BOMBAY CHAMBER

Bombay Chamber of Commerce & Industry

PRESIDENT
BHARAT DOSHI
Chairman
Mahindra & Mahindra Financial Services Ltd.

BY SPEED POST

LA/2892 October 7, 2009

Mr. A.K. Singh
Joint Secretary
Lok Sabha Secretariat
(Standing Committee on Finance Branch)
Government of India
Parliament Secretariat
New Delhi – 110 001

Dear Mr. A.K. Singh,

**Standing Committee on Finance –
Examination of the Companies Bill, 2009**

I refer to your letter no.18/1/1/2009/FC dated September 23, 2009 inviting our updated views/suggestions on the Companies Bill, 2009 by October 5, 2009 for consideration of the Standing Committee on Finance. I thank you for granting us an extension in time for submitting our updated recommendations.

The Core Group constituted by the Bombay Chamber to review and update our earlier representation has completed its analysis and I am pleased to enclose for consideration of the members of the Standing Committee on Finance the updated detailed memorandum of the Bombay Chamber.

I also confirm that our members will be happy to appear before the Committee in this regard. Please do intimate to us the venue, date and time of the meeting.

Thanking you,

Yours sincerely,

Bharat Doshi

Bharat Doshi

Encl: Memorandum, in triplicate.

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MEMORANDUM ON THE COMPANIES BILL, 2009

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MEMORANDUM ON THE COMPANIES BILL, 2009

CHAPTER I : PRELIMINARY

1) Clause 2(1)(f) : Associate company :

In the definition of "associate company" the term *significant influence* has been explained to mean *"control of at least 26% of total voting power, or of business decisions under an agreement."* The voting power percentage of 26% is at variance with the percentage specified in the Accounting Standard 18 i.e. 20%. Further, a new criterion of control over business decisions has been introduced. This may result in a company being treated as an "associate", if it enjoys control over business decisions of another company through exercise of affirmative voting rights, though not holding the requisite voting power.

Suggestion :

Meaning of the term *significant influence* must be kept at par with that under the Accounting Standard 18.

2) Clause 2(1)(z) : Contributory :

The Bill defines the term *contributory* as a person liable to contribute towards the payment of company's debts in the event of its being wound up. However, the term *contributory* has also been used interchangeably with shareholders in the provisions relating to winding up.

Suggestion :

To the definition of contributory, the following words need to be added *"Notwithstanding anything contained in the Act, a person holding fully paid up shares in a company shall be considered a contributory but shall have no liabilities of a contributory under the Act whilst retaining all the rights of a contributory under the Act*."

3) Clause 2(1)(zo) : Financial Institution :

This is an inclusive definition and will create problem of interpretation.

Suggestion :

A definition similar to Section 4A of the 1956 Act should be included and it should cover Banks also.

4) Clause- 2(1)(zq) - Financial Year :

Under Clause 2(zq), a financial year is necessarily required to be a period from April 1 of a Calendar Year to March 31 of the subsequent Calendar Year. Currently, many companies, mainly multi-national companies, have the calendar year as their financial year.

Suggestion :

In our view, determination of financial year should be left to the concerned company, as is the case presently under the Act.

The multinational companies prefer to have calendar year as their Financial Year. This freedom should not be curtailed.

If at all this provision is retained, then the power in the proviso should be given to the Regional Director or to the Registrar of Companies instead of to the Tribunal, as this is not a judicial or quasi judicial matter.

If the concept of uniform Financial Year is retained in the Bill, then it is necessary to provide for a transitory provision, as to what should be done in respect of the then current Financial Year of the Company, if it is not ending on 31st March.

5) **Clause 2(1)(zs) : Free Reserves :**

The term "Free Reserves" is defined to mean such reserves which, as per latest Audited Balance Sheet of a Company are available for distribution as dividend.

Clause 110 of the Bill deals with declaration of dividend. Second proviso to Sub-section (1) of Section 110 provides that dividend can be declared out of accumulated profits transferred to reserves only in the event of inadequacy or absence of profits and that too with the consent of all the Directors and the approval of the Financial Institutions whose term loans are subsisting and thereafter in accordance with a Special Resolution passed at the Annual General Meeting of the Shareholders. Thus, in the case of a Company having adequate profit, the accumulated profits of previous years which are transferred to reserves cannot be utilized for paying dividend.

The definition of Free Reserves in Clause 2(zs) defines "Free Reserves" means such reserves as are available for distribution of dividend. That means, for the purpose of Clause 164 in computing the limits a Company making profit will have a lower base because its Free Reserves cannot be utilized for declaration of dividend.

Suggestion:

The definition of the term "Free Reserves" should be delinked from declaration of dividend since under the 1956 Act as also under the Companies Bill 2008, there are restrictions prescribed for declaration of dividend out of Free Reserves. The definition of the term "free reserves" which is contained in the Companies Acceptance of Deposit Rules 1975 should be suitably modified. We suggest clause 2(zs) should read as under :

"Free Reserves" includes the balance in the securities premium account and any other reserves shown or published in the balance sheet of the company and created by appropriation out of the profits of the company, but does not include the balance in any reserve created -

(i) for repayment of any future liability or for depreciation in assets or for bad debts;

(ii) by the revaluation of any assets of the company; "

6) Clause 2(1)(zza) : "Key managerial personnel" :

The Bill defines "key managerial personnel" as the Managing Director, the Chief Executive Officer or the Manager and where there is no Managing Director or Manager, a whole-time director or directors, the Company Secretary and the Chief Financial Officer. It may be noted that whole-time directors of a company also enjoy substantial powers of management even when such company has a Managing Director/Manager, and therefore should be considered as Key managerial personnel.

Suggestion :

Whole-time directors should be recognised as key managerial personnel irrespective of whether a company has Managing Director/Manager.

7) **Clause 2(1)(zzs) : Public Company :**

The Bill defines the term *public company* as including such private company which is a subsidiary of a company other than a private company. This would mean that a private company that is subsidiary of `One Person Company' would be treated as a public company. This does not seem to be the intent of the Bill. This aspect may be corrected.

Suggestion :

The definition of public company in the Bill may be amended to provide that it would also exclude One Person Company.

8) **Clause 2(1)(zzv) : Red herring prospectus :**

The Bill defines "red herring prospectus" as a prospectus which does not include complete particulars of the quantum or price of the securities or class of securities included therein. However, under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 a red herring prospectus is required to specify the class of securities offered. The definition of red herring prospectus should be consistent with the definition of the term under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Suggestion :

The definition of red herring prospectus should be amended to bring the same in line with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

9) 2(1)(zzy) : Related Party :

Related Party definition in Clause 2(1)(zzy) includes a public company in which a director or a manager is a director or holds more than two per cent of its share capital. The rationale for including such a public company where there is common directorship is not clear. The related party definition is a combination of the concept of a 'related party' as recognized under Accounting Standard 18 and entities covered by Section 297 of the Act, relating to contracts in which directors are interested. Merely because a director is a director of another public company, it may not be correct to hold that such a director would be interested in a contract with such public company and consequently treat such contract as a related party contract. This is more so in case of a listed company, where such director is an independent director. Though through explanation in Sub Clause (1) to Clause 166, an exemption is sought to be given in respect of the transactions which are on arms' length basis, the concept of arms length basis is a very subjective issue and would create lot of practical difficulties. In our view, directorship coupled with shareholding of at least 2% should be the criterion for treating a public company as a related party.

Suggestion :

In sub-clause (iv) of Clause 2(1)(zzy) the word `and' be substituted for the word `or' between the word 'director' and the word 'holds'.

10) Clause 2(1)(zzz) : Definition of the term `relative' :

There cannot be any of the relationships mentioned in this definition which is by marriage except spouse.

Suggestion :

The word "marriage" in this definition appears to be redundant and should be deleted.

11) Clause 2(1)(zzzi) : Subsidiary Company :

The definition of “subsidiary” in the Bill does not cover a company in which voting power is held by a (holding) company and / or two or more of its subsidiaries taken together. This provision exists under the Act under Section 4(3)(b)(ii). This is an important provision and should be included in the Bill.

Suggestion :

The definition of subsidiary in the Bill should be modified to include a company in which the holding company holds voting power with / through two or more subsidiary companies as also the other carve outs as currently provided under Section 4(3) of the Act.

12) Clause 2 (zzzi) – “Subsidiary Company” :

Under Section 4(5) of the 1956 Act, for the purpose of definition of “subsidiary” a body corporate is deemed to be a “Company”. This provision is omitted. How will a foreign subsidiary or a foreign holding company be considered to be a subsidiary or a holding company”?

Suggestion:

A provision similar to Section 4(5) of the 1956 Act, be inserted in Section 2 (zzzi).

13) Clause 3(1)(a) & 165 : Minimum number of members for wholly owned subsidiaries:

Under the Bill, a public company is required to have at least 7 members. Also, a subsidiary of a public company is a public company and is therefore required to have at least 7 members. In case of a wholly owned subsidiary of a public company, it therefore becomes necessary for such holding company to find six other nominees to hold shares in order to comply with the above requirement of having at least 7 members. This aspect of nominee shareholders is covered under proviso to Clause 165(1).

Also, in case of such wholly-owned subsidiaries, since the holding company is the only shareholder, the requirement of holding of general meetings including annual general meetings should be done away with. These companies should be allowed to make decisions by way of passing written resolutions.

Suggestions :

1) In our view, the requirement of having nominee shareholders in a wholly owned subsidiary merely to comply with the requirement of having minimum members, is unnecessary and should be done away with. However, a provision can be added that such 100% subsidiary of a company shall not be deemed to be a one-person company.

2) Proviso to Clause 165(1) should be deleted and Clause 3(1)(a) should be amended to provide a carve out from the minimum number of members requirement in case of wholly owned subsidiaries of public limited companies. Clause 85 should be amended to allow dispensing with the requirement of holding general meetings including annual general meetings in case of companies, which are wholly owned subsidiaries.

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CHAPTER II : INCORPORATION OF COMPANIES

14) Clause 9: Effect of Memorandum and Articles:

The decision of the Supreme Court of India in the case of Mr.V.B. Rangaraj Vs. V.B. Gopala Krishnan (AIR 1992 SC 453) has created tremendous difficulty in implementing agreements *inter se* between shareholders. For example, a contract between two parties say Mr. A and Mr.B giving preemption right or right of first refusal over the shares held by the other even in a listed Company, has become unenforceable due to the said judgement. Such contract, if not reflected in the Articles of Association should not bind the Company, but to make it unenforceable as between the two contracting parties is contrary to the provisions of the Contracts Act.

