



Views/suggestions on Companies Bill 2009:

The Companies Bill, 2009 contains 426 sections as against the existing 658 sections. The reduction of 232 sections in the Bill has been made possible by the power to make more than 200 Rules. The Bill have used the phrase "as may be prescribed" at around 140 places. As one of the objectives of the Bill is to make the law simplified and less bulky, the prescription may be removed wherever possible and only procedural part should remain for prescription. Rest should be included in the main Bill itself. In the Companies Bill, 2009, heavy penalty provisions are incorporated with the objective to ensure compliance. However, the principle of capacity to pay has been totally ignored. In order to address this aspect, it is suggested that:

- i) Minimum amount of penalty should be prescribed on the basis of size of the Companies in the proposed Law as it is important to distinguish between a small company and a large company for the purpose of prescribing the penal provisions.
- ii) For technical/procedural mistakes such as late filing of documents etc. additional fees should be prescribed instead of penalty and/or prosecution.
- iii) Penalty of imprisonment be only considered in case of negligent or gross negligent, willful and knowing default with an intention of fraud affecting public interest substantially by established judicial system under CPC or under separate company Code.

NOTE: The above mentioned penal provisions should be made applicable for the entire law

The Bill should provide for the minority and 'minority interest' in the substantive law as is suggested by the expert committee on company law headed by Dr. J.J. Irani. While the Committee feels that the concept of independent directors would provide an objective scrutiny of management, operations and decision making, the Boards of the companies could also incorporate the concept of representation of specific minority shareholders group. The specific minority appointed director/independent director could also play an important role in investor protection and to ensure safeguarding the interest of investors through proper articulation of corporate governance in a manner that ensures transparency and accountability. The concept of investor protection cannot be treated in isolation from all the corporate processes. As such a framework exists in the country to deal with criminal offences the requirement is to provide a suitable orientation to corporate law so that the investor, irrespective of size, is recognized as a stakeholder in the corporate processes. The provision for vanishing companies should also be incorporated in the Companies Bill in the wake of investor protection.



Other suggestions:

S. No.	Companies Bill 2009	Views/suggestions of ICAI	Explanation
1.	Clause 2(1)(f): Associate Company	Definition for 'associate company' as given in the clause is not consistent with Accounting Standard 23, Accounting for Investments in Associates in Consolidated Financial Statements (AS 23).	<ul style="list-style-type: none"> AS 23, defines associate as an enterprise in which the investor has significant influence and which is neither a subsidiary nor a joint venture of the investor, however, the Bill refers only to subsidiaries. In accordance with AS 23, significant influence is the power to participate in the financial and/or operating policy decisions of the investee but not control over those policies. At the same time the Bill states that holding of 26% of total voting power or of business decisions under an agreement will constitute as significant influence. Reconciliation needed with AS 23 to ensure consistency across statute.
	Books of Accounts [Clause 2 (1)(m)(i) to (iv)]	<p>(ii) all sales and purchases of goods and/or service by the company"</p> <p>Another requirement that could be added to the definition to make it an all inclusive list will be "...such other records as may be prescribed under any other law for such class of companies...."</p>	<ul style="list-style-type: none"> To make the intention of preparers known and give more clarity to the requirement, it would be appropriate to replace 'and' with 'and/or'. <p>Reason being if an entity is rendering only services, it may take shelter under the provision by not keeping books of accounts as the Bill proposes that the company should maintain accounts for sales and services.</p>
	Controlling interest [Clause 2(1)(za)]	Definition should be consistent with that of AS 23. The likely criteria of assessing 50% interest by AS 23 may lead to conflicting situations.	Reconciliation required with Accounting Standard Rules, 2006



