

# SECRETARIAL AUDIT

## GENESIS & CONCEPT

A corporation has to function within the periphery of host of legislations. It is essential for an enterprise to abide by plethora of laws, rules, procedures, regulations and internal regulatory framework. Under most laws, the persons responsible for compliance and liable for punishment are directors, the Company Secretary and officers who have been designated to ensure compliances of specific laws and regulations. Amongst the directors, the responsibility of the managing and whole-time directors is greater but when the authorities initiate action by sending a notice, they send it to all the directors simultaneously. This is done on the understanding that the directors of the company have a vicarious liability.

Under the new Companies Act, a managing and/or whole-time director (besides Key Managerial Personnel and specified directors) are treated as 'officer who is in default', who is liable for penal consequences for non-compliance, while under most other laws 'persons in charge of and responsible for the conduct of the business of the company' held responsible .

Sub-clause I(C) (iii) of Clause 49 of the Listing Agreement provides, "The Board shall periodically review compliance reports of all laws applicable to the company, prepared by the company as well as steps taken by the company to rectify instances of non-compliances." This introduces us to the concept of Legal Compliance Reporting System wherein the Board of every listed entity is required to ensure a system in place for compliances and monitoring the corrective measures.

The introduction of the concept of Secretarial Audit (SA) way back in Corporate Governance Voluntary Guidelines, 2009 encapsulates the stakeholder relevance and board responsibility in compliance audit.

Secretarial Audit is a branch of compliance audit concerned with evaluating the affairs of a Company, whether the management is operating in

compliance with not only internal rules and regulations but also external laws mainly regulated by the Government. While performing the business, the Company has to keep track of all the rules and regulations specifically relating to the Companies Act, the Income Tax Act, various Labour Laws, Factories Act, Environmental and Pollution Related Acts and also various other Acts related to the safety and maintenance of law and order.

Secretarial Audit postulates verification of records, books, papers and documents to check compliance with the provisions of various statutes, laws, rules & regulations, procedures by a Competent Professional Company Secretary to ensure compliance of legal & procedural requirements and processes. Compliance Management backed with Secretarial Audit not only safeguards the interest of the Directors & Officers of the companies, shareholders, creditors, employees, customers etc. but also obviates any legal action being initiated by the law enforcing agencies.

Secretarial Audit is therefore an independent, objective assurance intended to add value and improve an organisation's operations. SA helps to accomplish the organisations objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes.

The Companies Act, 2013 codifies the importance of a compliance audit by making a provision under section 204. The section provides that every listed company and a company belonging to other class of companies as may be prescribed by rules are required to annex with its Board's report, a secretarial audit report. Company secretary in practice has been specifically assigned with the role of conducting secretarial audit. The section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules.

The Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, defines the other class of companies as under-

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or

(b) every public company having a turnover of two hundred fifty crore rupees or more.

The section further lays that the Board of Directors, in its Board's report, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in the secretarial audit report. In this respect section 134 of the Companies Act, 2013 provides that Board' report shall include explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the company secretary in practice in his secretarial audit report.

### **Purpose of Secretarial Audit**

Secretarial Audit provides an effective mechanism for the Regulator and the Board to ensure that compliance requirements under a host of legislations and regulations including the Companies Act and other laws applicable to the company are met by the company. Secretarial Audit is basically an audit of compliances and is a part of the total compliance management system of an organisation. It help to detect instances of non-compliance and facilitate taking of corrective actions.

Monitoring compliance with the requirements of law through a formal compliance management programme can produce positive results at several levels:

- Companies that go the extra mile with their compliance programs lay the foundation for good governance.
- Companies with an effective compliance management programme are more likely to avoid stiff penalties, both monetary and by way of imprisonment.
- Companies that embed business and personal ethics and an effective compliance management programme within their work culture often enjoy employee and customer loyalty and public respect for their brand, which can translate into better market capitalization and shareholder returns.
- - Recognition for the company as a good corporate citizen.

