Directors' and Key Managerial Persons': Duty of Care

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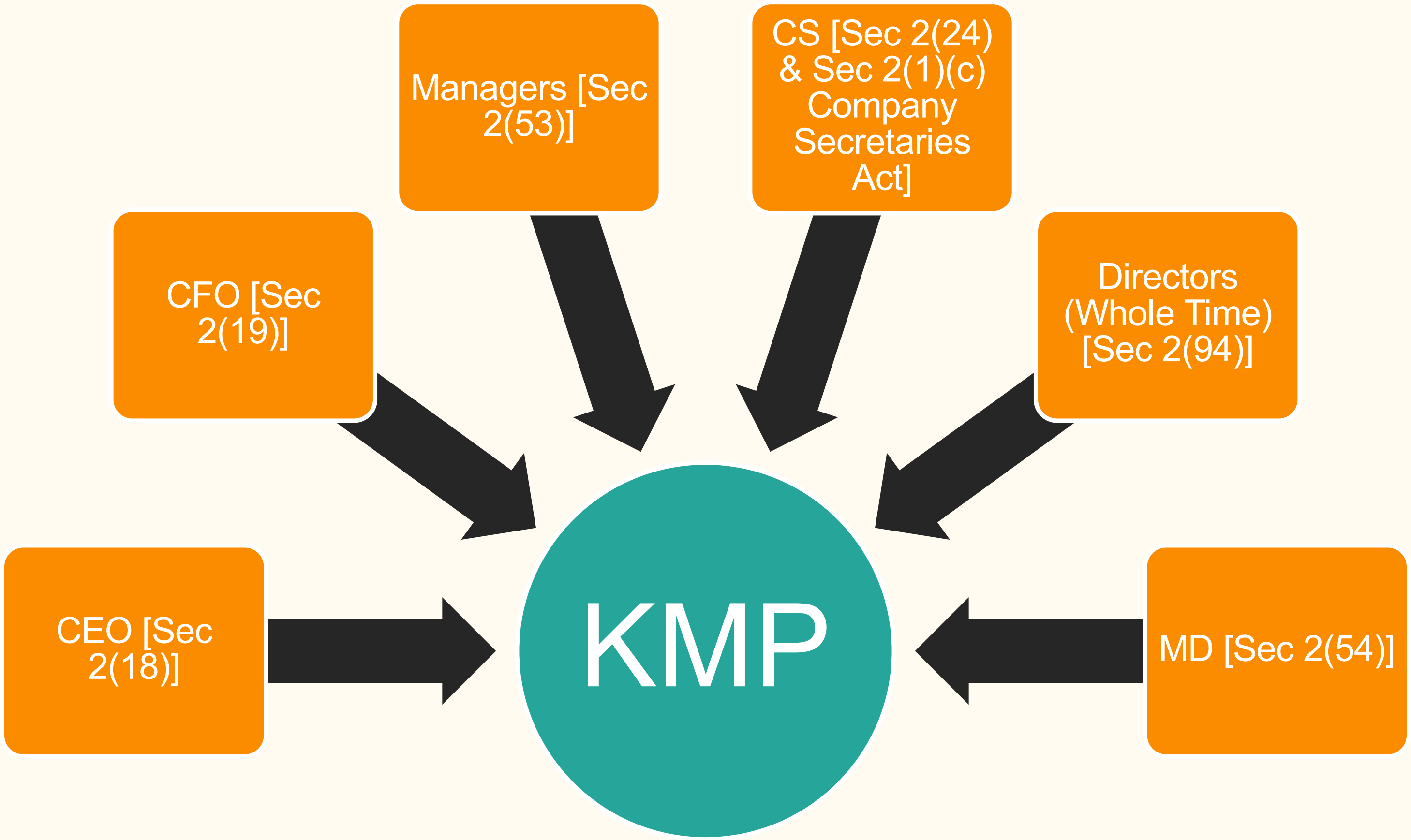
Key Managerial Personnel



Key Managerial Personnel

- *Management of affairs*
  - *Planning*
  - *Directing*
  - *Controlling*

First Point of contact b/w Company & Stakeholders

SEVEN SEAS
INTERNATIONAL LAWYERS

Who MUST appoint

Section 203(1) of Companies Act r/w Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014

- Listed Companies
- Public Companies (Paid up Share Capital <INR 10 Cr)

1. MD or CEO or Manager and in their absence Director (WT);
2. CS, and
3. CFO

Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014

- Private Companies (Paid up Share Capital <INR 10 Cr) (inserted vide MCA Notification dated 03/01/2020)