	<ul style="list-style-type: none"> • Key managerial personnel [Clause 2(1)(zza)] • Related Party [Clause 2(1)(zy)] 	<ul style="list-style-type: none"> • Definitions differ under Accounting Standard 18, Related Parties and the Bill. • Definitions given under the clause (in the Bill) is much wider. • List of Key managerial personnel extends to include all those persons who have the authority and responsibility for planning, directing and controlling the activities of the reporting 	Consistency should be ensured across Statutes, to avoid interpretational issues.
2	Small company	<ul style="list-style-type: none"> • Definition differ from what has been given under Companies Accounting Standard Rules, 2006 	Consistency should be ensured across Statutes.
3	Subsidiary company not to hold shares in its holding company [Clause 18]	<p>Clause 18 (1) No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void:</p> <p>Clause (2) (t) "company" means a company incorporated under this Act or under any previous company law;</p> <p>Clause (2) (k) "body corporate" or "corporation" includes a company incorporated outside India, but does not include—</p> <p>(i) a co-operative society registered under any law relating to co-operative societies; and</p> <p>(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification specify in this behalf;</p> <p>The clause specifically provides that no company can hold shares in its holding company. That means Body Corporate can hold shares in its holding company. Since Body corporate includes company incorporated outside India that means company incorporated outside India can hold shares in its holding company.</p>	<p>This particular clause corresponds to section 42 of the Act.</p> <p>Word 'body corporate' in section 42 has been replaced with 'company'.</p> <p>Does this mean that Indian subsidiary will be allowed to hold shares in body corporate which is its holding company?</p> <p>Clarity needed with regard to status of holding shares by subsidiary in body corporate.</p>



4	Kind of share capital [Clause 37]	<ul style="list-style-type: none"> The Bill does not allow issue of equity share capital with differential rights w.r.t dividend, voting etc. 	<ul style="list-style-type: none"> Though anomaly is removed, it is proposed to still maintain the concept of differential shares, else the bill should suggest the transition provisions as to how this needs to be extinguished in case some companies have such shares still existing in the books of accounts.
5	Declaration of Dividend [Clause 110]	<ul style="list-style-type: none"> Transfer of certain percentage of profits to Reserves, before declaring of dividend, is left on the discretion of the company. And in case company proposes to declare dividend out of such reserves, it shall be made by a resolution passed at a meeting of the Board with the consent of all the directors and the approval of the financial institutes whose term loans are subsisting, and thereafter in accordance with a special resolution passed by the shareholder at an AGM Further no company can declare any dividend on its equity shares if it has failed to comply with provisions of repayments of deposits etc. Dividend may also be paid in any electronic mode. 	<ul style="list-style-type: none"> Doing away with the 'Reserve Rules' are likely to have serious implications. Some rule bound initiatives are always required
	Chapter IX Accounts of Companies		
	Section 117: Financial Statements		
6	Section 117 (1): The financial statement shall give a true and fair view of the state of affairs of the company or companies as at the end of the financial year, comply with the accounting standards notified under section 119 and shall be in such form as may be prescribed.	The financial statement shall give a true and fair view of the state of affairs of the company or companies as at the end of the financial year , comply with the accounting standards notified under section 119 and shall be in such form as may be prescribed.	The company should be required to prepare and present the financial statement to give a true and fair view – (i) In the case of balance sheet, of the state of company's affairs at the end of the financial year : (ii) In the case of profit and loss account, of the profit and loss for its financial year; (iii) In the case of cash flow statements, of



	<p>(3) Where a company has one or more subsidiaries, it shall prepare a consolidated financial statement of all the subsidiaries in the same form and manner as that of its own which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2).</p>	<ul style="list-style-type: none"> • Presently, the Companies Act, 1956 requires the holding company having a subsidiary or subsidiaries at the end of the financial year to attach certain documents in respect of such subsidiary or of each such subsidiary to its balance sheet as per Section 212 of the Act. However, there exists no mandatory requirement for consolidation under Companies act. • Requirements with regard to consolidation is a welcome step in light of convergence, however, aforesaid clause needs to be reconsidered for retention. 	<p>the cash flow for its financial year.</p> <ul style="list-style-type: none"> • Companies will mandatory be required to give consolidated accounts in addition to the existing requirement of giving only standalone accounts irrespective of whether it is listed or unlisted. • Clause 117(5) of the Bill inter-alia states that the Central Government may, on its own or on an application by a class or classes of companies, by notification, exempt any class or classes of companies from complying with any of the requirements of this section or the rules made there under, if it is considered necessary to grant such exemption in the public interest and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification. • However, there exists a likely situation where a particular class of company may not be required to prepare consolidated account. <p>Requirements with regard to consolidation could be reconciled with IFRS, to ensure no interpretational issues later.</p>
	<p>Section 118: Constitution of National Advisory Committee on accounting and auditing standards</p>	<p>Status quo should be maintained for this section. The National Advisory Committee on accounting standards should remain as there in Companies Act 1956, (Sec. 210A) and National Advisory Committee on auditing standards should not be created.</p>	<p>The Parliament of India while framing the Chartered Accountants Act 1949 has constituted the Institute of Chartered Accountants of India as a Statutory Body to regulate accounting and auditing in India. The ICAI has played an important role in bringing out the technology of accounting</p>



