



Amcon
Anand Mehta & Co.
(CONSULTANTS) PRIVATE LIMITED

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7th January, 2013

Dear Colleagues

We have before us the much awaited and much debated piece of legislation in the form of the Companies Bill 2012 to replace the legendary Companies Act, 1956.

It has emerged after lot of public debate and consultation with various forums in and outside the Government and Parliament.

It seeks to introduce many new concepts like One Person Company, Entrenchment Provisions, Disgorgement Provisions, Private Placement, Electronic Voting, National Financial Reporting Authority, National Company Law Tribunal and Appellate Tribunal, Corporate Social responsibility, Long Term Appointment of Auditors with Mandatory Rotation, Prohibition of Insider Trading, Resignation of Directors, Serious Fraud Investigation Office, Video Conferencing of Meetings, Mandatory Secretarial Standards, Cross Border Mergers, Squeeze-out Provisions, Registered Valuers, Revival and Rehabilitation of Sick Companies and Special Courts to deal with the offenses under the Act.

While it is very difficult to put all these things at one place that too with brevity as the key, we have made an attempt to cull out and present the essence.

We have pleasure in presenting before you a short note on the subject which is compiled from various publicly available sources.

We will improve upon it as time goes and present before you in a more analytical manner

A copy of this will be available on our website www.amcoportal.com soon, so would the subsequent revision and improvements.

We look forward to your feedback.

With best regards and wishes for a very happy new year.

For Smart Consultants Private Limited

Anand Mehta

Director

COMPANIES BILL, 2012

A QUICK ANALYSIS

Prologue:

The law will be divided in 2 parts – The Companies Act., and the Companies Rules which will be prescribed separately.

Some of the major new concepts and definition are Associate, One Person, Small and Dormant Company, CEO/CFO, KMP

A Accounts

Accounts: Form & Format: Accounts can be maintained in Electronic Form. The Balance-sheet, Profit and Loss Account and Cash Flow Statement are collectively defined as Financial Statement.(FS) Along-with the FS, those of all subsidiaries will have to be consolidated. Subsidiary for this purpose includes Associate Company. and Joint Venture. The requirement of attaching the Balance-sheet, Profit and Loss Account, Report of the Board of Directors, Auditors' Report, Statement of Holding Company's Interest in the Subsidiary and other Reports as required u/s. 212 are dispensed with.

Accounts- Filing: The benefit given to Private Companies under Companies Act 1956 to file their Balance sheet & Profit and Loss account separately has been withdrawn.

Accounts-Reopening: Accounts which are once finalized can be re-opened on Court's or Tribunal's orders. It is possible to carry out a Voluntary revision of financial statements or Board's Report with Tribunal's consent .

Accounts- Standards

Auditing Standards to be made mandatory

Auditors:

Auditors- who can be ? LLPs may be appointed as auditors. Central Government empowered to prescribe manner and procedure for selection of auditors at AGM

Auditors-Term: On one hand, appointment for 5 years at a time for all companies with a ratification at each AGM and an automatic reappointment where the AGM does not decide. On the other hand, in a listed company a mandatory rotation after 5 or 10 years depending on whether it is an individual auditor or a firm of auditors. Besides, the audit partner and his team also to be rotated as resolved by the members of the company.

Auditors : Scope: The Auditor of the Company shall not provide directly or indirectly the specified services to the Company its Holding and subsidiary Company.

Auditors : Duty : A duty has been cast on the Auditor, to immediately report to the Central Government, any offense involving fraud which is being or has been committed against the Company by officers or employees of the Company, which he believe to be committed during the course of performance of his duties as an Auditor.

Auditors: New Mandates:

Internal audit by Cas/ CWAs/ such other professional as may .be decided by the Board proposed to be made mandatory for prescribed classes of companies

Secretarial audit mandatory for bigger companies (listed companies and such other classes of companies as may be prescribed) by a company secretary in practice.

The duties, which have been cast on Auditor, shall apply mutatis mutandis to both Cost Accountants for Cost Audit and Company Secretary in Practice for Secretarial Audit.

Contraventions: In case the Auditor contraventions than in addition to punishment provided in the section, he shall be required to

refund the remuneration received by him from the Company and shall be liable to pay the damages to the Company or to any person for the loss arising out of misleading or incorrect information. The responsibility whether civil or criminal as provided in this Bill or in any other law for the time being in force will be jointly and severally between the partners and the firm. If it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the Company or its Directors or officers, the Tribunal may direct a Company to change its auditors and the partner or partners of the firm shall also be punishable in the manner provided in Cause 447.

