

STUDY CIRCLE MEETING

AT

ICSI BANGALORE

DATE: 11TH JANUARY 2013

ON

COMPANIES BILL, 2012

Presented By

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Agenda

- New Concepts
- First time definitions
- Must aware definitions
- Board/Committees/Governance
- CSR
- KMP
- Miscellaneous Matters
- Role of CS
- Quick bites

Companies Bill 2012- A comparative study with Companies Act, 1956

Companies Act, 1956 (Act)

- 13 Parts
- 658 plus sections
- 15 schedules

Companies Bill (Bill)

- 29 chapters
- 470 clauses
- 7 schedules

New Concepts

- Concept of One Person Company introduced
- Small companies have been defined
- Conversion of already registered companies
- Appointment of Key Managerial Personnel [Clause 203(1)]
- Key Managerial Personnel includes CEO or MD, Company Secretary, CFO if appointed by Board and such other officers as may be prescribed
- Secretarial Standards given recognition
- Secretarial Audit introduced for listed and other companies as may be prescribed
- The concept of 'cost auditing standards' being mandated.
- Rotation of statutory auditors

First time definitions

- Following terms defined for the first time
 - Accounting Standards,
 - Auditing Standards,
 - Associate company
 - Books of Accounts
 - CEO, CFO, CS in practice
 - Change in the definition of Company
 - Called up capital
 - Deposit
 - Duties of Directors
 - Employee stock option
 - Expert

First time definitions

- Financial Year
- Fraud
- Independent director
- Interested director
- Key Managerial Personnel
- Promoter
- Postal ballot
- Price Sensitive information
- Related party
- Small company
- Turnover
- Voting right

'Must aware' definitions one should know

- Definition of private company changed – the limit on maximum number of members increased from 50 to 200
- “expert” includes an engineer, a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force.

'Must aware' definitions one should know

- “Key Managerial Personnel (KMP), in relation to a company, means—
 - (i) the Chief Executive Officer or the Managing Director or the Manager,
 - (ii) the Company Secretary;
 - (iii) the whole-time director;
 - (iv) the Chief Financial Officer; and
 - (v) such other officer as may be prescribed

'Must aware' definitions one should know

“Officer who is in default”, means any of the following officers of a company, namely:—

(i) whole-time director;

(ii) key managerial personnel;

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.

'Must aware' definitions one should know

- Bill defines the term 'promoter' to mean a person -
 - (a) who has been named as such in a prospectus or is identified by the company in the annual [return](#) or
 - (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
 - (c) in accordance with whose advice, directions or instructions the Board of Directors is accustomed to act.

'Must aware' definitions one should know

- Small company has been defined as a company other than a public company having a paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than Rs.5 crore or turnover of which does not exceed two crore rupees or such higher amount as may be prescribed not exceeding twenty crore rupees. [clause 2(85)].

Absolute New things

- CSR - company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy
- Question: what if previous three years were under loss?

Absolute New things

- A new chapter has been inserted in relation to registered valuers.
- Valuation in respect of any property, stock, shares, debentures, securities, goodwill, net worth or assets of a company shall be valued by a person registered as a valuer (Clause 247).
- Concept of '**dormant companies**' being introduced
- It is proposed to create and maintain as 'Mediation and Conciliation Panel' for facilitating mediation and conciliation between parties during any proceeding under the purposed Legislation before the Central Government or Tribunal

Company defined

- Definition of private company changed – the limit on maximum number of members increased from 50 to 200.
- Private company which is a subsidiary of a public company shall be deemed to be a public company. Confusion whether such a company can retain the provisions in the articles of private company though now a public company removed.
- Associate Company – A company is considered to be an associate company of the other, if the other company has significant influence over such company (not being a subsidiary) or is a joint venture company. Significant influence means control of at least 20 per cent of total share capital of a company or of business decisions under an agreement.
- Dormant Company – Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar for obtaining the status of a dormant company.
- “foreign company” means any company or body corporate incorporated outside India which,—
 - (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (b) conducts any business activity in India in any other manner.

Company defined

- Definition of subsidiary company in relation to any other company (that is holding company), changed to mean a company in which the holding company –
 - Controls the composition of the Board of Directors; or Exercises or controls more than one half of the total share capital (instead of equity share capital as prescribed under the 1956 Act) either at its own or together with one or more of its subsidiary companies.

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Board / Committees/Governance

- **Number of directors:**
 - Minimum: Public company -3 Private -2 , **OPC-1.**
 - Maximum: limit **increased to 15 from 12 .**
- More directors can be added by passing of special resolution without getting the approval of Central Government as earlier required.
- **Woman director**-At least one woman director on the Board of such class or classes of companies as may be prescribed.
- **Resident Director** -Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. [clause 149(2)].