Suggestion:

Add the following as Sub-clause (3) in Clause 9:

"(3) Any contract or arrangement between the shareholders including in respect of voting rights, transfer of shares, management of the Company, shall not become non-enforceable as a contract inter-se between the parties to such contract merely because it is not mentioned in the Company's Articles of Association, even though the same shall not bind the Company if it is not contained in the Company's Articles of Association."

15) Clause 12 : Alteration of Memorandum of Association (including Capital clause) :

Under Clause 12 (1) it is proposed to provide that all the provisions in the Memorandum of Association can be amended only by a Special Resolution. Under the 1956 Act, amendment to Capital Clause does not require a Special Resolution. Apart from this, Clause 55(1)(a) directly conflicts with Clause 12(1). Under Clause 55(1)(a) authorised share capital can be increased by an ordinary resolution. This is justified because if Special Resolution is provided-for, then, even a Rights Issue under Clause 56 (1)(a) can be blocked if authorised Share Capital cannot be increased due to 25.01 percentage shares vote against.

Suggestions:

Clause 12(1) should be amended to read as under:
"12(1) A Company may, by a special resolution, and after complying with the procedure specified in this section, alter the provisions of its Memorandum referred to in Clauses (a) to (d) of Sub Section (1) of Section 5."

16) Clause 19 : Service of documents :

A. Clause 19 provides that all shareholders' communications be sent by registered post or by delivering at his office or address by such electronic or other mode as may be prescribed.

Presently in terms of Section 53(1) of the Companies Act, 1956, a document may be served by the company on any member by sending it by post to him.

The requirement to send communications to members only by registered post as provided in Clause 19 will not only be costly but also impractical for companies with large shareholder base, as documents to be sent to members would include annual reports, halfyearly results, dividend warrants and other investor related correspondence.

Further, Section 4 of Information Technology Act, 2004 provides that a printed document may be provided in electronic form. It is noteworthy that the provisions of the said Section 4 have overriding effect on any other law.

Suggestion :

The current provisions of sending shareholders' communications by post should be continued. Since the Bill recognises electronic mode of communication in various clauses, companies with large shareholder base should be permitted to adopt provisions similar to the UK Act and website communication should suffice if an opportunity to shareholders to 'opt out' is given. Accordingly, suitable provisions should be made in the Bill.

If this suggestion is favourably considered, it would enable companies sending annual report every year to shareholders to reduce usage of natural resources namely fossil fuel and forest cover and thus aiding to measures controlling global warming.

B. Clause 19(2) :

Clause 19(2) regarding modes for services of documents on any member of a company does not include provisions existing under Section 53(3) of the Act relating to service of documents by advertisement in newspapers. This provision should be reinstated in the Act and should not be prescribed by Rules.

Suggestion :

Clause 19(2) should be amended to facilitate service of documents by companies through advertisement in the newspaper.

CHAPTER III : PROSPECTUS AND ALLOTMENT OF SECURITIES

17) Clause 22 : Prospectus and allotment of securities

In Clause 22 of the Bill, SEBI and the Central Government, both have powers over certain matters including those relating to prospectus, return of allotment, issue of shares and redemption of preference shares. This provision is similar to the existing provision under Section 55A of the Act. In our view, in respect of listed companies, the powers to regulate all procedural aspects in relation to the issue of prospectus, issue of securities, etc. should exclusively vest with SEBI, administered through regulations and guidelines formulated by SEBI under powers given to SEBI under the SEBI Act, 1992. Most of these matters over which there is an overlap, are regulated by separate guidelines issued by SEBI and therefore, it will be more efficient if only SEBI is responsible for regulating these matters.

Suggestion :

In view of this, the Bill should not contain any procedural aspects relating to issue of securities by listed companies and should only lay down principles of law and the procedural aspects could be administered by SEBI e.g. Clause 23(1) of the Bill with respect to contents of Prospectus, Clause 25 with respect to advertisement of Prospectus, etc.

18) Clause 23(1)(b)(iii) : Matters to be stated in prospectus :

Clause 23(1)(b)(iii) of the Bill states that every prospectus issued by or on behalf of a public company shall set out "reports made by the auditors upon the profits and losses of the business of the company for five financial years, and assets and liabilities of its business on the last date before the issue of prospectus in the prescribed manner". It would be extremely impractical for an issuer company to draw up its Balance Sheet until the last date before the issue of the prospectus and there will always be a time gap between the date of the balance sheet and the date of issue of prospectus.

Suggestion :

The Bill should provide that the balance sheet should be recent and a maximum time gap between the date of the balance sheet and the date of issue of the prospectus should be provided. On the lines of SEBI (Issue of Capital and Disclosure requirements) Regulations, 2009, the Auditors Reports should be based on the balance sheet which should not be more than 6 months old as at the date of the prospectus.

19) Clause 24(3) :

Clause 24(3) provides that if a company fails to allot its securities within seventy days of receipt of application money, it shall within eight days repay such share application money. However, there is no provision for payment of interest for failure to repay the application money within the prescribed eight days period.

Suggestion :

Clause 24(3) should be amended to provide for interest on the share application money remaining unpaid beyond the above eight-day period.

20) Clause 29 : Criminal liability for misstatements in prospectus :

In Clause 29 of the Bill, criminal liability is sought to be affixed on to persons who authorized the issue of the prospectus, if such prospectus includes any statement which is untrue or misleading or where such inclusion or omission is *likely to mislead*. The phrase “likely to mislead” is, in our view, very subjective in nature and can be open to wide interpretation.

Suggestion :

The existing criteria under Section 63 of the Act for fixing criminal liability should be retained in Clause 29 of the Bill.

CHAPTER IV : SHARE CAPITAL AND DEBENTURES

21) Clause 37 : Kinds of share capital :

(A) In the Bill, the provision relating to issue of shares with differential rights as to dividend, voting or otherwise as currently provided under Section 86(a)(ii) of the Act has been done away with. These provisions were introduced in the Companies Act in the year 2000 with a view to enabling companies which have a certain consistent track record of profitability to issue equity shares with differential rights as to voting or dividend. This is a very progressive provision which enabled companies to raise capital without diluting voting powers held by the promoter in such companies. It also benefited financial and other investors who may not be interested in the management/voting rights in the company and are only focused on higher and secured returns from their investments. These kind of shares are also popular internationally.

Suggestion :

The provisions relating to issue of shares with differential rights should be retained in the Act. The eligibility criteria for companies which are eligible to issue such shares may be made stricter.

(B) The clause relating to participating preference shares as are currently provided in explanation to Section 85(1) of the Act has been done away with.

Suggestion :

This provision which provides flexibility to corporates to issue participating shares should be retained.

22) (A) Clause 41 : Voting rights :

Under explanation to Section 87(2)(a) of the Act, the rights of preference shareholders are deemed to be directly affected by a resolution for repayment or reduction of share capital of the company, thereby requiring consent of the preference shareholder. However, under Clause 41(2) of the Bill, preference shareholders have a right to vote on a resolution for reduction of preference capital. Since the reduction of equity share capital directly affects the rights of preference shareholders, their consent should be necessary for such resolution.

Suggestion :

It should be clarified in Clause 41(2) that preference shareholders will have a right to vote on resolution for reduction of share capital, both equity and preference.

(B) Clause 41: Voting Rights:

This clause 41 corresponds to section 87 of the 1956 Act. As provided in Section 90(2) of the 1956 Act, this provision is not applicable to a private company. However, clause 41 of the Bill does not make any distinction between a public company and a private company.

A private limited company should be given flexibility in applying this provision as is available to it under the 1956 Act. Clause 41 of the Bill, inter alia, gives power to the Central Government to notify that certain provisions of the Act will not apply to a private company. It is desirable that flexibility under clause 41 should be given to a private limited company under the Act itself by specific legislative provision.

Suggestion:

It should be provided in Clause 41 that the same shall not apply to a private limited company.

23) Clause 42 : Variation of shareholders' rights :

In Clause 42(2), the time within which the dissentient shareholders can object for variation of rights is not captured.

Suggestion :

The time period may be captured on the lines of existing Section 107(2) of the Act.

24) Clause 49 : Issue and redemption of preference shares :

Clause 49 of the Bill provides for issue of preference shares for a period exceeding 20 years for infrastructure projects. However, the recommendation made by the Irani Committee that dividend payable on such preference shares should be linked to some market benchmark or should be reset periodically, has not been provided for in Clause 49.

Suggestions :

(A) In respect of preference shares which are redeemable after 20 years, the provision should be inserted to provide that dividend on such preference shares will be linked to certain market benchmark or reset periodically, in such a manner, as may be prescribed.

(B) The Bill should provide usage of Capital Redemption Reserve similar to the existing provisions contained in section 80(5) of 1956 Act.

25) Clause 53 : Transferability of Shares

Under Clause 53 of the Bill, the provision regarding free transferability of shares for a public company as currently appearing in Section 111(A) has been done away with. The above provision seems to have been omitted in the Bill in order to provide the ability to public companies to impose restrictions on transfer of its shares. The Dr. Irani Committee had made a recommendation to allow JV companies to include in its Articles provisions from the JV Agreement relating to restrictions on transfer of shares of such JV companies. However, deletion of the provision on free transferability of shares of a public limited company from the Companies Act, would result in a change in the basic character of a public company, which is that its shares are freely transferable. This is one of the important factors which differentiate a public company from a private company. Therefore, in our view, this provision should be specifically stated as is the case under the Act. However, in respect of JV companies, a carve-out should be provided. This can be achieved by allowing public companies to impose restrictions on transfer of its shares if such restrictions are contractually agreed upon amongst the members of such company.

Suggestion :

The provision relating the free transferability of shares of a public company should be introduced in Clause 53, but companies may be allowed to impose such restrictions if contractually agreed upon amongst its members.

