

Analytically Speaking



Look forward to heydays of CS Profession: Certification requirements under the new Act

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Note

There is enough buzz in the corporate world regarding the role of Practising Company Secretaries (**PCS**) under the Companies Act, 2013 (**the Act, 2013**). Professionals were worried inasmuch as the scope and position of a Company Secretary in employment seemed to have increased, the role of PCS was a matter of concern when the corresponding section of 383A under the Companies Act, 1956 (**the Act, 1956**) was missing in the Act 2013. However, it seems that Act 2013 has widened the scope of services that a PCS can offer. One of such area is Annual Return to be filed by a Company under Section 92 of the Act, 2013

Provisions of law

As per Section 92 of the Companies Act, 2013 (**the Act, 2013**), the Annual Return is required to be signed by a Company Secretary and in the absence of a Company Secretary by a PCS.

Provided that in case of in relation to One Person Company and Small Company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the Company.

As per Section 2 (85) of the Act, 2013

“small company” means a company, *other than a public company*,—

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

Further, as per draft rule 7.9 (2) the Annual Return, filed by a *listed company or a company having paid-up share capital of five crore rupees or more and turnover of twenty five crore rupees or more*, needs to be certified by a PCS. The certificate shall be in Form no. 7.8

As per Section 203, every *listed company* and every *other company having a paid-up share capital of five crore rupees or more* need to appoint full time Company Secretary (a Key



Note

Managerial Personnel as per Section 2(51) of the Act, 2013). Except for section 203, the Act, 2013 does not provide for appointment of full time Company Secretary.

The Act, 2013 further, under Section 204, even mandates *Secretarial Audit* for a *listed company* and *every public company having a paid-up share capital of one hundred crore rupees or more*, which shall be given by a PCS and such report shall be annexed to the Board Report of the Company.

Our Analysis

Based on the above discussions we can classify companies in 5 categories and state the relevant compliance requirements with respect to PCS.

Categories	Particulars	Requirement
Category I	Private companies with paid up capital of upto ₹ 50 lakhs	May or May not appoint Company Secretary. However, if appointed, whether on a whole time basis or on a part time basis, will qualify as a KMP. So Annual Return will be signed by the Company Secretary. Where there is no company secretary appointed, the annual return shall be signed by the director of the Company
Category II	a) Private companies with paid up capital of above ₹ 50 lakhs and upto ₹ 5 crores. b) Public Companies with paid up capital upto ₹ 5 crores.	May or May not appoint Company Secretary. However, if appointed, whether on a whole time basis or on a part time basis, will qualify as a KMP. So Annual Return may be signed either by the Company Secretary where there is one or by PCS in the absence of a Company Secretary.
Category III	a) Companies with paid up capital of ₹ 5 crores and above;	Mandatory to appoint full time Company Secretary (Sec 203). So Annual Return will be signed by Company Secretary.
	b) Companies with paid up capital of ₹ 5 crores or more and turnover of ₹ 25 crores or more;	Mandatory to appoint full time Company Secretary (Sec 203). So Annual Return will be signed by Company Secretary. Further, the Annual Return will be certified by PCS.



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<p>Category IV</p>	<p>Public Companies with paid up capital of ₹ 100 crores or more;</p>	<p>Mandatory to appoint full time Company Secretary (Sec 203). So Annual Return will be signed by Company Secretary.</p> <p>Secretarial Audit by PCS and, the Annual Return will be certified by PCS (as a Company with paid up capital of ₹ 100 crores will surely have a turnover of ₹ 25 crores)</p> <p>So such companies will need both Secretarial Audit and Annual Return certification from PCS.</p>
<p>Category V</p>	<p>Listed Company</p>	<p>Mandatory to appoint full time Company Secretary, so Annual Return will be signed by Company Secretary.</p> <p>Secretarial Audit by PCS and, the Annual Return will be certified by PCS.</p> <p>So Listed companies will need both Secretarial Audit and Annual Return certification from PCS.</p>

Statistical Analysis

According to the October 2011 statistics from the Department of Company Affairs¹, there are 11,63,136 companies registered in India. Of these, only 24,682 (or 2.12 per cent) have paid-up capital between ₹ 2 crore and ₹ 5 crore, and Companies with paid-up capital over ₹ 5 crore number 23,589 (2.02 per cent).

