent. of the board of directors shall comprise of non-executive directors.**



Provided that where the **regular non-executive chairperson** is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, **at least half of the board of directors** of the listed entity shall consist of independent directors.

**Note:** Regulation 17 of SEBI (LODR) Regulations, 2015 shall not be applicable to SME Listed Entities [Read Regulation 15(2) SEBI (LODR) Regulations, 2015].

#### DISCLAIMER

While every efforts have been made and care has been taken in preparation of this newsletter and to ensure its accuracy at the time of its publication, EIRC of ICSI assumes no responsibility for any errors which despite of all precaution, may creep in. ICSI-EIRC does not own any responsibility for the information and views published in journal which are of the contributors.

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**What is the maximum limit to appoint Directors in Companies?**

A company may appoint maximum of 15 directors on its board as per section 149(1)(b) of the Companies Act, 2013.

As per the First proviso clause of section 149 (1), a company may appoint more than fifteen directors after passing a special resolution.

**Note:** Section 8 Companies may appoint more than fifteen directors without passing special resolution as per the exemption notification dated 5th June, 2015.

**Are there any time limit to fill up the intermittent vacancy of a woman director or a independent director?**

Any intermittent vacancy of a woman director or a independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

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**What are the obligations with respect to directors for holding directorship in Companies?**

Pursuant to 165 (1) of the Companies Act, 2013 No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time.

Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

*Explanation:- For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.*

**Note:** Section 8 companies shall not to be included for reckoning the limit of 20 companies for the purpose of section 165(1) as per the exemption notification dated 5th June, 2015.

**What are the obligations with respect to Independent directors for holding independent directorship in listed entities?**

Pursuant to sub-Regulation (1) of Regulation 25 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, A person shall not serve as an independent director in more than seven listed entities.

Pursuant to first proviso to sub-Regulation (1) of Regulation 25 Provided that any person who is serving as a whole time director in any listed entity shall serve as an independent director in not more than three listed entities.

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**Can Whole Time Director be a director liable to retire by rotation?**

The Companies Act, 2013 does not restrict a whole time director to be appointed as a rotational director. Therefore, a Whole Time Director can also be a director liable to be retire by rotation.

**Elucidate the obligations with respect to directors and senior management for holding Membership and Chairpersonship in the Committees pursuant to Listing Regulations?**

Pursuant to sub-Regulation (1) of Regulation 26 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, a director shall not be a member in more than ten committees or act as chairperson of more than five committees across all listed entities in which he is a director. Which shall be determined as follows-

a) the limit of the committees on which a director may serve in all public limited companies, whether listed or not, shall be included and all other companies including private limited companies, foreign companies and companies under Section 8 of the Companies Act, 2013 shall be excluded;

b) for the purpose of determination of limit, chairpersonship and membership of the audit committee and the Stakeholders' Relationship Committee alone shall be considered.

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**What are the disclosures required to be given annually or in case of any change by the directors?**

The following disclosures required to be submitted by the directors to the Company:

1. Pursuant to section 184(1) of the Companies Act, 2013, every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, by giving a notice in writing in Form MBP- 1.

2. Pursuant to Section 149(7) of the Companies Act, 2013, every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director,

give a declaration that he meets the criteria of independence as provided in sub-section (6) of section 149.

3. Every director shall inform to the company concerned about his disqualification under sub-section (2) of section 164, read with rule 14(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, if any, in Form DIR-8 before he is appointed or re-appointed. **Note:** As a good practice, Form DIR -8 may be submitted before the commencement of a financial year as provided by the Institute suggestion.

4. Pursuant to sub-Regulation (2) of Regulation 26 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, every director shall inform the listed entity about the committee positions he or she occupies in other listed entities and notify changes as and when they take place.

