



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

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CS UPDATE

June 01, 2010

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Forthcoming Programmes

- 38th National Convention of Company Secretaries at Kolkata on 2-3-4 September, 2010

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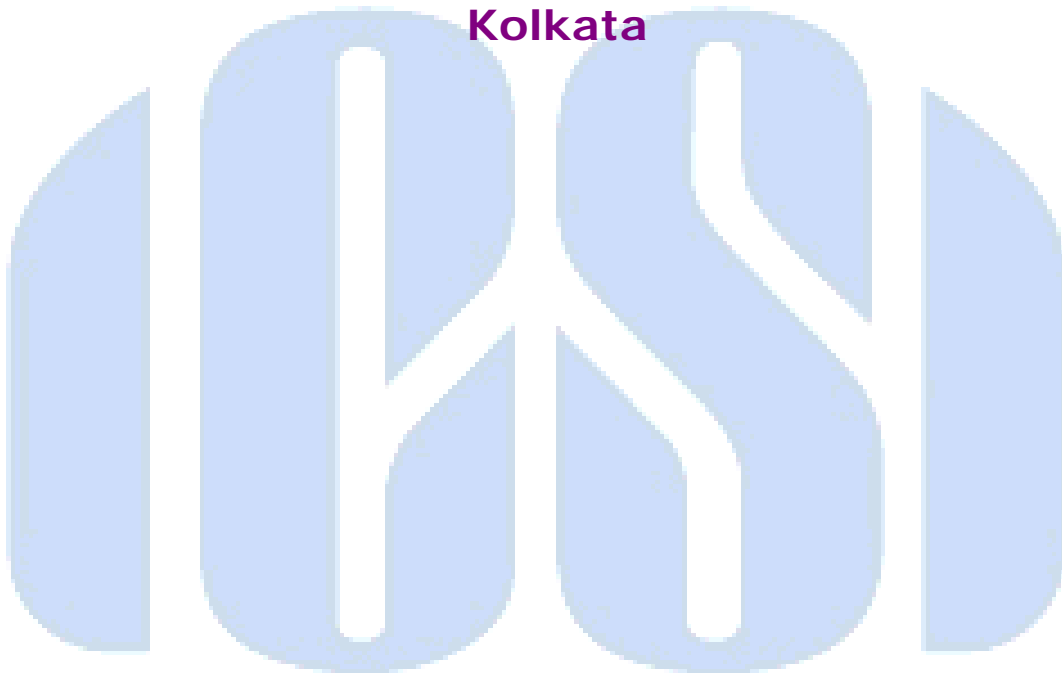
38th National Convention of Company Secretaries

Dates:

September 2-3-4, 2010

Venue:

Kolkata



PCS Updates

The Institute has released the Exposure Draft of the Referencer on Secretarial Audit at the 11th National Conference of Practicing Company Secretaries held at Chandigarh on April 30-May 01, 2010. Members are requested to send their views / suggestions / comments on the Exposure Draft through email at sutanu.sinha@icsi.edu so as to reach the Institute latest by June 15, 2010.

EXPOSURE DRAFT OF THE REFERENCER ON SECRETARIAL AUDIT

01. Introduction

The Ministry of Corporate Affairs, Government of India has released CORPORATE GOVERNANCE VOLUNTARY GUIDELINES 2009. The preamble to Guidelines states that *“These guidelines provide for a set of good practices which may be voluntarily adopted by the Public companies. Private companies, particularly the bigger ones, may also like to adopt these guidelines.”*

The Guidelines, amongst other things, recommended, the introduction of Secretarial Audit. Para V of the Guidelines states that:

“Since the Board has the overarching responsibility of ensuring transparent, ethical and responsible governance of the company, it is important that the Board processes and compliance mechanisms of the company are robust. To ensure this, the companies may get the Secretarial Audit conducted by a competent professional. The Board should give its comments on the Secretarial Audit in its report to the shareholders.”

