

CPE Study Circle Meeting on Companies Bill, 2012 - An overview

March 27, 2013

- STRUCTURE OF THE BILL
- Existing Act had some 658 sections and 14 Schedules.
- New Bill has **470 Clauses** and **7 Schedules**.
- Huge amount of erstwhile Law has been moved into the Rules.
- There are 416 occurrences of the word — “as may be prescribed”
- Govt. retains enormous rule making power and constant changes in the next 2/3 years.
- Sections have been consolidated into single section. In fact, there are lots of new provisions, new restrictions and approvals to be sought.
- Types of companies - OPC, Pvt Ltd, Public Limited with subdivisions

One Person Company – 2(62)

- ⊙ Introduction of One Person company akin to UK Companies Act
- ⊙ A private Company subscribed by one company
- ⊙ Name shall affix OPC or one person Company

Dormant Company - 455

- ⊙ Introduction of Dormant Status: Formed for future project, holding as asset or intellectual property etc
- ⊙ Companies not carrying significant accounting transaction & inactive companies
- ⊙ ROC may suo-moto issue treat notice for dormant status

Small Company - 2(85)

- ⊙ Private Company having

- INR 50 lacs of paid up capital (*or higher limit to be prescribed not exceeding INR 5 Cr; and*
- Turnover not exceeding INR 2 Crores (*or higher limit to be prescribed not exceeding INR 20 Cr*)
- 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 either at its own or together with one or more of its subsidiary companies

Provided prescribed Companies shall not have layers of subsidiaries beyond such numbers as may be prescribed

- As per the provisions of the Act, it is more than one half of the **total equity share capital**, however the term used by the Bill is **'share capital'** which may include all kinds of share capital including equity, preference or any other convertible securities
- Minimum paid-up share capital of 1 lacs; *and*
- Restricts the right to transfer its shares; *and*
- Limits the number of its *members to 200*
- Ease of capital raising by offering securities to more than 50 members
- *Refer Clause 42 (Private Placement) which restricts offers of shares to not more than 50 people or such higher number as may be prescribed. This GAP needs to be addressed.*

The definition of the term has been expanded to include the following class of persons other than already provided under Section 5 of the Cos Act:

- 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, authorizes, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default
- **Every Director**, who is aware of **any contravention** by virtue of **receipt by him of any proceedings of the Board** or participation in such proceedings **without objecting to the same – Guilty of Estoppel when resolution is passed ?**
- 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**

- Person named in a prospectus or is identified as such in the annual return; or
 - Who has control over the affairs of the company, other than in professional capacity, as a shareholder or a director or otherwise; or
In accordance with whose advice or directions the Board is accustomed to act
Impact:
 - Control of Fraud, non-compliance etc attracts with this widened definition of “Promoters”
- A company in which that other company has a **significant influence**, but which is not a subsidiary company of the company having such influence and **includes a joint venture company**

“Significant influence”:

- Control of at least 20% of total share capital; or
- business decisions under an agreement;

Impact:

- Disclosure of associate companies in financial report and consolidation for Associate Co’s
- Widens scope of related parties covering associate parties under its ambit
- Associate Company included to put restrictions on following:
 - Qualification of Directors
 - Qualification of Auditors
 - Vacation of officer of Director
 - Restriction on non-cash transactions involving directors
 - **A director** or his relative;
 - **A Key Managerial Personnel** (‘KMP’) or his relative;
 - **A firm** – in which a director, manager or his relative is a partner;
 - **A private company** - in which a director or manager is a member or director;
 - **A public company:** in which a director or manager is a director or holds along with his relatives, **more than two per cent of its paid-up share capital**

Impact:

- All Related Parties Transactions ('RPT') to be at arm's length price, similar to ALP under Income-tax Act
 - All specified RPT to be approved by Board of Directors and special resolution in general meeting (except certain transactions with prescribed value and Cos with prescribed paid up capital)
- Includes the right to appoint majority of the directors; or
 - control the management or policy decisions by a person or persons acting in concert, directly or indirectly, including by virtue of their shareholding; or
 - or Management rights or Shareholders agreements or Voting agreements or in any other manner;

Impact:

Definition in line with SEBI's definition of control

- Means the period ending on the 31st day of March every year
- The National Company Law Tribunal ("NCLT") shall have the power to allow a different financial year for companies which are either holding companies or subsidiaries of a company incorporated outside India so as to enable consolidation of accounts of such companies
- Window of 2 year given to align the financials as per new Co's Bill

