

Secretarial Audit

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Disclaimer

Views expressed are of my own as a professional and not of the Organisation in which I am employed

Since the concept is new and is very complex, views expressed are my own and to the extent of my understanding and interpretation

Scope for Company Secretary profession

An inept drafted and hastily implemented Companies Act 2013 made it an **arduous and risky affair to interpret as well as its implementation**

Like earlier FERA, Companies Act 2013 appears to be **a draconian Act**

There is a great opportunity to our profession to raise to the occasion and to show our ability and competency to show our metal to all concerned

Need to spend our midnight oil and have to indulge in lot of interactions amongst the professionals

Company secretaries in practice and in service have to have great understanding of the requirements and compliances since **we started playing a role of an Auditor and an Auditee**

Secretarial Audit

Corporate sector is governed by complex web of laws

Secretarial Audit is an **effective tool for ensuring flawless compliance** and gives an assurance to the management on the level of compliances

It also **ensure timely compliances** and also **eliminates unintended non-compliances**

Secretarial audit is **an important milestone in the Indian history of Companies Act** and an **important landmark in the history of Company Secretary profession**

Section 204 of the Companies Act, 2013 read with the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, provides that every prescribed company shall annex with the Board's Report, a Secretarial Audit Report

Secretarial Audit Report

Secretarial audit is prescribed for every listed company and the following class of companies

- Every public company having paid up share capital of Rs 50 crore or more or
- Every public company having a turnover of Rs 250 crore or more

The secretarial audit **report is to be in Form MR 3**

The **scope of secretarial audit** is neither given in the Act nor in the Rules but **given in the Form only**

The **format is not in a structured form** such as a CARO report of financial audit. **Moreover it is very badly and loosely worded**

Secretarial audit report shall be annexed to the Board's Report

Secretarial Audit Report contd....

As prescribed in the format the secretarial audit report shall report not only about the compliances but also the following

- Adherence to good practices – **very vague and ambiguous**
- Evaluating the corporate conduct – auditor has to evaluate this. What is Corporate conduct? Whether the auditor has to talk about the conduct of the Corporate towards all its stakeholders?
- Company has proper board processes and compliance mechanism – need to study the mechanism

To understand the nuances of the audit report format (MR-3) and to study the client in all respects on which the Secretarial Auditor is expected to comment, the auditor would have been given sufficient time and this report would have been made applicable from FY 2015-16

Contents of Secretarial Audit Report

The secretarial audit report is to comment on examination of books, forms and returns filed in respect of the following enactments

Companies Act 2013

SCRA 1956

Depositories Act 1996

FEMA 1999 **to the extent of FDI, ODI and ECB**

Various Regulations and Guidelines under SEBI Act 1992

Reporting on compliance of secretarial standards issued by ICSI

Reporting on compliances with the Listing Agreement

Other laws **as may be applicable specifically to the company** – for example Banking Laws, Insurance Laws and laws applicable to industries such as Petroleum, Steel, Cement etc

Contents of Secretarial Audit Report contd...

The report shall also talk about -

constitution of Board and its composition i.e. proper balance of executive and non-executive directors and independent directors

Conduct of board meetings i.e. issue of 7 days notice and system to seek information and clarifications on agenda items for meaningful participation

Whether views of dissenting members in the general meetings is captured

Details of specific events having major bearing on Company's affairs such as IPOs, buyback, merger / amalgamations, foreign technical collaborations etc

There are adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with **applicable laws (here it is not specific laws applicable to the company)**, rules, regulations and guidelines

Contents of Secretarial Audit Report contd...