## RELEVANCE AND BENEFITS

Corporate governance provides the basis for a stable and productive business environment. Corporate governance, driven by the growing recognition that countries need to attract and protect all investors, both foreign and domestic is becoming increasingly crucial to attracting investment capital. Secretarial Audit gives a necessary comfort to the investors that the affairs of the company are being conducted in accordance with the legal requirements and also protects the companies from the consequences of non compliance of the provisions of the Companies Act and other important corporate laws.

We have witnessed lack of compliance as major cause of corporate failures which have been detrimental to the corporate reputation. Adapting and imbibing the governance measures necessarily calls for incorporation of secretarial audits as a yearly activity for finalizing the business. This shall act as a proactive measure to respond to increasing legal compliance.

Few benefits that accrue from the proactive approach of secretarial audit are as under:

### (a) Promoters

Secretarial Audit will assure the Promoters of a company that those in-charge of its management are conducting its affairs in accordance with the requirements of laws and the owners' stake is not being exposed to undue risk.

### (b) Management

Secretarial Audit will assure the Management of a company that those who are entrusted with the duty and responsibility of compliance are performing their role effectively and efficiently. This also helps the management to establish benchmarks for the compliance mechanism, review and improve the compliances on a continuing basis. It ensures the Management that the company has complied with the laws and, therefore, they are not likely to be exposed to penal or other liability or to action by law enforcement agencies for noncompliance by the company.

(c) Non-executive directors

Secretarial Audit will provide comfort to the Non-executive Directors that appropriate mechanisms and processes are in place to ensure compliance with laws applicable to the company, thus mitigating any risk from a regulatory or governance perspective; so that the Directors not in-charge of the day-to-day management of the company are not likely to be exposed to penal or other liability on account of non-compliance with law.

(d) Government authorities/regulators

Being a pro-active measure, Secretarial Audit facilitates reducing the burden of the law-enforcement authorities and promotes governance and the level of compliance.

(e) Investors

The rationale behind inculcation of Secretarial audit as a part of Management Practices is not only to provide the organization with an assurance that all essential laws, rules, regulations and provisions of law as applicable on the company and any particular event or action thereto have been duly complied with but also to impart necessary confidence in its stakeholders that their interest is being taken care of. Secretarial Audit informs the investors whether the company is conducting its affairs within the applicable legal framework.

(f) Other Stakeholders

It can be an effective due diligence exercise for the prospective acquirer of a company or controlling interest or a joint venture partner. Further Financial Institutions, Banks, Creditors and Consumers are enabled to measure the law abiding nature of Company management.

### **Secretarial Audit & Company Secretary in Practice (PCS)**

A PCS is considered to be a professional well-versed in matters of statutory, procedural and practical aspects of laws applicable to companies, both listed and unlisted public and private companies. A strong knowledge base

would make a PCS a competent professional to conduct Secretarial Audit.

A PCS has been assigned the role of Secretarial Auditor under section 2(2)(c)(v) of the Company Secretaries Act, 1980.

In order to provide guidance to its members who are in practice to adopt a robust and efficient process of Secretarial Audit, the Institute of Company Secretaries of India has issued this Referencer.

## SKILLS OF A SECRETARIAL AUDITOR

The object of the Secretarial Auditor's Report is to form an opinion, based on the inspection of an organization's secretarial and legal record, and to report to the organization's owners as to whether, and if so, to what extent, the company has complied with the laws comprising various statutes, rules, regulations, etc. This requires expert knowledge of all corporate laws. As a significant area of competence of Company Secretary in Practice is "Corporate Laws" it makes them the most obvious and competent professional to conduct Secretarial Audit.

Section 204(2) provides that it is the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company. Sec. 143 of the Act defining powers and duties of auditors applies *mutatis mutandis* the company secretary in practice conducting secretarial audit under section 204. The section specifically provides that every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place and shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor.

