

Companies Bill 2011 - Changing Face of Indian Company Law - Part 2

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Last month the corporate governance provisions relating to directors were discussed. Continuing the discussion, the provisions relating to meetings of the board of directors, their powers and other related concepts are highlighted in this paper.

Removal of Directors

The director can be removed by passing an ordinary resolution in any general meeting. The procedure of removal remains same as provided in the present Companies Act. On receipt of a special notice from member(s) not holding less than 1/10th of the total voting power, the director concerned will be sent the special notice with a chance to send written representation to be read out at the general meeting. The director removed at a general meeting cannot be re-appointed by the Board of directors, while filling the vacancy as a casual vacancy.

Board Meetings

It is now proposed that every new company shall hold its first board meeting within 30 days of incorporation. The minimum number of board meetings in a year stays at 4 but with a rider that the gap between two board meetings should not be more than 120 days. The present provisions provided more flexibility to the board as each company was mandated to hold at least one board meeting

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in each calendar quarter. But the condition that gap between two board meetings should not be more than 120 days has taken away that flexibility. Presently, if a board meeting was held on 1st of January in any year, the next board could have been held on or before 30th June in that year. However, under the changed scenario, after the board meeting on 1st January, the next board meeting will be required to be held on or before 1st May. These provisions have been borrowed from clause 49 of the listing agreement. Small companies and one-person companies can hold one board meeting each half of calendar year provided that gap between two meetings is not less than 90 days. For the uninitiated, one person company means a company having only one person as a director and small companies will be categorized (only private companies) based either of two criteria - paid-up capital not exceeding Rs. 50 lakhs or higher amount as may be prescribed by the government but not exceeding Rs. 5 crores and turnover not exceeding Rs. 2 Crores or higher amount as may be prescribed by the government but not exceeding Rs. 20 crores. Both these concepts are new and will be discussed in some other continuing part.

Board Meetings through Video Conferencing

Under the present regime, the Act is silent about holding of board meetings through video conferencing. This is set to change with new provisions whereby the board meetings are proposed to be permitted to be held through video conferencing or other audio visual means, as may be prescribed by the Central Government. The Government shall also specify the matters, which may not be dealt in board meetings through video conferencing or audio visual means. The provisions reflect movement in right direction in the light of technological advancement and thinning of distances between places. There is every possibility of misuse of these provisions and it is expected that Government will come out with comprehensive safeguards as to the requirement of quorum,

recording of proceedings and signing of minutes by each director participating in such meetings.

Length of Notice for calling Board Meetings

The present Act is silent as to the notice period for calling board meetings. The new Bill provides calling of board meetings by giving at least seven days' notice in writing to every director. The Bill also permits sending of notices by electronic means. The board meetings can be called at a shorter notice provided at least one independent director is present at the board meeting. The condition of independent director will be applicable only for the companies, which are required to have independent directors. The Bill also provides that even if no independent director is present, the meeting can be held but the decisions taken shall become valid after ratification by at least one independent director after they are circulated to all the board members.

Quorum for Board Meetings

The quorum for board meetings has been pegged at the same level - $1/3^{\text{rd}}$ of total strength or two directors, whichever ever is higher excluding the interested directors. The Bill continues the practice of passing resolutions by circulation with only one change that in case $1/3^{\text{rd}}$ of the directors desire that any resolution under circulation must be decided at a board meeting, such a resolution will be put up at the board meeting. Though it was a customary practice to record circular resolutions in the minute books but the Bill now provides that all circular resolutions will be noted at the subsequent board meeting and made part of the minutes of the meeting.

Audit Committee

The Bill provides that every listed company and any other company, as may be prescribed by the Government, shall have an Audit Committee. Presently the public companies having paid-up capital upwards of Rs. 5 crores are mandated to constitute audit committee. The minimum number of directors constituting audit committee remains at three but the Bill proposes that majority of the audit committee members should be independent directors. The Bill also states that the chairperson of the audit committee shall be financially literate i.e. ability to read and understand the financial statement. The Bill also provides the terms of reference of audit committee must include 7 items stated in the Bill, which, inter alia, include review and monitoring of the auditor's independence and performance, and monitoring the end use of funds raised through public offers. This is a welcome change as no such charter items are stated in present Act. The Bill also stipulates establishment of "vigil mechanism" to safeguard the whistle blowers.

Nomination and Remuneration Committee and Stakeholders Relationship Committee

It is now proposed to have nomination and remuneration committee consisting of minimum 3 non-executive directors of which not less than 50% should be independent directors. This committee, amongst others, will identify the persons qualified to become directors and at senior management level and submit their recommendation to the Board for their appointment and removal. The committee will also be responsible for evaluating the performance of directors. The question, however, remains who will evaluate the members of this Committee? Also does the appointment criteria will apply to promoter directors? The clarity on this aspect is needed.

The companies having more than 1000 shareholders and debenture holders will also constitute Stakeholders Relationship Committee for resolving the grievances of the security holders. This is a new name to erstwhile Investor Grievances Committee formed by listed companies under clause 49 of the listing agreement. The Bill also provides that the chairperson of each of the committee shall attend the general meetings of the company.

The high level of penalties for contravention of the provisions by the directors may, however, deter them from accepting such a responsibility.

Powers of the Board

The powers of the Board substantially remain the same except that the list where power can be exercised by means of a resolution in a Board meeting only has been expanded by including approval of financial statements, diversification of business, approval for amalgamation and takeover of a company. In effect this means that such powers cannot be delegated to any director. The bill also proposes that certain powers including sale of undertaking, investment and borrowing of funds in excess of paid-up capital and free reserves shall be exercised by the board after obtaining approval of the shareholders in a general meeting by means of a special resolution (3/4th majority). The proposed provision seems to be restrictive in as much as shareholders holding 26% of the shareholding will be in apposition to block even borrowing of funds by the company. This may be a stumbling block, which, in some cases, may result in choking the company financially.

One-person Company

The Bill has, for the first time, introduced the concept of One Person Company essentially being a private company. One Person Company (OPC) shall have only one member. It is essential to nominate, who shall, in the event of death of the subscriber, shall become a member of OPC. But the Bill does not provides for a situation where nominee predeceases the subscriber and upon the death of the subscriber, who will become a member of such OPC. It seems, in such an eventuality, OPC will have to be liquidated. OPC will also use the word 'private' as part of its name. The question, thus, arises as to how the general public will be able to identify whether it is a private company or an OPC. It is suggested that such companies should mandatorily use OPC as part of its name as was provided for in Companies Bill, 2008.

Public Deposits

The Bill proposes a blanket prohibition on invitation, acceptance or renewal of deposits from public by the companies. The banking companies and non-banking financial companies are excluded from this blanket ban. The companies may be allowed to accept deposits from its members subject to certain conditions as decided by the Central Government. The bill also provides that the companies shall repay existing deposits within a period of one year from the commencement of the proposed Bill. Failure to repay the deposits with interest attracts penalty of Rs. 1 crore to Rs. 10 crore on company and Rs. 25 lakhs to Rs. 2 crore penalty on directors besides imprisonment.

The Government proposes to strictly control the acceptance of public deposits and may frame rules for such acceptance based upon networth and turnover of the company besides the requirement to obtain rating every year. Undoubtedly, stringent provisions are required to ensure protection of deposit holders but the need for maintaining balance cannot be lost sight of. Looking at the proposed

provisions, one gets a feeling that companies may find themselves in a situation where obtaining funds may become hard and challenging.