Section 143 of the Act provides powers and duties of auditors and sub section 14 provides that the provisions of this section mutatis mutandis apply to secretarial auditor

Secretarial auditor has also have responsibility to report frauds under sub section 12 of section 143

Secretarial audit at Reliance Industries Limited

Amongst the first companies (since 2005) to institute Secretarial audit voluntarily

Amongst the first to publish the secretarial audit report in RIL annual report voluntarily

Amongst the first to institute internal secretarial audit voluntarily

While drafting MR3 major portion picked up from RIL secretarial audit report

For example FEMA provisions **to the extent of FDI, ODI and ECB**

Laws specifically applicable to the company

Secretarial auditor has to mention the **other laws as may be applicable specifically to the company**

This may be interpreted that the auditor need not comment on general laws applicable to the company

Hence the auditor while commencing his audit has to **obtain the laws specifically applicable to the company and the monitoring mechanism existence in the company**

He may **familiarise himself with such laws** and **align with the monitoring mechanism** and **observe the non-compliances if any** which may be reported

Specific Laws applicable to Petroleum Industry

Specific laws applicable to Petroleum Industry

PNGRB Act 2006

PNGRB Regulations

Petroleum Act 1934

Petroleum Rules 1976

The Oil Industry (Development) Act 1934

The Oil Fields (Regulations & Development) Act 1948

Oil Mines Regulations 1984

The Offshore areas Mineral (Development & Regulations) Act 2002

Mines Act 1952

Territorial waters, continental shelf exclusive economic zone & Other maritime zone Act 1976

Ozone depleting substances (Regulation & Control) Rules 2000

PNGRB Act 2006

Petroleum and Natural Gas Regulatory Board (PNGRB) Act 2006 is provided **for establishment of PNGRB**, to **regulate** the refining, processing, storage, transportation, distribution, marketing and sale of petroleum and petroleum products and natural gas

Production of crude oil and natural gas **are excluded**

PNGRB is established to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas

To ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas to all parts of the country and to promote competitive markets and for matters connected and incidental thereto

Registration with PNGRB

Every entity desirous of

- Marketing any notified petroleum or petroleum products or natural gas or
- Establishing or operating a liquefied natural gas terminal or
- Establishing storage facilities for petroleum, petroleum products or natural gas exceeding such capacities as may be specified in the regulations

Has **to get registered** with PNGRB

Without obtaining registration no entity shall

- lay, build, operate or expand any pipeline as common carrier or contract carrier
- laying, building, operating or expanding any city or local natural gas distribution network

PNGRB Regulations

In exercise of the powers conferred by Section 61 PNGRB Act 2006, Petroleum and Natural Gas Regulatory Board (PNGRB) makes the PNGRB Regulations

These Regulations are called as Petroleum and Natural Gas Regulatory Board (Determination of Petroleum and Petroleum Products Pipeline Transportation Tariff) Regulations 2012

These Regulations are applicable to an entity authorised by Central Government and accepted by the Board for laying, building, operating or expanding a petroleum and petroleum products pipeline

Petroleum and petroleum products pipeline tariff shall be determined by PNGRB

The tariff shall be determined by benchmarking against alternate mode of transport i.e. rail at a level of 75% except for LPG where it will be 100% on a train load basis for equivalent rail distance along the petroleum and petroleum product pipeline route

If any dispute arises with regard to the interpretation of any of the provisions of these regulations the decision of the board shall be final

Petroleum Act, 1934

Import, transportation and storage of petroleum

No one shall import, transport or store any petroleum save in accordance with the Rules made under section 4 and a licence obtained

Rules for the import, transport and storage of petroleum

- Prescribing places where petroleum may be imported and prohibiting its import elsewhere
- Regulating the import of petroleum
- Regulating the transport of petroleum
- Specifying the nature and condition of all receptacles and pipe-lines in which petroleum may be transported
- Regulating the places at which and prescribing the conditions of all receptacles and pipe-lines in which petroleum may be transported
- Regulating the places at which and prescribe conditions for storage of petroleum
- Specifying the nature, situation and conditions of all receptacles in which petroleum may be stored
- Provide for the granting licences for import, transport and storage of petroleum

Production, Refining and Blending of petroleum

Central Government prescribes conditions subject to which petroleum may be produced, refined and blended

Central Government regulates the removal of petroleum from places where it is produced, refined or blended

All receptacles containing class A petroleum shall have stamped, embossed, painted or printed warning in conspicuous characters the words “Petrol” or “Motor Spirit” or an equivalent warning of the dangerous nature of the petroleum

No licence is required for transport or storage of limited quantities of petroleum class B (2500 litres) and none of it is contained in a receptacle exceeding one thousand litres in capacity and petroleum class C (45,000 litres)

