iComply

Editorial

Dear Reader,
Last month we completed our first Survey on Corporate Secretarial Practices in which 222 Professionals participated. What made the survey results rich was the experience profile of the participants and the rationale they shared for their practices.
Read more…

Interview with C.S. Pramod, Partner of HBP & Co.



Would you advice professionals to get on the board of private companies as Directors? If they get on the Board what precautions should they take?

India as the fastest growing large economy is emerging as the land of opportunities with the start-ups being epi-centres of growth.

Read more…

Compliance Calendar

Due dates for Income tax, Professional tax, Service tax, Companies Act, 2013 etc has been captured for your ready reference.

View the list…

Veto Rights and Good Governance: Are the two in Sync?



One of the most debatable questions in CimplyFive's First Survey on Secretarial Practice conducted in July 2016 was on the practice of taking Directors consent for holding Board Meeting at shorter notice. Though this is not a statutory requirement, our survey indicated that 81% of the respondents revealed that they took Directors consent for holding Board Meetings at shorter notice.

Read more…

Gist of Regulatory Changes in Companies Act, 2013 in the month of July 2016



Eight Regulatory changes in Companies Act, 2013 in the month of July.

View the list…

Editorial

Dear Reader,

Last month we completed our first Survey on Corporate Secretarial Practices in which 222 Professionals participated. What made the survey results rich was the experience profile of the participants and the rationale they shared for their practices.

Of specific interest is one question in the survey on taking Directors consent for conducting Board Meetings at shorter notice. An overwhelming 81% of the practitioners confirmed that they take Directors consent for holding Board Meetings at shorter notice. Arising from this response, we explore the concept of veto rights and good governance in this issue. A debatable matter no doubt. That is why we have taken it up to kick start the debate.

In this issue we have interviewed CS Pramod, partner of HBP & Co, a leading firm of Practicing Company Secretaries in Bangalore on the Liabilities of a Director on a Corporate Board and to what extent Directors Liability Insurance protects them. In addition to this, all our regular features–Gist of Regulatory Changes and Compliance Calendar are there in this issue.

We are eager to know what you think of ***icomply*.** Please do share your thoughts with us at contact@cimplyfive.com.

Happy reading,
Shankar Jaganathan
Editor
August 5, 2016

Interview with C.S. Pramod, Partner of HBP & Co.

1. **Would you advice professionals to get on the board of private companies as Directors? If they get on the Board what precautions should they take?**

   India as the fastest growing large economy is emerging as the land of opportunities with the start-ups being epi-centres of growth. Many of the start-up founders have limited commercial experience, where knowledge of accounting, taxation and legal needs to be supplemented. This is where professionals on the Board can add significant value as the entrepreneur designs new business models.

   The opportunities that start-ups bring to the professional is immense. We only have to look at Google & Facebook, the two best known start-ups to see that they brought in professionals very early in their ventures and gained immensely for that. I believe we will soon see the next Eric Schmidt or Sheryl Sandberg in India.

   But a word of caution. Professionals have to go in with their eyes open. In particular they need to look at the attitude of entrepreneurs on compliance with laws, as defaults not only impose liabilities on the Company but also on the Directors. In the case of Directors, it can be more than monetary penalties as some offences may lead to imprisonment in addition to the monetary penalty.

2. **There is a major debate on the role of Directors Liability Insurance? While it is more prevalent in the US, what is its current status in India? How far do you think it is prevalent in India and what type of companies are taking Directors Liability Insurance?**

   Directors & Officers Liability Insurance (D&O) is a result to personal liabilities being enforced, as many Independent Directors refused to get on Corporate Boards due to fear of personal liabilities. Given this underlying logic, in large companies D&O insurance is more the norm than an exception. Mid-sized companies with US operations also tend to take this insurance due to high litigation cost combined with

high damages awarded in the US. Further companies with VC/PE investors take D&O insurance to protect their nominees. Once class action suits gain traction in India, more companies will look to D&O policy as they look to engage with qualified independent directors who may be concerned about their personal liability.

3. **What are the major areas where Directors Liability Insurance does not protect the Directors in India?**

   D&O policy can cover former, present and future members of the board of Directors and the management. It can also cover individuals of the parent company, the subsidiary companies and subsidiary companies newly acquired or incorporated during the policy period.

   Essentially, personal liability claims may arise under contract, in tort or under a statute. Directors can be personally liable for their own default as well as jointly and severally liable with the company and their fellow Directors for its or their negligence or omission. The policy normally indemnifies damages awarded against Directors or officers and the company, with reimbursement from the insured companies in case of a valid contractual obligation on their part to hold a director or officer harmless. Defence costs are also normally covered.

   A D&O policy does not cover fraudulent, criminal or intentional non-compliant acts. However, innocent directors remain fully covered even if they are co-defendants with their colleagues who were fraudulent or attributed with criminal intent. D&O policy will not indemnify the Company for any claims against it.