26) Clause 53: Rectification of Register of Members

This clause provides for jurisdiction of the Tribunal to order rectification of Register of Members. It further provides that in respect of foreign members or debenture holders, residing outside India, the jurisdiction will be that of a Competent Court outside India as may be specified by the Central Government by notification. That means that the rectification ordered by the Tribunal will not apply to a foreigner who is a shareholder but is not a member as transfer of shares in his favour is rejected, then he is not a "foreign member" and therefore he cannot avail of this provision.

Secondly, it is not clear whether an Indian citizen residing outside India could be considered to be a foreign member.

It is not clear as to how Government of India can confer jurisdiction on a court outside India to administer laws of India.

The Notes on clauses do not even refer to this provision. There is no clarity as to how Government of India is going to confer jurisdiction on a court of another country.

The situs of the Shares is in the Register of Member. The Register of Members is required to be maintained at the registered office of the Company. Therefore, situs of the Shares is where the registered office of the Company is located. How can a foreign court/tribunal have jurisdiction in respect of the shares the situs of which is in India?

Suggestion :

The following words be deleted from clause 53(1): "or to a competent court outside India specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India".

27) Clause 56 : Further issue of share capital :

Currently under the Act, there is no specific provision on issue of bonus shares by companies. The only provision under the Act in this regard is about the sources from which bonus shares can be issued, namely free reserves, Capital Redemption Reserve and Share Premium Account.

Suggestion :

In our view, a specific enabling provision should be introduced in the bill for issue of bonus shares and it should be clarified that bonus shares can be issued out of free reserves created from the profits of a company and from the Share Premium Account but not from Asset Revaluation Reserve.

28) Clause 56(1)(c) : Further issue of share capital :

Clause 56(1)(c), as it is currently drafted, it appears that a preferential issue of shares is permitted only to persons other than the existing shareholders of the company. Under Section 81(1A) of the Act, preferential issue is specifically permitted to be made to persons including existing shareholders of the company, e.g., promoters.

Suggestion :

The preferential issue should be permitted to existing shareholders also. Therefore, Clause 56(1)(c) of the Bill should be amended appropriately.

29) Clause 59 : Reduction of Capital

Even in the 1956 Act, there is no provision for giving notice to SEBI for reduction of capital or for any scheme of arrangement under section 391. Under the Listing Agreements, necessary intimations are required to be given to the Stock Exchanges. Apart from this, reduction of capital and scheme of arrangement will be subject to sanction by the Tribunal. No useful purpose will be served by involving SEBI.

Suggestion :

The requirement of giving notice to SEBI in Clause 59 as also in Clause 201 (Scheme of Arrangement) should be deleted. If at all requirement of giving notice to SEBI and other authorities is retained in Clause 59, the time limit of 3 months prescribed in sub-clause (2) of Clause 59 be reduced from 3 months to 1 month.

30) Clause 60 : Restrictions on purchase by company or giving of loans by it for purchase of its shares :

Clause 60 of the Bill, which is similar to Section 77 of the Act, *inter alia* prohibits a public company from directly or indirectly, including by way of providing of security, providing any financial assistance to any person, for the purpose of or in connection with a purchase or subscription to its own shares. This provision prohibits undertaking of leveraged buy-outs in India where an investor buys the shares of a company, where such investment is funded from money borrowed on the security of the assets of the investee company as such transactions may be considered to be in violation of Clause 60 of the Bill. Internationally, leveraged buy-outs are a popular means of acquisition of companies with wide benefits to the acquirer and the investee company and its other shareholders. The Bill should have provisions facilitating such leveraged buy-out transactions of Indian companies.

Suggestion :

Clause 60 of the Bill should be amended to facilitate leveraged buy-out transactions in Indian companies by providing a specific carve out from the provisions of this clause in respect of such transactions.

31) Clause 63(c) : Prohibition for buy-back of securities

Clause 63(c) prohibits buy-back of securities if there is any default in repayment of deposits etc. It is not clear how long this disqualification would continue. In the corresponding existing provision contained in section 77B(c) of the 1956 Act it is clearly mentioned that this restriction would apply so long as such default is subsisting.

Suggestion :

In Clause 63(c) add the following words : “and such default is subsisting”.

32) Clause 64(3) : Debentures :

In clause 64(3) of the Bill, only certain classes of companies which would be prescribed, would be permitted to issue secured debentures. A reference to “certain classes of companies” used in the clause is not clear.

Suggestion :

All companies should be permitted to issue secured debentures.

33) Clause 64 : Debentures

Sub-clause 4 of clause 64 refers to creation of debenture redemption reserve account (DRR). The existing section 117C provides for creation of DRR of **adequate amount.** There is no such provision in Clause 64. Presently, the adequacy of DRR is being prescribed by circular of DCA

Suggestion :

In Sub-clause 13 of Clause 64 after the word “thereof’ add the words “the quantum of DRR to be created”.

34) Clause 65 : Nominations of shares or debentures :

This clause 65 corresponds to Section 109A of the 1956 Act. Though it is identical to Section109A, this clause requires reconsideration.

Under the law, nominee is merely a trustee to receive from banks/Insurance Company/Share Issuing Company. Nomination is not intended to be a transfer or transmission of beneficial interest. Section 39 of the Insurance Act, 1938 provides for nomination. Upon death of the person whose life is insured the amount covered by the policy is payable to the nominee. The courts have held that this provision is not intended to alter the course of succession under the law. Thus, nominee merely receives as a trustee and the insurance company is discharged upon payment to a nominee. The person who inherits such insurance money either under the intestate succession or under a Will can claim this amount from the nominee. In Sarbatti Devi Vs. Usha Devi (AIR 1984 SC) the Supreme Court of India has held that a mere nomination made under section 39 of the Insurance Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured.

However, the wordings of clause 65 of the Companies Bill, 2008 suggests that upon death of the Shareholder, the nominee shall become entitled to all the rights in the shares to the exclusion of all other persons. Thus, if a shareholder makes an nomination under this clause 65 and if he subsequently bequeaths these shares under a Will to another person without cancelling the nomination, then who would be entitled to the shares? Sub- clause (3) of Clause 65 of the Bill states : “Notwithstanding anything contained in any other law for the time being in force or in any disposition , whether testamentary or otherwise,….” This is a non-obstante clause.

The Notes on Clauses on this clause 65 clearly states that this section seeks to provide that every shareholder may appoint a nominee who shall be the Owner of the Shares in the event of death of the shareholder unless the nomination is varied or cancelled.

This entire provision is totally contrary to the concept of nomination and will lead to unnecessary litigation. It should be brought in line with Section 39 of the Insurance Act, 1938 and it should be clearly provided that the nomination shall not in any manner prejudice the right of any person to receive the shares/debentures under any law of intestate succession or testate succession.

The wordings of clause 65 of the Bill and of Section 109A of the 1956 Act are identical to Section 45(ZA) of the Banking Regulation Act, 1949. As against this, the wordings of Regulation 29A of the SEBI (Mutual Funds) Regulations 1996 are similar to Section 39 of the Insurance Act, 1938.

In clause 65 a provision similar to Section 8(2) of the Government Savings Certificates Act, 1959 should be added . The said Section 8(2) reads as under:

"(2) Nothing in sub-section (1) shall be deemed to preclude any executor or administrator or other representative of a deceased holder of a sayings certificate from recovering from the person receiving the same under section 7 the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration."

This matter also needs to be referred to the Law Commission as different wordings for provisions relating to nomination in various legislations create confusion about the concept of nomination.

Suggestion :

From sub clause (3) of Clause 65 delete the following words :

"Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise”.

Add the following as a new sub clause immediately after sub clause (3) :

"Nothing in sub-section (3) shall be deemed to preclude any executor or administrator or other representative of a deceased holder of shares or debentures from recovering from the person receiving the same under sub-section (3)".

We further suggest that the nomination facility under clause 65 should be extended to all securities instead of restricting it to shares and debentures.

CHAPTER V : ACCEPTANCE OF DEPOSITS BY COMPANIES

35) Clause 66 : Prohibition on acceptance of deposits from public

Clause 66 of the Bill prohibits companies from inviting, accepting or renewing deposits from public except from its members. Dr. Irani Committee in its report had decided against complete prohibition on acceptance of deposits from the public and had instead recommended stricter norms for acceptance of public deposits such as providing insurance in respect of such deposits, which has been captured under the Bill. Public deposits are an important source of raising funds for the companies and the same should be continued.

Suggestion :

The companies may be permitted to accept deposit from members of the public other than shareholders. The Bill may provide for stricter norms for such acceptance to protect the investors' interest. It may be clarified that inter-corporate deposits will not constitute public deposit, as is currently the case.

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CHAPTER VI : REGISTRATION OF CHARGES

36) Clause 74 : Company to report satisfaction of charge :

Suggestion :

The provisions contained in Section 138(4) of the Companies Act, 1956 should be introduced in the Bill.

Similarly, the provisions contained in section 138(5) of the 1956 Act should also be introduced in the Bill.

We also suggest that the provisions contained in section 139 of the 1956 Act should be retained in the Bill.

CHAPTER VII : MANAGEMENT AND ADMINISTRATION

37) Clause 82 : Annual Return :

The provisions contained in Directors Report should be sufficient to give information to the Shareholders. Annual Return, in any event is a public document. There is no need for annexing extract of annual return to the Boards Report. This will unnecessarily increase the contents of Annual Report without serving any useful purpose.

Suggestion :

We, therefore, suggest deletion of sub-clause (2) of Clause 82.

38) Clause 85 : Annual General meeting :

The expression “National Holiday” used in sub-clause (2) should be clearly defined since it is neither defined in the Act nor in the General Clauses Act.

39) Clause 97: Voting through electronic means:

This section gives right to a member to vote at a meeting by electronic means unless AOA otherwise provide . That means all companies will have to amend their AOA if they do not intend to provide electronic voting.

It is not clear what is intended by this provision. Even Notes on Clauses merely repeat the wordings of clause 97.

The wordings suggest that a member present at a meeting may vote by electronic means. This is not practical. In parliamentary election a voter’s identity is first established and then there is secret ballot . Secondly, there is only one vote per person. But in a Company meeting the signature of the member is verified after ballot and each member has different number of votes and hence his identity has to be known to the scrutineers.

Whether he uses a paper to mark his votes or uses an electronic machine, there is no saving of time. On the contrary, before he votes electronically his signature will have to be first verified at the meeting itself. Now imagine a poll at a meeting of a Company which has two /three lacs shareholders out of which say 1000 are present in person or by proxy. How will you verify their signatures while the meeting is going on in a public auditorium?

