



Companies Act, 2013- A Relook At The Rules in Light of The Role of A Company Secretary

KEYWORDS

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1.0 Introduction:

The Companies Act, 2013 is a much anticipated legislation that has been enacted after many attempts to refurbish the erstwhile Companies Act, 1956 with a new framework for the governance of companies. While enforcing greater responsibility on company managements, the new law has also clearly spelt out the role of a Company Secretary as a harbinger of Corporate Governance.

1.1 Appointment of a Company Secretary under the erstwhile Companies Act, 1956

Any business to be successful apart from having a good business model would also require maneuvering amongst plethora of laws related to every aspect of business. The role of Company Secretary comes into focus here as an individual responsible for the overall compliance of corporate and allied laws thereby ensuring that the business is never caught on the wrong side of the law. A statutory recognition to the company secretary was first bestowed through Section 383A of the Companies Act, 1956 and the rules made thereunder, which provided that every company having a paid-up capital exceeding rupees five crore to compulsorily appoint a company secretary. Such an individual should necessarily be a member of the Institute of Company Secretaries of India (ICSI). This ceiling of 5 crores was gradually enhanced from 2 crores in view of the paucity of qualified company secretaries in contrast to the number of companies with 2 crore paid up capital.

To ensure that companies not fulfilling the mandatory limit are not tempted to relax the norms it was further provided that every company having a paid-up share capital of rupees ten lakh or more but less than rupees five crore must engage the services of a secretary in whole-time practice and ensure compliance of the relevant provisions validated through the issue of a compliance certificate. Such compliance certificate is issued after the conduction of a secretarial audit. Significantly these provisions were uniformly applicable to both public and private companies without any bias.

Although the duties of the Company Secretary were not strictly laid down under the earlier law, there was a whole gamut of legal, financial and administrative duties and obligations expected of out of a company secretary's position. While the precise scope of the duties of a company secretary vary depending on the type of company as well as its organizational structure, the broad range of duties normally performed by a company secretary include:

- 1) Maintaining and updating the company's statutory registers and records.
- 2) Annual filings with the MCA

- 3) Event based filings with the regulator, such as for the appointment or resignation of directors.
- 4) Conducting board meetings and shareholder and stakeholder meetings
- 5) Liaisoning with internal and external stakeholders of the company.
- 6) Discharging the finance and treasury functions in certain companies.

1.3 Appointment of a Company Secretary for Private Companies: the need

Private companies are not as closely regulated as public listed entities in view of the fact that private companies run the business on the funds raised privately with larger stakes of controlling insiders. However compliance to good governance norms apart from regular filing is also important for private companies to safe guard the interests of the various stakeholders such as creditors, lending banks, vendors, minority shareholders and last but definitely not the least, the society at large. Such companies would benefit from an objective review and advise from a company secretary.

Private companies sooner or later metamorphose into public companies and listed entities. Adherence to good governance norms since the beginning will enable a smooth transition and serve as a good track record for such companies and would help in garnering investor's interest. This onerous responsibility is the prerogative of the company secretary.

1.3.1 Responsibility towards minority shareholders:

In contrast to public corporations, where shareholders owe each other no fiduciary duties, every shareholder in a closely held corporation must act in good faith and in the corporation's best interests. Also, unlike publically traded corporations, closely held corporations often provide shareholders with their sole source of income, through employment and dividends, and can often restrict its shareholders to their investment in it because of lack of trading market for its stock. In this context the services of a full time company secretary will enable the protection of minority shareholder's rights.

1.3.2 Responsibility towards lenders:

The presence of an in house compliance officer will entail protection to lenders by ensuring that the capital is utilized for the state purpose, is repaid on time and the lenders do not fall prey to any management fraud.

1.3.3 Responsibility towards employees:

All Companies public and private owe certain duties towards their employees, viz. rewarding them adequately

and providing them with a healthy work environment. The labor laws in our country also specify certain statutory responsibilities of companies towards their employees. This includes provision of bonus, leave, Provident fund, gratuity and other benefits. A company secretary having expert knowledge of the various labour legislations can also be called upon to contribute towards compliance with the applicable legal provisions.

1.3.4 Responsibility towards the society:

In 2009, the MCA issued voluntary guidelines for corporate social responsibility (CSR). The guidelines discuss key aspects of governance practices that business organizations need to focus on. The policy covers various aspects such as care of all stakeholders, ethical functioning, respect for workers' rights and welfare, respect for human rights, respect for environment and activities of social and inclusive development. The policy requires that business entities should provide an implementation strategy covering various projects.

Under Section 135 of the Companies Act, 2013, CSR has been made mandatory for certain classes of companies. Although the primary responsibility to fulfill this duty is assigned to a CSR committee, the Company Secretary being the compliance officer of the company has a key role to play in assisting the board in framing its CSR policy and ensuring its compliance. Keeping in mind the above responsibilities, it becomes imperative for a private company to have a full-time compliance officer who can discharge these duties satisfactorily. Considering the multifarious responsibilities and the need for good governance in a private company, there seems to be no just cause in excluding the appointment of a company secretary in such companies.