Companies, which do not adopt these guidelines, either fully or partially, are expected to inform their shareholders about the reasons for not adopting these Guidelines. This is in consonance with the popular doctrine of “Comply or Explain”. The Board should give its comments on the Secretarial Audit in Directors’ Report as provided in Para V of the Guidelines.

02. Need for Compliance Management

Secretarial Audit is compliance audit; it is a part of total compliance management in an organisation. The Secretarial Audit is an effective tool for

corporate compliance management. It helps ensure timely corrective measures when non-compliance is detected.

The multiplicity of laws, rules, regulations, etc. has necessitated introduction of a compliance management system to ensure compliances of laws applicable to a company. This has a two-fold objective:

- (a) Firstly, to protect the interests of the customers, employees, revenue, environment and the directors and officers of the company.
- (b) Secondly, to avoid any unwarranted legal actions by the law-enforcing agencies and other persons as well.

Under most laws, the persons responsible for compliance and liable for punishment are directors, company secretary and some of the senior officers who have been designated for specific compliances. From amongst the directors, the responsibility of managing and executive directors is greater. Under the Companies Act, a managing and/or whole-time director (besides company secretary) is an officer-in-default liable for penal consequences of defaults under the Act and the rules made under it and thus responsible for compliance, while under most other laws they are *a person in charge of, and responsible to, the company for the conduct of the business of the company*.

In India a number of statutes contain under the heading “Offences by Companies” an identical provision regarding vicarious liability of directors and other company officers for company’s offences. In *Girdhari Lal Gupta v. D.N. Mehta* AIR 1971 SC 2162, the Supreme Court has construed the expression ‘a person in charge and responsible for the conduct of the business of the company’ as to mean the person in overall control of the day-to-day business of the company. This ruling has been followed in a number of subsequent decisions.

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.” Accordingly, all listed companies have to have a system for reporting to the Board compliances with laws applicable to them. Hence, a Legal Compliance Reporting System is necessary to comply with sub-clause I(C)(iii) of Clause 49 of the Listing Agreement.

03. Secretarial Audit & Company Secretary in Practice (PCS)

A Company Secretary in Practice has been assigned the role of Secretarial Auditor in section 2(2)(c)(v) of The Company Secretaries Act 1980, which is the only statute in the country, carving out ‘Secretarial Audit’ as an area of practice.

PCS is the competent, fit and proper professional to conduct Secretarial Audit. A significant area of competence of PCS is “Corporate laws” (comprising statutes, rules, regulations, notifications, circulars and clarifications, forms, guidelines and bye-laws) owing to intensive and rigorous coaching, examinations, training and continuing education programs. PCS is a highly specialized professional in matters of statutory, procedural and practical aspects

involved in proper compliances under corporate laws. Strong knowledge base makes PCS a competent professional to conduct Secretarial Audit.

In order to guide its members in employment and in practice with the process of Secretarial Audit, The Institute of Company Secretaries of India has issued this Referencer.

04. Usefulness of Secretarial Audit

Secretarial Audit is sometimes described as Corporate Law Compliance Audit/Review. Whatever its name, Secretarial Audit is a process of verification of records and documents to check compliance with the provisions of various laws and rules/procedures, maintenance of books, records etc. by an independent professional to ensure that the company has complied with the legal and procedural requirements and also followed due processes. It is essentially a mechanism to monitor compliance with the requirements of stated laws.

Benefits of Secretarial Audit are manifold and its beneficiaries are many. Secretarial Audit enables corporate law compliance management. Ever-increasing complexities of laws and responsibilities of directors (especially non-executive or independent directors) make it imperative that a PCS opines whether or not there exist robust compliance mechanism and systems in the corporate structure. Also, PCS has to verify whether diverse requirements under applicable laws have been duly complied with or not and if there is a need for any corrective measures or improvement in the system.

05. Beneficiaries of Secretarial Audit

The major beneficiaries of Secretarial Audit include:

(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 requirements of laws.

(b) Management

Secretarial Audit will assure the Management of a company that those who are charged with the duty and responsibility of compliance are performing their duties competently, effectively and efficiently.