A company secretary in practice has been assigned the role of Secretarial Audit under section 2(2)(c)(v) of the Company Secretaries Act, 1980. Further to add the Companies Act, 2013 section 204 provides that a secretarial audit report shall be given by a company secretary in practice.

To be able to give efficient and effective report a company secretary in practice is expected to have the following:

- 1) Team: He is required to ensure that he has a team of appropriately trained staff, who can support the preparation of the report, most importantly they should be communicated with basic audit requirements and ethics. Related legislative, administrative updates should be timely shared and communicated with the team to build and maintain the expertise.
- 2) Adhering to the timelines: Schedule set to conduct the audit process should be strictly adhered to in order to gain the confidence of the client and boost the expertise level of the team.
- 3) Honesty and impartiality: A PCS has the professional duty to provide an unbiased and objective view. PCS should be independent from the operations evaluated and report to the highest level in an organisation, the senior managers and the governors, i.e. the Board of Directors or the Board of Trustees, as the case may be.

The secretarial auditor is expected to ensure that activities of the client are in accordance with the applicable procedure and that supporting evidence maintained by the company is genuine.

## **PROCESS OF SECRETARIAL AUDIT**

Secretarial Audit is a process to check compliance with the provisions of all applicable laws and rules/regulations/procedures; adherence to good governance practices with regard to the systems and processes of seeking and obtaining approvals of the Board and/or shareholders, as may be necessary, for the business and activities of the company, carrying out activities in a lawful manner and the maintenance of minutes and records relating to such approvals or decisions and implementation. The Secretarial Auditor is also expected to express an opinion, after satisfying

himself, that there exist adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

The Secretarial Auditor has also to verify whether diverse requirements under applicable laws have been duly met or not and report on the need for any corrective measures or improvement in the system.

#### *Engagement of Secretarial Auditor*

For effective functioning, it is recommended that the secretarial auditor is engaged by a board resolution. This has been substantiated from the format specified for secretarial audit report which lays that secretarial auditor has examined that the Company has complied with the provisions of the Companies Act, 2013 and the Rules made thereunder and the Memorandum and Articles of Association of the Company.

#### *Communication to earlier incumbent*

Whenever a PCS is engaged as a Secretarial Auditor in place of an earlier incumbent, he is expected to communicate to the earlier incumbent about the proposed engagement in writing to be sent by registered /speed post or any other recognized mode of delivery recognised by The Institute of Company Secretaries of India.

#### *Assignment*

A formal letter of engagement should be issued by the company to the Secretarial Auditor. This letter should formally be accepted by the Secretarial Auditor. This letter should communicate the scope and objectives of the audit. It is recommended that along with the formal acceptance a preliminary questionnaire be sent to the management that helps to learn more about the company.

#### *Preliminary discussions/surveys*

It is important to have relevant information about the company. At this stage secretarial auditor is expected to obtain general overview of the operations of the company, interact with the personnel involved to know about the files and their sources. The secretarial auditor may opt for surveys for generating information about the company.

#### *Preliminary Meeting*

The preliminary meeting with the senior management and the administrative staff involved in the audit will give a fair idea of what is expected and the manner in which audit activities are to be undertaken. In the meeting the preliminary questionnaire and the initial observations of the secretarial auditor may be put forth and discussed. At this stage time frame of the audit should be determined and finalized. The secretarial auditor shall at this stage discuss the scope and objectives of the audit, gather information on important processes, evaluate existing controls, and plan the audit steps.

#### *Finalization of Audit plan and briefing the staff*

For an efficient and effective audit report it is important to work out an action plan. The work plan involves briefing the audit staff as to allotment of work, fieldwork responsibilities and other roles. The audit plan should comprehensively outline the fieldwork and usage of auditing tools. The review of controls helps the auditor determine the areas of highest risk and design tests to be performed in the fieldwork section. It is essential that the audit work plan is in adherence strictly with the timelines.