Independent Directors

- Concept of independent directors has been introduced for the first time in Company Law [clause 149(5)]
- All listed companies shall have at least one-third of the Board as independent directors.
- Such other class or classes of public companies as may be prescribed by the Central Government shall also be required to appoint independent directors.
- The independent director has been clearly defined in the Bill.
- Nominee director nominated by any financial institution, or in pursuance of any agreement, or appointed by any government to represent its shareholding shall not be deemed to be an independent director.
- An independent director shall not be entitled to any remuneration other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit related [commission](#) as may be approved by the members.
- An Independent director shall not be entitled to any stock option.
- Only an independent director can be appointed as alternate director to an independent director. [clause 161(2)]

Independent Directors

- An Independent Director should not be a promoter nor related to the promoter, he should have no connection with the promoter, the company, associate company, subsidiary or holding company
- A person aspiring to be an independent director will have to possess such other qualifications as may be prescribed by the Centre from time to time
- There is also a separate schedule to the Bill that lays down the code to be followed by an independent director. The code includes guidelines of professional conduct, role, functions and duties, and so on.
- independent directors are also expected to scrutinise the performance of management in meeting agreed goals and objectives and also monitor reporting of their performance
- An important provision in the code is that of empowering and enjoining upon independent directors of a company to hold at least one meeting in a year, without the presence of non-independent directors and members of management. They have to review the performance of non-independent directors as also of the chairperson of the company

Independent Directors

- Independent directors also need to assess the quality, quantity and timeliness of flow of information between the company management and the board
- An independent director will be permitted a maximum of two terms of five years each. He can be appointed once again by the company after a cooling period of three years. However, during that period, an independent director should not have any relationship with the company
- Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided

in sub-section

Notice of Board Meeting

- At least seven days' notice is required to be given for a Board meeting. The notice may be sent by electronic means to every director at his address registered with the company. [clause 173(3)].
- A Board Meeting may be called at shorter Notice subject to the condition that **at least one independent director**, if any, shall be present at the meeting. However, in the absence of any independent director from such a meeting, the decisions taken at such meeting shall be final only on ratification thereof by at least one independent director. [clause 173(3)].

Participation in Board Meetings: [Clause 173]

- Permitted both in person or through Video Conferencing/other audio-visual modes
- Meetings to be recorded and stored
- The meeting of the Board may be called at shorter notice to transact urgent business where at least one independent director, if any, shall be present
- Directors participating through Video-conferencing/audio-visual means to be counted for quorum [clause 174]

Resignation of Directors – clause 168

- A director may resign from his office
 - by giving a notice in writing
 - and the Board shall, on receipt of such notice take note of the same
 - and the company shall intimate the Registrar and place such resignation in the *subsequent general meeting* of the company.
 - The director shall also forward copy of resignation with reasons to Registrar.
 - The clause further provides for the date on which the notice of resignation shall take effect.
 - The director shall be liable for the offences occurred during his tenure

Committees of Board

- Besides the Audit Committee, the constitution of Nomination and Remuneration Committee has also been made mandatory in the case of listed companies and such other class or classes of companies as may be prescribed. [clause 178(1)].
- The Audit committee shall consist of a minimum of three directors with independent directors forming a majority and majority of members including its Chairperson shall be persons with ability to read and understand the financial statement. [clause 177(2)].
- The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees [Clause 178(3)].
- The Nomination and Remuneration Committee shall consist of three or more non-executive director(s) out of which not less than one half shall be independent directors. [clause 178(1)].
- Where the combined membership of the shareholders, debenture holders, deposit holders and any other security holders is more than one thousand at any time during the [financial year](#), the company shall constitute a **Stakeholders Relationship Committee**. [clause 178(5)].

Board's Report – new additional disclosures

Board's Report has been made more informative and includes extensive disclosures like –

- (i) extract of annual return in the prescribed form;
- (ii) company's policy on director's appointment and remuneration including the criteria for determining qualifications, positive attributes, independence of a director etc. ;
- (iii) a statement of declaration by independent directors;
- (iv) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report and by the company secretary in practice in his secretarial [audit report](#);
- (v) particulars of [loans](#), guarantees, or investments made;
- (vi) particulars of contracts or arrangements entered into;
- (vii) statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company;

Board's Report-new additional disclosures

(viii) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year

(ix) in case of listed companies and other prescribed class of companies, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of committees and individual directors.

(x) The Directors' Responsibility Statement shall also include the statement that the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

(xi) The Boards' Report is to be signed by the Chairperson of the company if he is authorized by the Board and where he is not so authorized, it shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director. (Clause 134).