**Amendments:-**  
 >> In case of Section 8 company - Section 149 (1) and the first Proviso to Sub-section (1) shall not apply - Notification G.S.R. 466(E), dated 5th June, 2015. | >> In case of Section 8 company - Sub-sections (4), (5),(6), (7), (8), (9), (10) , (11), Clause (i) of sub-section (12) and Sub-section (13) of Section 149 shall not apply. - Notification G.S.R. 466(E), dated 5th June, 2015. | >> In case of section 8 company - Section 165 (1) shall not apply - Notification G.S.R. 466(E), dated 5th June, 2015. |Disclaimer: Due diligence has been done to ensure accuracy and correctness of this article. The Author is not responsible for any harm, penalty that may be caused on the basis of the above article.



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**SHORT SUMMARY:** VIA Notification No. IBBI/2016-17/GN/REG010 dated 31st March, 2017 IBBI has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. The same has been published in the official gazette. As a result of the same w.e.f. 1st April, 2017 voluntary winding up shall be conducted under Insolvency and Bankruptcy Code, 2016 (hereafter referred as "IBC").

In this Flash editorial, the auditor begins by referring notifications for applicability of provisions of Voluntary Liquidation/ winding up under Insolvency and Bankruptcy Code, 2016. The main thrust of the article, however, is upon the provisions / regulations, of IBC concerning liquidation of a corporate person - companies, limited liability partnerships and any other persons incorporated with limited liability and process of liquidation under these regulations.

**Members' Voluntary Liquidation** is the option for solvent companies when it comes to liquidation. If you are a director of a company that you feel no longer has a purpose and the company has enough funds to pay back creditors in full then this process would be the option for you. A Members' Voluntary Liquidation is a tax efficient method for distributing or restructuring the assets and/or trade of a company

This is article no. 218 of the series of editorials written by the author on corporate laws (including Companies Act, 2013, SEBI, RBI Regulations, IBC, LLP Act, 2008 etc.).

## INTRODUCTION:

Liquidation (or "winding up") is a process by which a company's existence is brought to an end.

The provisions concerning to Voluntary Winding up of Company was specified in section 304-325 of Companies Act, 2013 although these provisions not at all notified. As the IBC got the president assent on 28/05/2016 as per section 255 and schedule XI of IBC the sections of Voluntary winding up "Omitted" from Companies Act, 2013. Prior to 1st April, 2017 voluntary Winding up was ongoing in Companies Act, 1956. VIA Notification No. IBBI/2016-17/GN/REG010 dated 31st March, 2017 IBBI has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. The same has been published in the official gazette. As a result of the same w.e.f. 1st April, 2017 voluntary winding up shall be conducted under Insolvency and Bankruptcy Code, 2016 (hereafter referred as "IBC").

These Regulations shall apply to the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016.

## HIGHLIGHTS:

>><sup>1</sup> Insolvency Professionals shall act as liquidator.

>> The corporate person shall from the liquidation commencement date cease to carry on its business except as far as required for the beneficial winding up of its business

>> The liquidator shall endeavor to complete the liquidation process of the corporate person within twelve months from the liquidation commencement date.

>> The liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account referred to in Regulations 8 and 10 for at least eight years after the dissolution of the corporate person, either with himself or with an information utility.

## Process of Voluntary Winding Up

The Winding up of a Company can also be done voluntarily by the members of the Company, if:

- If the Company passes a Special Resolution in the General Meeting for winding up of the Company.
- The Company in general meeting passes a resolution requiring the Company to be wound up voluntarily as a result of the expiry of the period of its duration, if any, fixed by its articles of association or on the occurrence of any event in respect of which the articles of association provide that the company should be dissolved.

The Voluntary winding up process applies where the directors and shareholders decide to cease trading their solvent limited company.

## Step 1

### CONVENE A BOARD MEETING with two Directors or by a majority of Directors.

- 1.1. Pass a resolution for proposal of Voluntary Liquidation of the Company.
- 1.2. Prepare a declaration from majority of the directors of the company verified by an affidavit stating that—
  - i. they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
  - ii. The company is not being liquidated to defraud any person -
- 1.3. File the declaration with ROC in e-form GNL-2
- 1.4. Attachment to Declaration:
  - >> audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later;
  - >> a report of the valuation of the assets of the corporate person, if any, prepared by a registered valuer;

<sup>1</sup> The following categories of individuals are eligible for registration as an insolvency professional:

(a) Advocates, Chartered Accountants, Company Secretaries and Cost Accountants with 10 years' of post-membership experience (practice or employment) or a Graduate with 15 years' of post-qualification managerial experience, on passing the Limited Insolvency Examination.  
(b) Any other individual on passing the National Insolvency Examination.

