

Prologue

There are plethora of laws, rules, procedures and regulations applicable to every form of business. The Corporate sector in India has to abide by various Acts, rules and regulations made thereunder.

Every Company, while pursuing its business activities, has to comply with the rules and regulations relating to the Companies Act, Securities Laws, FEMA, Industry Specific laws and General laws like Labour laws, Competition law and Environment related laws etc. and is further expected to good governance practices.

Under the Companies Act, 2013, a Company Secretary, along with other Key Managerial Personnel and Whole time Directors may be treated as 'officer who is in default' and will be liable for penal consequences for non-compliance, while under most of the other laws, persons in charge of and responsible for the conduct of business of the company are held responsible.

The Regulators have expressed faith in the profession of Company Secretary for furtherance of better control and development of the good governance in the Corporate Sector in India. The role of Company Secretaries have increased manifold under the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, SEBI (Prohibition of Insider Trading) Regulations, 2015 and other Regulations.

Company Secretary is a competent officer to ensure compliances that is the reason the SEBI, in line with International Best Practices, made it mandatory for listed entity to appoint a Company Secretary as Compliance Officer. Further, to ensure better and effective compliance management, a Company Secretary in Practice is authorised by the SEBI for issuance of Annual Secretarial Compliance Report to listed entity effective from the financial year ended on March 31, 2019.

BACKGROUND

The Securities and Exchange Board of India (SEBI) as the nodal agency for regulation of capital market in India is continuously bringing out new regulations and guidelines for keeping pace with the development of international capital markets. One of the steps in this direction was SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR Regulations') which came into effect from December 01, 2015.

Corporate Governance being a dynamic concept. India Inc. has also faced issues of aligning Corporate Governance with the evolving business environment. Accordingly, the SEBI, in June 2017, constituted a Committee under the Chairmanship of Shri Uday Kotak to review the existing Corporate Governance principles. The Committee was represented by different stakeholders including the Government, Industry, Stock Exchanges, Academicians, Proxy Advisors, Professional Bodies (including ICSI), Lawyers, etc. The Committee in its Report proposed a set of Corporate Governance norms aimed at increasing transparency, strengthening board independence, board composition and enhancing disclosures.

Based on the recommendations of the Kotak Committee, SEBI notified the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 dated May 09, 2018 enhancing the Corporate Governance norms to be complied with by a listed entity; which were followed by a Circular on May 10, 2018 for implementation of certain recommendations of the Kotak Committee.

Specifically, Regulation 24A was inserted and made effective for the financial year ended March 31, 2019 in the LODR Regulations which mandated the requirements of annexing a Secretarial Audit report in a specified format for the listed entity and all its material unlisted subsidiaries.

The SEBI *vide* its Circular dated February 8, 2019, specified that the listed entity and its unlisted material subsidiaries shall continue to use the same Form No. MR-3 as required under Companies Act, 2013 and the Rules made thereunder for the purpose of compliance with Regulation 24A of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Further, in terms of Secretarial Audit by virtue of Section 204(1) of the Companies Act, 2013 read with Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 which provides that:

1. every listed company;
2. every public company having a paid-up share capital of fifty crore rupees or more; or
3. every public company having a turnover of two hundred fifty crore rupees or more

shall annex with its Board's Report made in terms of sub-section (3) of section 134, a Secretarial Audit Report, given by a Company Secretary in Practice, in such form as may be prescribed.

Applicability of Annual Secretarial Compliance Report

While the Annual Secretarial Audit shall cover a broad check on compliance with all laws applicable to the entity, listed entities shall **additionally**, on an annual basis, require a check by the Company Secretary in Practice on compliance of all applicable the SEBI Regulations and circulars / guidelines issued thereunder, consequent to which, the Company Secretary in Practice shall submit a report to the listed entity in the manner specified in this circular.

The Annual Secretarial Compliance Report is applicable to all Listed Entities.

It is recommended that the format for Annual Secretarial Compliance (ASC) Report may be annexed to the Annual Report for the financial year 2018-19.

As per SEBI Listing Regulations:

“Listed entity” means an entity which has listed, on a recognised stock exchange(s), the designated securities issued by it or designated securities issued under schemes managed by it, in accordance with the listing agreement entered into between the entity and the recognised stock exchange(s).

Explanation : As it is apparent from the above definition, listed entity means and includes entities other than companies such as banks, body corporates etc. securities of which are listed on the Stock Exchange(s).

“Material subsidiary” shall mean a subsidiary, whose income or net worth exceeds ten percent of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year. (w.e.f. 01.04.2019)

Accordingly, by virtue of the above definitions, it is implied that, every unlisted material subsidiary which is a public company or private company, it has to fall under the category of material subsidiary as defined under the SEBI Listing Regulations to which the Secretarial Audit is applicable for the financial year 2019-20 onwards.

However, for the year 2018-19 the definition of Material Subsidiary shall mean a subsidiary, whose income or net worth exceeds twenty percent of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding

accounting year and the provisions of the law shall be applicable on them accordingly.

The listed entity in addition to the Secretarial Audit Report as required under section 204 of the Companies Act, 2013 read with its Rules, is also required to annex a separate report i.e. 'Annual Secretarial Compliance Report' for due compliance with the circular.

The ASC report is required to be submitted by the listed entity to the Stock Exchange(s) within 60 days from the end of the financial year.

Purpose

The ASC Report postulates for an independent verification of the records, books, papers and documents by a Company Secretary in Practice to check the compliance status of the company with the provisions of all applicable SEBI laws, Regulations and circulars/guidelines issued thereunder.

Further, SEBI has also suggested for the issuance of a guidance note by ICSI for enabling the Company Secretary in Practice to conduct this exercise in letter and spirit.