(c) Non-executive directors

Secretarial Audit will assure 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 people not in-charge of the day-to-day management of the company are not likely to be exposed to penal or other liability (and consequential risk and embarrassment) on account of non-compliance with law.

(d) Government authorities / regulators

Being a pro-active measure, Secretarial Audit has a salutary effect of substantially reducing the burden of the law-enforcement authorities and enhance governance and level of compliance.

(e) Investors

Secretarial Audit will assure the Investors that the company is conducting its affairs within the applicable legal framework.

(f) Other Stakeholders

Financial Institutions, Banks, Creditors and Consumers are enabled to measure the law abiding nature of Company management.

Corporate actions manifesting good Corporate Governance are vital for the healthy, vibrant and ever growing corporate sector in global economy. In developing economies, inclusive growth of all segments of society is more than imperative. Such actions adopting effective management tools like Secretarial Audit can go a long way in fulfilling these objectives.

06. Scope and Contents of Secretarial Audit

Scope:

The scope of Secretarial Audit, comprises the following:

- The Companies Act, 1956 and the Rules made under that Act;
- The Memorandum of Association and the Articles of Association of the company;
- Corporate Governance Voluntary Guidelines- 2009 issued by the Ministry of Corporate Affairs, Government of India;
- Corporate Social Responsibility Voluntary Guidelines, 2009 issued by the Ministry of Corporate Affairs, Government of India;
- Secretarial Standards issued by The Institute of Company Secretaries of India;
- The Depositories Act, 1996 and the Regulations and Bye-laws framed under that Act;
- The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the Rules made under that Act;
- The Equity Listing Agreements with Stock Exchange(s) both in India and overseas, including in particular clause 49;
- The Simplified Listing Agreement for debt securities in India;
- 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, 1997;

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

Besides, Secretarial Audit may cover:

- Guidelines on Corporate Governance for Central Public Sector Enterprises, 2007; and
- Corporate Governance guidelines for Insurance Companies, 2009 issued by IRDA in case of companies regulated by IRDA.

Contents:

Secretarial Audit report should be addressed to the members and form part of the Annual Report (not as part of Directors' Report).

It should, among other things, contain:

1. Secretarial Auditor's comments and observations on compliance or non-compliance during the defined audit period, in relation to the statutes, rules, regulations, etc. applicable to the company;
2. Significant litigation(s) within the Scope of Audit;
3. Board Processes followed by the Company;
4. A statement on the existence of adequate internal control systems, procedures and safeguards for ensuring compliance with laws applicable to the company, commensurate with the size of the company and the nature of its business.
5. Such other matters that may be required to be audited/ reviewed from a compliance and governance perspective.
6. Any material event(s) happening after the financial year but before the date of the report having substantial impact on any of the above reported items.

Secretarial Audit Report shall be signed by the Practicing Company Secretary, who acts as the Secretarial Auditor in his individual capacity (and not as a partner or sole proprietor of a firm) by mentioning his CP Number.

07. Secretarial Audit-Periodicity

Proactive Secretarial Audit on a continuous basis would help the company in initiating corrective measures and strengthening its compliance mechanism and processes. It is advisable that the Secretarial Audit be carried out periodically (quarterly / half yearly) and adverse findings if any, be reported to the Board immediately.

08. Reporting with Qualification

The qualification, reservation or adverse remarks, if any, shall be stated by the PCS at the relevant places in his/her report. It is recommended that the qualifications, reservations or adverse remarks of PCS, if any, should be stated in **thick** type or in *italics* in the Secretarial Audit Report.

If the PCS is unable to form any opinion on any matter, he / she shall state that he/she is unable to form an opinion on that matter and the reasons thereof. If the scope of work required to be performed, is restricted on account of limitations imposed by the company or on account of circumstantial limitations (like certain books or papers being in custody of another person or Government Authority) the Report shall indicate such limitations. If such limitations are so material as to render the PCS incapable of expressing any opinion, the PCS should state that:

“In the absence of necessary information and records, he / she is unable to report compliance(s) by the Company”.