**Step 2**
**CONVENE A GENERAL MEETING**

Within 4 weeks of passing of above said declaration hold the meeting of Shareholders for the following purposes:

- 2.1. Pass a Special Resolution for approving the proposal of Voluntary Liquidation of the Company.
- 2.2. Appoint an insolvency professional to act as the liquidator. Resolution should contain the terms and conditions of the appointment of the insolvency professional, including the remuneration due to him.
- 2.3. File the special resolution with ROC in e-form MGT-14

**Step 3**
**APPROVAL OF CREDITORS IF COMPANY OWES DEBT**

- 3.1. If the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed above by the shareholders within seven days of passing of such special resolution.
- 3.2. Approval can be by holding of Meeting, by Consent of 2/3 of creditors in writing etc. Company will place the copy of resolutions before the creditors for their approval.

**COMMENCEMENT OF VOLUNTARY LIQUIDATION**

A voluntary liquidation for a corporate person shall be deemed to have commenced from the date of passing of the resolution (after approval from the creditors of the Company).


**Step 4**
**PUBLIC ANNOUNCEMENT BY THE LIQUIDATOR**

The liquidator shall make a public announcement in Form A of Schedule I within five

days from his appointment (i.e. 5 days from the date of General Meeting).

4.1. The public announcement shall-

- >> Call upon stakeholders to submit their claims as on the liquidation commencement date; and
- >> Provide the last date for submission of claim, which shall be thirty days from the liquidation commencement date.

4.2. The announcement shall be published-

- i. In one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate person and any other location where in the opinion of the liquidator, the corporate person conducts material business operations;
- ii. On the website, if any, of the corporate person; and
- iii. On the website, if any, designated by the Board for this purpose.

**Step 5**
**PROCEEDINGS BY LIQUIDATOR**

5.1. The liquidator shall submit a Preliminary Report to the Company within 45 days from the liquidation commencement date, detailing as given below. The liquidator shall preserve a physical as well as an electronic copy of the reports for eight years after the dissolution of the corporate person.

- the capital structure of the Company
- the estimates of its assets and liabilities as on the liquidation commencement date based on the books of the Company
- Whether he intends to make any further inquiry in to any matter relating to the promotion, formation or failure of the Company or the conduct of the business thereof; and
- The proposed plan of action for carrying out the liquidation, including the timeline within which he proposes to carry it out and the estimated liquidation costs.

**5.2. Maintenance of Registers and Books of Account:**

5.2.1. The liquidator shall maintain the registers and books (as mentioned in regulation 10), as may be applicable, in relation to the voluntary liquidation of the corporate person, and shall preserve them for a period of eight years after the dissolution of the corporate person.

5.2.2. Where the books of account of the corporate person are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought up-to-date, with all convenient speed.

5.2.3. The liquidator shall keep receipts for all payments made or expenses incurred by him

**5.3. Liquidator has following duties & Rights:**

5.3.1. The liquidator may call for such other evidence or clarification as he deems fit from a Claimant for substantiating the whole or part of its claim.

**5.3.2 Verification of claims:**

5.3.2.1. The liquidator shall verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be, as per section 40 of the Code.

5.3.2.2. A creditor may appeal to the Adjudicating Authority against the decision of the liquidator as per section 42 of the Code.

### 5.3.3. List of stakeholders:

5.3.3.1. The liquidator shall prepare the list of stakeholders within forty-five days from the last date for receipt of claims.

5.3.3.2. The liquidator shall prepare a list of stakeholders on the basis of proofs of claims submitted and accepted under these Regulations, with-

- >> the amounts of claim admitted, if applicable,
- >> the extent to which the debts or dues are secured or unsecured, if applicable,
- >> the details of the stakeholders, and
- >> The proofs admitted or rejected in part, and the proofs wholly rejected.

