

Statement to be annexed to Notice (Sec 102)

1. Legislative background

The notes on clauses to the Companies Bill, 2011 read as follows:

“Clause 102.— This clause corresponds to section 173 of the Companies Act, 1956 and seeks to provide that a statement setting out all the material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting. This clause further provides for the businesses that shall be deemed to be special. In case of non-disclosure or insufficient disclosure in any statement made by promoter, director, manager or other key managerial personnel which results into any benefit for themselves or their relatives, shall have to be compensated. Penal provision has been provided for any default in compliance.”

2. Ordinary and special businesses

The businesses to be transacted at the general meeting are divided into two categories special and ordinary businesses. The explanatory statement is required to be given in case of special businesses only. The following businesses transacted at annual general meeting are to be treated as ordinary businesses:

- (a) the consideration of financial statements and the board's and auditors' reports;
- (b) the declaration of any dividend;
- (c) the appointment of directors in place of those retiring;
- (d) the appointment of, and the fixing of the remuneration of, the auditors.

All other businesses in case of an annual general meeting and all businesses in case of an extraordinary general meeting are deemed to be special businesses.

3. Statement to be annexed to notice Sub-section (1) of section 102 provides for a statement setting out all the material facts concerning each item of special business to be transacted at a general meeting, to be annexed to the notice calling such meeting. Disclosures with regard to the nature of concern or interest, financial or otherwise, if any, in respect of every director and the manager, every other key managerial personnel and relatives of such persons are mandatory.

Proviso to sub-section (2) of section 102 further mandates further disclosure of interest where any item of special business proposed to be transacted at a meeting of the company relates to or affects any other company. In such case, the explanatory statement shall also specify the extent of shareholding interest of every promoter, director, manager, and key managerial personnel of the company where

the resolution is proposed in that the other company. Such disclosure is required to be made if the extent of such shareholding is not less than two percent of the paid-up share capital of that company. Hitherto, under the proviso to sub-section (2) of section 173, such disclosure was required only if the shareholding interest of the directors and the managers was not less than 20% of the paid up share capital of the second company.

As provided in clause (b) of sub-section (1) of section 102, all the information and facts shall be provided in the explanatory statement so as to enable the members to understand the meaning, scope and implications of the business and to take proper decisions. Hence, the disclosures in the explanatory statement are governed by the motive of ensuring transparency and do away with the problem of hidden information. Clause (b) is especially very sweeping in its coverage.

The object of this provision was explained in *Mohanlal Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co. Ltd* [63 (1964) O GLR 804] in the following words:

“The object of enacting Section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interest of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in Section 173, I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to the nullification of the action taken”.

It was further explained in *Firestone Tyre And Rubber Co. vs Synthetics And Chemicals Ltd.* [1971 41 CompCas 377 Bom] that “the object underlying section 173(2) is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them. Any fact which would influence them in making up their minds, one way or the other, would be a material fact under section 173(2) and had to be set out in the explanatory statement to be notice of the meeting.”

Further, in *Laljibhai C. Kapadia And Anr. vs Lalji B. Desai And Ors.* [AIR 1972 Bom 276] it was held that “But I must make it clear that under Section 173(2) material facts will not necessarily include the reasons. It will all depend upon the nature of the subject - matter which constitutes the special business. Sometimes the facts stated are sufficiently eloquent and there is no need to justify the proposed action by giving reasons.” Further stressing the factual nature of the disclosures, it was held in *B.A. Mendonca And Ors. vs Philips India Ltd. And Ors.* [2001 106 CompCas 526 CLB] that “It is difficult, if not impossible to lay down any standard/guideline as to what would constitute material facts as the same would vary from case to case depending on the proposal under consideration. From the very fact that the section uses the words “material facts”, it is clear that facts which are not material need not be furnished. As long as the explanatory statement is fair and gives, as far as possible, all information reasonably necessary for the shareholders to understand and appraise the proposal, such a statement would satisfy the requirements of Section 173(2) of the Act, provided it does not conceal or suppress or withhold relevant information or facts and does not make any false suggestion.” It was held in *Joseph Michael And Anr. vs Travancore Rubber And Tea Co. Ltd.* [1986 59 CompCas 898 Ker] that “very minor defect arising out of strict non-confirmity with the provisions contained in Section 173(2) might not render the amendment null and void.”

4. Provision for inspection where documents are referred to

Sub-section (3) mandates every company to make necessary arrangement for inspection of documents referred to in any item of the business of the general meeting. The explanatory statement shall also specify the details of time and place where the said documents are available for inspection.