			and auditing to the highest international level. The various accounting standards and auditing standards prepared and notified by the ICAI are of highest international standards. The setting up of auditing standards is the basic objective of the Institute of Chartered Accountants of India itself. The formulation of auditing standards by the Government or any other body nominated or created by the Government will defeat the very objective of setting up of the Institute of Chartered Accountants of India. At the same time we had already converged all our auditing standards with the International standards.
	Section 120: Financial Statement, Board's report etc. (Corresponds to section 210 & 211 of the Companies Act 1956.)		
	Section 120 (1): The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the Chairman where he is authorised by the Board or by two directors out of which one shall be Managing Director or Chief Executive Officer, or, in the case of a One Person Company, only by one director, for submission to the auditor for his report thereon: Provided that such financial statements shall be authenticated in such manner as may be prescribed.	The Board of Directors Report NOW has to be ANNEXED with financial statement, which shall include certain new requirements	<ul style="list-style-type: none"> • Director Report should ideally be attached and not to be annexed as required by provisions of existing section 217 of the Act. • Annexing the Directors report with financial report tantamount that it will now be part of annual accounts that needs to be audited. • Will this leads to increase in auditors responsibility?



	Chapter X Audit and Auditors		
7	Section 123: Appointment of Auditors (Corresponds to section 224 of the Companies Act 1956.)		
	<p>Section 123 (1): Subject to the provisions of this Chapter, every company shall, at each annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of the next annual general meeting:</p> <p>Second proviso to section 123 (1): Provided further that the company shall inform the auditor concerned of his appointment, and also file a notice of such appointment with the Registrar within fifteen days of the meeting in which the auditor is appointed.</p> <p>Section 123 (9): The auditor appointed under this section may be removed from his office before the expiry of his term only by a special resolution of the company: Provided that before taking any action under this sub-section, the auditor concerned shall be given a reasonable opportunity of being heard.</p>	<p>Subject to the provisions of this Chapter, every company shall, at each annual general meeting, appoint an individual or a firm <u>or Limited Liability Partnership, or such other entity as may be prescribed,</u> as an auditor who shall hold office from the conclusion of that meeting till the conclusion of the next annual general meeting: The corresponding effect, in respect of removal of 'Body corporate', be made under section 124 (3). Second proviso to section 123 (1): Provided further that the company shall inform the auditor concerned of his appointment <u>and the remuneration fixed,</u> and also file a notice of such appointment with the Registrar within fifteen days of the meeting in which the auditor is appointed.</p> <p><u>Removal of auditor:</u> (1 9) The auditor appointed under section 123 may be removed from his office before the expiry of his term only <u>when he has been held guilty of the following: by a special resolution of the company:-</u> <u>(i) he has been convicted of any offence involving moral turpitude</u> <u>(ii) he acted negligently or gross negligently with an intention of fraud</u> <u>(iii) he has been held guilty of professional mis-conduct</u> (iv) Disciplinary proceedings conducted under the Chartered Accountants Act 1949 conclude that the auditor is guilty of criminal breach of trust; <u>Provided that before taking any action under this sub-</u></p>	<p>Suitable amendment is required to permit appointment of Limited Liability Partnership Firms or such other entities as may be permitted by the Council of the Institute of Chartered Accountants of India from time to time, as an auditor.</p> <p>With regard to filing of casual vacancy by board of directors time period should be specified. Moreover, it should be clearly stated that the auditor appointed to fill in the casual vacancy should hold office till the conclusion of next annual general meeting.</p> <p>The clause 123 is for the appointment of the auditor and sub-section (9) and (10) relates to the removal of auditor, therefore the provision of this sub-section should not be clubbed with section 123 and there should be a new heading and section for the same.</p>