### 5.3.4. Paid Money into Bank Account:

5.3.4.1 The liquidator shall open a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person.

5.3.4.2. All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account.

### 5.3.5. Distribution.

5.3.5.1. The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders.

5.3.5.2. The liquidation costs shall be deducted before such distribution is made.

## Step 6

### COMPLETION OF LIQUIDATION

6.1. The liquidator shall endeavor to wind up the affairs of the corporate person within one year from the voluntary liquidation commencement date.

6.2. In the event of the voluntary liquidation continuing for more than one year, the liquidator shall.

6.2.1. Call a meeting of the contributories of the corporate person within fifteen days from the end of the year in which he is appointed, and at the end of each succeeding year; and

6.2.2. Shall present a Status Report indicating progress in liquidation, including-

- Settlement of list of stakeholders,
- Details of any property that remain to be sold and realized,
- Distribution made to the stakeholders, and
- Distribution of unsold property made to the stakeholders;
- Developments in any material litigation, by or against the corporate person; and
- Filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code.

6.2.3. The Status Report shall enclose an audited account of the voluntary liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

## Step 7

### PREPARATION OF FINAL REPORT

7.1. **Final Report:** On completion of the liquidation process, the liquidator shall prepare the Final Report consisting of:

7.1.1. An audited account of the voluntary liquidation, showing the receipts and payments pertaining to liquidation since the liquidation commencement date; and

7.1.2. A statement demonstrating that-

- >> the assets of the Company has been disposed of;
- >> the debt of the Company has been discharged to the satisfaction of the creditors;
- >> No litigation is pending against the Company or sufficient provision has been made to meet the obligations arising from any pending litigation.

7.1.3. Sale statement in respect of all assets containing: i) the realized value; (ii) cost of realization, if any; (iii) the manner and mode of sale; (iv) an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets (v) the person to whom the sale is made; and (vi) any other relevant details of the sale.

## Step 8

### SUBMISSION OF FINAL REPORT/ APPLICATION WITH NCLT

8.1. **The liquidator shall send the Final Report to by registered post at their registered address and by electronic means –**

- >> The contributories of the corporate person;
- >> The registrar; and
- >> The board,

8.2. **Submission with NCLT:**

Where the affairs of the Company have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the NCLT in form NCLT-1 for the dissolution of such Company

### ORDER BY NCLT

The Tribunal shall fix a date for the hearing of the petition. Where the Tribunal satisfied with the application. NCLT to pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly

## Step 9

### FILING OF ORDER WITH ROC

The order of the Tribunal shall be filed with the Registrar by the company within a period of 14 days of the receipt of the copy of order, or such other time as may be fixed by the Tribunal.

### CONCLUSION:

**Suspension of Process of Liquidation:** If liquidator is of the opinion that the voluntary liquidation is being done to, defraud a person, he shall make an application to the Adjudicatory Authority to suspend the process of voluntary liquidation. Where the liquidator is of the opinion that the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation, he shall make an application to the Adjudicating Authority to suspend the process of voluntary liquidation.

*As now Registered Insolvency Professional will be required to act as a Liquidator in case of winding up proceedings. It is a great opportunity for the Company Secretaries. It will help to boost our profession on a new height.*

# THE ROLE OF WHOLE-TIME COMPANY SECRETARIES IN STATUTORY AUDIT AND DRAFTING OF ANNUAL FINANCIAL STATEMENTS



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With the conclusion of financial year 2016-17, most of the Companies at this moment must be busy in hosting Audit teams and finalizing their books of Accounts. This Article aims at enhancing the expertise of Whole-time Company Secretaries who keep themselves at an arm's length from the annual events of drafting of Annual Financial Statements and Statutory Audits.