#### *Testing, Interviews and Analysis*

The secretarial auditor may use a variety of tools and technology to gather information about the company's operations. It is during this stage that the Secretarial Auditor determines whether the controls identified during the preliminary review are operating properly and in the manner described by the Company. Fieldwork typically consists of interviewing with staff of the company whether formally or informally, reviewing procedure manuals,

processes, testing and analysing compliance with applicable policies and procedures and laws, rules, regulations, and assessing the adequacy of controls. This is a crucial stage which relates to significant findings which the secretarial auditor uses while preparing the draft audit report.

As discussed earlier, it is essential to remember here that under section 204 of the Companies Act, 2013 it shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company. Further the Act also places the secretarial auditor equivalent to other auditors in terms of powers and duties while auditing company operations.

#### *Working Papers*

Working papers are a vital tool of the audit profession. They are the support of the audit opinion. They connect the management's records and financials to the auditor's opinion. They are comprehensive and serve many functions.

#### *Preliminary Report/Audit Summary for Discussions*

The detailed commentary describing the findings and recommended solutions shall be summarised and presented for initial discussions with the management for their insights and clarity. Upon completion of the fieldwork, the auditor to summarize the audit findings, conclusions, and recommendations necessary in the form of the audit report.

#### *Audit Report Submission*

The auditor shall prepare the final report based on the field work and working papers to present the audit findings and discuss recommendations for improvements, if any. The Final report shall contain the opinion on the statutory compliances examined by the auditor and shall state whether in his opinion the Company is carrying out / not carrying out due compliances of the applicable provisions of the various corporate laws. A final meeting shall be an opportunity for the management and the auditor to discuss various aspects of the audit report and review management

responses. This is an opportunity to discuss how the audit went and any remaining issues to be scrutinized. The final report shall be provided with or without qualifications.

#### *Review of audit plan*

As part of Secretarial Audit's self-evaluation program, the secretarial auditor after the completion of the audit work plan shall investigate into the details of how did the audit plan work out, assess the odds and take corrective measures for future audits.

#### *Secretarial Audit-Periodicity*

It is recommended that the Secretarial Audit be carried out periodically (quarterly / half yearly) and deficiencies or concerns, if any, be communicated to the Company Secretary/CEO/CFO/MD/ED of the company and/or the Board as the letter of engagement may specify for taking corrective action or obtaining an explanation.

#### *Reporting with Qualification*

A qualification, reservation or adverse remarks, if any, should be stated by the secretarial auditor at the relevant places in his report in bold type or in italics.

If the secretarial auditor is unable to express an opinion on any matter, he should mention that he is unable to express an opinion on that matter and the reasons therefor. If the scope of work required to be performed is restricted on account of restrictions imposed by the company or on account of circumstantial limitations (like certain books or papers being in the custody of another person who is not available or a Government Authority) the Report should indicate such limitations. If such limitations are so material that the secretarial auditor is unable to express any opinion, the secretarial auditor should state that in the absence of necessary information and records, he is unable to report on compliance(s) relating to such areas by the Company.

## **Scope of Secretarial Audit and Contents of the Secretarial Audit Report**

### *Scope:*

#### SCOPE AND CONTENTS OF SECRETARIAL AUDIT

A. The scope of Secretarial Audit comprises verification of the compliances under the following enactments, rules, regulations and guidelines:

(i) The Companies Act, 2013 (Act) and the Rules made under that Act: The Act is divided into 29 chapters and 470 sections, on various issues Central Government has been empowered to make rules through delegated legislation. A perusal of the scheme of the Act makes it clear that compliances under this Act happen on two counts. Compliances of the first type are non-event based such as filing of the annual return, annual report including secretarial audit report wherever applicable. The compliances of second category are event based i.e. on happening of certain event. These events require compliance of various provisions of the Act and in certain cases provisions of the legislation also. The secretarial auditor may consider the following:

1. Whether necessary registers and records as required under the Act have been maintained.
2. Whether the requisite forms, returns and documents have been filed within the prescribed time or extended time as may have been permitted with the Registrar and other authorities as per the requirements laid down in the Act and other applicable laws, rules and regulations.

