

SECRETARIAL AUDIT UNDER COMPANIES ACT, 2013

Introduction

According to Wikipedia the term Auditing is defined as a systematic and independent examination of data, statements, records, operations and performances (financial or otherwise) of an enterprise for a stated purpose. In any auditing the auditor perceives and recognizes the propositions before him/her for examination, collects evidence, evaluates the same and on this basis formulates his/her judgment which is communicated through his/her audit report.

Companies Act, 2013 prescribed four different kinds of Audits for companies, namely Internal Audit, Statutory Audit, Cost Audit and Secretarial Audit.

- a) The purpose of Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. Its objective is to bring a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes. Internal auditors are employed by Board of Directors to perform the internal auditing activity.
- b) The purpose of a Statutory audit is to determine whether an organization is providing a fair and accurate representation of its financial position by examining information such as bank balances, bookkeeping records and financial transactions.
- c) The purpose of a Cost Audit represents the verification of cost accounts and check on the adherence to cost accounting plan. Cost Audit ascertain the accuracy of cost accounting records to ensure that they are in conformity with Cost Accounting principles, plans, procedures and objective.

Secretarial Audit

Before enactment of Companies Act, 2013, Secretarial Audit was not mandatory for the Companies. Section 204 of Companies Act, 2013 has made Secretarial Audit mandatory for Certain Companies.

In Companies Act, 2013 requirement of Compliance Certificate has been withdrawn and a new and wider Concept of Secretarial Audit Report has been inserted in Section 204 of the said act.

The secretarial Audit is better in the interest of every corporate management as, an independent professional will certify that the company has carried out the compliances under the Act

Applicability

Secretarial Audit has been made mandatory only for bigger Companies. Private Limited Companies has been kept out of preview of Secretarial Audit, irrespective of their paid-up capital, turnover and various Laws applicable to private companies.

Section 204 (1) of the Companies Act 2013 mandates Secretarial Audit for every Listed company and Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, mandates Secretarial Audit for every public company having a paid-up share capital of fifty crore rupees or more; or every public company having a turnover* of two hundred fifty crore rupees or more.

*“Turnover” means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. [Section 2(91)]

The Secretarial Audit Report shall be in the Form MR-3 and shall be annex with its Board's report made in terms of sub-section (3) of section 134.

Appointment/ Qualifications of Secretarial Auditor

Only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the company.

As per section 2 (25) of Companies Act, 2013 “company secretary in practice” means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980;

As per Rule 8 of the Companies (Meetings of Board and its powers) Rules, 2014, Secretarial Auditor is required to be appointed by means of resolution passed at a duly convened Board meeting and resolution for appointment shall be filed with Registrar of Companies within 30 days of such Appointment in E-form MGT-14.

Rights and Duties of Secretarial Auditor

Section 143 of the Companies Act, 2013 deals with powers and duties of Statutory Auditors. Sub-section (14) of the section provides that the provisions of this section shall mutatis mutandis apply to the Company Secretary in Practice conducting Secretarial Audit under section 204.

Where any of the matters required to be included in the audit report under section 204 is answered in the negative or with a qualification, the report shall state the reasons therefor.

Reporting of Frauds by Secretarial Auditor to Central Government

Section 143, Sub-section (12) of the Companies Act, 2013 specifies that if an auditor of a company, which includes Secretarial Auditor [Section 143(15)] in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately but not later than sixty days of his knowledge report the matter to the Central Government in the form of a statement as specified in Form **ADT-4**.

Before reporting the frauds to central government auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within forty-five days;

In case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government alongwith a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.

The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.

The report shall be on the letter-head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.

Scope of Secretarial Audit

In terms of Form MR-3, Scope of Secretarial Audit has been divided into five heads.

I. Examine and report on the compliance of the following five specific laws:

- (i) The Companies Act, 2013 (the Act) and the rules made thereunder;
- (ii) The Securities Contracts (Regulation) Act, 1956 (SCRA) and the rules made thereunder;
- (iii) The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;
- (iv) Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

- (v) The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 („SEBI Act“):-
- (a) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
 - (b) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
 - (c) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
 - (d) The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
 - (e) The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
 - (f) The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;
 - (g) The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and
 - (h) The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
- (vi) Other laws as may be applicable specifically to the company.

Reporting on compliance of “Other laws as may be applicable specifically to the company” which shall include all the laws which are applicable to specific industry for example for Banks- all laws applicable to Banking Industry; for insurance company- all laws applicable to insurance industry; likewise for a company in petroleum sector- all laws applicable to petroleum industry; similarly for companies in pharmaceutical sector, cement industry etc.

II. Secretarial Standards & Listing Agreements:

- (i) Secretarial Standards issued by The Institute of Company Secretaries of India and approved by the Central Government.
- (ii) The Listing Agreements entered into by the Company with Stock Exchange(s), if applicable;

III. Composition of Board of Directors/Minutes of Directors & Members Meeting-

The Board of Directors of the Company is duly constituted with proper balance of Executive Directors, Non-Executive Directors and Independent Directors.