## THE ROLE OF WHOLE-TIME COMPANY SECRETARIES IN STATUTORY AUDIT AND DRAFTING OF ANNUAL FINANCIAL STATEMENTS:

Section 134(1) of the Companies Act, 2013 like its predecessor, provides that a Company Secretary, if appointed, along with other signatories, shall sign the financial statements of the Company. Thus, it is pertinent for a Whole-time Company Secretary to ensure that the financial statements, which are about to be signed, exhibits true and fair view of the state of the affairs of the company. Being one of the Key Managerial Personnel u/s 203 of the Companies Act, 2013, a Company Secretary can also be held as responsible, if tomorrow any of the provisions of section 128 is violated.

In order to ensure that the financial Statements of the Company is exhibiting true and fair view of the state of affairs of the Company, a Company Secretary must keep its eyes and ears open throughout the year without thinking that a Chief Financial Officer (CFO) is already designated to look after the job. Evidently, since the Company Secretaries got a little edge over others in Company Affairs and are one of the expert u/s 2(38) of the Companies Act, 2013, the liabilities of Company Secretaries are far higher. The Annual events of Finalization of Annual Accounts as well as Statutory Audit are golden opportunities for a Whole time Company Secretary, wherein they may

not only ensure the compliance of the related provisions relating to the Companies Act, but can also contribute significantly in the process of finalization of Annual Accounts resulting into enlightening themselves about the real nature of the transactions. Moreover, the beneficiary will always be the Accounts Department, as this will only lead to shifting of significant liability from their overburdened shoulders. Thus, in my opinion, Company secretaries of every company must closely indulge themselves in the drafting of Annual Accounts and the Statutory Audit of financial and cost records.

The Annual Financial Statements of the Company are being drafted painstakingly after lots of adjustments and deliberations having regard to Company Law, Tax Laws, Labour laws, Accounting Standards, ICDS and other inter-related aspects. A Company Secretary must be conversant with the very basics and must have the sufficient adaptability to make themselves abreast of latest developments. Though, there are lots of areas which must be taken care of by a Company Secretary, while assisting in drafting the financial statements, one can at least start by keeping the following points in their mind:

## POINTS TO BE TAKEN CARE OF FROM SECRETARIAL POINT OF VIEW, WHILE PARTICIPATING IN THE DRAFTING OF ANNUAL ACCOUNTS

1. Drafting of Annual Financial Statements should be strictly in conformity to the Section 198 and Schedule III of the Companies Act, 2013 along with applicable Accounting Standards.

2. The Statement of Change in Equity, if applicable, is a part of financial statement as defined u/s 2(40). However, no prescribed format relating to the same has been provided in Schedule III of the Companies Act, 2013 or any Accounting Standard. There are also no MCA circulars or notifications till date, in this regard from MCA's end. Only IFRS and Ind AS talks about the same. Presently, drafting of this statement is mandatory only for following class of entities (other than Banks, NBFCs and Insurance Companies) on whom Ind AS is applicable w.e.f. 01.04.2016:

- A. Companies listed/ in process of listing on stock Exchanges in India or Outside India having Net worth  $\geq$  500 Crores,
  - B. Unlisted Companies having net worth  $\geq$  500 Crores, and
  - C. Parent, Subsidiary, Associate and Joint Ventures of above
- For other companies, whether to draw the said statement or not, would be Management's call. In case, the said statement is not drawn, a note must be provided citing the reasons for not drawing the same.

3. In case the Company is having Advances from Customers, a note is to be provided in the Notes to Accounts as follows:

" None of the Advances from Customers exceeds 365 days and the provisions of Section 73 & 74 of the Companies Act, 2013 read with

Rule 2(1)(xii)(a) of the Companies (Acceptance of Deposit) Rules, 2014 are not attracted."

4. The Books of Accounts should be kept in the manner as provided in Section 128. There are many companies which maintain their Books of Accounts at their factory premises or administrative office. Some Companies outsource this assignment to professional firms. In any case, if the Accounts are being maintained at a place other than its registered office, then it should be backed by a Board Resolution. The intimation of the same is to be filed to the concerned Registrar of Companies in e form AOC-5 within 7(seven) days of passing the Board Resolution.