3. Whether the requirements relating to the meetings of directors, shareholders, creditors and others as well as those relating to the minutes of the proceedings thereat as laid down in the Act are being complied with and duly maintained.
4. Whether the company has followed the applicable secretarial standards prescribed by the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980).
5. Whether the appointment of directors and key managerial personnel ("KMP") of the company have been made in accordance with the provisions of the Act.
6. Whether due disclosures have been made by the directors and the company has complied with the requirements in pursuance of the disclosures made by its directors.
7. Whether the issue of capital and other securities, if any, were made in conformity with the provisions of the Act and other applicable regulations.
8. Whether certificates of shares and other securities, have been issued or appropriate credit has been made to the beneficiary accounts of the subscribers, as the case may be, within the prescribed time and in compliance with the Act and other applicable rules, including payment of stamp duty, and the transfer and transmissions thereof have been dealt with as per the requirements.
9. Whether the requirements relating to declaration and payment of dividend and also relating to transfer of unpaid/unclaimed dividend have been complied with.

10. Whether the company has complied with the relevant provisions of the Act and Rules in case of acceptance of deposits.
  11. Whether the borrowings of the company from directors, shareholders, public financial institutions, banks and others have been made in accordance with the requirements of the Act.
  12. Whether loans and investments have been made and guarantees furnished by the company in accordance with the requirements of the Act.
  13. Whether the Company has advanced any loan to its directors and/or persons or firms or companies in which the directors are interested and whether it has complied with the provisions of the Act.
  14. Whether particulars of creation, modification and satisfaction of charges by way of security on the company's property or undertaking have been filed with the Registrar as per the requirements.
- (ii) The Memorandum and Articles of Association of the Company: the secretarial auditor needs to ensure that the company abides by the Memorandum and Articles of Association of the Company. In addition to this he should ensure:

Whether the company has altered the provisions of its Memorandum and / or Articles of Association and whether it has complied with the requirements in this regard as laid down in the Act before and after making the alterations.

- (iii) The Securities and Exchange Board of India Act, 1992 and the rules/regulations made under that Act; (where applicable): The various laws/ regulations/ guidelines which could be considered under this are:
- a. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
  - b. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
  - c. The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
  - d. The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
  - e. The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
  - f. The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;
  - g. The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;
  - h. The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
- (iv) The Reserve Bank of India Act, 1934 and the rules/regulations/directions made under that Act (where applicable): The financial regulator time and again issues various directions, orders which are required to be complied with. The directions issued by RBI may be in specific reference to Non-Banking Financial Institutions or have reference to lending,

borrowing of funds. A secretarial auditor needs to ensure that the entity being audited has complied with all the applicable provisions, rules/ regulations/ directions under the aforesaid Act.

- (v) The Securities Contracts (Regulation) Act, 1956 and the Rules made under that Act; (where applicable): A secretarial auditor needs to ensure that the company has met with all the applicable rules, regulations and the provisions with respect to listing, delisting and continuous listing of any of the securities.
- (vi) The Depositories Act, 1996 and the Regulations and Bye-laws framed under that Act; (where applicable): A secretarial auditor needs to ensure that the depository or the participant has met with all the applicable rules, regulations, byelaws such as duly furnishing of information, return or other documents under the Act.
- (vii) The Foreign Exchange Management Act, 1999 and the Rules and Regulations made under that Act; (where applicable) As per Section 3 of FEMA, a person cannot do the following transactions except in accordance with the provisions of FEMA rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall-
  - (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
  - (b) make any payment to or for the credit of any person resident outside India in any manner;
  - (c) receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.- For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.- For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

This gives a fair idea of compliances under FEMA. Other than this there are various Notifications, Rules and regulations and directions of RBI relating to Foreign Direct Investment, Overseas Direct Investment, External Commercial Borrowings, foreign exchange transaction which are required to be complied with by any entity, a secretarial auditor needs to ensure conformity to the same.

