

Corporate Governance: Guide for Directors

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Ministry of Company Affairs continues its march towards simplification of the Companies Act, 1956 and reduction of government control over the corporates. The government, it seems, has realized that the companies and its directors can be made self-responsible if the interference of the government is lessened. The government is seriously assuming its role as regulator snooping down on the companies wherever the irregularities are sniffed. This is certainly a positive step as studies have shown that governmental say in business decisions does not necessarily brings excellence in governance. The directors have now to shoulder greater responsibilities and ensure transparency in decisions. Here is the update in the filed of Corporate Governance: -

Corporate Governance, New Companies Act Top Priorities: Moily

Corporate Affairs Minister M. Veerappa Moily recently took charge of his new portfolio. He stated that the passage of a new bill to replace the Companies Act, 1956 and ensuring good corporate governance were his top priorities. Moily was reportedly unhappy with the portfolio while being shunted out of Ministry of Law and Justice.

"There is an altogether new bill for companies that has been drafted. My priority is to see it through. It is a state-of-the-art legislation. This is a major challenge," the minister said, adding he will also focus on corporate governance.

Moily said it was his firm belief that corporate affairs ministry was crucial for the development of India and that it was with this in mind that he will work on his newly assigned portfolio. The minister claimed that he is the reformist.

Moily To Introduce Companies Bill In Monsoon Session

The newly appointed Corporate Affairs Minister, Veerappa Moily told CNBC-TV18 that he will introduce the Companies Bill in the monsoon session of the Parliament. Speaking exclusively to the channel, he said that corporate governance is a key issue and prevention is always better than cure when it comes to corporate affairs. To this effect, he finds an urgent need to strengthen the Serious Fraud Investigation Office (SFIO).

That apart, the minister says that there is a huge deficit in the culture of building corporate social responsibility (CSR) in the nation. Throwing open his willingness to look into the concerns of India Inc on CSR provisions, he says, "The issue of CSR in Companies Bill is not a closed chapter."

Corporate Affairs Min Rejects SFIO Report On Maytas, Orders Fresh Investigation

The competence of the Serious Fraud Investigation Office (SFIO) has been called into question, with the Ministry of Corporate Affairs (MCA) rejecting the agency's report in the Maytas Properties case says a report published in Indian Express.

The SFIO, which works under the MCA, has been rebuked for its delay in submitting the report that was found to be incomplete. The agency had not taken into consideration all records and documents related to the company, sources told The Indian Express. Maytas was promoted by B Ramalinga Raju, founder of the erstwhile Satyam Computer Services.

The agency was given the task of inspecting Maytas Properties in 2009, after the Satyam scam related to the misrepresentation of accounts broke out. It submitted the report on January 27, 2010.

The report was expected to highlight several aspects of the scam, including misstatement and manipulation of financial statements, fixing the role of directors, employees and officials of the company involved in the fraud and also throwing light on the conduct of auditors of the company — both internal and statutory. Maytas had around 350 subsidiaries and sister concerns.

Audit Firms May Also Face Action In Satyam-Like Cases

Unlike in the multi-crore Satyam fraud, audit firms will not be able to wash their hands of corporate scams perpetrated by companies in connivance with their partner auditors, says a report in Business Standard. The Companies Bill, 2011, being finalised by the Ministry of Corporate Affairs (MCA), would seek to

make audit firms and auditors equally responsible for such wrongdoing. MCA had assured a parliamentary panel that looked into an earlier version of the Bill that it would ensure that audit firms did not escape by putting the blame on auditors.

The need for such a clause was felt after B Ramalinga Raju, founder of the erstwhile Satyam Computer Services, admitted to having cooked the company's account books to show non-existent profits. The fraud was estimated to be of the order of Rs 10,000 crore. While Satyam's auditors — chartered accountants who were partners of associate audit firms of global consultancy PricewaterhouseCoopers — were arrested for alleged collusion with the management, the audit firms were left untouched. Under the current law, besides criminal proceedings, the Institute of Chartered Accountants of India (ICAI) can bar the guilty auditors from doing auditing work for a specified period.

Under the ICAI Act, members found guilty of professional misconduct can be barred from practice for up to five years or fined up to Rs 5 lakh. However, no action could be taken against the firms, either under the ICAI Act or the Companies Act. ICAI is conducting disciplinary proceedings against two PriceWaterhouse auditors, Srinivas Talluri and S Gopalakrishnan, for erroneous auditing of Satyam's books.