To Appoint CS

DOES NOT APPLY TO GOVT COMPANIES

Guidelines for appointment of KMP

- *Appointment only by means of a board resolution (Rule 8- Companies (Meetings of Board and its Powers) Rules, 2014):*
  - *[Sec 196(4)] & Sec 197] Must contain terms and conditions of appointment as well as remuneration;*
- *(Sec 196) No appointment or reappointment as Chairperson as well as, Managing Director or Chief Executive Officer at the same time, unless:*
  - *allowed by its articles; or*
  - *unless the company is carrying on multiple businesses and is exempted by the Central Govt notification; or*
  - *Public Companies with multiple businesses where share capital <INR 100 Cr and annual turnover <INR 1000 Cr [**vide MCA notification notification S.O. 1913(E) dated 25-7-2014**]*
  - *Not exceeding 5 years & no reappointment earlier than 1 year before expiry of term*

Guidelines (Contd..)

- *Not to hold office in more than one company at the same time (exception - subsidiary Company);*
  - *Directorship with permission of Board by resolution passed at a meeting of the Board and with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India;*
- *Vacancy to be filled up within six months from date of vacancy by Board meeting – except for Govt Company vide notification dated 05.06.2015;*
- *File MGT-14 with ROC and Form MR-1 return of appointment of MD, Director (WT) or manager;*
- *File DIR-12 along with fee in terms of Companies (Registration of Offices and Fees) Rules, 2014*

Guidelines (Contd..)

Sec 196 of Companies Act, 2013:

MD/Director (WT), Manager:

- No appointment/reappointment in dual capacity
- No appointment of a person who is/has:
  - >21 years and <70 years [unless by spl resolution with explanatory statement annexed thereto with justification or else, by voting and application to Central Govt;
  - Undischarged insolvent or has been so adjudged earlier;
  - Suspended payments to creditors at any time;
  - Convicted in an offence and sentenced for a period <6 months or fined <INR 1000;
  - Detained - Conservation of foreign Exchange and Prevention of Smuggling Activities Act, 1974(Subject to further conditions).
  - Indian Resident

Guidelines (Contd..)

<u>Sec 196 of Companies Act, 2013</u>:

MD/Director (WT), Manager:

- Sec 196(5) - Acts done prior to board approval shall not be deemed invalid;
- Exemptions
  - Sec 196(4 & 5) are not applicable in case of **<u>Pvt Companies</u>** and Sec 196 (2), (4) and (5) are not applicable to **<u>Govt Companies</u>** vide exemption notification dated 5.6.2015;
  - Sec 196(4) not applicable to **<u>Specified International Financial Services Centres (IFSC) public company</u>** vide notification dated 4.1.2017

Guidelines (Contd..)

Sec 196 of the Companies Act, 2013

MD/Director (WT), Manager:

- Notice convening Board Meeting must contain particulars of appointment;
- Rule 3 Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 – Form MR 1 to be filled within 60 days of appointment, with the Registrar along with fee
- Form MR 2 in cases where any of the provisions of Schedule V are not complied with
- Section 201 - General notice to members as well as newspaper publication (English AND principal language of district of regd. office)

Guidelines (Contd..)

Sec 196 of the Companies Act, 2013

MD/Director (WT), Manager:

- Form MR-1 must include:
  - Copy of Board Resolution,
  - Copy of Shareholders Resolution
  - Copy of letter of consent to act as managing director
  - Copy of Central Government Approval
  - Copy of certificate by nomination and remuneration committee

Guidelines (Contd..)

Sec 196 of the Companies Act, 2013

MD/Director (WT), Manager:

- Form DIR-12 to be filed with registrar within 30 days of appointment;
- File Form MGT-14;
- Inform all concerned about the appointment preferably by general notice in newspapers
- In case of listed Company as per SEBI (LODR) Regulations, 2015 - disclosures of appointment of Managing Director to stock exchanges with concerned Stock Exchange

Guidelines (Contd..)

Sec 2(60) of the Companies Act, 2013

"Officer in default"

- Officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise includes:
  - whole-time director;
  - key managerial personnel;
  - where there is no key managerial personnel, such director or directors as specified by the Board and who has or have given his or their consent in writing to the Board, or all the directors, if no director is so specified;
  - Any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
  - Any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
  - Every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
  - In respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.

Guidelines (Contd..)