If intention is to give this right to people who are not physically present at the meeting then the question is when will they vote? During the meeting, before the meeting or after meeting? What happens if an amendment is moved at the meeting? How is electronic voting different from Postal Ballot?

The way Clause 97 is worded would make it compulsory for a company to provide the facility of electronic voting unless the company provides otherwise by amending its Articles.

Suggestion :

We suggest that instead of negative wordings, it should be provided that if the Articles of Association of the company so provide, a member may exercise his vote at a meeting by electronic means in the manner as may be prescribed.

40) Clause 99 : Postal Ballot :

Section 192A of the 1956 Act provides for postal ballot only in respect of a listed public company. By clause 99 of the Bill the postal ballot is sought to be made compulsory even for unlisted companies. It should be provided in clause 99 that the requirement of postal ballot would be applicable only if **shares** of the company are listed on stock exchanges. For this purpose, the reference should be to shares and not to securities. There are companies whose shares are not listed but debentures are listed. In case of these companies also, postal ballot should not be made compulsory.

Suggestions :

(1) Clause 99 should be made applicable only if the company's **shares** are listed on stock exchange.

(2) If at all it is proposed to make Clause 99 applicable to unlisted companies, it should apply only to such unlisted companies where the number of shareholders is more than 500.

41) Clause 104 : Resolutions requiring special notice :

Clause 104 of the Bill relating to giving of Special Notice, whenever required under the Act or the Articles, does not prescribe the number of members by whom such notice is to be given and states that such number would be prescribed by rules.

Suggestion :

This being a substantive provision, it should be included in the Act itself on the lines of Clause 100 of the Bill.

42) Clause 107 : Minutes of Board Meeting :

Sub-clause (3) requires recording in the minutes of the Board Meeting all appointments of **officers** made at the meeting of the Board of Directors. Since the term \`officers' is not defined in the Bill, but the term \`Key Managerial Personnel' has been defined and used in various clauses, it would be appropriate to refer to appointment of Key Managerial Personnel in sub-clause (3).

Suggestion :

In clause 107(3) the word 'officers' be replaced by the words 'Key Managerial Personnel'.

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CHAPTER : VIII : DECLARATION AND PAYMENT OF DIVIDEND

43) Clause 110 : Declaration of Dividend :

Suggestion :

In the 2nd proviso change should be made to prescribe presence of "all directors present at such meeting" in place of "all directors".

Attention is invited to Clause 174 (5).

44) Clause 110(3) : Declaration of Dividend :

Clause 110(3) permits the Board of Directors to declare interim dividend from the profits of the company only for that part of the year. A company may have brought forward balance in its Profit & Loss Account and may wish to declare interim dividend from out of such profits also.

Suggestion :

Clause 110(3) of the Bill should be amended to provide that interim dividend can be declared out of surplus in the profit and loss account, including profits of the financial year in which such interim dividend is sought to be declared.

45) Clause 110 (6) : Interim Dividend

The Company should be free to declare interim dividend even out of the balance in the Profit and Loss Account. The Clause as worded suggests that interim dividend can be declared only out of the profits of the company for the current year.

Suggestion :

The words “for part of the year” in Clause 110 (3) be deleted.

CHAPTER IX : ACCOUNTS OF COMPANIES

46) Clause 116(6) : Books of accounts, etc., to be kept by company :

The Bill while providing for criminal liability for non-compliance under this clause has omitted the defence available under the provisos to existing section 209(5) of the Act, which provides that competent and reliable person/s were charged with the duty or that default was not committed wilfully.

Suggestion :

The relevant provision under section 209(5) of the Act should be incorporated in this clause.

47) Clause 117(1) – Financial Statement :

The term “Financial Statement” has been defined in Clause 2(zp).

The term “financial statement” includes profit and loss account which cannot be as at the end of a financial year. Profit & Loss Account is for the financial year. This is correctly stated in Clause 2(zp).

Suggestion:

In Clause 117(1) delete the words “as at the end of the financial year”.

48) Clause 120 - Financial Statement, Board’s Report, etc.

The present wording of Clause 120(i) suggests that the Chief Executive Officer (CEO) has to sign financial statements if he is on the Board of Directors. If CEO is on the Board of Directors he would become a Managing Director or atleast a Whole-time Director. We suggest that CEO should sign financial statement even if he not a director of the company.

Suggestion :

The wordings of sub-clause (i) clause 120 should be changed as under :

"... or by 2 directors out of which one shall be Managing Director, if any, and the Chief Executive Officer, if any...".

49) Clause 121 : Right of member to copies of audited balance sheet:

UK Companies Act, 2006 vide Section 1143 read with Schedule 5, facilitates communication by posting on the company's official website. Companies are required to provide an opportunity to shareholder to 'opt out' of website communications every year. Those shareholders not opting out would be deemed to have agreed for website communications and the company is not required to send individual communications to such shareholders.

The provision to compulsorily send hard copies of Annual Reports to all the shareholders should be done away with. The company should be required only to send hard copy of the notice convening AGM and it should contain a note that the Annual Report of the company has been uploaded of the website of the company. Any member requiring a hard copy of the Annual report can write to the company and the company shall, within 48 hours of the receipt of such demand, send by post or hand delivery the hard copy of Annual Report to such member.

In addition to this, a provision be also made that the company shall provide hard copy of the Annual Report to the member who has given a mandate in writing to the company to do so. Such mandate will hold good till the member ceases to be a member or withdraws or modifies the mandate.

Suggestion :

A provision be made in Clause 121 that hard copy of the Annual Report will be required to be given to a member on his demanding the same or if he has given a mandate to the company to that effect.

CHAPTER X : AUDIT & AUDITORS

50) Clause 123(2) : Appointment of Auditors :

The words “Company owned and controlled **directly or indirectly,** by the Central Government” will create difficulty in interpreting this section as indirect control is a vague concept.

Suggestion:

Delete the words “directly or indirectly from Clause 123(2)”.

51) Clause 123(9) : Appointment of Auditors :

The Auditor of the Company must be suitably protected against any pressure or harassment from the promoters. At the same time the shareholders should have power to recall / remove the auditors by passing a Special Resolution as provided in Clause 123(9). This Clause provides for giving reasonable opportunity of being heard to the auditor. However, the mechanism which exists in the 1956 Act to enable the auditor to make effective representation on the topic of his removal is sought to be done away with this Bill. For example, there is no provision about circulating auditors representation to the Shareholders. This sounds very unreasonable.

Suggestion:

Provisions similar to Sections 225(2) and (3) of the 1956 Act should be included in this Clause or alternatively the Clause should be amended to provide for compliance with the procedure to be prescribed for this purpose.

52) Clause 124(3)(a) : Eligibility, qualifications and disqualifications of Auditors :

By this provision it is sought to provide that an Auditor of a Company cannot be a body corporate. Under Section 3 of the Limited Liability Partnership Act it is provided that a limited liability partnership is a body corporate. This means that a firm of Chartered Accountants cannot be a Limited Liability Partnership.

Suggestion:

Clause 124(3)(a) should read "a body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2009".

53) Clause 124(3)(d)(ii) : Eligibility, qualifications and disqualifications of Auditors :

A person will not be qualified to be appointed as an Auditor of a Company if he is indebted to the company, its subsidiary, its holding or associate company or a subsidiary of such holding company. Hence even if a person is indebted even inadvertently for a small amount, he will be disqualified. Similarly a relative of a partner of the firm of Auditors may inadvertently be indebted to, say, a bank as a credit card holder in the ordinary course of credit card business, and this may result in the Firm getting disqualified from acting as the Auditor of that bank. A designated relative may deliberately do it to harass the Auditor and the Auditors firm has have no control over this situation.

Suggestion:

A limit should be prescribed and indebtedness over prescribed amount only should disqualify a person from being appointed as Auditor. This can be done by Rules and therefore Clause 124(3)(d)(ii) should read as under:

“ (ii) is indebted to the company or its subsidiaries or its holding or associate company or a subsidiary or such holding company in excess of such amount as may be prescribed. ”

54) Clause 126(1) : Powers and duties of auditors and Auditing Standards :

This sub-section specifies that the Auditor has a right of access to the books of accounts and vouchers of the Company at the Registered Office of the Company or at any other place **in India.**

Suggestion:

The right of access should not be restricted to places “in India”. The words **“in India”** should be deleted as a number of companies now have branches/ offices/subsidiaries outside India.

55) Clause 126(2) : Powers and duties of auditors and Auditing Standards :

This Clause proposes that the Auditor should “report to the members of the Company on the accounts examined by him and on every financial statement **or other documents which are required by or under this Act to be laid before the Company in General Meeting”.**

Suggestion:

The Auditors Report should cover only Accounts & Financial Statement as the other documents which are required by or under this Act to be laid before the Company in General Meeting contain matters which may not necessarily be of accounting or financial matters. Hence the words “**or other documents”** should be deleted on the two places where they appear in this Clause.

Alternatively, it should read “report to the members of the Company on the accounts examined by him and on every financial information of the Company contained in other documents which are required by or under this Act to be laid before the company in General Meeting”.

56) Clause 126(3)(e): Powers and duties of auditors and Auditing Standards :

In Clause 126(3)(e), reference to Auditing Standards may be deleted since the financial standards cannot comply with the auditing standards.

Suggestion :

Clause 126(3)(e) requires the auditors to state in their report that in their opinion, the financial statements comply with the accounting standards and the auditing standards. The financial statements can only comply with accounting standards. The auditing standards have to be complied with by the auditors.

Suggestion :

Delete the words “and the auditing standards” from the said clause (e). This requirement may be added in sub-clause (9) of clause 126 as under :

The auditor shall state in the audit report that in auditing the accounts of the company they have complied with the auditing standards.

Auditors should state in their report whether they have complied with the auditing standards while conducting audit of financial statements.

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57) Clause 126(3)(i) : Powers and duties of auditors and Auditing Standards :

This provision requires that in the listed company's audit report it should be mentioned whether the company has complied with the internal financial controls and directions issued by the Board of Directors.

These matters are discussed by the Audit committee of the Board which includes independent directors. The Audit Committee also requires the management to give action taken report. If this provision is retained, then even small irregularities which are rectified will have to be reported to the shareholders. These are matters of day to day management which should be left to be tackled by the internal auditors and the audit committee.