1.4 Pre-certification of e-forms by a Practicing Company Secretary:

Another area for deliberations for Company Secretaries is with respect to Precertification of e-forms by a Practicing Company Secretary which presently under the notified rules has been restricted to few forms. It is essential to deliberate on the rationale of introducing the process of precertification in the first place. The process of pre-certifications enabled verifying the correctness of documents before the same are filed with the registrar of companies. This measure had considerably reduced the MCA's burden to verify each and every form before taking the same on record in straight through process (STP). Although initially introduced to avoid delays in processes such as registration of charges among others, the benefit of precertification have been extended to almost all event based filings. Accordingly Form nos. 2, 3, 5, 8, 17, 18, 23, 24AB, 25C and 32 were required to be pre-certified under the Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2006. As the precertification process involved adequate due diligence on the part of the professionals it considerably improved the compliance and governance of public and private companies. However, while there appears to be no justification for restricting the precertification to few forms, the move might delay the process of MCA's service delivery as the forms would require through scrutiny by the ROC before taking on record the filing of such documents. Hence it is desirable to retain the procedure for precertification as currently exists.

1.5 Secretarial audit

The secretarial audit is an effective due diligence exercise for the prospective acquirer of a company or controlling

interest or a joint venture partner. It assures the owners that management and affairs of the company are being conducted in accordance with requirements of laws, and that the owners' stake is not being exposed to undue risk. It also ensures the management of a company that those who are charged with the duty and responsibility of compliance with the requirements of law are performing their duties competently, effectively and efficiently, so that the people in-charge of the day-to-day management of the company are not likely to be exposed to penal or other liability on account of non-compliance with law. The secretarial audit serves as an important tool to measure the levels of compliance and can assist regulators, stock exchanges, financial institutions and banks etc in their assessment of companies while providing comfort to investors about the safety of their investment. The audit also serves to detect unearthen fraudulent practices and also enable law-enforcing agencies to take timely corrective action by bringing to book the guilty.

The requirement of Secretarial audit has been specified under Section 204 of the Companies Act, 2013, which specifies that every listed company and every other company belonging to such class of companies as may be prescribed, shall annex its board report, a secretarial audit report to be given by a company secretary in practice, in such form as may be prescribed.

The "other class of companies" referred to above have been defined in the companies (appointment and remuneration of managerial personnel) rules, 2014, as follows:

- (a) Every public company having a paid-up share capital of fifty crore rupees or more; or
- (b) Every public company having a turnover of two hundred fifty crore rupees or more.

There appears to be no justification in excluding a Private Company out of the purview of Secretarial audit. While the need for secretarial audit can be linked to the scale of operations which can be assessed on the basis of key parameters such as paid-up capital, turnover, number of employees, outstanding borrowings etc, there appears to be no validation in exempting companies from the requirement of secretarial audit on the basis of their ownership. Considering that most of the exemptions available to private companies under the Companies Act, 1956, have been done away with under the Companies Act, 2013 it would be desirable to bring private companies also under the purview of secretarial audit. If restricted to only Public companies, less than 1% of Indian companies would be subject to secretarial audit, which is not in the larger interest of all the stake holders.

1.6 Certification of Annual Returns-some issues

The annual return is one of the key documents filed by every company with the MCA. It includes comprehensive information about the company's registered office, its shares, debentures, indebtedness, information about the key managerial personnel, among others.

Section 92(2) of the Companies Act, 2013, provides that the annual return, filed by a listed company or, by a company having such paid-up capital and turnover as may be prescribed, shall be certified by a Company Secretary in practice in the prescribed form, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this act. It has also been provided that except in the case of

small companies (companies having paid-up capital of less than rupees fifty lakhs or whose turnover does not exceed rupees two crores) and one person companies (OPC's), the annual return must be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

Rule 11 of the Companies (Management and Administration) Rules, 2014, provides that the annual return, filed by a listed company or a company having paid-up share capital of ten crore rupees or more or turnover of fifty crore rupees or more, shall be certified by a Company Secretary in practice. All companies are required to prepare their annual return in Form No. MGT-7 and where applicable, they are required to obtain a certification from a PCS in Form No. MGT-8.

To summarize the above provisions –

- a) In respect of companies having paid-up capital exceeding rupees ten crore but less than rupees fifty crore, or turnover of up to rupees fifty crore, the annual return must be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.
- b) In case of listed entities or those with a paid-up capital exceeding rupees ten crore or turnover exceeding rupees fifty crore, the annual return would require to be a certified by a company secretary in practice.

In the draft rules it was envisaged that companies with a paid-up capital exceeding rupees five crore or turnover exceeding rupees twenty five crore, would require to get their annual return certified by a company secretary in practice. This limit was increased two-fold when the rules were finally notified by the ministry. It is a pertinent question whether the companies which do not fall within the above bracket, are not required to take compliance seriously?

It may also be noted that since companies with a paid-up capital of less than fifty lakhs, are not subject to any audit in respect of its company law compliance, there is a chance of irregularities occurring in their management. Another vital aspect is that the draft rules required an extract of the annual return to be certified by a PCS and then circulated among various stakeholders. This requirement is missing under the notified rules and is definitely not in the public interest. The practicing professionals are also faced with a Catch -22 situation at the time of signing the annual return as they are faced with a dilemma between choosing to sign the return or not without having the option of putting their comments or reservations on the return while signing the same.

Representations made by ICSI to MCA

In view of the apparently relaxed regime of compliance made applicable to private companies, the Institute of Company Secretaries of India has made numerous strong representations to the MCA in the first week of April, 2014, to reconsider these rules, in the interests of both, good governance in the corporate sector as well as the profession of company secretaries.

The gist of the representations is as follows:

- Appointment of a company secretary be required by every company, whether public or private.
- Secretarial audit be made applicable at least to those companies which are subject to internal audit.
- The practice of pre-certification of e-forms be extended to all forms.
- Certification of annual return be made applicable to those companies with a paid-up capital exceeding rupees five crore or turnover exceeding rupees twenty five crore.

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