Sec 2(1)(c) of the Companies Act, 2013

Company Secretary:

- A member of the Institute of Company Secretaries of India (ICSI);
- Appointed by a company to perform the functions of a company secretary
- Functions of CS (Sec 205)
- Appointment is mandatory (**Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014** in Companies other than those covered under Rule 8 and with Share Capital > INR 5 Crores
- Appointment is mandatory in Companies with Share Capital > INR 10 Crores **(Rule 8A)** – Amended by Amendment Rules 2020 dated 3.01.2020 wef F.Y. on or after 2020-21

Roles & Responsibilities

Company Secretary:

- Statutory officer responsible for compliances by the Company;
- Not a managerial personnel;
- Salary not considered for the purpose of computation of 'managerial remuneration' under Sec 196 unless a Director

Roles & Responsibilities

Company Secretary:

- Statutory Officer:
  - Obligation to sign financial statement of the Company [Sec 134(1)];
  - Duty to report fraud [Sec 143(12)];
  - Make declaration under Sec 7(1) before incorporation;
  - Secretary to audit Committee [Regulation 18(1)(e) SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015;
  - Principal Officer under Section 2(35) of the Income Tax Act, 1961
  - Duty to ensure documents are duly stamped
  - Guidance to the Board (Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014)
  - Under Sec 205(1)(b) the CS must ensure compliance with Secretarial Standards issued by the ICSI under Sec 3 of the Company Secretaries Act, 1980

Roles & Responsibilities

Company Secretary:

- Statutory Officer:
  - To comply with the various provisions of the Act or is liable to be fined or imprisoned for non-compliance of his obligations;
  - Obligations under Competition Act, Foreign Exchange Management Act, SEBI Act, Security Contracts (Regulation) Act, 1956 and Depositories Act

Roles & Responsibilities

Company Secretary:

- Co-ordinator:
  - Principal Officer for the Board of Directors
  - Communicating channel b/w Company and Shareholders, society, Govts, Trade Unions, Regulators

Roles & Responsibilities

Company Secretary:

Statutory Duties & Liabilities

- Declaration regarding compliance with requirement of registration [Sec 7(1)(b)];
- Authentication of documents, proceedings and contracts [Sec 21];
- Signing share certificate [Sec 2(1)];
- Signing annual return [Sec 2(1)];
- Appear before NCLT (Sec 432);
- Secretary as ‘Compliance Officer’ of listed company [Clause (1) of Regulation 6 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015];
- Nodal Officer for the Company;
- Secretarial Auditor - Secretarial Audit Report in Form MR-3

Liabilities

Company Secretary:

- Defined as ‘Officer in default’ along with MD, Manager and Director (WT)
- Summons to be served on a Secretary [Rule 2 of Order 9 CPC]

Removal of CS

Company Secretary:

- Discretion with the Board to remove;
- Procedure:
  - In accordance with terms of appointment;
  - In Board meeting by special resolution (Sec 173) place it on the agenda & pass resolution;
  - File Form DIR-12 within 30 days with RoC, attaching letter of resignation (optional);
  - Inform Stock Exchange;
  - Entry in the register of Company Secretaries (Sec 170);
  - General public notice;
  - Fill up the vacancy in Board Meeting within 6 months

Duty of Care

- Fiduciary Duty
- In terms of prescribed laws and statutory framework:
  - To report true and fair picture;
  - To report fraud
  - Etc.
- In the best interest of:
  - Company
  - Shareholders
  - Board
  - Other stakeholders

Cases

- Wasava Tyres v. Printers (Mysore) Ltd. (2008) 86 SCL 171 (Kar)]
  - Deals with the powers of MD - Sec 2(26) of the Companies Act:
    - Whether MD has proper authorisation to file suit against applicants
    - Held: MD has the power to act on behalf of Company
    - “The words ‘substantial powers of management’ as occurring in section 2(26) of the 1956 Act [corresponding to section 2(54) of the 2013 Act] specifically excludes certain acts from its purview. Therefore, except the excluded acts the managing director has power and privilege of conducting the business of the company in accordance with the memorandum and articles of association of the company. The institution of the suit on behalf of the company by the Managing Director is deemed to be within the meaning of ‘substantial powers of management’ since such a power is necessary and incidental for managing the day-to-day affairs and business of the company. Therefore, by virtue of provisions of Section 26 the suit instituted by the Managing Director is deemed to be within his power and authority. The suit is obviously filed for the benefit of the company. In that view of the matter, the contention that the Managing Director had no authority to file a suit is untenable and the same is rejected.”

Cases

"Substantial Power" MD can also function as Director

Whether MD can continue as Director of a Company after having resigned from the post of MD?

- G. Subba Rao v. Rasmi Die-Casting Ltd.
  - Held: MD can continue even after resignation

- Shanta Shamsher Jung Bahadur v. Kamani Brothers P. Ltd.
  - Held: MD must hold and continue to hold the office of director

THANK YOU

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