5. Whole-time Company Secretaries must sincerely examine all the related party transactions (RPT) during the year under review and must try to comprehend and relate the nature of the said transactions. Evidently, the related party transactions as per AS-18 are broader in nature from that of Section 188 of the Companies Act, 2013. For instance, salary to whole time Director is a RPT as per AS – 18. However, it is not so as per section 188. A Company Secretary must diligently filter such transactions for the purpose of the Companies Act. Thereafter, it must be ensured that the said transactions are backed by respective Audit Committee/ Board/ Special Resolution, Contracts & Agreements and are also in conformity to the registers of contract maintained under section 189(1) of the Act. The tenure of omnibus or blanket resolutions should be cautiously verified and arrangements of their renewal should be done within stipulated time, if required.

6. It must be ensured that the remuneration paid to Managerial personnel is in accordance to the provisions of section 196, 197 and Schedule V of the Companies Act, 2013 and that the same should be adequately be disclosed in the Annual Financial Statements and the Directors' Report of the Company. There are sufficient instances when the Public Companies pay excess remuneration to its managerial personnel and often omit to recover the excess paid amount from them and the TDS provisions of the Income Tax Act often makes the entire thing complicated. It should be noted that until the money is not refunded by the concerned Directors it should appear on the asset side of the Balance Sheet of the Company. It must be noted that the Company got no power to waive the recovery of any sum refundable to it by its managerial personnel unless permitted by the Central Government.



7. It must be ensured that the Bona fide and charitable funds beyond 5% of average net profit for the three immediately preceding financial years should be backed by a member's resolution. Any contribution to political parties should be in compliance to Section 182 of the Companies Act, 2013.

8. The CSR expenditure to be shown separately and must not be clubbed with donations as Bona fide contributions to charitable organisations or funds. The CSR Expenditure should be exhibited as separate line item in Profit and Loss Account. However, it must be noted in this regard that CSR expenditure by the Company cannot be claimed as Business expenditure under the Income Tax Act. A Company Secretary must also ensure that the calculation of 2% of average net profit for the three immediately preceding financial years is correct. A certificate from PCS in this regard is much useful and desirable.

9. The Companies must cross check that the Loans and borrowings of the Company are within permissible limits as provided in Section 180(1)(c). If no then it is to be seen that whether such transactions are backed by Special Resolutions. It must be noted in this regard that the said provisions are not applicable to a private Company by virtue of MCA Notification dated 05th June, 2015.

10. Whole time Company Secretaries must ensure that the Loan and advances are not extended to its directors or any other person in whom directors are interested or give any guarantee or provide any security in connection with any loan taken by them or such other person as the case may be. Thus the extended loans and advances must be strictly in compliance to section 185 & 186. Company Secretaries of private Limited Companies must avail to their Companies, the benefits of exemption notification dated 05th June, 2015.

11. The Ministry of Corporate Affairs recently vide its Notification dated 30th March, 2017 has mandated that Every company shall disclose the details of Specified Bank Notes (i.e, demonetized currency notes of Rs. 1000 and Rs. 500) held and transacted during the period from 8th November, 2016 to 30th December, 2016 as provided in the Table below:

|                                       | SBNs | Other denomination notes | Total |
|---------------------------------------|------|--------------------------|-------|
| Closing cash in hand as on 08.11.2016 |      |                          |       |
| (+) Permitted receipts                |      |                          |       |
| (-) Permitted payments                |      |                          |       |
| (-) Amount deposited in Banks         |      |                          |       |
| Closing cash in hand as on 30.12.2016 |      |                          |       |



Accordingly, the Audit Reports shall also have scope of reporting the related compliances/ non compliances. This vital aspect should be reminded to the Finance team by the Whole-time Company Secretaries.

12. Company Secretaries should verify the closing balance provided in Bank statements of Unpaid / Unclaimed Dividend Account with the financials of the Company. A Company Secretary must ensure that the necessary funds are being duly transferred, within the prescribed time, to unpaid/ unclaimed dividend Accounts or the IEPF, as the case may be, along with applicable interests.