Accounts: Authority

instead of National Advisory Committee on Accounting Standards (NACAS), we will have National Financial Reporting Authority (NFRA) which, unlike NACAS, is not merely an advisory body but is charged with responsibility to monitor and enforce compliance with accounting and auditing standards recommended by it.

The Central government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India (ICAI) in consultation with and other examination of the recommendations made by the NFRA.

Further NFRA empowered to investigate into professional or other misconduct of CAs and impose penalties of not less than! 1,00,000 and not exceeding 5 times the fees received in case of individuals and not less than ~ 10,00,000 and not exceeding 10 times the fees received in case of firms and debar member/firm for a period of 6 months to 10 years.

C

Class Action

Shareholders associations or group of shareholders/depositors to be enabled to take legal action in case of any fraudulent action on the part of a company and to take part in investor protection activities and "Class Action Suits".

Such suits can be filed in the case of a misleading prospectus and against oppression /mismanagement by member/ members or by creditor/s who are affected there by

Corporate Social Responsibility

Every Company having net worth of Rs 500 crore or more, or turnover of Rs 1,000 Crore or more of a net profit of Rs 5 crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of 3 or more Directors out of which at least one Director shall be an Independent Director. The committee shall recommend the policy for CSR to the Board. The Company shall spend at least 2% of its average net profits during three immediately preceding financial years. If company fails to so spend, reasons to be disclosed in Board of Directors' Report .

D

Deposits

On and after the commencement of the Companies Act, 2012, only the following companies may invite, accept or renew deposits from the public:

- banking companies.
- NBFCs (non-banking financial company as defined in the Reserve Bank of India Act, 1934).
- notified companies.
- public company having such net worth or turnover as may be prescribed as per audited balance sheet of the immediately preceding financial year.

The NBFCs are not now governed by the Companies Act., but governed by the Rules issued by the RBI.

Companies other than those covered above shall not invite, accept or renew deposits from the public (i.e. persons other than members) except in the prescribed manner. Whatever deposits were accepted by companies other than those mentioned above before the commencement of

the Act shall be repaid by them within one year from the commencement of the Companies Act, 2011 or from the date on which payments are due, whichever is earlier.

Disgorgement provisions

If any person makes any application in a fictitious name or makes multiple applications apart from the punishments, the law provides for Disgorgement of gain made by and seizure and disposal of the securities still in the possession of the person. The amount realised will be credited to the IEPF.

Directors

Directors : Qualification: The provisions relating to Share Qualification [Section 270] have been deleted

Directors: Types: Woman Director: Mandatory for prescribed classes of companies to have at least one woman director. Resident Director: Every company to have at least one director who has stayed in India for 182 days or more in the previous calendar year. Independent directors to be appointed on the Boards of such companies as may be prescribed. The requirement to appoint minimum number of IDs, where applicable, to listed public companies is 1/3 of the total number of directors. For other public companies, the requirement and number may be prescribed through rules. Code for IDs provided in a new Schedule to the Bill. This includes items such as the Professional Conduct, Roles and Functions. Databank for IDs proposed to be maintained by a body/institute notified by the Central Government to facilitate appointment of Ids.

Directors: Number: The maximum number of Directors increased from 12 to 15 with power to add more by Special Resolution. A person cannot be Director in more than 20 Companies as against 15 and out of this 20, he cannot be Director in more than 10 Public Companies. Thus, there is a limit now on the number of Directorships in Private Company as well.

Directors: Duties: The Directors responsibility

statement shall include additional statement related to Compliance of all applicable laws and in case of listed Companies it shall also include statement related to internal finance control. The Directors are prohibited from Insider Trading in Securities.

Directors: Resignation :The Directors have to forward their resignation along with a detailed reasons to the Registrar within 30 days.

Directors Committees: Following Committees of directors mandatory for listed companies and other classes of companies as may be prescribed:

- Audit Committee
- Nomination and Remuneration Committee
- Stakeholders' Relationship Committee

Directors: Participation Participation of directors in board meetings by video conferencing or by electronic means permitted. Such participation shall count for quorum purposes. At least four meetings should be held in each year. There is no requirement for holding meeting in every quarter. At the same time not more than 120 days shall elapse between two consecutive meeting.