Suggestion:

We suggest that Clause 126(3)(i) should read as under:

"In case of listed Companies, whether the Company has adequate internal financial controls".

58) Clause 127(h) : Auditor not to render certain services :

Management Services is a very ambiguous and wide term which is prone to different interpretations. For example, advising on E.S.O.P involves financial matters and company law matters. In spite of this someone may take a different view that it is management service.

Suggestion:

Clause 127(h) be deleted.

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CHAPTER XI : APPOINTMENT AND QUALIFICATION OF DIRECTORS

59) Clause 132(1)(b) : Number of Directors :

The Companies Act should not subscribe maximum number of Directors. It should be left to the Company to prescribe maximum number of Directors in its Articles.

Suggestion :

Clause 132(1)(b) should be deleted.

60) Clause 132(5): Independent Directors :

Suggestion 1 :

Nominee Director (i.e. a Director nominated by the Financial Institution) should be treated as an Independent Director because he is normally not selected by the Promoter Group.

Suggestion 2:

In Explanation in sub-clause (5), there is reference to “institution”. The word institution should be replaced by the words “Financial Institution”. The term Financial Institution is defined in Clause 2(zo).

Suggestion 3:

Clause (c) in Sub-Clause 5 should be deleted. Having prescribed in this Clause (5) as to who will not be treated as an Independent Director, the remaining qualification should be left to be decided by the Board of Directors and the Shareholders. If power to prescribe “other qualifications” is given to the Government then it would be virtually giving powers to add to further disqualifications in addition to those already mentioned in Sub-Clause (5).

61) Clause 132(6) : Company to have Board of Directors :

This provision is not clear whether the approval of the members is required only for stock option to be given to independent director or whether it is necessary also for payment of :

(i) sitting fees;
(ii) reimbursement of expenses for participation in the board and other meetings; and
(iii) profit related commission.

Clause 176 (Remuneration Payable to Directors) and Clause 133 are overlapping. Is it intended that non-independent non-executive directors can get different remuneration as compared with independent directors ?

Is it intended that independent directors can get stock option and non independent directors cannot get stock option? Clause 176 which is applicable to all non-executive directors does not refer to stock option.

Suggestion:

Clause 132 (6) should be made a part of Clause 176 with necessary clarity on the issues mentioned above, so that there is no conflict between the two provisions.

62) Clause 133 (6) : Appointment of Directors :

Clause 133 (6) is not clear. It provides that out of the total number of Directors a number not exceeding one-third shall be liable to retire, and out of the remaining, one-third shall retire by rotation.

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Actually, the Directors retiring by rotation should be out of those who are liable to retire. However, the wordings of the Section suggests that one-third of those not liable to retire will retire by rotation.

Suggestion :

Wordings of this Clause should be brought in line with the existing Section 255(1) read with 256 (1) of the 1956 Act.

Alternate suggestion :

Add the word “not” before the words “liable to retire “so that sub-clause (6) should read as under :

> “Unless the Articles provide for the retirement of all the Directors at every annual general meeting, not exceeding one-third of the total number of Directors of a public company shall be not liable to retire, and out of the remaining, one-third shall retire by rotation ..”.

63) Clause 133(6): Retiring Director :

Clauses 133 (6) (as also Sec. 256 of the 1956 Act) provides that a director retires at annual general meeting. It is not clear whether he retires at the commencement of the meeting or at the end of the meeting. A provision similar to Clause 123 (1) which is for Auditors, should be provided for directors.

Suggestion :

It should be provided that a director retires at the conclusion of the AGM. It should also be provided that a person’s appointment /reappointment as a Director takes effect from the conclusion of that AGM.

64) Clause 133(7) : Appointment of Directors :

This Clause is not clear. It refers to adjourned meeting. It is not understood which adjourned meetings it is referring to. What happens if the AGM is not adjourned ?

Suggestion:

(1) This Clause needs to be altered, as the intended meaning is not understood.

(2) The provisions similar to section 256(4) of the 1956 Act should be inserted in Clause 133.

65) Clause 141(1): Right of persons other than retiring directors to stand for directorship :

The reference in this Clause should be to 25% of total valid votes cast either on show of hands or on poll.

Suggestion :

The wordings of Clause 141(1) at the end should be altered to read "…. or gets more than 25% of total valid votes cast either on show of hands or on poll".

66) Clause 142: Appointment of Additional Director, Alternate Director and Nominee Director :

This Clause does not permit appointment of a person as an Additional Director if he has failed to get appointed as a Director in a General Meeting. However, this Clause is silent as to the period of this disqualification. It is not intended that a person who cannot get elected in a general meeting cannot be appointed as Additional Director even after 5 years.

Suggestion :

A time limit of three years should be prescribed for disqualification. It should be provided that a person who fails to get appointed as a Director in a General Meeting shall not be appointed as Additional Director in that company for a period of three years.

67) Clause 142(1) : **Appointment of Additional Director, Alternate Director and Nominee Director :**

(A) Clause 142(1) provides that Additional Director shall hold office up to the date of next AGM.

(B) Clause 142(4) proviso (casual vacancy) also refers to : " .. up to the date up to which would have held office …"

That means these Directors appointed under Clause 142 (1) or 142 (4) will cease to be Directors on the day of AGM i.e. will cease to be directors even before AGM commences.

Suggestion:

It should be provided that they shall hold office of director till conclusion of the AGM instead of till date of the AGM.

68) Clause 142(4) : Appointment of Additional Director, Alternate Director and Nominee Director :

This Clause uses the expression "that a private company which is a subsidiary of a public company". In view of the definition of the term " Public Company" in Clause 2(zzs), a private company which is a subsidiary of a public company automatically becomes a public company. In view of this, there cannot be any private company which is a subsidiary of a public company.

Suggestion :

The expression "a private company which is a subsidiary of a public company" wherever it appears in the Companies Bill, 2008 should be deleted.

69) Clause 143(3) : Appointment of Directors to be voted individually :

There appears to be a mistake in the language. The wording should be identical with Section 263(3) of the 1956 Act.

Suggestion:

Clause 143(3) should read as under :
"A motion for approving a person's appointment, or for nominating a person for appointment, as a director shall be treated as a motion for his appointment.

70) Clause 145(1) : Disqualification for Appointment of Director :

145(1)(h) is in conflict with proviso to Clause 133(3). Clause 133(3) allows a person to be appointed as Director if he has applied for DIN.

Suggestion :

Item (h) in Sub-Clause (1) of Clause 145 should be deleted. Alternatively it should read :

" (h) he has not complied with Section 133(3)".

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71) Clause 145(2) : Disqualification for Appointment of Director :

Clause 145(2)(b) would disqualify even a promoter for being reappointed as a Director of that company which has defaulted. In that event who will be willing to get appointed as a Director and if there is no Director who will run the Company?

Suggestion:

In Clause 145(2)(b) the words "…. re-appointed as a Director of that Company" be deleted.

72) Clause 150 : Removal of Directors :

As per the current provision any member even if he holds one share in the company, can give a notice to the company about his proposal to move a resolution for removal of a director. Once such notice is given, the company has to issue notices to all the members as also advertise in newspapers. This involves tremendous expenditure. Apart from this, this right is being misused to cause embarrassment to the concerned director. It is necessary that the Act should prescribe minimum qualification for giving notice for removal of a director.

Suggestion :

The same requirement which is prescribed in clause 98 for demanding a poll should be provided in clause 150 relating to removal of directors. That means the shareholder holding 10% of the voting rights or holding shares of which paid-up value is atleast Rs.5 lacs, can only give such notice.

CHAPTER XII : MEETINGS OF BOARD AND ITS POWERS

73) Clause 154 : Meetings of Board :

Sub-Clause (2) : It should be clarified that participation by video conferencing is at the option of the Company and cannot be insisted upon by an individual Director.

Sub Clause (3): This sub clause refers to convening a Board Meeting by a Notice in writing or by electronic means. It is not intended that a verbal notice can be given by electronic means.

Suggestion :

In view of this we suggest that sub clause (3) should amended to read as under:

"A meeting of the Board shall be called by giving not less than 7 days notice in writing to every Director at his address registered with the Company. Such written notice may be sent by hand delivery or post or by electronic means."

74) Clause 154(3): Meetings of Board :

Clause 154(3) provides for convening of a Board Meeting at a shorter notice. As provided in the first proviso presence of atleast one independent director, if any, is required at such Board Meeting. That means a Company which does not require to have an independent Director on the board will not need to comply with this first proviso. However, the second proviso provides that in case of absence of independent directors from such a meeting, decisions taken at such meeting need ratification by atleast one independent director. This second proviso is based on the assumption that there is an independent director on the board. It is not clear how this second proviso would be complied with by a private limited company.

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Suggestion:

The last part of the second proviso should read "…….. by atleast one independent director, if any".

75) Clause 155(3) : Quorum for meetings of Board :

Clause 155(3) provides that if a Board meeting is adjourned for want of quorum, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a **public holiday,** till the next succeeding day, which is not a public holiday, at the same time and place. At present there is no restriction to hold a board meeting on a public holiday and therefore, there should not be any restriction in holding adjourned board meeting on a public holiday.

Suggestion:

The words `public holiday' appearing at two places in Clause 155(3) be substituted by the words `national holiday'.

76) Clause 156(1) : Passing of resolution by Board of Committee :

Clause 132(2) of the Bill requires only one director on the Board of a company to be ordinarily resident in India. However, Clause 156(1) requires that circular resolutions be sent to the directors at their usual address "in India". There is an inconsistency in these provisions in so far as it appears that all directors must have address in India.

Suggestion :

The words "in India" appearing in clause 156(1) may be deleted. Also, it may be provided in the Bill that circular resolutions can be delivered to the directors through electronic mode such as e-mail.

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77) Clause 158(12) : Stakeholders Relationship Committee :

The term “stakeholders” has not been defined. It is necessary to define this term as this term is used in commercial parlance even to include employees and other interested parties.

Suggestions:

Add the following definition of “stakeholders” : Stakeholders means shareholders, debenture holders and holders of other securities issued by the Company”.

Alternatively, the term “Stakeholders’ Relationship Committee” be called “Shareholders’/Investors’ Relationship Committee”.