(viii) Competition Act, 2002 and the rules and regulations made under that Act (where applicable); India’s anti-trust law is embodied in the Competition Act, 2002 (amended by the Competition Amendment Act, 2007) and became fully operational from 1 June 2011 when the provisions regulating mergers and acquisitions were notified. While competition advocacy was notified in 2003,

the provisions regulating anti-competitive agreements and abuse of dominance were notified with effect from 20 May 2009. Both the Competition Commission of India (CCI) (which administers the law) and the Competition Appellate Tribunal (CAT) are operational. Ensuring compliance with competition law, rules etc. is crucial, during strategic business decisions, as the consequences of non-compliance may be serious for concerned companies in terms of investigation by Competition Commission of India (CCI), hefty financial penalties, agreements being unenforceable and void, adverse publicity, damages, possibility of being sued for damages by those harmed by unlawful behaviour. Audit of competition law may be made under the following heads:

- (a) Audit of various agreements(both existing and proposed)
  - (b) Audit on dominance and its likely abuse if any,(existing)
  - (c) Audit on combinations (i.e. effect of proposed mergers & Acquisition)
  - (d) Competition law compliance programme of an enterprise
- (ix) The Listing Agreement, (where applicable): An entity seeking to list its securities needs to comply with the listing agreement and its amendments for continuous listing. A secretarial auditor needs to ensure that the company at all times is in compliance with the listing agreement and modifications such as introduction of Business responsibility reporting for few companies.
- (x) Any other law specifically applicable to the Company (where applicable): The scope of Secretarial Audit would include verification of requirements prescribed as applicable, and compliances, under the following laws as amended from time to time or re-enacted:
- a) Corporate & Economic Laws

- b) Securities Laws
- c) Commercial Laws including Intellectual Property Laws
- d) Labour Laws
- e) Tax Laws
- f) Pollution Control Laws
- g) Industry Specific laws
- h) Other Laws governing the company depending upon the type of industry/activity.

Acts mentioned above may include details as under:

(a) Corporate & Economic Laws

An illustrative list of the important corporate laws is given below:

- Accounting & Auditing Standards/Cost Accounting Standards issued by NFRA/ICAI/ICWAI, as the case may be.
- Emblems and Names (Prevention of Improper Use) Act, 1947.
- Foreign Contribution (Regulation) Act, 2010.
- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
- Special Economic Zones Act, 2005.
- Prevention of Money Laundering Act, 2002.
- Micro, Small and Medium Enterprises Development Act, 2006.
- Essential Commodities Act, 1955.
- Intellectual Property Laws.
- Secretarial Standards issued by ICSI
- Guidelines on Corporate Governance for Central Public Sector Enterprises, 2010;
- Guidelines on Corporate Social Responsibility and Sustainability for CPSEs, 2013;

- Corporate Governance Guidelines for Insurance Companies, 2009 issued by IRDA in case of companies regulated by IRDA; and

(b) Commercial Laws

- Indian Contract Act, 1872
- Transfer of Property Act, 1882
- Arbitration and Conciliation Act, 1996
- Negotiable Instruments Act, 1881
- Sale of Goods Act, 1930

(c) Fiscal Laws

- Income Tax Act, 1961
- Central Excise Act, 1944
- Customs Act, 1962
- Wealth Tax Act, 1957
- Central Sales Tax/State Sales Tax/VAT/Lease Tax
- Service Tax
- Profession Tax

(d) Labour Laws

- Minimum Wages Act, 1948
- Payment of Wages Act, 1936
- Payment of Bonus Act, 1965
- Payment of Gratuity Act, 1972
- Employees' Provident Funds and Misc. Provisions Act, 1952;
- Employees' State Insurance Act, 1948;
- Factories Act, 1948;
- Workmen's Compensation Act, 1923;
- Maternity Benefit Act, 1961;

- Industrial Disputes Act, 1947; and
- Contract Labour (Regulation and Abolition) Act, 1970.