Dividend

Interim Dividend: The Board of Directors of a Company may declare interim dividend during any financial year out of the surplus in the Profit and Loss Account and out of profits of the financial year in which such interim dividend is sought to be declared. Such interim dividend can not be at a rate higher than the average dividends declared by the Company during the immediately preceding 3 financial years, where it has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend.

Transfer to Reserves: Instead of transferring a fixed % of profits to reserve before declaring dividend every year as required under the Companies Act 1956, Company can on its

discretion transfer such % of profit to the reserve before declaring dividend as it deem necessary and moreover such transfer is also not mandatory.

Unpaid Dividends: The Bill provides that all shares in respect of which unpaid or unclaimed dividend has been transferred to Investor Education Protection Fund (IEPF) shall also be transferred by the Company in the name of IEPF along with a Statement containing such details as may be prescribed. Funds in IEPF can be utilized for distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court who had ordered disgorgement

E

E-Governance : Maintenance and allowing inspection of documents by companies in electronic form being allowed for the first time.

I

Incorporation and Closing Down

Removed Provisions: The provisions relating to Certificate of incorporation being the conclusive evidence [Section 35] , certificate of commencement of business [Section 149], Statutory meeting and statutory report [Section 165], have been removed

Names: The procedural aspects relating to availability and reservations of the names is now incorporated within the Act. Strict penalties and actions prescribed to deal with the names which have been applied by furnishing wrong or incorrect information. This includes penalty, direction to change the name, striking off of the name and applying for winding up of the Company.

Speedy incorporation process, with detailed declarations and disclosures about the promoters, directors, etc., at the time of incorporation are key highlights. This liberty is balanced by providing strict actions if a Company has got incorporated by providing false or incorrect information or representation or suppressing any material fact or information or by fraudulent action. The Tribunal may pass such orders as it may deem fit, including regulation of management of Company, changes in the MOA and AOA, directing that the liabilities of the members will be unlimited, directing removal of the name and passing an order for winding up.

Objects Clause: In the Memorandum of Association of a Company, there is no requirement as a bifurcation of the Objects clause into main, ancillary and other objects. Only the objects for which the Company is incorporated along with matters considered necessary for its furtherance shall be mentioned. The Company cannot provide for other objects clause.

Maximum number of members In a private company-limit proposed to be increased from 50 members to 200 members.

Companies with charitable objects : This facilities has been extended to a person or associations of persons and for promotion of not only commerce, arts, science, religion, charity and any other useful object also sports, education, research, social welfare, environment protection. Further, to check misuse, the Central Government has been empowered to direct the Company be wound up or be amalgamated with another company.

Layers of Subsidiaries: The Central Government has been empowered to prescribe restrictions in respect of layers of subsidiaries for any class or classes of companies.

Entrenchment: Articles may contain 'Provisions of entrenchment' in the articles of association. This means that there could be specified provisions which can be altered only if the more restrictive conditions or procedures is compared to those applicable in this case of Special Resolution are

met.

Commencement of Business The following needs to be filed by a Public / Private Company, with the RoC.

- Declaration by Director in prescribed form providing that the subscribers have paid the value of shares agreed to be taken by them, and
- Confirmation that the Company has filed a verification of its Registered Office with the Registrar.

Change of Name to be disclosed for a period of two years

Change of Objects is permitted by passing of the special resolution and filing with ROC however, a Company which is raised money through prospects and has still has any unutilized proceeds, cannot change the objects for which the money was raised unless, a special resolution is passed and published in newspapers and the dissenting shareholders have given an option to exit.

Cancellation of Registration by Tribunal - Tribunal empowered to direct removal of company's name from register of companies if company got incorporated by furnishing false or incorrect information or by suppressing material facts

Removal of Name: Application by company by special resolution or consent of 75% of members in terms of share capital to ROC for removing name of the company from register now permitted.

Reduction of Capital will not be allowed if the Company is in arrears for payment of deposits. The Company can make a buy-back of shares even if it is held at any time defaulted in repayment of deposits or redemption of debentures provided such default must have been remedied and 3 years have lapsed.

Debenture Trustee is require to be appointed only if the Company issues Prospectus or makes an Offer or Invitation to Public or its Members exceeding 500.