78) Clause 160 : Restrictions on powers of Board :

The Bill requires approval of general meeting and Board resolution for borrowing of moneys in excess of paid up share capital and free reserves other than temporary loans obtained from the company’s bankers in the ordinary course of business. However, the explanation defining ‘temporary loans’ which had been provided in the Companies Act, 1956 has been omitted from the Bill, leading to ambiguity.

Suggestion :

The existing Explanation II defining ‘temporary loans’ under the Act be incorporated in clause 160 of the Bill.

79) Clause 163(1) : Loan to Directors etc. :

This clause refers to “any other person in whom he is interested”. This term has not been defined though the term interested director has been defined in clause 2(zy).

Suggestion:

Add the following as an explanation in clause 163 (1).

Explanation :

For the purpose of this sub-section, a director shall be considered to be interested in those persons who are mentioned in clause (zy) of section 2”.

80) Clause 164 : Loan and investment by company :

Limits – Section 372A of the 1956 Act permits inter-corporate investments, loans and guarantees up to 100% of free reserves or up to 60% of paid up share capital plus free reserves, whichever is higher. The free reserves under section 372A also include the “securities premium amount”. However, a reading of Clause 164 of the Bill read with the definition of “free reserves” therein, it appears that the securities premium account is excluded from the basket of free reserves in so far as these limits are concerned. Since, securities premium account is a free reserve and represents the premium actually received from the shareholders and is, therefore, not at all a notional reserve, there is no objective reason as to why it should be excluded while calculating free reserves of a company.

Loans by Non-Banking Financial Companies (NBFCs) – Clause 164 of the Bill exempts NBFCs which are registered with the Reserve Bank of India (RBI) but only in respect of their investments and not lending activity. This will result in considerable difficulty to NBFCs in carrying on their business. NBFCs who undertake lending and investment activities need to be swift and nimble in granting loans to creditworthy borrowers. NBFCs fulfill an important role in the economy in the area of financial services and supplement the activities of commercial banks. The principal activity of most NBFCs is lending / asset financing / investments and the limit of 60% of paid-up share capital and free reserves permitted currently is easily reached by these NBFCs, hence limiting the scope of their business. Further, it will have to include in its annual financial statement a detailed statement giving full particulars of the loans given and the purpose for which the loan is to be utilized by the recipient. Not only would this statement be very lengthy (given the number of loans sanctioned by NBFCs each day), but would also result in disclosure of confidential competitive information relating to the NBFCs and its clients.

Like banks, NBFCs are also strongly regulated by the RBI and therefore they need not have further restraints placed on them. It is suggested that exemption from the applicability of Clause 164 of the Bill be extended to NBFCs for their lending activities as well.

Under the Bill, the exemption from the provisions of Section 372A of the 1956 Act, which is currently available for investment companies and infrastructure companies, is also sought to be done away with under Clause 164 of the Bill. Further, only NBFCs which are registered with the RBI and the companies engaged in the business of financing infrastructure companies are sought to be exempted. The rationale behind narrowing down the scope of exemption under Section 372A of the Act to only certain categories of companies is not clear. The exemptions under the Act proved to be very effective and should, in our view, be continued.

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Under Clause 164(10), any acquisition of shares allotted pursuant to Clause 56(1), is exempt. Clause 56(1) covers rights issue as well as preferential allotment of shares. Under existing Section 372A of the Act, the exemption is in respect of shares acquired by way of rights issue. Exemption granted to acquisition of shares allotted on preferential basis may not have been intended under the Bill and the same should be deleted.

Suggestions :

a) Reference our recommendation on Clause 2(25) regarding definition of Free Reserves, Free reserves for the purpose of Clause 164 should also include share premium account.
b) Exemption to registered NBFCs under Clause 164 should be in respect of their investment and lending activities.
c) Investment companies and infrastructure companies should also be exempted from the provisions of Clause 164.
d) Infrastructure companies should be defined in the Bill.
e) Particulars of loans should not be required to be made part of the Annual Report.
f) In Clause 164(10)(b)(iii) the reference should be to Clause (a) of sub-section (1) of section 56.

81) Clause 164(10)(a)(iii) : Loan and investment by company :

The Bill in Clause 164(10)(a)(iii) refers to "a private company unless it is a subsidiary of a public company". Under the Bill, a private company which is a subsidiary of a public company is defined as a public company. In view of this, such private companies should not be treated as a separate class under any provision of the Bill which would lead to confusion as to the provisions which would apply to such private companies.

Suggestion :

The Bill should not make any reference to private companies which are subsidiaries of public companies as a separate class (except in the definition of public company). Further, such private companies should not be allowed to continue as a private company and the Bill should also provide for a procedure and timeline for conversion of such private companies into public companies upon becoming a subsidiary of a public company.

82) Clause 166 : Related party transactions :

Clause 166 will create major problems for large companies because various types of contracts would require approval of shareholders in General Meeting. It would put such large companies to a great disadvantage as they would not be able to quickly enter into contracts which require approval of Shareholders.

Even prior approval of the Board of Directors irrespective of the size of the contract would create difficulty to large companies. Many of the day to day contracts in the ordinary course of business with group companies or with joint venture partners would get affected as these contracts cannot be entered into till the Board of Directors approves the same as also these are approved by general body of shareholders.

Though through explanation in Sub Clause (1) an exemption is sought to be carved out in respect to the transactions which are on arms length basis. The concept of arms length basis is a very subjective issue and would create lot of practical difficulties particularly when there is a prosecution provided for violation of this section.

Suggestion :

The requirement of Shareholders' Resolution should be confined only to the business of contracts listed in clauses (f) and (g) of Sub-Section 1. So far as clause (e) is concerned, it should be confined only to sole agents.

So far as transaction mentioned in Sub Clauses (a), (b), (c) and (d) are concerned, a provision should be made that these should be disclosed in the annual report of the Company similar to disclosure currently required under accounting standard No.18.

In any case, in the first proviso to Clause 166(1) the word `prior' should be deleted so that even post facto approval can be obtained by passing a special resolution.

83) Clauses 172 and 173 : Prohibition of Insider Trading of Securities :

Clauses 172 and 173 of the Bill are new provisions which seek to prohibit forward dealings and insider trading in securities of a company by directors and key managerial personnel. These are prohibitions which are applicable only in respect of listed companies and are currently administered and regulated by SEBI, by way of specific regulations. These regulations adequately cover all the aspects of these securities related offences and also prescribe penalties for the violation thereof. In our view, the Bill should not have any provisions in respect of matters which are administered and regulated by SEBI, which is the market regulator for securities transactions, as the same would lead to duplication and confusion.

Clause 173(1) as drafted, puts absolute embargo on Director or key managerial personnel dealing in securities of the Company irrespective of whether it is based on non- public price-sensitive information or not.

Alternate Suggestions :

Suggestion 1 :

This Clause 173 may be deleted from the Bill as there are already separate regulations dealing with this subject under the SEBI Act and are applicable to Listed Companies.

Suggestion 2 :

Sub-Clause (1) should be divided into two parts and the part relating to dealing in securities should read as under :

“No director or key managerial personnel having any non-public price-sensitive information shall either on his own behalf or on behalf of any other person, deal in securities of a Company”.

Suggestion 3 :

This Clause 173 should be made applicable only to listed companies.

Suggestion 4 :

These clauses may therefore be deleted.

CHAPTER XIII : APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL

84) Clause 174 : Appointment of Managing Director, Whole time Director or Manager :

Clause 174(5) requires appointment of the Managing Director / Whole-time Director / Manager to be with the unanimous consent of all the Directors present at the meeting as also by a Special Resolution at the next General Meeting of the company. The rationale for introducing the requirement of unanimous consent of the Board for such appointments is not clear. Like most other decisions, under the Act and Bill, such decision should be pursuant to a majority ruling of the Board, with the interested director not participating in the discussions and not voting on that matter.

It is not clear from sub-clause (5) whether the remuneration would be subject to approval of the shareholders by a special resolution.

Clause 174 refers to appointment of Managing Director/Whole time Director or Manager. It is not intended to apply to other Key Managerial Personnel. It appears that the expression Key Managerial Personnel sub-clause (4) is through oversight and therefore should be replaced by the words “managing director, whole-time director or manager”.

Suggestion :

This requirement of seeking the unanimous consent of the Board for appointment of the Managing Director / Whole-time Director / Manager should be done away with and the same should be with a majority vote of the Directors present and voting.

In the first para of sub-clause (5) it should be clearly provided that both appointment and remuneration shall be subject to approval by a special resolution.

In Sub-clause (4) the words “key managerial personnel” be substituted by the words “managing director, whole time director or manager”.

85. Clause 175: Managerial Remuneration:

The Bill does not prescribe any limit on managerial remuneration and has left it to be decided by the shareholders of the company. There is a debate on this issue and there are two divergent views. There is a strong case for liberalization and leaving it for the shareholders to decide without any control from any authority.

However, if at all the Government is thinking of regulating it, it should prescribe reasonable limits. In that event, the present limit of 5% of the net profit under the 1956 Act, for a single Managing Director /Whole-time Director and 10% limit collectively for all Managing Directors or Whole-time Directors may be retained. In the event of loss or inadequacy of profits, an absolute limit of Rs.3 crores as minimum remuneration be fixed and within this limit the shareholders can fix the remuneration. If it is beyond Rs.3 crores, and also exceeds 5% of the net profits of the Company then only it would also require Government’s approval so that in a deserving case an exception can be made. This monetary limit of Rs.3 crores may be prescribed by the Rules so that it can be suitably amended as and when required or it may be linked to some index. This limit of Rs. 3 crores should be irrespective of the turnover or effective capital of the company so that complicated provisions like Schedule XIII to the 1956 Act can be avoided.

Suggestions :

A provision be made in the Bill on the following lines:

1. The remuneration of an individual Managing Director/Whole-time Director/Manager shall not exceed 5% of the net profits of the Company or Rs. Three Crores (i.e. limit prescribed by the Rules), whichever is higher. In the event, there are more than one such executives, their aggregate remuneration shall not exceed higher of the following:-

   (i) 10% of the net profits of the company for that year by way of aggregate remuneration of all such managerial personnel.

   (ii) Rs.3 Crores (i.e. limit prescribed by the Rules) for each such managerial personnel.