The Bill would propose that if the audit partner or partners were proved to have acted in a fraudulent manner or abetted or colluded in any fraud by the company, its directors or officers, the audit firms would be equally liable for civil or criminal proceedings. The Companies Bill, 2011, would also propose a maximum of 10 years imprisonment, besides a fine of up to three times the amount involved in the fraud, for the guilty auditors.

No Approval Required For Payment Of Remuneration To Managerial Personnel In The Event Of Losses Or Inadequate Profits

In order to promote the development of Indian Corporate sector and another step towards simplification of procedure under the Companies Act, 1956, the Ministry of Corporate Affairs has decided to amend Schedule XIII to the Companies Act, 1956 w.e.f. 14.7.2011.

At present, listed companies and their subsidiaries companies, which are not having profits or having inadequate profits, have to come to the Central Government for seeking approval for payment of remunerations exceeding Rs. 4 lakh p.m. even to professional managerial person, who has no interest in the capital or any relation with the directors of the company.

Pursuant to this amendment, no approval of Central Government will be required by the listed companies and their subsidiary companies, which are not having profits or having inadequate profits for payment of remunerations exceeding Rs. 4 lakh p.m., if the managerial person:-

- (a) is not having any direct or indirect interest in the capital of the company or its holding company or through any other statutory structures at any time during last two years before or on the date of appointment and
- (b) is having a graduate level qualification with expert and specialized knowledge in the field of his profession.

The other general conditions specified in para (c) of Section II of Part II of Schedule XIII to the Act shall continue to be complied with.

Simplification of Name Availability Procedure

The MCA has delivered on its promise of simplifying the process of making available the name for new registration or for change of name. Though the fee has been enhanced from Rs. 500/- per application to Rs. 1000/-, the application for name availability, if certified by a practicing Chartered Accountant, Company Secretary or Cost Accountant, the name will be made available online after examination of the form electronically. In other cases, a decision will be conveyed within 3 days of the application. This is a move to ensure transparency and will go a long way in speeding up the process of incorporation of the companies in India.

The professionals will now shoulder the responsibility of ensuring that the name is not undesirable, which is a tough task considering the fact that undesirability also includes ensuring that the name is not similar to the name of an existing company or a limited liability partnership or a registered trade mark or a mark which is subject matter of registration. The data relating to registered companies and limited liability partnerships is available online but the facility relating to registered trade marks or applications pending for trade mark registration is not trustworthy.

MCA Inviting Public Comments On Draft Public Companies (Terms Of Issue Of Debenture And Of Raising Of Loans With Option To Convert Such Debentures Or Loans Into Shares) Rules, 2011

The Ministry of Corporate Affairs is considering to revise the Public Companies (Terms of Issue of debenture and of raising of loans with option to convert such debentures or loans in to shares) Rules, 1977 to sort out the difficulties being faced by the lenders while converting debentures or loans to companies in to shares as per existing rules. The draft rules are available on the website of MCA – www.mca.gov.in and the comments can be sent to monika.gupta@mca.gov.in or kamna.sharma@mca.gov.in.

Integration Of Director's Identification Number (DIN) Issued Under Companies Act, 1956 With Designated Partnership Identification Number (DPIN) Issued Under Limited Liability Partnership (LLP) Act, 2008

The Ministry of Corporate Affairs has been issuing two separate identification numbers as DIN to an individual for becoming a director of a company under Companies Act, 1956 and DPIN for a designated partner in a Limited Liability Partnership under Limited Liability Partnership (LLP) Act, 2008.

To avoid this duplicity and to give ease to the stakeholders, the Ministry has decided to issue only one identification number to an individual for both the purpose.

Therefore, the Ministry, vide notification dated 5th July, 2011, has integrated the Director's Identification Number (DIN) issued under Companies Act, 1956 with Designated Partnership Identification Number (DPIN) issued under Limited Liability Partnership (LLP) Act, 2008 with effect from 9.7.2011.

Pursuant to this notification:-

- (a) With effect from 9.7.2011, no fresh DPIN will be issued. Any person, who desires to become a designated partner in a Limited Liability Partnership, has to obtain DIN by filing e-form DIN-1.
- (b) If a person has been allotted DIN, the said DIN shall also be used as DPIN for all purposes under Limited Liability Partnership Act, 2008.

- (c) If a person has been allotted DPIN, the said DPIN will also be used as DIN for all the purposes under Companies Act, 1956.
- (d) If a person has been allotted both DIN and DPIN, his DPIN will stand cancelled and his DIN will be used as DIN as well as DPIN for all purposes under Limited Liability Partnership Act, 2008 and Companies Act, 1956.