09. Professional Responsibility and Penalty for Incorrect Audit Report

While the Voluntary Guidelines on Corporate Governance have opened up a significant area of practice for Company Secretaries, it equally casts immense responsibility on them and poses a greater challenge whereby they have to justify fully, the faith and confidence reposed by the industry as well as Regulators and measure up to their expectations. Company Secretaries must take adequate care while conducting Secretarial Audit.

Any failure or lapse on the part of PCS in issuing a Secretarial Audit Report may not only attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980 but also make him liable for any injury caused to any person due to his / her negligence in issuing the Secretarial Audit Report. Therefore, it becomes imperative for the PCS that he / she exercises great care and caution while issuing the Secretarial Audit report and also adheres to the highest standards of professional ethics and excellence in providing his / her services.

10. Pre-requisites to Secretarial Audit

Appointment

- a. Appointment of Secretarial Auditor and remuneration payable to him should be preferably made by the members and at the least by the Board of Directors of the Company. As a prudent corporate practice, it is advisable that changes in the office of Secretarial Auditor, are reported to the members in the Director's Report.

Communication to earlier incumbent

- b. Whenever a new Secretarial Auditor is appointed in place of the existing Secretarial Auditor, he/she should communicate the appointment to the earlier incumbent in writing by registered post, in view of the gist of relevant pronounced judgements apart from the provisions of clause (8) of Part I of the First Schedule to the Company Secretaries Act, 1980,

Assignment

- c. After the appointment is carried out in the manner suggested, a letter of engagement shall be issued by the Company. Practising Company Secretary should formally accept the letter of engagement.
- d. It would be in the interest of the new Secretarial Auditor to attempt to procure at appropriate stage, authentic information about the remuneration paid to the earlier incumbent in view of the provisions under clause(11) of Part I of the First Schedule to the Company Secretaries Act, 1980.

Right to Information and Access to Records

- e. To enable a PCS to conduct Secretarial Audit , the Company should provide the PCS access at all times to the books, papers, minute, books, forms and returns filed under various statutes, documents and records of the company, whether kept in pursuance of the applicable laws or otherwise and whether kept at the registered office of the company or elsewhere which the PCS considers essential for the purposes of Secretarial Audit .
- f. A PCS shall be entitled to require from the officers or agents of the company, such information and explanations as the PCS may think necessary for the purpose of such Reporting. However, depending on the facts and circumstances he/she may obtain a letter of representation from the company in respect of matters where personal verification may not be practicable.

SECRETARIAL AUDIT REPORT

To

The Members ,

_____ Limited

Secretarial Audit Report

I/We have examined the registers, records and documents of Limited ("the Company") for the financial year ended on __, _____. according to the provisions of:

- The Companies Act, 1956 and the Rules made under that Act;
- The Memorandum of Association and the Articles of Association of the company;
- Corporate Governance Voluntary Guidelines, 2009 issued by the Ministry of Corporate Affairs, Government of India;
- Corporate Social Responsibility Voluntary Guidelines, 2009 issued by the Ministry of Corporate Affairs, Government of India;
- Secretarial Standards issued by The Institute of Company Secretaries of India;
- The Depositories Act, 1996 and the Regulations and Bye-laws framed under that Act;
- The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the Rules made under that Act;
- The Equity Listing Agreements with Stock Exchange(s) both in India and overseas, including in particular clause 49;
- The Simplified Listing Agreement for debt securities in India;
- 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, 1997;
 - (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
- (i) The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
- Compliance with Guidelines on Corporate Governance for Central Public Sector Enterprises, 2007; and
- Corporate Governance guidelines for Insurance Companies, 2009 issued by IRDA in case of companies regulated by IRDA.