In other words, a good majority, i.e. 98 per cent, have paid-up capital below ₹ 5 crore. A whopping 11,14,865 companies (95.85 per cent) have paid-up capital less than ₹ 2 crore. Listed companies comprise only 0.6 per cent; the remaining 1.4 per cent are unlisted public or private companies

Further, as per the information gathered from professional colleagues at present there are about 9 lakhs active companies. Out of these, about 7 lakhs companies have a paid up capital of upto ₹ 50 lakhs which comprises of about only 35000 public companies and the rest are private companies (i.e. a 'small company' as discussed above)

¹ <http://www.thehindubusinessline.com/opinion/not-for-the-aam-company/article5150692.ece>



Note

So, if we exclude small companies from the abovementioned statistics, we will still have a reasonable figure of companies which will require its Annual Return to be signed by PCS. The reason behind this is that companies with paid up capital of below ₹ 5 crore were neither required to appoint a Company Secretary under the Act, 1956 nor is it mandatory to appoint under the Act, 2013. Therefore, we presume that these companies will not appoint a Company Secretary in employment. Further considering that there are only around 5800 PCS in the country, each PCS will get to sign a reasonable number of Annual Returns, even if all such companies were to be distributed evenly. So all the practicing professionals surely have a reason to cheer!

Annual Return under Act, 2013 v/s Annual Return under Act, 1956

Particulars	As per the Act, 2013	As per the Act, 1956
Governing Section	92	159, 160 and 161
Format of Annual Return	Form 7.7	Schedule V
Details to be given	As on the close of financial year	As on the date of Annual General Meeting
Signing of Annual Return	By a director and the company secretary, or where there is no company secretary, by a PCS. In case of One Person Company and Small Company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company	Both by a director and by the manager or secretary of the company, or where there is no manager or secretary, by two directors of the company, one of whom shall be the managing director where there is one
Certification requirement from PCS	A listed company or a company having paid-up share capital of five crore rupees or more and turnover of twenty five crore rupees or more.	Only for a company whose shares are listed on a recognised stock exchange.
Nature of Certification	that the annual return discloses the facts	(a) that the return states the facts as they stood on the day of the annual general



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	<p>correctly and adequately and that the company has complied with all the provisions of this Act</p>	<p>meeting aforesaid, correctly and completely ; <i>(aa)</i> that since the date of the last annual return the transfer of all shares and debentures and the issue of all further certificates of shares and debentures have been appropriately recorded in the books maintained for the purpose ; and <i>(b)</i> in the case of a private company also, <i>(i)</i> that the company has not, since the date of the annual general meeting with reference to which the last return was submitted, or in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and <i>(ii)</i> that, where the annual return discloses the fact that the number of members of the company exceeds fifty, the excess consists wholly of persons who under sub-clause <i>(b)</i> of clause <i>(iii)</i> of sub-section (1) of section 3 are not to be included in reckoning the number of fifty.</p>
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The content of Annual Return is very exhaustive as opposed to Schedule V under Act, 1956. Further, the certification is not limited to contents of Annual Return but also covers *compliance with all the provisions of the Act*. The format of Certificate to be given under the Act (Form 7.8) is very similar to a Compliance Certificate under the Act, 1956. 1956. Apart from this, other particulars such as remunerations, details of KMP, number of board and committee meetings held etc. also has to be certified. Therefore, this certification in itself is wholesome.

Verification v/s Certification

In case of a PCS being a co-signatory to the Annual Return, the PCS will only be verifying the information stated in the Annual Return. However, where the Annual Return requires certification of PCS, the PCS shall not only verify the contents of Annual Return but also certify compliance with provisions of the Act (as specified in Form 7.8).

Section 161 of Act, 1956 required certification of Annual Return only for listed companies. Interestingly, Act, 2013 ha widened the scope and has included Companies with paid up capital of ₹ 5 crores or more **and** turnover of ₹ 25 crores or more within the ambit of PCS certification.



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Further, as compared to Compliance Certificate prescribed under section 383A of Act, 1956, Annual Return certification under Act, 2013 is more extensive. Therefore, there is increased responsibility and accountability also with increased role and scope.

Conclusion

From the above discussion and analysis it is very evident that the both the scope and attribute of PCS is about to increase. However, it is to be kept in mind that with more responsibility comes more accountability. Keeping in mind that the certification requirements are by and large very exhaustive and complex, practising company secretaries have to exercise due caution.

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