(e) Pollution/Environment related Laws

- Air (Prevention and Control of Pollution) Act, 1981
- Water (Prevention and Control of Pollution) Act, 1974
- Water (Prevention and Control of Pollution) Cess Act, 1974
- Environment Protection Act, 1986
- Public Liability Insurance Act, 1991
- Green Tribunal Act, 2010.

(f) Industry/Sector Specific Laws

Laws and regulations applicable to specific categories of industries e.g. electricity, power generation and transmission, insurance, banking, NBFC, Housing Finance, Lease & Hire Purchase, chit funds, etc.

(g) Local Laws

These would include Stamp Act, Registration Act, municipal and civic administration laws e.g. Shops and Establishments Act, etc.

(i) Other applicable rules/ regulations - for eg. Rules and regulations applicable to STPI Units, Units situated in SEZ, etc. The Secretarial Auditor may add or delete laws to/from the above list as required in each case.

**(B.) Adherence to good corporate practices**

The scope of Secretarial Audit should also include the assessment of the company with regard to its adherence to good corporate practices and the audit report must include:

1. Instances of non-compliance during the defined audit period, in relation to the statutes, rules, regulations, etc. applicable to the company, steps that have been taken to remedy the non-compliance after it was noticed, consequences of the non-compliance and steps to be taken to deal with the consequences, continuing non-compliance, if any, and the reasons therefor;
2. Significant litigation(s) initiated by the company or filed against the company with brief details of the cases;
3. Deficiencies in the Board related processes which *inter alia* should cover:
  - (a) Board structure -
    - (i) Composition of the Board
    - (ii) Is there a stated process to ascertain the suitability of directors?
    - (iii) Is there a stated process in place for succession planning?
  - (b) Deficiencies in the Board systems and processes -
    - (i) In convening meetings.
    - (ii) In the circulation of agenda (whether the agenda is made available to the Board along with supporting papers/presentations sufficiently in advance of the meetings)
    - (iii) In conducting the meetings (frequency and length)
    - (iv) In the decision making process of the Board.
    - (v) Adequacy and integrity of minutes recorded.
    - (vi) In the functioning of Board constituted Committees
4. The existence of adequate internal control systems, procedures and processes, commensurate with the size of the company and the nature of its

business, for ensuring compliance with laws applicable to the company;

5. Such other matters that have been audited/ reviewed from a compliance and governance perspective.

6. Any material event(s) that have happened, after the end of the financial year but before the date of the report, having a significant impact on any of the above reported items.

The Secretarial Audit Report should be signed by the SA who conducted or under whose supervision the Secretarial Audit was conducted indicating his CP Number issued by The Institute of Company Secretaries of India.

## **PROFESSIONAL RESPONSIBILITY AND PENALTY FOR INCORRECT AUDIT REPORT**

While the Companies Act, 2013 provides a new and significant area of practice for Company Secretaries it casts immense responsibility on the company secretaries. Company Secretaries must take care while conducting such audits. Any failure or lapse on the part of secretarial auditor may attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980. Further Section 448 of Companies Act, 2013 deals with penalty for false statements. The section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement, –

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

Section 447 deals with punishment for fraud which provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

In view of this, a company secretary in practice will be attracting the penal provisions of section 448, for any false statement in any material particular or omission of any material fact in the Secretarial Audit Report. However, a person will be penalised under section 448 in case he makes a statement, which is false in any material particular, knowing it to be false, or which omits any material fact knowing it to be material.

It is pertinent to note that section 448 applies to “any person”. In view of this, a company secretary in practice, who is an independent professional, will be attracting the penalty, as prescribed in Section 448 in case his observations in the secretarial audit report turns out to be false or omits any material fact, knowing it to be false or material, along with the other signatories to the Annual Return.