Based on my examination and verification of the registers, records and documents produced to me and according to information and explanations given to me by the Company, I report that the Company has in my/our opinion, complied with the provisions of the Companies Act, 1956 (Act) and the Rules made under the Act and the Memorandum and Articles of Association of the Company. I report that:

1. The status of the Company during the Financial year has been that of a Private Company/Unlisted Public Company/Listed Public Company.
2. Also the Company has / has not been a holding or subsidiary of another company. The company has not been a Government/non Government Company or a financial/non financial company.
3. The Board of Directors of the Company is duly constituted. The change in the Board of Directors that took place during the period under review were carried out in due compliance with the provisions of the Companies Act, 1956.
4. The Company has complied with the provisions of the Act and Rules made under that Act in carrying out the following changes:
 - (a) Name of the Company
 - (b) Registered Office
 - (c) Principal business in conformity with the Objects
 - (d) Particulars of holding and subsidiary companies
 - (e) Promoters
 - (f) Auditors
 - (g) Directors
 - (h) Managerial Remuneration
 - (i) Officers in default

- (j) Share Capital (authorized, issued, subscribed, paid-up, conversion/redemption, reclassification, sweat).
5. The shareholding pattern of the company as on ——— was as detailed in Annexure
6. During the period under review the changes that took place in the shareholding pattern of the Company are detailed in Annexure.....
7. The company has altered the following provisions of :
- (i) The Memorandum of Association during the period under review and has complied with the provisions of the Companies Act, 1956 for this purpose.
- (ii) The Articles of Association during the period under review and has complied with the provisions of the Companies Act, 1956 for this purpose.....
8. The company has entered into transactions with business entities in which directors of the company were interested as detailed in Annexure.....
9. The Directors have complied with the requirements as to disclosure of interests and concerns in contracts and arrangements, shareholdings / debenture holdings and directorships in other companies and interests in other entities.
10. The Directors have complied with the disclosure requirements in respect of their eligibility of appointment, their being independent and complied with the code of Business Conduct & Ethics for Directors and Management Personnel.
11. The company has advanced loans, given guarantees and provided securities amounting to Rs. _____ to directors and/or persons or firms or companies in which directors were interested, and has complied with the provisions of the Companies Act, 1956.
12. The Company has made loans and investments; or given guarantees or provided securities to other business entities as detailed in Annexureand has complied with the provisions of the Companies Act, 1956.
13. The amount borrowed by the Company from its directors, members, bank(s)/ financial institution(s) and others were within the borrowing limits of the Company. Such borrowings were made by the Company in compliance with applicable laws. The break up of the Company's domestic borrowings were as detailed in Annexure
14. The Company has not defaulted in the repayment of public deposits, unsecured loans, debentures, facilities granted by bank(s) / financial institution(s) and non-banking financial companies.
15. The Company has created, modified or satisfied charges on the assets of the company as detailed in Annexure....
16. Investments in wholly owned Subsidiaries and/or Joint Ventures abroad made by the company are as detailed in Annexure

17. The Company has issued and allotted the securities to the persons-entitled thereto and has also issued letters, coupons, warrants and certificates thereof as applicable to the concerned persons and also redeemed its preference shares/debentures and bought back its shares within the stipulated time in compliance with the provisions of the Companies Act, 1956 and other relevant statutes.
18. The Company has declared and paid dividends to its shareholders as per the provisions of the Companies Act, 1956.
19. The Company has credited and paid to the Investor Education and Protection Fund within the stipulated time, all the unpaid dividends and other amounts required to be so credited.
20. The Company has complied with the provisions stipulated in Section 372 A of the Companies Act in respect of its Inter Corporate loans and investments.
21. Prosecutions initiated against or show cause notices received by the Company for alleged defaults/offences under various statutory provisions and also fines and penalties imposed on the Company and or any other action initiated against the Company and /or its directors in such cases are detailed in Annexure.....
22. The Company has insured all its secured assets.
23. The Company has paid all its Statutory dues and satisfactory arrangements had been made for arrears of any such dues.
24. The Company (being a listed entity) has complied with the provisions of the Listing Agreement.
25. The Company has deposited within the stipulated time both Employees' and Employer's contribution to Provident Fund with the prescribed authorities.
26. The Company has provided a list of statutes in addition to the laws as mentioned above and it has been observed that there are proper systems in place to ensure compliance of all laws applicable to the company.
27. There are proper Board processes in the company