2. The remuneration shall be subject to approval of the shareholders in general meeting by passing an ordinary /special resolution, as the case may be.

3. Any company may pay remuneration in excess of the limit prescribed in sub-clause (1) above with the approval of the shareholders under sub-clause (2) and with approval of the Central Government.

4. This Section shall not apply to a private limited company.

86) Clause 178 : Appointment of key managerial personnel :

Clause 178 of the Bill provides that the whole-time key managerial personnel cannot be appointed in more than one company at a time. Currently, under the Act, it is permissible for a Managing Director or a

Manager to be appointed in two companies with the approval of the Board of Directors at a meeting with the unanimous consent of all the directors present at the meeting. This provision allows two companies to share the managerial resources and may also prove to be cost efficient for the companies.

Suggestion :

Whole-time key managerial personnel should be allowed to be appointed on two companies at a time with the unanimous consent of the Board.

CHAPTER XIV : INSPECTION, INQUIRY AND INVESTIGATION

87) Clauses 179 (Power to call for information, inspect books and conduct inquiries) & 183 (Investigation into affairs of company) :

Under Clause 179 of the Bill, the Registrar may call for information or inspect the books pertaining to any past period. In view of this, companies are required to preserve their records forever. Therefore, a time limit should be prescribed within which the Registrar can order information or request inspection of records of a company. This may be on the lines of similar provisions under the Income Tax Act, where the power to re-open an assessment is available only for a limited period from the expiry of a particular assessment year. Similar time period may also be prescribed under Clause 183 for ordering of investigation by the Central Government. Further, these clauses should also provide for a time bound manner in which such inspection/ investigation would be completed.

Suggestions :

Clauses 179 and 183 should lay down a time limit within which the Registrar / Central Government can exercise their powers under the said Clauses as also time limit within which such inspection / investigation has to be completed.

Under Section 635B of the Act, protection was granted to employees of the company during investigation by the inspector or during pendency of proceedings before the Appellate Tribunal in cases where such employees were discharged or punished, whether by dismissal, removal, reduction in rank or otherwise.

Provisions similar to those under Section 635B of the Act should be introduced at an appropriate place under Chapter XIV of the Bill.

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88) Clause 194: No suit or proceedings till submission of final report :

This is a draconian provision. This directly attacks the right of a company and/ or its shareholders to approach the court for justice. If there is substance in the case of the Company then only they would be able to get any relief from the court. Apart from this, in any event shareholders of a company can file a writ petition.

Suggestion:

Delete Clause 194.

CHAPTER XV : COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

89) 201(2)(c)(i) : Power to compromise or make arrangements with creditors or members :

It is not clear as to who will make this statement. This needs to be clarified.

90) Clause 201(3) : Power to compromise or make arrangements with creditors or members :

Under Clause 201(3), notice convening a meeting of the creditors or members or debenture holders can be sent either individually or by advertisement.

Suggestion :

In our view, a notice convening such a meeting which is pursuant to an Order of the Tribunal should compulsorily be required to be sent individually at the address registered with the company and not through advertisement as such a provision is likely to be misused.

91) Clause 201(5): Power to compromise or make arrangement with creditors and members :

The Bill requires that a notice of the scheme of compromise/ arrangement be sent together with the prescribed documents to the Central Government, RBI, SEBI, the Registrar, the respective stock exchanges, and *such other authorities that are likely to be affected* by the compromise or arrangement. It is not clear as to which other authorities are being referred to.

Suggestion:

The words “and such other authorities which are likely to be affected by the compromise or arrangement” should be deleted as these words are very wide and vague.

92) Clause 201(6) : Power to compromise or make arrangement with creditors and members :

Clause 201(6) refers to "majority representing three-fourths in value". This may create difficulty of interpretation whether majority in number is required or not.

It is therefore suggested that the word "majority" be substituted by the word "persons".

93) Clause 203: Merger and amalgamation of companies :

i) It is not clear as to why it is necessary to prescribe categories of mergers like : a) "Merger by absorption" and, b) "merger by formation of a new Company" It is also not clear why it is necessary to use the expression "division". Under the 1956 Act, all types of schemes are covered under Sec. 391. Similarly under clause 201 of the Bill all such schemes would be covered. There does not appear to be any necessity of prescribing separate procedure depending on the nature of the merger.

Suggestion :

There is no need to define different types of mergers.

ii) It is not understood as to which "ordinary resolution" is contemplated in Clause 203(2)(f). Does it mean that in case of merger by formation of a new company, it is necessary to pass an ordinary resolution by the members of the transferor company even before approaching the Tribunal for directions to convene the meeting for approving the scheme? The purpose of this double general meeting is not understood.

Suggestion :

Clause 203(2)(f) should be deleted.

iii) Clause 203(3) provides power to the Tribunal to make provision for certain matters while sanctioning the compromise and arrangements. Sub-clause (f) of this clause which provides for *"allotment of any foreign direct investment"* is not clear. It appears that the intent of this clause is to cover a situation of a foreign company merging into an Indian company and the resultant issue of shares of the Indian transferee company to the non-resident shareholders of the foreign company, which would become foreign direct investment in the Indian transferee company.

iv) Clause 203(5) refers to filing of the order within 30 days after making of the order. On the other hand clause 201(8) provides for filing of the order within 30 days of the receipt of the order.

Suggestion :

1) The language under Clause 203(3)(f) should be amended to appropriately cover the above.

2) Clause 203(5) should read "every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within 30 days of the receipt of certified copy of the order.

94) Clause 204 : Merger or amalgamation of certain companies :

Under Clause 204 of the Bill which provides for mergers and amalgamations between two small companies or between the holding company and its wholly owned subsidiary, the holding of meetings of the members and creditors of such companies is contemplated. The Dr. Irani Committee had recommended a fast track procedure for mergers or amalgamations between such companies.

Suggestion :

As the procedure for convening such meetings is quite time consuming, mergers and amalgamations between small companies or between the holding company and its wholly owned subsidiary will be unnecessarily prolonged. Therefore, the requirement of convening such meetings should be done away with.

95) Clause 205: Amalgamation by mutual agreement (Cross Border Mergers):

Currently, cross border merger is permitted only if the transferee company is an Indian Company and hence the merger of an Indian Company with a foreign company, being the transferee company is prohibited. Under Clause 205(2) of the Companies Bill of 2008, cross border mergers both inward and outward will be allowed with such countries as may be notified from time to time by the Central Government. The consideration to shareholders of merging company may be discharged by payment of cash or issue of Indian Depository Receipts or a combination of both.

Under the Bill, a foreign company before qualifying to be a merged entity must have a place of business in India.

The term " foreign company" is defined as a body corporate, incorporated outside India and having a place of business in India.

This means that if a foreign company does not have a place of business in India, it is not allowed to have a cross border merger with an Indian Company.

This provision needs to be looked at since in most of the situations, the foreign company may not have a place of business in India. This is completely different from the 1956 Act.

Obviously the term “foreign company” as defined in the Bill is meant for Chapter XXI and that definition is not intended for the purpose of Clause 205(2).

Suggestion :

In clause 205(2) after the words “foreign company” add the words “whether having a place of business in India or not”.

96) Clause 205(1) : **Provision to be made for demergers :**

Clause 205(1) refers only to mergers and amalgamations and does not provide for demergers. There should be a provision for demerger of a unit / division / assets / liabilities of Indian Company and vesting thereof in a foreign company and vice-versa.

Though many schemes of demergers have already been implemented under 1956 Act, there is no definition of the term demerger in the 1956 Act nor is the term demerger expressly used anywhere in the 1956 Act. Even in the Companies Bill 2008 the term “demerger” is not used in Chapter XV.

Suggestion:

Define the term “demerger”:
Add the word “demerger” in clause 205(1).

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CHAPTER XVI: PREVENTION OF OPPRESSION AND MISMANAGEMENT

97) Clause 212 : Application to Tribunal for relief in cases of oppression, etc.

Clause 212 is intended to cover sections 397 and 398 of the 1956 Act. Section 398 refers to mismanagement of the company and uses the expression "... or in a manner prejudicial to the interests of the company". These words are missing from clause 212(1)(a). The language of clause 212(1)(a) does not cover the eventuality of the affairs of the company being conducted in a manner prejudicial to the interests of the company itself.

Suggestions :

At the end of clause 212(1)(a) add the words "or in a manner prejudicial to the interests of the company".

Also, the end of clause 213(1)(a) add the words "or in a manner prejudicial to the interests of the company".

98) Clause 216 : Class action :

This provision does not provide that a person initiating action should be supported by any minimum number of members or members having certain percentage of voting rights. This provision may be misused by even a single member and he may initiate action against the Company. Moreover, if these matters are going to be heard (depending on the provisions in the Rules and Regulations which may be prescribed) by the Principal Bench of the Tribunal then one or a few shareholders residing in Delhi or other city where Principal Bench of the Tribunal is located will frequently file such complaints and harass the Companies.

Suggestion:

A provision similar to clause 215(1) of the Bill should be inserted in clause 216 to provide that a minimum number of members holding at least prescribed voting power can only make an application under this Clause.

CHAPTER XVII : REGISTERED VALUERS

99) Clause 219(2) : Registration of valuers :

Clause 219(2) of the Bill provides that a company or body corporate shall not be eligible to act as a registered valuer. This provision will prohibit financial institutions and investment banks, which are incorporated as companies, to act as registered valuers. These entities are recognized under various other regulations framed by RBI, SEBI, etc. to conduct valuation exercise. Therefore, companies and bodies corporate should not be prohibited from acting as registered valuers.

Suggestion :

The proviso to Clause 219(2) should be deleted.

CHAPTER XX: WINDING UP

100) Clause 247 : Petition for winding up

Suggestion:

In clause 247 (1) (g) the cross reference should be to clause (c) of sub-section (1) of Section 246.

CHAPTER XXVI: NATIONAL COMPANY LAW TRIBUNAL AND APPELLATE TRIBUNAL

101) Clause 380: Benches of Tribunal :

Clause 380 provides that there shall be such number of Benches of the National Company law Tribunal (NCLT) as may, by notification, be specified by the Central Government. The Principal Bench shall be at New Delhi.

