

India July, 2011

Corporate Affairs Ministry launches Makeover

New team at the ministry has junked antiquated rules, introduced sensible new ones and given India Inc a boost. A steady string of notifications and circulars has considerably eased procedural issues.

Exemption from submission of separate balance sheets for all subsidiaries.

Government of India, Ministry of Corporate Affairs vide its General Circular No: 2 /2011, has directed that provisions of Section 212 of the Companies Act, 1956 shall not apply in relation to subsidiaries of those companies subject to the fulfillment of the following conditions

1. The Board of Directors of the Company has by resolution given consent for not attaching the balance sheet of the subsidiary concerned
2. The company shall present in the annual report, the consolidated financial statements of holding company and all subsidiaries duly audited by its statutory auditors.
3. The consolidated financial statement shall be prepared in strict compliance with applicable Accounting Standards and, where applicable, Listing Agreement as prescribed by the Security and Exchange Board of India.
4. The company shall disclose in the consolidated balance sheet the following information in aggregate for each subsidiary including subsidiaries of subsidiaries:- (a) capital (b) reserves (c) total assets (d) total liabilities (e) details of investment (except in case of investment in the subsidiaries) (f) turnover (g) profit before taxation (h) provision for taxation (i) profit after taxation (j) proposed dividend.
5. The holding company shall undertake in its annual report that annual accounts of the subsidiary companies and the related detailed information shall be made available to shareholders of the holding and subsidiary companies seeking such information at any point of time. The annual accounts of the subsidiary companies shall also be kept for inspection by any shareholders in the head office of the holding company and of the subsidiary companies concerned and a note to the above effect will be included in the annual report of the holding company. The holding company shall furnish a hard copy of details of accounts of subsidiaries to any shareholder on demand.
6. The holding as well as subsidiary companies in question shall regularly file such data to the various regulatory and Government authorities as may be required by them.
7. The company shall give Indian rupee equivalent of the figures given in foreign currency appearing in the accounts of the subsidiary companies along with exchange rate as on closing day of the financial year.

HIGHLIGHTS

- **Exemption from submission of separate balance sheet for all subsidiaries through circular No.2/2011, subject to certain conditions, issued by Ministry of Corporate Affairs.**
- **Unlisted Companies Having No Profits/Inadequate Profits Shall Not Require Government Approval For Managerial Remuneration.**
- **M&A regulation under the Competition Act, 2002 notified.**
- **Registration of companies in 24 hours.**
- **The Ministry has introduced the electronic mode for compliance with some of the provisions of the Companies Act, 1956.**
 - Ø Service of documents under Sec. 53 of the Companies Act, 1956, can be made through the electronic mode
 - Ø Soft copy of the annual report of companies can be sent to registered e-mail addresses of their members in compliance of Sec. 219 (1) of the Companies Act, 1956.
 - Ø An electronic platform for electronic voting process for postal ballot under Sec. 192A of the Companies Act, 1956.



M&A regulations under the Competition Act, 2002 notified

The Competition Commission of India (CCI) released the final version of The CCI (Procedure in regard to the transaction of business relating to combination) Regulations, 2011 (*Merger Control Regulations*). The Merger Control Regulations came into force on June 1, 2011.

Sections 5 and 6 of the Act prohibit a combination which causes or is likely to cause an “*appreciable adverse effect on competition*” and treats such combinations as void. Only transactions meeting the thresholds (based on assets and turnover) specified in the Act must be pre-notified to the CCI. Importantly, transactions which are subject to merger control review by the CCI cannot be consummated until merger clearance has been obtained or 210 calendar days have passed from the date of notification, whichever is earlier.

Some key provisions of the Merger Control Regulations include.

- 1. Transitional provisions:** the new merger control regime applies only to (a) mergers/amalgamations where the boards of directors approve the transaction on or after 1 June 2011; (b) acquisitions where the binding documents are executed on or after 1 June 2011. Therefore, if binding documents have been executed prior to 1 June or, in case of a merger/amalgamation, board approval is obtained prior to 1 June no merger filing will be necessary.
- 2. Exempt transactions:** the CCI has specified a list of transactions which they believe do not “*ordinarily*” raise competition concerns and therefore are “*normally*” exempt from the filing requirement (e.g. intra group acquisitions, acquisition of raw materials, current assets, overseas acquisitions with insignificant local nexus and effect on markets in India, etc.).
- 3. Short form filing:** the Commission has specified a list of transaction which may “*ordinarily*” be filed in the short form (Form I)(e.g. where there are no overlaps, where there are horizontal overlaps but the market share of the enterprises is below 15%, where there are vertical overlaps and the market share of the enterprises is below 25%, etc)
- 4. Long form filing:** a party that elects to make a long form filing (Form II), is required to pay a filing fee of INR 10,00,000 (USD 22,400 approx). Form II requires extremely detailed information
- 5. Two phase review process:** Phase I consists of up to 30 calendar days wherein the CCI will decide to clear a transaction or subject it to further scrutiny. If remedies

are submitted in Phase I, Phase I could be an additional 15 calendar days (or a total of 45 calendar days). A transaction will shift to Phase II if the CCI, in its *prima facie* opinion believes it is likely to cause an appreciable adverse effect on competition. Phase II can last up to an additional 180 days and will entail a detailed investigation of the transaction and its effects.