13. Company Secretaries must check whether their Company would be required to prepare Consolidated Financial Statements (CFS) or not u/s 129(3). Last year, majority of Companies having associate Companies, finalizing their Books of Accounts for the FY 2015-16, were in great dilemma relating to applicability of CFS. However with the advent of notification dated 27th July, 2016 and the exemption provided in Para 11 of AS 21, this year there should not be any scope for any bewilderment. The eligible Companies must also furnish updated form AOC 1 along with other financial statements and must be certified in the same manner in which the other financial statements are certified.

14. Pursuant to AS 26, the entire amount attributable to Preliminary expenses or Merger/Demerger Expenses should be exhibited in Profit and Loss Account in one go. However, only 1/5th of the said amount would be available in the first year for claiming the benefit of Section 35DD of the Income Tax Act, 1961. In this regard, the concept of 'deferred tax' should be recognized.

15. Surprisingly, many Companies are not adequately exhibiting Contingent liability and Commitments as per the provisions of the Act. The Contingent liabilities should be strictly classified as follows:

- (a) Claims against Company not acknowledged as debt:
- (b) Guarantees:
- (c) Other money for which Company is contingently liable:

Whereas the Commitments should be classified as:

- (a) Estimated amount of contracts remained to be executed on capital account and not provided for;
- (b) Uncalled liability on shares and other investments partly paid;
- (c) Other Commitments (Specify Nature).

A Whole-time Company Secretary is the prime authority empowered by the Board and the Law. Their objective, while dealing with accounts department and Audit team, should be 'to assist' and not 'to dominate.' A Company Secretary must be doubly sure before placing any of his views or suggestions before the Accounts and Audit team, as their words carry great credence. If any discrepancies are noticed in course of finalization of Books of Accounts, its instant resolving should be preferred without widening the same. However, if the inconsistencies are major in nature, it is the honest duty of the Secretary to firmly report the same to the Management. It has been generally noticed that the Companies, in which Company Secretaries participate in finalization of Books of Accounts, tend to make lesser non compliances in comparison to other companies. This reputation must be maintained consistently.





## Activity Report of Chapters of ICSI of EIRC in APRIL 2017

### Bhubaneswar Chapter

|                                       |  |
|---------------------------------------|--|
| 8th April, 2017                       | Valedictory session of MSOP                            |
| 8th April, 2017                       | Workshop on "NCLT, NCLAT & Profession – A New Era      |
| 8th April, 2017                       | Chairman, EIRC Interactive session with the Counsellor |
| 19th April, 2017                      | Oral Coaching Faculty Meeting                          |
| 27th April, 2017-<br>29th April, 2017 | 3 days e-Governance Programme                          |

### Dhanbad Chapter

|                  |  |
|------------------|--|
| 22nd April, 2017 | Study Circle Meet on 'The Constitution of India' |
| 29th April, 2017 | Study Circle Meet on 'Company Meetings'          |

### Hooghly Chapter

|                                      |   |
|--------------------------------------|---|
| 8th April, 2017 &<br>9th April, 2017 | "Junoon-e-June" - A Two(2) Day Practical Class Room Series Workshop |
| 16th April, 2017                     | 2nd Full Day Seminar of 2017  |
| 30th April, 2017                     | 1st, 2nd, 3rd & 4th Study Circle meeting of 2017                    |

### North-Eastern (Guwahati) Chapter

|   |   |
|---|---|
| 22nd April, 2017  | Study Circle Meeting on NCLT under Companies Act 2013 and Insolvency & Bankruptcy Code 2016 |
| 4 CAREER AWARENESS PROGRAMME were organized during this period. |   |

### Ranchi Chapter

|  |  |
|--|--|
| 10th April, 2017 -<br>12th April, 2017 | 4 <sup>th</sup> 3-days e-Governance Programme      |
| 24th April, 2017 -<br>28th April, 2017 | 4 <sup>th</sup> 5-days Skill Development Programme |

### Patna Chapter

|                  |                                    |
|------------------|------------------------------------|
| 8th April, 2017  | Study Circle Meeting               |
| 22nd April, 2017 | Professional Development Programme |

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