CSR

- Every company having net worth of rupees 5000 crore or more, or turnover of rupees 1000 crore or more or a net profit of rupees 5 crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
- The CSR Committee shall formulate and recommend Corporate Social Responsibility Policy which shall indicate the activity or activities to be undertaken by the company as specified in schedule VII and shall also recommend the amount of expenditure to be incurred on the CSR activities.
- The Board of every company shall ensure that the company spends in every financial year at least 2% of the average net profits of the company made during the three immediately preceding financial years in pursuance of its CSR policy.
- Where the company fails to spend such amount, the Board shall in its report specify the reasons for not spending the amount. The approach is to 'comply or explain'.
- The company shall give preference to local areas where it operates, for spending amount earmarked for Corporate Social Responsibility (CSR) activities.

Position of CS in Companies Bill 2012

- Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—
- (i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
- (ii) Company Secretary
- (iii) CFO

Provided that unless the articles of such a company provide otherwise, an individual shall not be the chairperson of the company as well as the managing director or Chief Executive Officer of the company at the same time.

- **Every Company Secretary being a KMP shall be appointed by a resolution of the Board** which shall contain the terms and conditions of appointment including the remuneration.
- If any vacancy in the office of KMP is created, the same shall be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy [Clause 203 (2) & (4)]
- If a company **does not appoint a Company Secretary**, the penalty proposed is :
 - On company – one lakh rupees which may extend to five lakh rupees.
 - On every director and KMP who is in default – 50,000 rupees and 1,000 rupees per day if contravention continues

KMP

- **A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time:**

Provided that nothing contained in this sub-section shall disentitle a key managerial personnel from being a director of any company with the permission of the Board:

Provided further that whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel:

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

Misc Matters - AGM

- **Calling of first AGM [Clause 96]**
- First annual general meeting shall be held within a period of *nine months from the closing of first financial year* and within a period of six months of closure of financial years in all other cases.
- Meetings not to be held on 'national holidays' unlike 'public holidays'
- "National Holiday" means and includes a day declared as National Holiday by the Central Government
(what about state government declared holidays? For Ex: Nov 1 in Karnataka – will it fall under National Holiday list and whether a company can host its AGM on that day?)

Misc Matters - AGM

Quorum for AGM [Clause 103]

In case of a public company the quorum shall depend on number of members as on the date of a meeting.

- If members not more than 1000, quorum is 5 members personally present
- If more than one thousand but upto five thousand, then quorum shall be fifteen members personally present
- If such number exceeds five thousand, then thirty members personally present shall be the quorum
- In case of a private company, two members personally present shall be the quorum for a meeting

Misc Matters - AGM

- In case of adjournment or of change of day, time and place of meeting, the company shall give not less than three days' notice to the members
- Right to vote by e-voting-**Clause 108**
- Every listed company to prepare
 - a report on each annual general meeting including confirmation to the effect that the meeting was convened, held and conducted as per the provision of the Act and the rules made thereunder.
 - a copy of this report shall be filed with the Registrar

Misc Matters – Annual Return (Clause 92)

- Annual return of companies now to include addition data pertaining to:
 - Change in the Promoters and KMPs along with directors
 - Meeting of members, Board along with attendance details
 - Remuneration of KMPs to be disclosed
 - Penalty or punishment imposed on the company, directors and/or officers and details of compounding and appeals
 - Annual return to be signed by a director and a company secretary in whole time employment/practice (in case where there is no CS in employment)
- (It means that now in respect of all the companies, whether private or public, listed or unlisted, if no Company Secretary is appointed by the company, the Annual Return is compulsorily required to be signed by the Company Secretary in practice)**
- In case of non-filing within due time, penalty is strict in comparison to the Act and now also includes imprisonment;
 - In case of change in number of shares held by promoters and top ten shareholders in a listed company such company shall file a return with the Registrar about such change. [Clause 93]

Misc Matters – Annual Return (Clause 92)

- A Company Secretary in whole-time practice in respect of:
- (a) a company having such paid-up capital and turnover as may be prescribed, and
- (b) a company whose shares are listed on a recognized stock exchange.
- The Practicing Company Secretary has to certify that the annual return states the facts correctly and adequately and that the Company has complied with all the provisions of the Act.

(It means, in case of a listed company, even if the Annual Return is signed by the Company Secretary in employment of the Company, it is further required to be signed by the Company Secretary in Whole time practice)

- Also, in case of a company having such paid up capital and turnover as may be prescribed and even if the company is not listed, the Annual Return is required to be signed by the Company Secretary in whole time practice in addition to the Company Secretary in employment.
- (iii) In relation to a One Person Company and Small Company, the annual return is required to be signed by the Company Secretary, or where there is no Company Secretary, by one director of the company.