Suggestion:

There should be NCLTs in all major cities as this will not only reduce the burden of the Principal Bench, but also help in expediting the entire process of disposing of the proceedings. The current scenario is that there are Regional Benches in Mumbai, Delhi, Calcutta and Chennai and the Principal Bench of CLB in Delhi and the Additional Principal Bench in Chennai. We suggest that the Regional Benches of the Tribunals should be in all major cities and the Additional Principal Benches should be located in the four metros.

102) Clause 401: Compounding Offences

This clause 401 corresponds to section 621A of the 1956 Act. However, clause 402 provides that the offence can be compounded only with the permission of the Court.

The provisions of Section 621A of the Companies Act, 1956 have worked well and have helped in reducing the number of cases and in saving lot of time of the department as also of the judiciary. Even the Notes on Clauses annexed to the Bill do not throw any light on the reason to change the present provisions which permit Registrar of Companies/Regional Director to compound the matters under Section 621A.

Suggestion :

Clause 402 should be amended to have provisions similar to 621A of the 1956 Act.

CHAPTER XXVIII : MISCELLANEOUS

103) Independent Directors and Non-Executive Directors :

An important aspect of the Bill which needs to be considered is that of criminal liability of officers of the company for technical default or non-compliance of the provisions of law. Both under the 1956 Act as also the proposed Bill, whenever a company defaults in complying with any of the requirements, officers of such company are held criminally liable that includes prison term. While non-compliance with certain important provisions (e.g. making untrue statements in the prospectus or some personation for acquisition of securities or fraudulently inducing persons to invest money, audit of annual financial statements, etc) must entail criminal liability for the officers of the defaulting company, the technical defaults which are not wilful must not carry criminal liability. For instance, defaults or delays in filing of Tribunal's order under clause 42(3) of the Bill or filing of annual return with the Registrar, etc., which most of the times are inadvertent, should be de-criminalized. While a higher penalty may be justifiable, prison term, which would entail criminal prosecution, may not be appropriate for a large number of non- compliances under the law.

Experience shows that many a times criminal proceedings are misused, or are so protracted that it fails to achieve what a higher penalty could have achieved to deter such defaults. The fear of criminal liability also discourages good talented people from getting involved in the affairs of the company.

Suggestion :

a provision similar to Section 5 ("officer who is in default") of the Companies Act, 1956 be inserted in the Companies Bill, 2009 as mentioned below :-

"Notwithstanding anything contained in any other law, where an offence under any law is committed by a company governed by the Act, a non-executive director of the company shall be liable to be prosecuted only if:-

(i) there was no designated officer on the Board of Directors of the company at the time the offence was committed; or

(ii) the offence is shown prima facie to have been committed with the consent or connivance of such non-executive director ;or

(iii) the commitment of offence by the company is prima facie shown to be attributable to any gross neglect on the part of the non executive director.

Explanation*:* For the purpose of this Section "designated officer" means all the following directors/officers of the company viz:-

(a) the managing director or managing directors ;

(b) the whole-time director or whole time directors;

(c) the manager as defined in the Act;

(d) any person charged by the Board of Directors of the company with the responsibility of complying with the provisions of the law specified or generally all laws:

Provided that the person so charged has given his consent in this behalf to the board and the same is filed with the Registrar of Companies.

(e) where any company does not have any of the officers specified in Clauses (a) to (d), any director or directors who may be specified by the Board of Directors in this behalf or where no director is so specified, all the directors;

Provided that where the Board of Directors exercises any power under Clause (d) or clause (e), it shall, within 30 days of the exercise of such powers file with the Registrar of Companies a return in the prescribed form.

104) Clause 426 : Power of Central Government to make Rules :

Under the proposed Bill, a substantial part of law making would be done through rules. Since these rules will have a significant bearing on the overall administration of company law in India, it is imperative that sufficient opportunity is provided to all the stakeholders to give their comments on the proposed rules before their notification.

To provide flexibility, in various clauses of the Companies Bill, 2008, powers have been delegated to the Central Government to prescribed rules or to prescribe conditions etc. The past experience suggests that the wordings of the Rules and Notifications may create confusion and uncertainty about interpretation. The prime example is The Companies (Issue of Share Capital with Differential Voting Rights) Rules 2001.

Secondly, frequent amendments also create confusion. Example of this is frequent amendments to Rules, Regulations and Guidelines under the SEBI Act.

Suggestion :

In the rule making provision in the Bill, it should be mandated for all draft rules to be kept for public comment at least for sixty (60) days for public comment. We also suggest constitution of an advisory committee with representation from the Industry and professional bodies such as ICAI, ICSI, etc., to make recommendations to the Government on framing of rules. The advisory committee should meet periodically to discuss and review the existing rules and suggest required changes.

The new Companies Act should provide for an Advisory Council for advising the Government on drafting Rules and issuance of notifications. The administration should first consult the Advisory Council. The Advisory Council may be constituted of people from trade, commerce and profession.

Merely putting up draft rules/notifications on Government's websites for inviting comments is not enough. This would also give to the trade and commerce a sense of involvement in framing of delegated legislation and persons familiar with these matters will be able to contribute in effective manner.

In any event, the draft Rules should be made public for comments for a reasonable period, say 60 days.

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OTHER RECOMMENDATIONS

A. Time limit for maintaining statutory records and registers :

Under the Rules framed under the 1956 Act i.e. Companies (Preservation and Disposal of Records) Rules, 1966 there are provisions providing number of years after which some of the statutory records of the company can be destroyed. However, this does not cover various other statutory records and registers. This causes tremondous difficulty for the company as shareholders and other statutory authorities can call upon the company to produce records even 60 years old. It is therefore, suggested that in the Bill, a separate and suitable provision should be made for prescribing maximum period for maintenance of such statutory records and statutory registers, after which period the company should be free to destroy such records with the approval of Board of Directors and in accordance with the Rules that may be prescribed.

Suggestion :

Specific provision for destruction of statutory records and statutory registers be included and should be made applicable to **all** such records required to be maintained under the Act.

B. Power of court to grant relief in certain cases :

Under Section 633 of the Act, a court hearing a case for negligence, default, breach of duty, misfeasance or breach of trust against an officer by a company, has the power to relieve such an officer either wholly or partly from his liability, if it appears to the court that such officer has acted honestly and reasonably having regard to the circumstances of the case. There is no corresponding clause to this effect in the Bill.

This is an important provision, which provides the ability to the court to absolve the officer of the company against whom the above charges are levelled based on the facts and circumstances of the case. There is enough safeguard in this provision as the ultimate decision to relieve such an officer is with the court and has to go through the due process.

Suggestion :

An appropriate clause on the lines of Section 633 of the Companies Act, 1956, should be incorporated in the Companies Bill, 2009.

C. Prohibition against indemnification :

Currently, under Section 201 of the Act, a company is prohibited from entering into any contractual obligations for exempting any officer, employee or auditor of such company or indemnifying such a person from any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust of which such a person may be guilty in relation to the company. There is no corresponding provision in this respect in the Bill. Such omission may be interpreted as enabling companies to provide for such protection to its officer, employee or auditor. An auditor is an independent person, and such protection granted to an auditor may prejudice the independence of the auditor and is therefore not in the interest of the shareholders.

Suggestion :

Provisions on the lines of Section 201 of the Act should be incorporated in the Bill prohibiting companies from providing indemnification or any other protection to its auditors/officers/ employee from any liability in relation to the company.

D. Rights of auditors :

Under the provisions of the UK Companies Act, an auditor, who ceases to hold office for any reason, is required to deposit with the company, a statement explaining the circumstances connected with the cessation of his office. While such a requirement is mandatory for an auditor of a listed company, in case of an unlisted company, if the auditor considers that there are no such circumstances which need to be brought to the attention of the members or creditors, a statement to this effect has to be deposited with the company. Failure to comply with these provisions is an offence.

Along with the statement referred to above, in case of resignation of the auditor, the auditor has a right to call on the directors to convene a general meeting of the company for the purpose of receiving and considering such explanation of the auditor.

Suggestion :

A suitable provision, on the lines of the above, should be incorporated in the Companies Bill, 2009.

E. Tracking Stocks and Treasury Stocks :

Dr. Irani Committee had recognized that some preparatory actions by market regulations in India would be necessary before introducing new concepts such as Tracking Stocks and Treasury stocks which are common internationally. However, the Committee had recommended that enabling provisions for Tracking / Treasury Stocks could be incorporated in the new Law with a provision that the actual introduction of Tracking and Treasury Stocks in the Indian Capital Markets would be done when the necessary framework is ready.

The enabling provisions for tracking stocks and treasury stocks should be incorporated in the Bill.

F. Protection to Non-executive directors against criminal liability under other laws :

It is a cardinal principle of criminal jurisprudence that a person cannot be held vicariously liable for a criminal offence. However, for offences committed by companies, several statutes create a legal fiction whereby directors and other officers of companies are held liable for any offence committed by the companies. These provisions of law, however, are often applied mechanically and even non-executive directors, who are not involved in day to day operations of the company, are implicated in criminal cases simply by virtue of them being directors of the company.

Since the company law is the principal legislation on management of companies and the liability of the directors, it ought to recognize the distinction between those directors who are involved in day to day affairs of the company and those who are not. Today, large companies operate in several jurisdictions and are required to comply with various legal and regulatory requirements. It is therefore necessary to expressly exempt non-executive directors from vicarious criminal liability under the applicable statutes. Although this view has been endorsed in several judicial decisions and was also recommended by the Naresh Chandra Committee, it would be advisable to codify this principle in the statutes.

Suggestion :

Since it would be impracticable to amend all such statutes which create vicarious criminal liability, a non-obstante clause be incorporated in the Bill to exclude non-executive directors from any vicarious criminal liability for offences committed by the company. This provision should have overriding effect on all other laws. The inclusion in the definition of "officers in default" of every director, in respect of a contravention of any provisions of the Act, who is aware of such contravention by virtue of the receipt by him of any proceeding of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance", recognizes the above principle.

Miscellaneous Drafting Changes

- In Clause 28(2) the word "abridged" should be deleted.
- In Clause 143(6), the word "not" should be inserted before the words "liability to retire" in the 3rd line.
- In Clause 148(1)(d), after the word "arrangement" the words "in which he is directly or indirectly interested" should be inserted.

Doc. emailed to Lok Sabha Secretariat (Standing Committee on Finance Branch) on October 8, 2009, hard copies sent by speed post.