

10 Key Takeaways for Directors from the Companies Amendment Bill, 2017

Gaurav N. Pingle



The Companies (Amendment) Bill, 2016, was introduced in Lok Sabha on March 16, 2016 and the Bill was referred to the Standing Committee on Finance ('Standing Committee') on April 12, 2016 for examination and report thereon, by the Speaker, Lok Sabha. Various representations were made by Professional Institutes, Industry Bodies (FICCI, CII and ASSOCHAM) and Ministry of Corporate Affairs. The Standing Committee submitted its report on December 1, 2016. Considering the suggestions of the Standing Committee, the Companies (Amendment) Bill 2017 was then presented and passed in Lok Sabha on July 27, 2017. It is expected that the Companies (Amendment) Bill 2017 ('the Amendment Bill') will be passed in Rajya Sabha in the Winter Session of 2017.

This article is an analysis of the impact of the important takeaways for directors from the Amendment Bill.

Resident Director: With an objective to introduce accountability and answerability of the directors towards the Government authorities and stakeholders, in case of defaults, the Companies Act, 2013 had introduced 'Resident Director' as a concept. According to extant provisions, every company (private company or public company) shall have at least one director who has stayed in India for a total period of not less than 182-days in the previous calendar year. This provision is being amended in the Companies (Amendment) Bill, 2017 specifically w.r.t. the newly incorporated companies. The Amendment Bill states that for newly incorporated companies, the requirement w.r.t. 182 days shall apply proportionately at the end of the financial year in which they are incorporated.

Independent Director: Under the Companies Act, 2013, listed companies

and certain public companies (with prescribed threshold) are required to appoint independent directors on their boards. The criterion for a person to be an 'independent director' has been prescribed in sub-section (6) of Section 149 of Companies Act, 2013. One of the conditions as per extant provisions in the Companies Act, 2013 is that the director has or had no pecuniary relationship with the company, its holding company, subsidiary company or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. Presently, there is no threshold to determine independence under the clause. Therefore, even Re. 1 transaction by a director with the company, its holding company, its subsidiary company or its associate company during the two immediately preceding financial years or during the current financial year, will dilute his

independence. The Amendment Bill proposes to address this concern by prescribing monetary threshold for determining independence of a director. The proposed amendment permits pecuniary relationship, other than remuneration as such director or having transaction not exceeding 10% of his total income. The Amendment Bill also addresses the issue of pecuniary relationship of relatives or their transactions with the company, its holding company, subsidiary company or associate company.

Right of persons other than retiring directors to stand for directorship :

Pursuant to the extant provisions of Section 160 of the Companies Act, 2013, a person who is not a retiring director shall be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has issued a notice signifying the candidature as a director. The applicant is also required to deposit of Rs. 1 lakh with the company, which will be refunded if the person proposed gets elected as a director or gets more than 25% of total valid votes cast.

The Amendment Bill proposes to provide some exceptions to the compliance of the provisions. It is proposed that the requirements of deposit of amount shall not apply in case of

- (i) Appointment of Independent Director or

- (ii) Director recommended by Nomination and Remuneration Committee or Board of Directors, where the Committee is not required to be constituted.

Alternate Director : As per the extant provisions of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its Articles of Association or by a resolution passed by the company in a general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence from India for a period of not less than 3 months. The Amendment Bill proposes to amend the definition of the Alternate Director, where the Board of Directors of the company may appoint a person as an Alternate Director, whereby the present director of the company cannot be an alternate director in the same company. This provision is intended to avoid multiple directorships of the same person in a company, i.e. as a director and as an alternate director. The proposed amendment will also provide clarity in case of quorum and voting in board meetings.

Director by casual vacancy: Pursuant to the extant provisions of the Companies Act, 2013, if the office of any director appointed by the company in a general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy

may be filled by the Board of Directors at a meeting of the Board. Presently, the provision is applicable only in case of a public company. The Amendment Bill intends to make this provision applicable to all companies. The Bill also contemplates filling of casual vacancy by the Board of Directors at its meeting which shall be subsequently approved by members in the immediate next general meeting. Therefore, appointment of director by casual vacancy will require shareholders' approval in the immediate next general meeting.

Disqualification for appointment of director: Pursuant to the extant provisions, Section 164 of the Companies Act, 2013, states that no person who is or has been a director of a company that:

- a) Has not filed financial statements or annual returns for any continuous period of 3 financial years; or
- b) Has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared, and such failure to pay or redeem continues for 1 year or more, shall be eligible to be re-appointed as a director of that company or appointed in another company for a period of 5 years from the date on which the said company fails to do so.

The Amendment Bill provides a breather for companies and the directors, whereby if a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of 6 months from the date of his appointment. The intention of the proposed amendment would be to make good the default or non-compliance.

Directorships of directors: Section 165 of the Companies Act, 2013 provides for the limits on the number of directorships for a person in companies. According to the provisions, a person can be a director in not more than 20 companies, of which the maximum number of public companies in which he





can be appointed as a director shall not exceed 10. Pursuant to the Amendment Bill, directorship in a dormant company (either a private company or public company) shall not be included while calculating the 20 companies.

Resignation of Director: Pursuant to Section 168 of the Companies Act, 2013, a director may resign from his office by giving a notice in writing to the company. After the receipt of the notice, the board of directors shall take note of the same and the company shall intimate the Registrar of Companies about the resignation. The company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting. It further states that the director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar of Companies within 30 days of the resignation. Presently, the provision of forwarding the reasons of resignation by director is mandatory. The Amendment Bill proposes to make it optional for directors to forward reasons of resignation to Registrar of Companies.

Board Meetings : Pursuant to the extant provisions of the Companies Act, 2013, the participation of directors in Board Meetings may be either in person or through video conferencing or other

audio visual means, as may be prescribed. MCA has prescribed a list of matters which shall not be dealt with in a meeting through video conferencing or other audio visual means. These matters are :

- i) Approval of the Annual Financial Statements,
- ii) Approval of the Board's Report,
- iii) Approval of the prospectus,
- iv) Audit Committee Meetings for consideration of financial statement,
- v) Approval of matters relating to amalgamation, merger, demerger, acquisition and takeover.

The Amendment Bill has allowed the Board of Directors to discuss and approve the above mentioned matters in a meeting through video conferencing or other audio visual means, if there is quorum in a meeting through physical presence of directors. The proposed amendment would be very beneficial for routine annual matters like approval of the Annual Financial Statements and Approval of the Board's Report.

Maximum Managerial Remuneration : Section 197 of the Companies Act, 2013 provides for overall maximum managerial remuneration where a company is having adequate profits or having inadequate profits. The provisions of Section 197 of the Act are

applicable to public companies only. The provisions prescribe for remuneration of executive and non-executive directors of the company. Where the company has loss or inadequate profits, the Amendment Bill proposes the approval of stakeholders, i.e. banks/public financial institutions/debenture holders/other secured creditors, if the remuneration exceeds the prescribed limits. As per extant provisions, the approval of Central Government is required.

Conclusion: It is expected that the Amendment Bill will be passed in the Winter Session of the Parliament. In all, there are 93 amendments proposed in the Bill, which will have an impact on the working of the companies, director roles/responsibilities/liabilities, compliance processes, etc. After the Bill is passed, the corresponding Rules, if any, will also be amended to avoid conflict of the provisions.

Gaurav Pingle
Practising Company Secretary, Pune
(E) : gp@csgauravpingle.com
(W) : www.csgauravpingle.com