		<p><u>section, the auditor concerned shall be given a reasonable opportunity of being heard.</u></p> <p>(2) Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal, if it is satisfied that the auditor of a company has acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors.</p>	<p>This Proviso may be given to provide for mandatory recommendation of the audit committee for removal of auditor as a pre-requisite to move a special resolution for removal of auditors before the expiry of their term, in all those cases where the audit committee has been constituted in terms of section 158.</p>
	Eligibility, qualifications and disqualifications of auditors [Clause 124]	New disqualifications have been added to the list of existing ones like holding of securities or indebtedness of relatives	<ul style="list-style-type: none"> • It's very difficult to identify holdings or indebtedness of relatives in the company or in its subsidiary. • Disqualification with regard to situation where he is a person who has been held guilty of fraud should be added.
	Section 125: Remuneration of auditors. (Corresponds to section 224 (8) of the Companies Act 1956.)		
	<p>Section 125</p> <p>(1) The remuneration of the auditor of a company shall be fixed in its general meeting or in such manner as may be determined therein.</p> <p>(2) The "remuneration" under sub-section (1) in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and anything given to him otherwise</p>	<p>(1) The remuneration of the auditor of a company shall be fixed in its general meeting or in such manner as may be determined therein.</p> <p>(2) The "remuneration" under sub-section (1) in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and anything given to him otherwise than in cash, but does not include any remuneration paid to him for any other service rendered by him at the request of the company.</p>	<p>Status quo should be maintained in respect of remuneration of auditor.</p>



<p>than in cash, but does not include any remuneration paid to him for any other service rendered by him at the request of the company.</p>		
<p>Section 126: Powers and duties of auditors and Auditing Standards. (Corresponds to section 227 of the Companies Act 1956.)</p>		
<p>Section 126 (3): The auditor's report shall also state— (h) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith; (i) in case of listed companies, whether the company has complied with the internal financial controls and directions issued by the Board; and (j) such other matters as may be prescribed.</p> <p>Section 126 (10): The Central Government may, after consultation with the National Advisory Committee on Accounting and Auditing Standards, by notification, lay down auditing standards: Provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be</p>	<p>Section 126(3) may be re-drafted as follows : (h) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith; (i) in case of listed companies, whether the company has complied with the internal financial controls and directions issued by the Board; (j) such other matter as may be prescribed <u>in consultation with ICAI.</u></p> <p>The reporting requirements in respect of audit may be included in a separate section. This will enable adequate emphasis on respective aspects.</p> <p>The Central Government may, after consultation with the National Advisory Committee on Accounting and Auditing Standards, by notification lay down auditing standards <u>as formulated by the Institute of Chartered Accountants of India.</u> Provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.</p>	<p>Being an insignificant matter to be included in the auditor's report.</p> <p>The same is being covered fully by the Auditing Standard on Audit Report.</p> <p>The setting up of auditing standards is the basic objective of the Institute of Chartered Accountants of India itself. The formulation of auditing standards by the Government or any other body nominated or created by the Government will defeat the very objective of setting up of the Institute of Chartered Accountants of India. At the same time we</p>



	the auditing standards.		had already converged all our auditing standards with the International standards.
	Section 127: Auditor not to render certain services.		
	<p>Section 127: An auditor appointed under this Act shall provide the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services, namely:—</p> <p>(a) accounting and book keeping services; (b) internal audit; (c) design and implementation of any financial information system; (d) actuarial services; (e) investment advisory services; (f) investment banking services; (g) rendering of outsourced financial services; and (h) management services.</p>	<p>Section 127: An auditor appointed under this Act shall provide the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services, namely:—</p> <p>(a) accounting and book keeping services; (b) internal audit; (c) design and implementation of any financial information system; (d) actuarial services; (e) investment advisory services; (f) investment banking services; (g) rendering of outsourced financial services; and (h) management services <u>as may be prescribed.</u></p>	
	Section 129: Auditors to attend general meeting. (Corresponds to section 231 of the Companies Act 1956.)		
	<p>Section 129: All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company, and the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be</p>	<p>Status quo should be maintained with the Companies Act 1956: All notices of, and other communications relating to, any general meeting of a company which any member of the company is entitled to have sent to him shall also be forwarded to the auditor of the company; and the auditor shall be entitled to attend any general meeting and to be heard at any general meeting which he attends on any part of the business which</p>	<p>It shall be the discretion of the auditor whether or not to attend the general meeting. It may not be feasible for an auditor to attend all meetings which may be held at different places.</p>



