

## COMPANIES BILL 2012

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### Introduction:

The Companies Act, 2012 is a long overdue attempt of the Central Government to overhaul and replace the more than half a century old Companies Act, 1956 ("Act"). Currently, the Companies Bill, 2012 (the "Bill"), having sailed through the Lok Sabha on December 18, 2012 awaits the approval of the Rajya Sabha and Presidential assent.

The Bill assumes significance in light of the country's attempt to bridge the gap between the old and the new, trying to keep pace with globally accepted concepts in respect of corporate personality, where social responsibility is of paramount importance in an era where fraud and money laundering have become more sophisticated and challenging to monitor.

### Key features:

The Bill in its current version contains 29 chapters, 470 sections and 9 schedules and an in-depth discussion would run into pages. However, it is still possible to identify some key changes which are elucidated below:

#### Company and related concepts

- The 'One Person Company' concept i.e. a company with a single member introduced is a departure from the earlier concept of a company being a contract between at least two persons.
- Private companies may now have upto 200 members as against the existing 50.
- A private company which is a subsidiary of a public company is deemed to be a public company irrespective of its articles of association stating otherwise.
- For calculating the 50% threshold shareholding in respect of a holding company not only equity shareholding but preference shareholding would be taken into consideration.
- The concept of "Dormant Company" has been introduced. This provides recognition to all entities that are not specifically engaged in any business or conducting any operations.
- The financial year for all companies will mandatorily begin on April 01 of a calendar year and end on March 31 of the subsequent calendar year.

## **Directors**

- Every company would mandatorily have to appoint at least one director who has stayed in India for a total minimum period of 182 days in the previous calendar year.
- The terms "Independent Director" and "Key Managerial Personnel" have now been defined. Higher standards of corporate governance translate into specific conditions laid down for appointment of independent directors and maintenance of their independent status.
- An example of increase in the duties of a director and imposition of a greater degree of responsibility and liability on the management is carved out in laying down that a nominee director cannot be regarded as an independent director. The maximum number of directors has been increased from 12 to 15.
- The government may classify a class of companies wherein at least 1 woman director is to be mandatorily appointed.
- Every listed company must have at least one-third of the total number of directors as independent directors, while in case of unlisted public companies, the number may be specified by the government from time to time.
- The maximum number of directorships has been increased from 15 to 20 companies, of which not more than 10 companies can be public companies.
- A director absenting himself from all meetings of the Board held throughout a year with or without seeking a leave of absence from the Board stands disqualified as opposed to 3 meetings or a period of 3 months (whichever is more) as stated in the Act.
- The definition of the term "Officer in default" now includes persons authorised to file accounts by the Board, directors who become aware of any defaults and in respect of the issue or transfer of shares, the share transfer agents, registrars and merchant bankers to the issue or transfer.

## **Share Issuance**

- Provisions with regard to offer or invitation for subscription of securities on private placement basis have been revised to ensure better transparency and accountability.
- Except for sweat equity shares, issuing shares at a discount is prohibited.
- Reduction in share capital of a company would be subject to approval of the National Company Law Tribunal with additional requirements for public companies.

## **Mergers and Amalgamations**

- Chapter XV stipulates a comprehensive framework has for compromises, amalgamations and arrangements.
- An Indian company may be merged with a foreign company incorporated in a country which is included in a notification to that effect issued by the Central Government from time to time thereby making the Indian corporate environment more suitable and flexible for restructuring of trans-border group operations.

## **Audit**

- Several provisions regarding auditors and accounts have been introduced to ensure transparency.
- The definition of "related party", with reference to a company has been significantly broadened and it extends beyond the persons and entities covered under the existing provisions dealing with related party transactions. The definition encompasses (a) public companies in which a Director of a

Company is a director or holds more than 2% of the paid-up capital of the public company, (b) a body corporate whose Board of Directors, managing director or manager is accustomed to act on the advice of the Director or a Manager and (c) any person on whose advice a director or manager is accustomed to act.

## **Liquidation and Winding Up**

- The National Company Law Tribunal is authorised to wind up a company if the company:
  1. Cannot pay its debts; or
  2. Has passed a special resolution to that effect; or
  3. is acting against national and sovereign interest; or
  4. is a sick company and the National Company Law Tribunal has ordered the winding up of the company under the provisions of revival and rehabilitation of sick companies; or
  5. has been managed fraudulently or established for a fraudulent purpose; or
  6. has defaulted in filing documents with the Registrar of Companies for the preceding 5 consecutive financial years; or
  7. in the National Company Law Tribunal's opinion it is just and equitable for the company to be wound up.

## **Litigation and Investor Protection**

- The concept of "class action suits" allows certain members or depositors to initiate action on behalf of the other members or depositors against the company, its directors, auditors and/or advisors, experts, consultants.
- The National Company Law Tribunal and National Company Law Appellate Tribunal are to be established under the Bill for company related matters with the Supreme Court as the final court of appeal.
- The Central Government is empowered to establish Special Courts for the purposes of providing speedy trials including exercise of provisions of the Criminal Procedure Code, 1973.
- Insider trading has been prohibited by a director or key-management member, the non-compliance of which could be a criminal offence.
- The Serious Fraud Investigation Office has been given wider powers including the power to arrest in certain scenarios.
- The Bill now incorporates within its stringent provisions addressing fraudulent conduct and provides for significantly higher penalties in situations where fraud is proved for which the punishment may be from a minimum of 6 months to a maximum of 3 years.

## **Corporate Social Responsibility ("CSR")**

- The Bill also incorporates provisions regarding CSR whereby certain companies may be required to set up CSR Committees based on their turnover, profit, etc. and make efforts towards spending certain specified amounts on CSR activities and policy.

## **Summary**

There is no doubt that the Bill is a blended result of the Government's effort at introducing a modern corporate statute at par with the country's growing economy characterised by foreign investment and striking a balance with ethics of corporate governance. This is evident from the introduction of concepts such as "One Person

Company" and trans-border merger of companies. The introduction of the National Company Law Tribunal and National Company Law Appellate Tribunal are also conscious efforts to streamline and compartmentalise companies' related litigation. Perhaps provisions such as enhancing the time for disqualification of directors are inspired by practical issues such as large number of petitions/applications being filed before the Company Law Board in this regard, usually in case of private companies. Nevertheless, the effectiveness will be gauged only when the Bill becomes effective law (probably as an ordinance initially in case the Rajya Sabha approval and Presidential Assent remain pending).

**- *By Kailash Lad (Associate Partner), Rhishikesh Bidkar (Associate) and Param Sampat (Advocate)***

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- Editor : Mirat Patel

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