No licence is required for import, transport or storage of small quantities of petroleum class A i.e. 30 litres not intended for sale

Petroleum Rules, 1976

Petroleum transportation and storage

No person shall deliver or despatch any petroleum to anyone in India other than the holder of a storage licence

The petroleum delivered or despatched shall be of the specified class and shall not exceed the quantity storage of which is permitted with or without a licence

Without licence petroleum is not to be imported

Petroleum shall not be imported to India by sea except through the ports of Bombay, Calcutta, Cochin, Haldia, Kandla, Madras, Mormugao, Okha, Portblair Vishakhapatnam, Tuticorin or Mangalore

No petroleum shall be imported into India by land except at places specially authorised for the purpose by the Central Government

Petroleum in bulk shall not be carried by water except in a ship or other vessel licenced for the carriage of petroleum in bulk

The Oil Industry (Development) Act 1934

Oil Industry Development Board

The Act is to provide for the establishment of a Board for the development of Oil industry and for that purpose to levy a duty of excise on crude oil and natural gas

The Board shall render financial and other assistance for the promotion and development of Oil industry. It may render assistance by

- making grants or advancing loans to any oil industrial concern
- Guaranteeing loans raised by any oil industrial concern
- Underwriting the issue of stock, shares, bonds or debentures issued by any oil industrial concern
- Subscribing to the stock, shares or debentures of any oil industrial concern

Functions of Oil Industry Development Board

The Board may render assistance by way of

- prospecting for and exploration of mineral oil with in or outside India
- Establishment of facilities for production, handling, storage and transport of crude oil
- Refining and marketing of petroleum and petroleum products
- The manufacture and marketing of petro-Chemicals and fertilisers
- Scientific, technological and economic research which could be directly or indirectly useful to oil industry
- Experimental and pilot studies in any field of oil industry
- Training of personal engaged in any field of oil industry

The Board may charge such fee or commission for rendering such services

The Board shall render such services in regard to such directions the Central Government may issue

Oilfields (Regulations and Development) Act 1948

Oil fields regulation & development

'Mine' means any excavation for the purpose of searching for or obtaining mineral oils and includes oil well

Mineral oil includes natural gas and petroleum

'Oil field' means any area where any operation for the purpose of obtaining natural gas and petroleum, crude oil, refined oil, partially refined oil and any of the products of petroleum in a liquid or solid state is to be or is being carried on

Mining lease is to be obtained for exploration and production of oil under this Act

The regulation of the drilling, re-drilling, deepening, shutting down, plugging and abandoning of oil wells in an oilfield and for the limitation or prohibition of such operations and for the taking of remedial measures to prevent waste of or damage to oil are to be in accordance with the rules prescribed by the Central Government

The holder of a mining lease shall pay royalty in respect of any mineral oil mined, quarried, excavated or collected by him from the leased area at the rate for the time being specified in respect of the mineral oil

Oil Mines Regulations 1984

Oil Mine Regulations

When a mine is opened the actual date opening is to be forthwith to be communicated to the Chief Inspector and to the Regional Inspector in Form - I

On or before the 20th day of April, July, October and January in every year **quarterly returns** are to be filed in Form II

On or before 20th February every year, **yearly return** is to be filed in form III

Notice of any accident, explosion or ignition, blowout, outbreak of fire, bursting of pipeline, uncontrolled emission of petroleum, influx of noxious gases shall be forthwith be informed to Chief and Regional inspectors in form IVA

The Offshore Areas Mineral (Development & Regulation) Act 2002

Some important definitions

This Act controls and regulates of mines and development of minerals in the offshore areas

Mine means any place in the offshore area wherein any exploration or production operation is carried on

Mineral oil includes natural gas and petroleum

Offshore area means the territorial waters, continental shelf, exclusive economic zone and other maritime zones of India under the territorial waters, Continental shelf, exclusive economic zone and other Maritime Zones

Provisions for acquisition of operating rights in offshore areas

No person shall undertake any reconnaissance operation, exploration operation or production operation **in the offshore areas**

Except under and in accordance with the prescribed terms and conditions of a reconnaissance permit, exploration licence or production lease granted under this Act and the Rules made thereunder