	heard at such meeting on any part of the business which concerns him as the auditor.	concerns him as auditor.	
	Section 130: Punishment for contravention.		
	<p>Section 130:</p> <p>(1) Where any of the provisions of sections 123 to 129 is contravened, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and any officer who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees, or with both.</p> <p>(2) Where an auditor of a company contravenes any of the provisions of section 126 or section 127 or section 128 he shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees:</p> <p>Provided that where it is proved that an auditor has knowingly or wilfully contravened any of the provisions of the aforesaid sections, he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees, or with both.</p>	<p>(2) <u>If the auditor report is made in contravention of section 126 or where an auditor of a company contravenes any of the provisions of section 126 or section 127 or section 128 he shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees:</u></p> <p>It is proposed that the severe penalties of imprisonment and criminal prosecution should be provided specifically in those cases where the following criteria are made:</p> <p>(i) The auditors knowingly and willingly are part to a fraud or abatement to a fraud;</p> <p>(ii) Public interest is materially and substantially adequately effected;</p> <p>(iii) Disciplinary proceedings conducted under the Chartered Accountants Act 1949 conclude that the auditor is guilty of criminal breach of trust;</p> <p>Penalty should be limited to 'x' times of the audit fee paid to the auditor (say 5 times).</p>	



	(3) Where an auditor has been convicted under sub-section (2), he shall be liable to— (i) refund the remuneration received by him to the company; and (ii) pay for damages to the company or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.	“any other person” is a very wide term and may lead to protracted litigation.	An auditor although appointed under the terms of the Act, is engaged by way of a contractual relationship with the company in general meeting to the board of directors. Accordingly, as with any other contractual obligation, the auditor is an obligor only to the counterparty to the engagement, i.e. the company. Hence the words ‘or to any other person’ in this clause should be deleted.
9	Appointment and Remuneration of Managerial Personnel		
	Remuneration of managerial personnel [Clause 175]	Provisions are more or less similar to that of section 309(3) of the Act	Clause 120 which deals with Financial Statements, Board’s report, etc, should also make reference to this clause.
10	Winding up by Tribunal		
	Petition for winding up	Almost same provisions, except that earlier contributories could present a petition only in case their number is reduced below prescribed limit specified in the Act, which has been done away with and put in this provision in Clause 246.	In clause 247(1)(g) a reference of clause(d) of sub-section (1) of section 246 is given which should be 246(1)(c)
	General Comments		
11	Class Action suits [Clause 216]		Indian economy is still in the progressive phase and such a severe clause may not be welcomed.
12	Registration of valuers. 219. (1) The Central Government shall maintain a register to be called as the register of valuers in which it shall enter the names and addresses of persons registered under subsection (2) as valuers. (2) Any Chartered Accountant, Cost and Works Accountant, Company Secretary or	The penalty provision as applicable to the auditors may be applicable to the registered valuers also.	



<p>other persons possessing such qualifications as may be prescribed may apply to the Central Government in the prescribed form for being registered as a valuer under this section:</p> <p>Provided that no company or body corporate shall be eligible to apply.</p> <p>(3) Every application under sub-section (2) shall be accompanied by such fee as may be prescribed, containing a declaration to the effect that the applicant shall—</p> <p>(a) make an impartial and true valuation of any assets which may be required to be valued;</p> <p>(b) make the valuation in accordance with such rules as may be prescribed, and</p> <p>(c) shall not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during the valuation of the assets.</p>		
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