- 6. Clarification on trigger event:** under the Act, a qualifying acquisition must be notified within 30 calendar days of execution of any agreement or other document for acquisition. The Merger Control Regulations clarify that the term “*other document*” means a binding document conveying an agreement or decision to acquire. In case of a hostile transaction, “*other document*” would mean any executed document conveying a decision to acquire
- 7. Stoppage of the clock:** under the Act, if the CCI does not issue an order within 210 calendar days from the date of filing a notification, the combination is deemed to have been approved. The Merger Control Regulations specify various scenarios where the clock will be stopped and time taken will not count towards the 210 day period (or the 30 day Phase I period). These scenarios include, where the notifying party (a) submits an incomplete form; (b) is requested to file any additional information by the CCI or (where Form I has been filed) requested to file Form II, etc. As a result, there is a risk that the merger review process could well exceed the 210 day period prescribed by the Act.

Registration of Companies in 24 hours

The Union ministry of corporate affairs has set the first week of July as the target date for launching a completely digitized service that will allow anyone with all relevant documents and approvals to complete the process of registering a company in one day. The announcement of the launch is likely by end of July.

Unlisted Companies Having No Profits/Inadequate Profits Shall Not Require Government Approval For Managerial Remuneration.

Schedule XIII of the Companies Act, 1956 is being amended to provide that unlisted companies (which are not subsidiaries of listed companies) shall not require Government approval for managerial remuneration in cases where they have no profits/inadequate profits, provided they meet the other conditions stipulated in the Schedule.



Participation of shareholders in General meeting through Electronic Mode

1. The Ministry of Corporate Affairs has taken a "Green Initiative in the Corporate Governance" by allowing paperless compliances by the Companies after considering sections 2, 4, 5, 13 and 81 of the Information Technology Act, 2000 for legal validity of compliances under Companies Act, 1956 through electronic mode.
 2. The Ministry has been receiving representations from various Industry bodies to recognize participation by shareholders in meetings under the Companies Act, 1956 through electronic mode.
 3. Section 13 of the Information Technology Act, 2000, *inter alia* provides time and place of dispatch of notices in electronic mode, which may be applicable for the purpose of notice period provided in the Companies Act, 1956 or in the Article of Association of the company.
 4. It was also clarified that a shareholder of the company may participate in a general meeting under the provisions of Companies Act, 1956 through electronic mode.
- For this purpose, the company shall also comply with the following requirements and procedures, in addition to the normal procedures required under the Companies Act, 1956 for holding general meeting :
- a) Electronic mode means video conference facility *i.e.*, audio-visual electronic communication facility employed which enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.
 - b) The notice of the meeting must inform shareholders regarding availability of participation through video conference, and provide necessary information to enable shareholders to access the available facility of video conferencing.
 - c) The Chairman of the meeting and Secretary shall assume the following responsibilities.
 - I. to safeguard the integrity of the meeting *via* video conferencing
 - II. to ensure proper video conference equipment/facilities.
 - III. to prepare the minutes of the meeting
 - IV. to ensure that no one other than the concerned shareholder or proxy to the shareholder is attending the meeting through electronic mode
5. If a statement of a participant in the meeting *via* video conferencing is interrupted or garbled, the Chairman of the meeting or Secretary shall request for a repeat or reiteration, and if need be, the Chairman or Secretary shall repeat what he heard the participant was saying for confirmation or correction.
 - a) Section 166 of the Companies Act, 1956 *inter alia* provides that a company is required to have its Annual General Meeting either at the registered office of the company or at place within the city, town or the village in which registered office of the company is situated.
 - b) Section 174 of the Companies Act, 1956 *inter alia* provides that at least five members in case of public company and two members in case of other company have to be personally present and shall be the quorum for the general meeting.
 - c) In a general meeting, where shareholders are allowed to participate through electronic mode, the quorum as required under section 174 of the Companies Act, 1956 as well as chairman of the meeting shall have to be physically present at the place of the meeting.
 6. To provide larger participation and for curbing the cost borne by the shareholders to attend general meetings, listed companies may provide video conferencing connectivity during such meetings at least five places in India. It is recommended that these places would be situated all over India in such a way that it covers top five States/UTs based on maximum number of members or at least 1000 members, whichever is more, residing as per the address registered with the depositories

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