A permittee or licensee or lessee shall **furnish all data and information** relating to reconnaissance operation or mineral exploration or mining and all the relevant data on current tides, waves, wind, other geophysical and geotechnical data and any other data collected during exploration operation or mining operation **to the Director-General, Geological Survey of India**, Kolkata and the Controller General, Indian Bureau of Mines Nagpur

A lessee shall **pay royalty to the Central Government** in respect of any mineral removed or consumed by him from the area covered under the production lease at the rate specified in First Schedule

A lessee shall **pay a fixed rent every year** as specified in Second Schedule

Mines Act 1952

Provisions relating to Mines

Mines Act 1952 provides measures relating to the health, safety and welfare of workers in the coal and oil mines

Mine means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and **includes all borings, oil wells and accessory crude conditioning plants etc**

Before commencement of any mining operations a notice is to be given to the Chief Inspector, Indian Bureau of Mines and the District Magistrate of the district in which the mine is situated

Working hours in a mine

No person shall be allowed to work in a mine for more than six days in any one week

No adult employed above ground shall be required or allowed to work for more than 48 hours in any week or for more than nine hours in any day

No person employed below ground in a mine shall be allowed to work for more than 48 hours in any week or for more than eight hours in any day

No person employed in a mine shall be allowed to be present in any part of a mine below ground except during his working hours

No person shall be allowed to work in a mine if he has already been working in any other mine within the preceding twelve hours

No person shall be allowed to work in the mine for more than 10 hours in any day inclusive of overtime

Limitation of employment

No person below 18 years of age shall be allowed to work in any mine

Apprentices and other trainees not below 16 years may be allowed to work under proper supervision in a mine

No woman shall be employed in any part of a mine which is below ground

Prescribed Registers containing particulars of employees are to be maintained and Notice boards are to be displayed

The territorial waters, continental shelf,
exclusive economic zone & other maritime
zone Act 1976

Exploitation of continental shelf or resources

The sovereignty of India extends and has always extended to the **territorial waters of India** and to the seabed and subsoil underlying and the air space over such waters

All foreign ships shall enjoy the right of **innocent passage** through the territorial waters and **foreign ships including submarines** may enter or pass through the territorial waters **after giving prior notice to the Central Government**

The **continental shelf of India** comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters

No person shall except under and in accordance with the terms of a licence granted by Central Government **explore the continental shelf or exploit its resources** or carry out **any search or excavation or conduct any research within the continental shelf or drill therein** or construct maintain or operate any artificial island, offshore terminal, installation or other structure or device therein for any purpose whatsoever

Exclusive economic zone of India

The **exclusive economic zone of India** is an area beyond and adjacent to the territorial waters

In the **exclusive economic zone the Union has sovereign rights** for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents

No person shall except under a licence explore or exploit any resources of the exclusive economic zone or drill therein or carry out any search or excavation or construct any off-shore terminal

Ozone Depleting Substances (Regulation & Control) Rules 2000

Regulation on the ozone depleting substance

No person shall produce or cause to produce any ozone depleting substance as specified in Schedule V unless he is registered

Ozone depleted substance means the ozone depleting substances as mentioned in Schedule I

No person shall import or cause to import from or export or cause to export to any country not specified in Schedule VI any ozone depleting substance unless he obtains a licence

No person shall either himself or by any other person on his behalf or enterprise purchase, sell, stock or exhibit for sale or distribute any ozone depleting substance unless he is registered

No person shall establish or expand or cause to establish or expand any manufacturing facility, with a view to manufacturing products which contain or are made with any ozone depleting substance

Regulation on the ozone depleting substance contd.....

No person shall import or cause to import, export or cause to export any product specified in Schedule VII which are made with or contain ozone depleting substances unless he obtains a license

No person shall either himself or by any other person or enterprise on his behalf sell, stock or exhibit for sale or distribute any product resulting out of activities or provide services specified in schedule IV using ozone depleting substance

No person shall destroy or cause to destroy any ozone depleting substance specified in schedule V unless he is registered

Persons who produces, imports, exports or sells, stocks, purchases, having facility to destroy ozone depleting substance shall maintain records and file reports in the manner specified in Schedule X