The changes in the composition of the Board of Directors that took place during the period under review were carried out in compliance with the provisions of the Act.

Adequate notice is given to all directors to schedule the Board Meetings, agenda and detailed notes on agenda were sent at least seven days in advance, and a system exists for seeking and obtaining further information and clarifications on the agenda items before the meeting and for meaningful participation at the meeting.

Majority decision is carried through while the dissenting members' views are captured and recorded as part of the minutes.

IV. Adequate systems and processes in the company-

Secretarial Auditor also requires to report on whether Adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

V. Details of specific events / actions having a major bearing on the company's affairs-

Secretarial Auditor also requires to report on details of specific events / actions having a major bearing on the company's affairs in pursuance of the laws applicable on the Company during the audit period the company.

Documents to be examined/verified while conducting secretarial audit. The points are inclusive and not exhaustive:

For Companies Act, 2013

- (i) Books , Papers, as per Section 2 (12) of Companies Act, 2013, "book and paper" and "book or paper" include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form.
- (ii) Memorandum of association

- (iii) Articles of association
- (iv) Certificate of Incorporation
- (v) Audited balance sheet(s).
- (vi) Statutory Registers maintained by the Company i.e, Register of Members/ Register of debenture holder/ Register of Charges/ Register of Directors and Key Managerial Personnel/ Register of Loans, Guarantee, Security etc.
- (vii) Details of E-forms filed during the period.
- (viii) Notice of calling Board Meetings.
- (ix) Notice of calling Extra Ordinary General meeting, Annual General Meeting along with the explanatory statement.
- (x) Minutes of the Board meetings, Extra Ordinary General meeting, Annual General Meeting, Audit Committee Meetings, Nomination & Remuneration Committee Meetings, etc.
- (xi) Notices of disclosure of directors' interests in Form No. MBP-1 as well as specific notices received from time to time from the directors and recorded in the minutes of Board meetings.
- (xii) Copy of documents related to the appointment/Resignation of Statutory Auditor of the company.
- (xiii) Copies of contracts made between the company and any of the related parties u/s section 188 of Act.
- (xiv) Details of inter-corporate investments/loans/guarantees/securities etc.
- (xv) Copy of Internal Audit Report given by Internal Auditor appointed u/s 138 of Companies Act, 2013.

The Securities Contracts (Regulation) Act, 1956 (SCRA) and the rules made thereunder;

- (i) The Securities Contract (Regulation) Act, 1956 deals with stock exchanges, contracts in securities, and listing of securities on stock exchanges, and keeps a vigil over all the stock exchanges of India and prevents undesirable contracts in Securities market through a process of recognition and continued supervision.
- (ii) Details of Intimation to the all the stock exchange for book closure or record date.

- (iii) Details of Proof of dispatch of Six copies of the Annual Report, to the stock exchange where securities of the Company are listed.
- (iv) Details of Proof of dispatch/ mail of copy of the proceedings of Annual and Extraordinary General Meetings of the Company.
- (v) Details of filing of Shareholding Pattern, under clause 35 of the equity listing agreement, to the stock exchange where securities of the Company are listed.
- (vi) Details of filing intimation of quarterly financial statements under Clause 41(1) of the equity listing agreement to the stock exchange where securities of the Company are listed.
- (vii) Copy of Newspaper advertisement for the Board Meeting in which quarterly financial statement(s) has been approved.

The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;

- (i) Copy of Agreement entered into by the Company with any Depository/ Depository Participant.

Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings

- a) Copy of Foreign Inward Remittance Certificate.
- b) Copy of Form FC-GPR.
- c) Copy of Annual return on Foreign Liabilities & Assets (FLA).
- d) Certificates received from Company Secretary and Chartered Accountant.
- e) Copy of approval Reserve Bank of India/ Foreign Investment Promotion Board.

Documents for Secretarial Standard(s):

- a) Need to check whether Secretarial Standards issued by the Secretarial Standards Board (the SSB), ICSI with respect to **General and Board meetings** specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 has been complied with.

Penalties

Section 204(4) further provides that, the company, every officer of the company or the company secretary in practice, contravenes the provisions of Section 204, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

In terms of Section 448, a Company Secretary in Practice is liable to attract penal provision under section 447, if he makes statement in the Secretarial Audit Report which is false in any material particulars, knowing it to be false; or which omits any material fact, knowing it to be material.

Section 447 deals with punishment for fraud which provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Persuasion/Opinion regarding exclusion of Private Companies from Secretarial Audit:

Exclusion of private companies, irrespective of their size, from Secretarial Audit gives a message that the matters covered under such audit such as compliance with applicable laws is not important. Serious Misdemeanor has been noticed in many private companies. My view is that Private Companies having some prescribed Paid-up Capital or Turnover should also be included in the preview of Secretarial audit.

Satyendra Kumar Mishra
Founder & CEO
EmpressaLegal.com
Email: Info@EmpressaLegal.com