Sick Companies:

Provisions have been made for Revival and Rehabilitation of sick companies [Chapter XIX]

Inspection, Inquiry & Investigation

The provisions relating to Special audit [Section 233A] have been removed

Investigation into the affairs of companies by Serious Fraud investigation Office (SFIO) is provided.

A new definition of 'fraud' has been provided.

K

Key Managerial Personnel:

The Chief Executive Officer (CEO), the Chief Financial Officer (CEO) and the Company Secretary to be as Key Managerial Personnel (KMP).

M

Management and Administration:

Annual Return: Additional Info: Every Annual Return shall contain the additional information like particulars of its Holding, Subsidiary and Associate Companies; Matters related to certification of compliances, disclosures for remuneration of directors and key Managerial Personnel etc.

Annual Return: Certification: In case of the Companies with prescribed Paid up Capital and turnover, certification of Annual Return by Practicing Company Secretary is mandatory.

Annual Return: Period : The Annual Return shall carry information up to the date of closure of financial year and not up to the Annual General Meeting as required under the Companies Act, 1956.

Promoters Shareholding: Every listed Company shall file a Return in the prescribed form with the Registrar with respect to change in the number



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of shares held by promoters and top ten shareholders of such company, within 15 days of such change.

First AGM: First Annual General Meeting of the Company shall be held within the period of 9 months from closure of its first financial year instead of 18 months from the date of the incorporation, as provided in the Companies Act, 1956l.

Electronic Voting: The Central government may prescribe the class or classes of Companies and manner in which a member may exercise his right to vote by electronic means.

Postal Ballot: The provisions of the Postal Ballot shall be applicable to all the Companies whether listed or unlisted.

Secretarial Standards: Every Company has to follow the Secretarial Standards while making the Minutes of Board and General Meeting.

Mergers

A single forum for approval of mergers and acquisitions along with a simple and shorter merger process for holding and wholly owned subsidiary companies or between two or more small companies. Concept of deemed approval also provided in certain situations.

Detailed provision have been made for Cross border mergers.

N

National Company Law Tribunal (NCLT) and Appellate Tribunal (AT)

Various matters under the Bill will be tried by the NCLT and the appeals will lie to AT

O

One Person Company:

This is a newly introduced concept. It will be incorporated as a Private Company.

To ensure perpetual succession, the Memorandum of OPC to indicate the name of the person with his prior written consent who should become member in the event of the death of the subscriber or is in capacity to contract.

P

Penalties

The Bill seeks to lay down the maximum as well as minimum quantum of penalty for each offense with suitable deterrence for repeated defaults. The company is identified as a separate entity for imposition of monetary penalties from the officers in default

Levy of additional fee in a non-discretionary manner for procedural non-compliance, such as late filing of statutory documents, to be enabled through rules.

Prevention of Oppression and Mismanagement

Past Actions: The provisions are so worded that they may apply to the past actions also.

Application: A specified number of members, creditors or depositors can file an application before the Tribunal to restrain the company and or to claim damages from the company, auditor, expert/ advisor/consultant.

Orders: The Tribunal shall take into account whether the application is in good faith, whether any person other than director is involved, whether the action can be pursued in its own



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right, what are the use of other members etc. and pass an appropriate order.

Private and Public Issues

The provisions relating to Statement in lieu of prospectus [Section 70] deleted.

Manner: The Bill clearly provides for the manner in which Securities can be issued by both Public and Private Companies. A Public Company can issue Securities either by way of a Public Offer or a Private Placement or Bonus or Right Issue. A Private Company can also do the same minus the Public Offer.

Public Offer: Only a Public Company can make a public offer which includes

- Initial public offer
- Further public offer
- An offer for sale by an existing shareholder

through issue of Prospectus.

New enabling provision for offer of sale by members .

Where certain members of a company propose in consultation with the board of directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public; they may do so in accordance with prescribed procedures. Any document by which such offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company. The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to public shall collectively authorize the company whose shares are offered for sale to take all action in respect of offer of sale and will reimburse the company of all expenses incurred by it on this matter.

Prospectus: The contents of the Prospectus have now been made more detailed. If it is proved that prospectus was issued with intent to defraud the

applicants or any other person or for a fraudulent purpose, the directors, promoters, experts etc. shall be personally responsible without any limitation of liability for all or any of the losses or damage that may have been incurred by any person who subscribed w the securities on the basis of such prospectus. A Company which has raised money from the Public through Prospectus and still has any un-utilized amount out of the money so raised shall not change its Object unless a Special Resolution is passed by the Company and other requirements of Advertisement and exit opportunity to dissenting shareholders is complied with.