I further report that:

- (a) the Company has complied with the provisions of Corporate Governance Voluntary Guidelines, 2009 issued by the Ministry of Corporate Affairs, Government of India;
- (b) the Company has complied with the provisions of Corporate Social Responsibility Voluntary Guidelines, 2009 issued by the Ministry of Corporate Affairs, Government of India;
- (c) the Company has followed the following Secretarial Standards issued by the Institute of Company Secretaries of India;
- (d) the Company has complied with the provisions of Equity listing Agreements entered into with _____ Stock Exchange(s) and Simplified Debt listing Agreement entered into with _____ Stock Exchange(s);

- (e) the Company has complied with the provisions of The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 including the provisions with regard to disclosures and maintenance of records required under the Regulations;
- (f) the Company has complied with the provisions of The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 including the provisions with regard to disclosures and maintenance of records required under the Regulations;
- (g) the Company has complied with the provisions of The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 with regard to _____ ;
- (h) the Company has complied with the provisions of The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999 with regard to grant of Stock Options and implementation of the Schemes;
- (i) the Company has complied with the provisions of The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 with regard to _____ ;
- (j) the Company has complied with the provisions of 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;
- (k) the Company has complied with the provisions of The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 with regard to delisting of Equity shares from the _____ Exchange(s);
- (l) the Company has complied with the provisions of the Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998 with regard to buy back of Equity shares.
- (m) the Company has complied with the Guidelines on Corporate Governance for Central Public Sector Enterprises, 2007.
- (n) the Company has complied with Corporate Governance guidelines for Insurance Companies, 2009 issued by IRDA in case of companies regulated by IRDA.

Place :

Signature

Date :

Name of Company Secretary / Firm:

ACS/FCS No.

C P No.:

Note : The qualification, reservation or adverse remarks, if any, are explicitly stated at the relevant paragraphs above.

Board of Directors

... Limited

...

SECRETARIAL AUDIT REPORT

FOR THE PERIOD ...

EXECUTIVE SUMMARY

In terms of my appointment for conducting Secretarial Audit and the instructions I received, I conducted the audit of the records and documents maintained by the Company under the-

- The Companies Act, 1956;
- The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997;
- The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 1992; and
- The Listing Agreement with the Stock Exchanges.

The Company has complied with the provisions of the Act and the Regulations mentioned above, subject to the following observations.

SEBI Updates

THE GAZETTE OF INDIA
EXTRAORDINARY
PART - III - SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, MAY , 2010

SECURITIES AND EXCHANGE BOARD OF INDIA
NOTIFICATION

Mumbai, the 31st May, 2010

**Notification under regulation 3 of the Securities and Exchange Board of India
(Certification of Associated Persons in the Securities Markets) Regulations, 2007.**

No. LAD-NRO/GN/2010-11/09/6422. In terms of sub-regulation (1) of regulation 3 of the Securities and Exchange Board of India (Certification of Associated Persons in the Securities Markets) Regulations, 2007 (the Regulations), the Board is empowered to require, by notification, any category of associated persons as defined in the Regulations to obtain requisite certification.

Accordingly, it is notified that with effect from June 01, 2010, the following category of associated persons, i.e., distributors, agents or any persons employed or engaged or to be employed or engaged in the sale and/or distribution of mutual fund products, shall be required to have a valid certification from the National Institute of Securities Markets (NISM) by passing the certification examination as mentioned in the NISM communiqué NISM/Certification/Series-V-A: MFD/2010/01 dated May 05, 2010. Provided that if the said associated person possesses a valid certificate by passing before June 01, 2010, the AMFI Mutual Fund (Advisors) Module, he shall be exempted from the requirement of the aforementioned NISM certification examination.

C. B. BHAVE

CHAIRMAN

SECURITIES AND EXCHANGE BOARD OF INDIA