Directors To File E-Form DIN – 4 Furnishing Permanent Account Number By 30 September 2011

As per Circular no. 32/2011 dated 31.05.2011, the Ministry has made Income Tax Permanent Account Number (PAN) mandatory for obtaining DIN for Indian nationals. Further, all existing DIN holders, who have not furnished their PAN at the time of obtaining DIN, are required to furnish their PAN to the Ministry by filing e-form DIN-4 by 30th September, 2011.

Similarly, all DPIN holders, who had not furnished their PAN at the time of obtaining DPIN, are required to furnish their PAN to the Ministry by filing eform DIN-4 by 30th September, 2011, failing which their DPIN/DIN will be disabled and they will also be liable for heavy penalty.

Revised Name Availability Guidelines 2011

MCA has advised Applicants and Registrar of Companies to adhere to Name Availability Guidelines 2011 while applying/approving a name. These guidelines supersede all the previous circulars and instructions issued by Ministry of Corporate Affairs from time to time regarding name availability.

1. As per provisions contained in Section 20 of the Companies Act, 1956, no company is to be registered with undesirable name. A proposed name is considered to be undesirable if it is identical with or too nearly resembling with:
 - (i) Name of a company in existence and names already approved by the Registrar of Companies;
 - (ii) Name of a LLP in existence or names already approved by Registrar of LLP;or

- (iii) A registered trade-mark or a trade mark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999.
2. While applying for a name in the prescribed e-form-1A, using Digital Signature Certificate (DSC), the applicant shall be required to furnish a declaration to the effect that:
- (i) he has used the search facilities available on the portal of the Ministry of Corporate Affairs (MCA) i.e., www.mca.gov.in/MCA21 for checking the resemblance of the proposed name(s) with the companies and Limited Liability Partnerships (LLPs) respectively already registered or the names already approved.
 - (ii) the proposed name(s) is/are not infringing the registered trademarks or a trademark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999;
 - (iii) the proposed name(s) is/are not in violation of the provisions of Emblems and Names (Prevention of Improper Use) Act, 1950 as amended from time to time;
 - (iv) the proposed name(s) is not such that its use by the company will constitute an offence under any law for the time being in force.
 - (v) the proposed name is not offensive to any section of people, e.g., proposed name doesnot contain profanity or words or phrases that are generally considered a slur against an ethnic group, religion, gender or heredity;
 - (vi) he has gone through all the prescribed guidelines, understood the meaning thereof and the proposed name(s) is/are in conformity thereof;
 - (vii) he undertakes to be fully responsible for the consequences, in case the name is subsequently found to be in contravention of the prescribed guidelines.
3. There is an option in the e-form 1A for certification by the practicing Chartered Accountants, Company Secretaries and Cost Accountants, who will certify that he has used the search facilities available on the portal of the Ministry of Corporate Affairs (MCA) i.e., www.mca.gov.in/MCA21 for checking the resemblance of the proposed

name(s) with the companies and Limited Liability Partnerships (LLPs) respectively already registered or the names already approved and the search report is attached with the application form. The professional will also certify that the proposed name is not undesirable name under the provisions of section 20 of the Companies Act, 1956 and also in conformity with Name Availability Guidelines, 2011.

- 4(i) Where e-form 1A has been certified by the professional in the manner stated at '3' above, the name will be made available by the system online to the applicant without back-end processing by the Registrar of Companies (ROC). This facility is not available for applications for change of name of existing companies.
 - (ii) Where a name has been made available online on the basis of certification of practicing professional in the manner stated above, if it is found later on that the name ought not to have been allowed under provisions of section 20 of the Companies Act read with these Guidelines, the professional shall also be liable for penal action under provisions of the Companies Act, 1956 in addition to the penal action under Regulations of respective professional Institutes.
 - (iii) Where e-form 1A has not been certified by the professional, the proposed name will be processed at the back end office of ROC and availability or non availability of name will be communicated to the applicant.
5. The name, if made available, is liable to be withdrawn anytime before registration of the company, if it is found later on that the name ought not to have been allowed. However, ROC will pass a specific order giving reasons for withdrawal of name, with an opportunity to the applicant of being heard, before withdrawal of such name.
 6. The name, if made available to the applicant, shall be reserved for sixty days from the date of approval. If, the proposed company has not been incorporated within such period, the name shall be lapsed and will be available for other applicants.
 7. Even after incorporation of the company, the Central Government has the power to direct the company to change the name under section 22 of the Companies Act, 1956, if it comes to his notice or is brought to his notice through an application that the name too nearly resembles that of another existing company or a registered trademark.

The new name availability guidelines can be accessed at the website of the Ministry of Corporate Affairs.