Misc Matter – Director Disqualification & Moral Turpitude

- **Clause 164 - Disqualifications for appointment of director (Corresponding to Section 274)**
- This clause provides that a person shall not be eligible for appointment as a Director of a company, if he has inter-alia been convicted by a court of any offence, whether involving **moral turpitude or otherwise**, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence.
- The proviso to clause 164 expressly states that the disqualification shall not take effect where an appeal is preferred against the conviction.

Misc Matter – Director Disqualification & Moral Turpitude

- **Clause 167 - Vacation of office of Director (Corresponding to Section 283)**
- Clause 167 inter-alia provides that the office of a Director shall become vacant in case he is convicted by a court of any offence whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months provided that the office shall be vacated by the Director even if he has filed an appeal against the order of such court
- The proviso to clause 164 expressly states that the disqualification shall not take effect where an appeal is preferred against the conviction which is not the case in Clause 167.

Clause 164 Vs Clause 167:

- a person is not disqualified from being appointed at the stage of initial appointment (164) but if the same person attracts such disqualification post appointment then he has to vacate his office even if an appeal has been preferred (167)

Comments: removal of stay on disqualification when an appeal is being filed is unwarranted as it is against the principles of natural justice and amounts to rights being restricted even before one is finally pronounced guilty or not guilty

Misc Matters -SS recognition

For the first time, the **Secretarial Standards** has been introduced and provided **statutory recognition** [refer **Clause 118(10) & 205**]

Clause 118(10) reads as;

“Every company shall observe Secretarial Standards with respect General and Board Meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.”

Clause 205 casts duty on the Company Secretary to ensure that the company complies with the applicable Secretarial Standards.

It is the beginning of a new era where non financial standards have been given importance and statutory recognition besides Financial Standards

Question: why other SS are not made mandatory?

Misc Matters -Dividend

- A company to transfer voluntarily a portion of its profits to the reserve as considered appropriate, before declaration of any dividend. **MANDATORY TRANSFER TO RESERVES DONE AWAY**
- In case of inadequacy of profits in any financial year, the company can declare dividend out of the accumulated profits transferred to reserve in accordance with the rules to be prescribed
- Interim dividend may be declared out of the surplus in the P&L as well as profits of the financial year in which dividend is sought to be declared. In case company has incurred loss upto the preceding quarter of the current financial year, then interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding 3 financial years

Misc Matters – Statutory Auditors

- No listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint
 - (a) an individual as auditor for more than one term of five consecutive years; and
 - (b) an audit firm as auditor for more than two terms of five consecutive years:

Provided that—

- (i) an individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;
- (ii) an audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term:

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Misc Matters – Internal Audit

- Such class or classes of companies as may be prescribed shall be required to appoint an internal auditor, who shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company (clause 138)
- The Central Government may, by rules, prescribe the manner and the intervals in which the internal audit shall be conducted and reported to the Board
- Note: the word ‘professional’ is not defined in the Bill. This will lead to appoint any non CA or non CA as an internal auditor as may be decided by the Board.

Some Quick Bites

- The word 'as may be prescribed' is mentioned in 300 plus clauses of the bill
- No bifurcation of objects between main, ancillary and other objects is required in MOA
- AOA can have entrenchment to the effect that specified provisions in Articles can be altered only if restrictive conditions as specified are met or complied with
- Provisions relating to certificate of 'commencement of business' dispensed with. Only declaration within 180 days required by public company
- First AGM to be held within 9 months from closure of its first financial year instead of 18 months from the date of incorporation under companies act, 1956

Some Quick Bites

- Members have been permitted to vote at meetings by electronic means
- Provision of Postal Ballot shall be applicable to all companies whether listed or unlisted, on all such matters which shall be prescribed by CG
- Equity share capital includes shares with different voting rights
- Dissenting shareholders to be given exit option at the time of decision making of the company such as change in object clause, any new business proposal etc

Some Quick Bites

- Class or class of holding companies not to have layer of subsidiaries beyond a prescribed number
- Shares of public company are freely transferable but contract of arrangement between two or more persons, enforceable as a contract
- Constitution of National Financial Reporting Authority to provide for matters relating to Accounting and auditing standards under this Act

Some Quick Bites

- 15% of the deposits maturing in a financial year and the financial year next following to be kept in a scheduled bank in a separate bank account to be called as 'deposit reserve account'.
- The deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits.
- Business hours defined to say between '9.00 a.m and 6.00 p.m' for holding AGM (clause 96 (2))
- Voluntary revision of Financial Statement or Board's report in respect of any of the three preceding financial years after obtaining of Tribunal

Some Quick Bites

- The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the Chairman where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and Chief Executive Officer, if any, if he is a director in the company and by Chief Financial Officer and company secretary of the company.
- In the case of a One Person Company, only by one director, for submission to the auditor for his report thereon



Q&A