'Foreign Company':

- 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**
- conducts any business activity in India in any other manner

Impact:

- Currently there is no specific provision for mandatory registration of foreign companies engaged in online business practices, e commerce activities etc
- Enable effective regulation of such entities

'Listed company':

- Means a company which has **any of its securities** listed on **any recognized stock exchange**

Impact:

- With the new definition of listed company, Any Co having securities like debentures listed on any stock exchange would be termed as listed Company
- Recognition of keeping Books of accounts in electronic form;
- Laying of Consolidated Accounts besides subsidiary shall also include associate company & joint venture;
- No provision for extension of financial year;
- Uniform Financial Yr, i.e. period ending 31st March
- Provision of re-opening/recasting of Books of A/c
- Provision of revision of financial statements;
- Authority to prescribe Accounting Standards now vested with Central Govt.
- A limit of **20 audits per partner** without any distinction between public and private companies, as against the current ICAI imposed limit of 30 audits
- **Ratification of appointment of auditors**, by the members at every annual general meeting of the company, has been made **mandatory**
- Shareholders at liberty to decide by passing resolution that audit partner and the audit team, be rotated every year
- Company bound to **re-open and recast its financial statements** if application having been made by following and an **order has been made by the NCLT or a other Court**
 - Central Government, SEBI, Income tax authority
 - Any Statutory body or authority or any person concerned
- **Consolidated financial statements** of companies are required to also include financial statements of **associate companies and joint ventures**
- **Class action suits**, can be **filed against auditors** to claim damages or compensation for improper or misleading statement of particulars in the audit report or for fraudulent, unlawful or wrongful actions
- The word **“firm”** shall include a incorporated **LLP**;
- LLP can be appointed as an Auditor but only Chartered Accountant can act as an Auditor *under Clause 141(2)*;

Impact:

- Formation of Multi disciplinary/ Hybrid LLP's permitted
- Corresponding amendments to be brought in Acts governing professionals like CA, CS, CWA's etc.

Clause 144

- ⊙ Accounting and book keeping services
- ⊙ Internal audit
- ⊙ Design and implementation of any financial information system
- ⊙ Actuarial services
- ⊙ Investment advisory services
- ⊙ Investment banking services
- ⊙ Rendering of outsourced financial services
- ⊙ Management services

Directly/ Indirectly not allowed

- Expected to act as Whistle Blower;
- Mandatory Attendee of the AGM;
- Conduct of Internal Audit by CA/CWA/authorized professional;
- Written consent & Certificate required in case of Appointment;
- Extraneous duty to report to Central Govt. in case of fraud;
- Imposition of Criminal Liability on Auditors
- PENAL PROVISION – COMPANIES ACT 1956
- Replacement of NACAS by NFRA;
- Autonomy given to ICAI under the C.A. Act curtailed;
- Harsh Provisions of Clause 140 & 147 can be restricted to large & listed Co's;
- Prohibition of rendering consultancy services to hamper growth of CA Profession;
- Difficulty in Survival of small and medium-size audit firms.

Impact:

- Private limited included under new clause
- Definition widened as loans given to '**any person**' included
- Clarity brought on inclusion of securities premium for upper cap
- Rate of loan in line with yield of G-Sec
- New Definitions are

 - ***Associate Company***
 - ***Small Company***
 - ***Employee Stock Option***
 - ***Promoter***
 - ***Related Party***
 - ***Turnover***
 - ***CEO/ CFO/KMP***
 - ***Global Depository Receipt***

- **KMP ????**
- **Recognition of highest level of Management Personnel With Liabilities commensurate with their position**
- Covered under '***Officer in Default***' & '***Related Parties***'
- KMP cannot be a ***KMP*** of ***any other company*** other than the subsidiary
- **CEO/MD/Manager**
- **Co Secy**
- **Whole Time Director**
- **CFO**
- No provision of Independent Director under Act but term now defined in the Bill
- Prescribed Co's including Listed Co's, to have **minimum 1/3rd Directors as Independent Directors**