   It is pertinent to note that fines, penalties and other penal liability are not insured. The Company and its Directors will have to pay the same from their pocket. Due to this exclusion, many Companies after a cost benefit analysis don't go for D&O policy. An important point to note is that Section 197(13) of the Companies Act, 2013, provides that the premium paid on such insurance will not be treated as remuneration payable to such personnel.

4. **How far does the use of technology and information systems like ERP and Compliance Software like SAP, Oracle and BLISS protect Directors?**

   Non-executive Directors need assurance on the status of compliance as they not do not participate in the day to day activities. Technology can be a big help for them. An example is the dash board in BLISS that gives the compliance status in a simple graph form comprehensible to even a non-commercial person. By accessing such software Non-Executive Directors can know the compliance status at anytime from anywhere. Availability of information to Directors can be a big driver to push company management to be more compliant, as Directors can also take corrective action, which includes resigning from the Board in case of continuing non-compliance. Directors to avoid liabilities under the various provisions of the law may in future insist on such software being in place in addition to D&O insurance.

Compliance Calendar (Last Date for Compliance)

August 5, Friday	Physical payment of Excise duty, Non SSI for the month of July,2016
August 6, Saturday	E-payment of Excise duty, Non SSI for the month of July,2016
	E-payment of Service Tax
August 7, Sunday	TDS Return for the month of July
August 14, Sunday	To submit Quarterly Financial Statement to Stock Exchange
August 15, Monday	Pay PF contribution for July,2016
August 20, Saturday	Professional Tax payment
August 21, Sunday	ESIC monthly deposit
August 25, Thursday	PF return Filing-Monthly

Veto Rights and Good Governance: Are the two in Sync?

By Shankar Jaganathan
Founder & Chief Executive, CimplyFive

One of the most debatable questions in CimplyFive's First Survey on Secretarial Practice conducted in July 2016 was on the practice of taking Directors consent for holding Board Meeting at shorter notice. Though this is not a statutory requirement, our survey indicated that 81% of the respondents revealed that they took Directors consent for holding Board Meetings at shorter notice.

Taking consent from all participants even though it is not mandatory seems to be a desirable practice as it meets the basic yardstick of good governance, which is to enable all the eligible members to participate in the decision making process. The moot question is, does a deeper scrutiny of this practice stand the test of good governance?

When we dig deeper, an unintended implication of this practice has the effect of providing a veto right to each and every director, as the failure of even a single director to give their consent has the effect of deferring the Board Meeting, even if every other director wants to have it.

In this context, it is worth noting an interesting observation made by the **Robert's Rules of Order**, first published in 1876 which is considered the Bible of Parliamentary procedures, on getting consent from members. The options available are:

- All members, or
- All members present, or
- All members present and voting.

The Book reasons that getting consent from all the members or all members present has the effect of treating a vote to abstain or inability to vote for whatever reason, as a negative vote. Given this effect, this basis is not to be used unless the matter is of such grave importance that a positive consent from all the members is considered essential.

Given this backdrop, it is worth examining how and why veto rights emerged, and is it an appropriate instrument for Corporate Board Meetings.

Veto rights or negative affirmative rights are basically negation of the power of majority to take decisions. This is a right not normally accorded in the statute books, which uphold the principles of democracy and endorses decision made by the majority. The rare exceptions where the rule of majority is negated by the statutes is when the rights of a minority group is adversely affected or a basic principle of their association is being modified, altered or substantially changed.

In sharp contrast, veto rights are a standard feature of private Shareholder Agreements that are used mainly by financial investors taking a stake in start-ups to protect their large financial outlay they bring to the table. Covering areas of Board representation, Approval for Financing plans and CXO appointments, Anti-dilution provisions and Shareholder Reward sharing mechanisms like Right of First Offer (ROFO), Right of First Refusal (ROFR), Tag along rights and Drag-along rights, veto rights have a logical and justified place, as in their absence it will be difficult for start-ups with ideas to attract capital, despite the knowledge that capital without entrepreneurs will remain idle cash. Hence, for dreams to be realized and idle cash to become riches, veto embedded in shareholder agreements is a valuable conduit.

In contrast to shareholder meetings where ownership rights are to be protected, the Corporate Board is more a body of collective wisdom to guide and run the company, which includes some high-end residual powers that involve day to day running of the company like powers to borrow and appoint representatives to present company's interest. Given the nature of the Corporate Board, it is worth debating if consent from Directors should be obtained for holding Board Meetings at Shorter Notice.

Gist of regulatory changes in Companies Act, 2013 in the month of July, 2016

14.07.2016

a) Companies (cost records and audit) Amendment Rules, 2016

Highlights of the Amendment are:

- Definition of Regulated Sector for Telecommunication Industry expanded to include activities that requires authorization or license issued by the Department of Telecommunications, Government of India under Indian Telegraph Act,1885.
- Consent letter and eligibility certificate to be obtained from the Cost Auditor prior to proposing a Cost Auditor for appointment by the Board.
- Provision introduced for
  - Removal of Cost Auditor after giving a reasonable opportunity of being heard.
  - Cost Audit Report should be approved by the Board of Directors.
  - Cost Audit Report (CRA-4) to be filled in XBRL format.