Scope

The Company Secretary in Practice needs to examine and report the compliance of the SEBI Regulations, which *inter alia* includes:

- (a) Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015;
- (b) Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018;
- (c) Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
- (d) Securities and Exchange Board of India (Buyback of Securities) Regulations, 2018;
- (e) Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014;
- (f) Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
- (g) Securities and Exchange Board of India (Issue and Listing

of Non-Convertible and Redeemable Preference Shares) Regulations, 2013;

(h) Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015;

(i)(other regulations as applicable)

and circulars/ guidelines issued thereunder;

(Note: The aforesaid list of Regulations is only illustrative. The list of all SEBI Regulations, as may be relevant and applicable to the listed entity for the review period, shall be added.)

Minimum fees to be charged with respect to exercise of Annual Secretarial Compliance Report

There is no minimum fees prescribed by ICSI for issuing the Annual Secretarial Compliance Report by a Company Secretary in Practice. However, it would be in the fitness of things that Company Secretary in Practice takes proper call about fees considering the nature & size of the company, type of company and the efforts required to be put in while carrying out such exercise. It is expected that member should maintain high standard and quality in issue of the ASC Report.

Signing

The Annual Secretarial Compliance Report should be signed by the Company Secretary in Practice by whom the exercise for verifying/ checking the compliances was conducted or under whose supervision the same was conducted indicating his FCS/ ACS number along with Certificate of Practice Number issued by the Institute of Company Secretaries of India.

In case of PCS firm, the Annual Secretarial Compliance Report may be signed by the partner by whom the exercise for verifying/ checking the compliances was conducted or under whose supervision the same was conducted indicating his FCS/ACS number alongwith his Certificate of Practice number. The Annual Secretarial Compliance Report cannot be signed by an employee of the PCS firm even if he/she may be a member of the ICSI.

Reporting Observations/ Adverse Remarks

1. Details of any action taken by the SEBI or Stock Exchanges should be stated by the Company Secretary in Practice table

(c) of the format as prescribed in the SEBI Circular in his report in bold type or in italics.

2. 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.
3. If such limitations are so material that the Company Secretary in Practice is unable to express any opinion, the Company Secretary in Practice 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.

Clarification on filing of Secretarial Audit Report of Material Unlisted subsidiary

The Secretarial Audit Report (MR-3) for the Material Unlisted Subsidiaries is incorporated in India has to be filed to the Stock Exchange by the listed entity along with the Annual Report of the listed entity.

Diligence while checking the compliances and co-operation by the listed entity in this regard

Where certifications by other intermediaries like Merchant Bankers are required (e.g. in case of public issues, takeovers etc.) with respect to compliances with the provisions of any SEBI Regulations, the Company Secretary in Practice may rely upon their due diligence certificates; if thought fit, the Company Secretary in Practice may perform a sample check. It is imperative that the Company Secretary in Practice undertakes necessary diligence while checking the compliances. This exercise might include the requirement of various certificates/declarations/undertakings from the listed entity/its related entities and their co-operation in the matter is desired. While checking the compliances for the ASC Report, Company Secretary in Practice may also refer the relevant Circulars and Amendments issued by the SEBI.



CIRCULAR

CIR/CFD/CMD1/27/2019

February 08, 2019

To

All Listed Entities (whose equity shares are listed) and their material subsidiaries

All the Recognized Stock Exchanges

Institute of Company Secretaries of India (ICSI)

Madam / Sir,

Sub: Format for annual secretarial audit report and annual secretarial compliance report for listed entities and their material subsidiaries

1. The Committee on Corporate Governance, constituted under the Chairmanship of Shri Uday Kotak, in its report dated October 05, 2017, recommended the following in view of the criticality of secretarial functions to efficient board functioning:
 - a. Secretarial audit to be made compulsory for all listed entities under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“Regulations”) in line with the provisions of the Companies Act, 2013.
 - b. Secretarial audit to be extended to all material unlisted Indian subsidiaries in line with the recommendations of the Committee on strengthening group oversight and improving compliance at a group level for listed entities.
2. The aforesaid recommendations were accepted and in order to implement the same, the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 have been amended to include the following Regulation 24A:

“24A: Secretarial Audit

Every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex with its annual report, a secretarial audit report, given by a company secretary in

practice, in such form as may be prescribed with effect from the year ended March 31, 2019.”

3. Accordingly, the following shall be complied with by a listed entity and its material unlisted subsidiaries, as applicable:
 - a. Annual secretarial audit report:
 - (i) Currently, Section 204 of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 requires Secretarial Audit by Practicing Company Secretaries (PCS) for listed companies and certain unlisted companies above a certain threshold in Form No. MR-3.
 - (ii) In order to avoid duplication, the listed entity and its unlisted material subsidiaries shall continue to use the same Form No. MR-3 as required under Companies Act, 2013 and the rules made thereunder for the purpose of compliance with Regulation 24A of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 as well.
 - b. Annual secretarial compliance report:
 - (i) While the annual secretarial audit shall cover a broad check on compliance with all laws applicable to the entity, listed entities shall additionally, on an annual basis, require a check by the PCS on compliance of all applicable SEBI Regulations and circulars/ guidelines issued thereunder, consequent to which, the PCS shall submit a report to the listed entity in the manner specified in this circular.
 - (ii) The format for the annual secretarial compliance report is placed at Annex-A.
 - (iii) The annual secretarial compliance report in the aforesaid format shall be submitted by the listed entity to the stock exchanges within 60 days of the end of the financial year.
 - c. The listed entities and their material subsidiaries shall provide all such documents/information as may be sought by the PCS for the purpose of providing a certification under the Regulations and this circular.