- Limited Tenure: Maximum of 2 consecutive tenures of 5 consecutive years
- Not entitled to any remuneration in form of stock option
- **Insulated from liability** unless the fraudulent act is done with their consent, knowledge & connivance
- Maximum limit of 11% profits – retained
- Insurance Premium not be treated as part of remuneration (CTC)
- Public Co's required to seek prior approval of Central Govt; if limits exceeded
- Additional exemptions in case of Co's having no/inadequate profits
- Enhanced Individual limits vis-à-vis existing limits
- **CSR – Sec 135**
- *This is the first time where a legal provision is introduced for Corporate Social Responsibility.*
- Clause 135 (under Chapter IX – Accounts of Companies)
- Clause 135 contains 5 sub-clauses with one Explanation.
- Schedule VII of the Companies Bill 2012 lists out the CSR activities.
- DETAILS
- NW of Rs. 500 cr or above (OR)
- Turnover of Rs.1000/- cr or above (OR)
- NP of Rs.5 cr or above during prev financial year
- Board appoints CSR committee - 3 or More directors
- One CSR committee member shall be independent director
- Policy to be announced as per Schedule VII
- Recommend, Monitor & Ensure amounts to be spent
- At least 2% of its average net profit made during the 3 immediately preceding financial years
- Explain why the amount were not spent
- **CSR Activities (as a project)**

1. **Eradicating hunger and poverty**
2. **Promotion of education**
3. **Promoting gender equality and empowering women**
4. **Health - reducing child mortality, improving maternal health, combating HIV, AIDS, malaria**
5. **Employment enhancing vocational skills**
6. **Contribution to PM's fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women**
7. **Ensuring environmental sustainability**
8. **Social business projects**
9. **Such other matters as may be prescribed**

Constitution

- Central Govt. to constitute and notify NFRA
- A Quasi judicial authority & Powers that of a Civil Court
- NFRA Order can be appealed against with Appellate Authority

Composition

- 1 chairperson & members (Maximum 15)

Scope

- Advisory role, monitoring compliances & Investigation of professional misconduct by CA's;
- Oversee the quality of service of the Auditors;
- **Marginalization** of ICAI;
- **Intrusion** into Exclusive domain of ICAI like Investigation, Penalization, recommendation of Accounting & Auditing Policies;
- **Restriction** ICAI's role to acting as a certifying body;
- **Seizure** of power to institute proceedings if already initiated by NFRA

Impact/ Issues:

- Matters of misconduct handled by ICAI in past
- Validity of verdict by peers

National company law tribunal ('NCLT')

Constitution : CG by notification to constitute NCLT & its appellate body, NCLAT (**Proposed to replace CLB, BIFR & AIFR**)

Role

- Speedy disposal of cases; likely within 3 months
- All proceedings relating to Arbitration, Compromise & Arrangement shall be transferred to NCLT
- Special Courts for speedy trial if required by Govt.

Means :

- Consolidation of all legal bodies of Corporate law
- Practical issues regarding functioning, resource and training to Authorities

Object of SFIO under New Co's Bill

- Specific enunciation of good governance practices
- Easier prosecution of Delinquent Directors
- Active involvement of Directors
- Enhancement of objectivity/independence by non-executive & Independent Directors
- Liabilities specified with defined limits
- Status of SFIO established under Bill

Role

- Investigation of Report of SFIO equivalent to Police Report for framing charges
- Power to arrest in case of certain cognizable offences
- Stringent penalty provided for fraud related offences

Impact/ Issues

- Strengthening of investigation proceedings
- Effective process by inclusion of experts of various fields
- Maintenance of **electronic form** of Books of Account - Recognized
- **Re-opening/recasting** of books of accounts – Provided
- Revision of **financial statements** - Provided
- Authority to **prescribe Accounting Standards** now vested with Central Govt.
- **REGISTERED VALUER**
- Mandatory appointments & Valuation of shares, net worth, assets, liabilities, as required under law
- Specific duties & Role of Register Valuer has been prescribed
- Qualification & experience as prescribed by way of Rules
- Appointment to be effective by **audit committee or Board of Directors**
- REGISTERED VALUER

Mandatory valuation

- Allotment of ___ for consideration **other than cash**
- Acquisition of **minority shareholding** by an _____ of issued equity share capital of a company
- **Exit opportunity** to the **dissenting shareholders** of transferor company/listed company being merged with an unlisted company
- Submission of valuation report by liquidator where **tribunal has made a winding up order**
- **Declaration of solvency** by the board of directors in case of **voluntary winding up**
- **Professional Opportunities**
- Augmented Role in Advisory Services
- Registered Valuer – Functional Role
- Appointment by the NCLT as administrators, Company Liquidators & Technical members
- Appearances before NCLT, NCLAT etc.
- Role of Independent Director