While answering in negative the question whether inspection of document can cure incomplete disclosures, it was held in *Shaligram Jhaharia v. National Co. Ltd.* [(1965) 1 Com LJ 112 (Cal)] that “The provision for inspection of the agreement at the registered office of the company in terms of Section 173(3) is not sufficient for the purpose of Section 173(2). ... As the legislature has thought it fit to provide that shareholders must approve of the appointment of selling agents the opportunity given to the shareholders must be full and complete and there must be a full and frank disclosure of the salient features of the agency agreement before the shareholders can be asked to give their sanction. The provision for inspection of the document at the registered office of the company is not enough. Few shareholders have neither the time nor the inclination to go to the registered office to find out what the company is about to do. Moreover, such an opportunity is illusory in the case of shareholders who do not live in Calcutta when the registered office is situate here”.

5. Additional disclosures prescribed in various Sections The various provisions of the Act provide for disclosures in addition to the matters required to be disclosed under this section. Such provisions are as follows:

- a. Conversion of a section 8 company into a company of any other kind- Rule 21 of the Companies (Incorporation) Rules, 2014
- b. Private placement- Rule 14 (2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014
- c. Issue of equity shares with differential rights- Rule 4 (2) of the Companies (Share Capital and Debentures) Rules, 2014
- d. Issue of sweat equity shares- Rule 8 (2) of the Companies (Share Capital and Debentures) Rules, 2014
- e. Issue of preference shares- Rule 9 (3) of the Companies (Share Capital and Debentures) Rules, 2014
- f. Issue of employee stock option- Rule 12 (2) of the Companies (Share Capital and Debentures) Rules, 2014
- g. Issue of shares on preferential basis- Rule 13 (2) of the Companies (Share Capital and Debentures) Rules, 2014
- h. Provision of money by company for purchase of its own shares by employees or trustees for the benefit of employees- Rule 16 (2) of the Companies (Share Capital and Debentures) Rules, 2014
- i. Buy-back of shares or other securities- sub-section (3) of section 68 read with rule 17 (1) of the Companies (Share Capital and Debentures) Rules, 2014
- j. Contract or arrangement with related party- Rule 15 (3) of the Companies (Meetings of Board and its Powers) Rules, 2014
- k. Appointment of independent director- Sub-section (2) of section 150 and 152 read with part IV of Schedule IV
- l. Appointment of a person who has attained the age of 70 years- sub-section (3) of section 196 Para 1.2.5 of Secretarial Standard-2 makes further provisions for effecting disclosures in various cases.

6. Consequences of non-disclosure or insufficient disclosure

Sub-section (4) of section 102 is a new provision whereby as a result of non-disclosure or insufficient disclosure being made in the explanatory statement, any benefit accrues to the promoter, director, manager, key managerial personnel or relatives thereof, either directly or indirectly, then person to whom such benefit is accrued shall hold such benefit in trust for the company. Such person shall be liable to compensate the company to the extent of such benefit received by him. Such compensation is without any prejudice to any other action which may be taken under the provisions of this Act or any other law.

An important ratio of deciding whether the provisions of explanatory statement are violated was given in *Lalji B. Desai And Ors. vs Lalji B. Desai And Ors.* [AIR 1972 Bom 276] "Any non - compliance with this requirement will nullify the action taken at the meeting. While considering the efficacy of any such notice, a

benevolent construction will not be adopted so as to defeat the provisions of the statute. It is also clear that whether or not a particular notice or an explanatory statement in a given case complies with the statutory requirement is a question of fact. There are two ways in which the mandatory provisions contained in Section 173 may be contravened. It may be a case where no explanatory statement is at all appended to the item of special business, or it may be a case where the statement is incomplete, misleading or tricky. The contravention may be the result of an act of omission or an act of commission. Whatever be the nature of the contravention, the question always is a mixed question of fact and law.”

7. Applicability of the section to private company

This section applies to a private company unless its articles provide otherwise. This exemption was given by the notification no. G.S.R. 464 (E) dated 05.06.2015. Hence, the articles of the private company may exclude the applicability of this section and make its own regulations as regards the explanatory statement to be attached to the notice.

8. Punishment and Compoundability

In case of any default in complying with the provisions of this section, the promoter, director, manager, or other key managerial personnel shall be punishable with fine which may extend to rupees fifty thousand or five times the benefit accruing to the said promoter, director, manager, key managerial personnel or any of his relatives, whichever is more. The fine is in addition to the provisions of compensation provided in sub-section (4) of section 102.

The offenses under both sub-sections are punishable only with fine and hence, are compoundable under section 441 of the Act.

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.