New provision of raising of capital by private placement:

This means any offer of securities or invitation to subscribe securities by a company which satisfies the following conditions that such offer or invitation is to a select group of persons; Is other than by way of public offer; is through issue of a private placement letter and satisfies other conditions in clause 42 including the condition that the offer or invitation is made to not more than 50 or such higher number of persons as may be prescribed (excluding QIBs and employees offered securities under ESOP) in a financial year. The offer shall be made to persons whose names are recorded by company prior to the issue, no advertisement shall be released, the moneys received shall be kept in a separate bank account and the securities shall be allotted within 60 days

New provision for issue of Bonus Shares:

The Bill provides that a company may issue fully paid up bonus shares to its members, in any manner whatsoever, out of :- its free reserves, the securities premium account, or the capital redemption reserve account. No issue of bonus shares shall be made by capitalizing reserves created by the revaluation of assets. No company shall capitalize its profits or reserves for the purpose of issuing fully paid up bonus shares unless; it is authorized by its articles of association, it has on the recommendation of the

Board, been authorized in the general meeting of the company, it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it, it has not defaulted in respect of the payment of statutory dues of the employees such as contribution to provident fund, gratuity and bonus, the partly paid shares, if any outstanding as on the date of allotment are made fully paid up, it complies with such condition as may be prescribed. Bonus shares shall not be issued in lieu of dividend

Return: In addition to Shares, Return of Allotment is require to file for all types of securities.

S

Shares and Shareholders:

Discount: A Company cannot issue Shares at discount except as Sweat Equity.

Preference Shares: Preference Shares in case of Specified Infrastructure Projects can be issued for more than 20 years to be redeemed at a specified percentage on an annual basis at the Option of the Preference Share-holders. The Preference Shareholder can brought if their dividend is in arrears for a period of two years or more irrespective of whether they are cumulative or non-cumulative.

Buy back: As opposed to Companies Act 1956 under the Bill, a Company can make buyback even if it had at any time defaulted in repayment of deposit or interest payable thereon, redemption of debentures or Preference shares or payment of dividend to any shareholder or repayment of any term loan or interest payable thereon to any financial institution or bank, provided that such default must have been remedied and a period of 3 years must have lapsed after such default ceased to subsist.

Debenture Trustee: As per the Bill, Debenture trustee is required to be appointed only when the Company issues Prospectus or makes an offer or

invitation to the public or to its members exceeding five hundred for subscription of its debentures.

Voting through electronic means by members at meetings. Consolidated financial statements mandatory if company has one or more subsidiaries - Consolidation of financial statements of subsidiaries with those of holding companies is proposed to be made mandatory. For this purpose the word 'subsidiary' bill include associate company and joint venture

Warrants: The provisions relating to Share warrants [Section 114] have been deleted.

Return: Every listed company required to file a return with the Registrar regarding change in the shareholding position of promoters and top ten shareholders of such company.

'Squeeze-out provisions' - Bill permits purchase of minority shareholding by acquirer on becoming registered holder of 90% or more of issued share capital of a company.

Sickness of a company to be determined not on the basis of whether accumulated losses exceed net worth but on the basis of whether the company is able to pay its debts. The Rehabilitation and Revival Fund as provided in the Companies (Second Amendment) Act 2002 is to be replaced by Rehabilitation and Insolvency Fund with voluntary contributions linked to entitlements to draw money in a situation of insolvency

Special Courts

The Bill aims to set up special courts to try the offenses under the Bill.

V

Vigil Mechanism: Provisions in respect of vigil mechanism (whistle blowing) proposed to enable a company to evolve a process to encourage ethical corporate behavior, while rewarding employees for their integrity and for providing valuable information to the management on



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deviant practices.
Registered valuers

Miscellaneous

The following provisions stand omitted from the Companies Act, 1956

- Public Trustee Section 153A]
- Payment of interest out of capital [Section 208]
- Restrictions on appointment and remuneration of sole selling and sole-purchasing agents [Sections 294 to 294AA]
- Employees Securities and PF [Section 417]
- Receivers and managers [Sections 421 to 424]

Epilogue

While a lot has been provided, a lot has been left open to the Rules to be prescribed.

This material is prepared by Smart Consultants Pvt. Ltd., a Company established under the Indian Companies Act, 1956.

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