19.07.2016

a) Companies (Share Capital and Debentures) Third Amendment Rules, 2016

- Companies which have defaulted on payment of dividends, repayment of loans or statutory payments were earlier prevented from issuing equity shares with differential rights. After this amendment these restrictions are withdrawn five years after the Company has made good these defaults.
- Preferential offer of partly paid up shares at the time of their allotment permitted.
- Companies without Share Capital need to file Form SH-7 for increase in members now.
- Secured debentures can be issued by creating a charge on the properties or assets of company's subsidiaries or its holding company or its associates companies.
- Startups (as defined by the Department of Industrial Policy and Promotion) are given additional flexibility for a period of five years from the date of Incorporation to:
  a. Issue Sweat Equity shares up to 50% of its paid-up capital.
  b. Provide ESOPs to promoters or directors, including directors who either directly or indirectly, holds more than ten percent of the equity shares.

b) In exercise of the powers conferred by sub- section (1) of section 381 of the Companies Act, 2013 (18 of 2013)

A foreign Airlines Company is now required to submit the following documents to ROC from the FY 2016-17

- Latest consolidated financial statements of the parent foreign company.
- A statement of receipt and payments for its Indian operations for the financial year, duly authenticated by a practicing Chartered Accountant.

21.07.2016

National Company Law Tribunal Rules, 2016 and National Company Law Appellate Tribunal Rules, 2016

National Company Law Tribunal Rules, 2016 and National Company Law Appellate Tribunal Rules, 2016 is notified with effect from 21.07.2016.

27.07.2016

a) Companies (Incorporation) Third Amendment Rules, 2016

- Now a natural person shall not be member of more than 1 OPC and the said person shall not be a nominee of more than 1 OPC.
- Proof of identity and residence of the subscriber are not required to be filed with the ROC at the time of filing application of incorporation of the company, where the subscriber is already having a valid DIN.
- Every Company having a website to disclose/publish its name, address of its

registered office, the CIN, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries.

- Rule 37 is inserted for conversion of unlimited liability company into a limited liability company by shares or guarantee.
- Forms INC-27 and INC-11 have been amended and new forms for 'Advertisement to be published in the newspaper for conversion of Unlimited Liability into Limited Liability Company' and 'Certificate of Incorporation pursuant to conversion of Unlimited Liability Company into Limited Liability Company' have been inserted in the principal rules.
- Partnership firm can't be subscriber to the Memorandum of Association.

b) Companies (Accounts) Amendment Rules ,2016

- A Company which is a subsidiary of another company need not present its Consolidated Financial Statement (CFS) if:
    - Its parent presents CFS
    - Is not listed in any Stock Exchange or has plans to list in a Stock Exchange.
    - Has given notice of its intent not to publish CFS to its members, both with voting and without voting rights and they have not objected to it.
- The Directors' Report is now required to include highlights of performance and contribution to the overall performance of subsidiaries, associates and joint venture companies instead of a report on their performance and financial position.
- A Cost Accountant both in practice or in employment can be appointed as an Internal Auditor.
- AOC-4 form now contains a provision to file revised Financial statements.

c) Special Court under section 435 of the Companies Act, 2013

MCA has designated the 'Court of Additional Sessions Judge-03, South-West District, Dwarka' as the Special Court under Section 435 of the Companies Act, 2013 in respect of jurisdiction of National Capital Territory of Delhi for the purposes of providing speedy trial of offences punishable under the Companies Act, 2013 with imprisonment of two years or more under the Companies Act, 2013.

29.07.2016

MCA has announced relaxation of additional fee and extension of due date for filing of AOC-4, AOC-4 (XBRL), AOC -4(CFS) and MGT-7 for AGM held on or after 01.04.2016 up to 29.10.2016.

About us

CimplyFive Corporate Secretarial Services Pvt Ltd

Vision:

Eliminate procedural non-compliance risk for entities incorporated under Indian Companies Act, 2013

Mission:

Provide a cost-effective, secure web-based, menu driven, subscription services that provides curated resolutions, timely alerts and ;informative dashboards to free the management bandwidth for pursuing business goals

BLISS (Board Leaders Integrated Software Solution)

Our product BLISS (Board Leaders Integrated Software Solutions)

- A digital productivity tool for Compliance with the Companies Act,2013
- Provides comprehensive coverage of Board meetings, Shareholder meetings and Sub-committee meetings
- Rich bank of curated but editable resolutions
- Fully integrated modules- Agenda, Minutes, Registers and Returns
- Timely alerts and reminders
- Rich and real-time dashboard

www.ca2013.com: Company law at your fingertips. A free to use website, integrating Companies Act with Rules, Notification, Orders and Circulars that is real time and online

Contact:

contact@cimplyfive.com

Phone: 080-23441212

CAIRR