## STEPS FOR A COMPANY TO BE PREPARED FOR SECRETARIAL AUDIT

Under the new Act The functions of company secretary have been prescribed under section 205 which provides that company secretary is responsible:

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;

- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other duties as may be prescribed.

Significantly, the section provides for compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company as a part of the function of company secretary.

A company should be prepared for secretarial audit by taking following steps:

1. Team: Compliance with various laws and legal parameters by the company is essential to avoid unwanted litigations, a company may consider to have a team of officers charged with compliances under different laws.
2. Maintenance of records: The entity at all levels imbibe the practice of maintaining proper records, employees must be sensitized with the importance of file management system.
3. Preparation of compliance chart: A company may prepare compliance chart under various laws applicable to the company as a checklist. Various charts are readily available in the market but a customized chart would be a better option.
4. Conduct Compliance Awareness Programmes: A company a organize compliance awareness programmes at all the organizational levels to sensitize the employees about the requirement and importance of compliance and penalties for non- compliance.

Further the section 204 provides that it is the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company. The section specifically provides that every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place

and shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor. Hence it becomes responsibility of the company secretary of the company to maintain proper records and ensure compliance of various laws.

**Form No. MR-3**  
**SECRETARIAL AUDIT REPORT**  
FOR THE FINANCIAL YEAR ENDED ... ..

*[Pursuant to section 204(1) of the Companies Act, 2013 and rule No.9 of the Companies (Appointment and Remuneration Personnel) Rules, 2014]*

**SECRETARIAL AUDIT REPORT**  
FOR THE FINANCIAL YEAR ENDED ... ..

To,  
The Members,  
..... Limited

I/We have conducted the secretarial audit of the compliance of applicable statutory provisions and the adherence to good corporate practices by..... (name of the company).(hereinafter called the company). Secretarial Audit was conducted in a manner that provided me/us a reasonable basis for evaluating the corporate conducts/statutory compliances and expressing my opinion thereon.

Based on my/our verification of the ..... (name of the company's) books, papers, minute books, forms and returns filed and other records maintained by the company and also the information provided by the Company, its officers, agents and authorized representatives during the conduct of secretarial audit, I/We hereby report that in my/our opinion, the company has, during the audit period covering the financial year ended on \_\_\_\_\_, \_\_\_\_\_ complied with the statutory provisions listed hereunder and also that the Company has proper Board-

processes and compliance-mechanism in place to the extent, in the manner and subject to the reporting made hereinafter:

I/we have examined the books, papers, minute books, forms and returns filed and other records maintained by ..... (“the Company”) for the financial year ended on \_\_, \_\_\_\_\_ according to the provisions of:

- (i) The Companies Act, 2013 (the Act) and the rules made thereunder;
- (ii) The Securities Contracts (Regulation) Act, 1956 (‘SCRA’) and the rules made thereunder;
- (iii) The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;
- (iv) Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;
- (v) The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 (‘SEBI Act’):-
  - (a) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
  - (b) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
  - (c) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
  - (d) The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
  - (e) The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;

(f) The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;

(g) The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and

(h) The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;

(vi) ..... (Mention the other laws as may be applicable specifically to the company)

I/we have also examined compliance with the applicable clauses of the following:

(i) Secretarial Standards issued by The Institute of Company Secretaries of India.

(ii) The Listing Agreements entered into by the Company with ..... Stock Exchange(s), if applicable;

During the period under review the Company has complied with the provisions of the Act, Rules, Regulations, Guidelines, Standards, etc. mentioned above subject to the following observations:

*Note: Please report specific non compliances / observations / audit qualification, reservation or adverse remarks in respect of the above para wise.*

***Disclaimer:*** *The entire material is compiled for discussion purposes and these are not the views of ICSI-NIRC.*